STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (LAW DEPARTMENT),
Public Employer-Respondent,

MERC Case No. 20-D-0755-CE

-and-

UAW 2211, PUBLIC ATTORNEYS ASSOCIATION
Labor Organization-Charging Party.

____/

APPEARANCES:

City of Detroit (Law Department), by Jason McFarlane, for Respondent

Nickelhoff & Widick, PLLC, by Andrew Nickelhoff and Marshall J. Widick, for Charging Party

DECISION AND ORDER

In April 2020, the City of Detroit Law Department (Respondent or Employer) notified UAW Local 2211, Public Attorneys Association (Union or Charging Party), that it would begin to reduce the working hours of bargaining unit members to address a budgetary shortfall brought on by the coronavirus pandemic. The reduction in force would result in certain bargaining unit members having their weekly work hours reduced, such that those employees would only receive either 10 or 80 percent of their regular salary amount. The Employer also advised the Union that it would be eliminating a 2% contractual pay increase scheduled to start on July 1, 2020. As a result of these actions, Charging Party filed an unfair labor practice charge alleging that Respondent repudiated the parties' collective bargaining agreement (Contract or Agreement), in violation of § 10(1)(e).

ALJ Calderwood issued his Decision and Recommended Order on Motion for Summary Disposition on February 17, 2021. (MOAHR Hearing Docket No. 20-007845) He concluded that Respondent violated its duty to bargain in good faith by unilaterally imposing a mid-term contract modification by failing to provide the 2% wage increase it was contractually obligated to provide, and that such conduct further amounted to a repudiation of the parties' agreement. However, the ALJ dismissed the Union's allegations concerning the Department's "reduction in force," concluding that those were matters covered by the contract, such that the dispute should be resolved through the parties' grievance procedure, and not an unfair labor practice proceeding.

In its exceptions, the Union asserts that: (1) the Employer repudiated the contract when it unilaterally imposed its reduction in force; (2) contrary to the ALJ's decision, the Employer did

not reasonably rely on any contract provisions when it imposed its reduction in force, and; 3) any assertion by the Employer that the Commission should create a new economic exigency exception should be rejected. As part of its assertions, the Union also makes the new contention that bargaining unit members are salaried employees whose compensation does not depend on whether they work thirty hours or eighty hours per week and that, by paying them less than 40 hours per week, the employer violated and repudiated the agreement.

In its cross exceptions, the Employer takes exception to the Administrative Law Judge's failure to adopt the NLRB and Supreme Court's "economic exigency" exception and recommend dismissal of the "reduction in force" allegation on that basis. The Employer further takes exception to the Administrative Law Judge's finding that its failure to pay the July 1, 2020 wage increase was an unfair labor practice, claiming that "the wage increase has been paid retroactively to July 1, 2020." The Employer also argues that the Union should be precluded from raising any argument concerning the "salary" status of the unit employees as it relates to the Employer's reduction in force argument, since the argument was not made before the ALJ.

In response to Respondent's cross exceptions, the Union argues that it did, in fact, raise before the ALJ that its unit members were salaried professionals whose compensation did not depend on hours scheduled or worked, and that the Department's "economic exigency" exception borders on the "patently frivolous."

For the reasons set forth below, we affirm the ALJ's Decision and Recommended Order.

Procedural History:

On April 20, 2020, the Union filed the instant charge alleging that the Employer violated PERA when it made a mid-term modification of a contract concerning a mandatory subject of bargaining without the agreement of both parties. The charge alleged that "[o]n or about April 17, 2020, the Respondent's corporation counsel announced in a virtual meeting with Union leadership, including but not limited to its President Robyn Brooks, that the City would reduce unit members to either '10% status' and or '80% status'– reductions which expressly were not based on seniority, as provided in the Agreement, but rather on an undefined assessment or speculation about the attorney workloads. The percentage 'status' reflected the amount of pay or salary that the unit member would receive from his or her original salary." The charge further objected to the "removal" of the 2% wage increase due on July 1, 2020.

After hearing oral argument on August 14, 2020, ALJ Calderwood issued his Decision and Recommended Order on Motion for Summary Disposition on February 17, 2021.

Charging Party filed exceptions and a supporting brief on April 9, 2021, and Respondent filed cross exceptions and a brief in support on April 19, 2021. On April 28, 2021, Charging Party submitted a brief in response to Respondent's cross exceptions.

Facts:

The factual background is derived from the ALJ's Decision and Recommended Order.

A. Background

The Public Attorneys Association (Union) represents a bargaining unit consisting of certain attorneys employed within the City's Law Department (Employer). The Union and the Employer are subject to a collective bargaining agreement, effective from September 22, 2017, through December 31, 2020.

Article 3 of the Agreement, Management Rights and Responsibilities, provides in relevant part:

> C. The City will have the right and obligation to determine and establish the policies, goals and scope of its operations. Consistent with its operational needs, the City may reasonably determine and implement work schedules/shifts, vacation schedules, flex time, the goals and methods and processes by which such work is performed, the qualifications of employees assigned to do the work and the below listed rights and obligations provided they do not conflict with the terms of this Agreement. Except as specifically limited by the terms of this Agreement or applicable law, these rights and obligations include, but are not limited to:
>
> * * *
>
> 8. Determine personnel hiring and reductions;
>
> * * *
>
> 15. Determine methods, means and employees necessary for departmental operations; and
>
> 16. Control the departmental budget.

Article 8 of the agreement, Grievance and Arbitration Procedures, sets forth the parties' agreed upon grievance procedure that ends in binding arbitration.

Article 12 of the agreement, Seniority, governs the establishment, use and retention of seniority. Under Article 12, the order in which bargaining unit members are to be laid off in the event of a "reduction in force" is governed by seniority, as defined by the contract.

Article 14 of the agreement governs "Reductions in Force, Layoff, Demotion and Recall." Section 14(b) provides:

> If as a result of a reduction in force in the Law Department, it is necessary to reduce the number of employees in a classification represented by the Union, such reduction in force shall be in accordance with the reduction in force provisions

> provided in the Human Resources Department Rules as adopted by the Civil Service Commission in effect January 1, 2014.

Human Resources Department Rule 10, Section 1(a), "Reduction in Force" defines the term "reduction in force" as:

> A reduction in the number of employees in a given class in a department of the City for lack of work, lack of funds, or reasons other than the acts or delinquencies of employees.

Rule 10, Section 1(b), provides that:

> A lay off due to reduction in force is the removal of an employee from a position in a department and from the classified service of the City of Detroit, subject to the recall rights provided under this Rule.

Article 45 of the contract, Wages, sets forth the wage increases bargaining unit members were due during the life of the contract. Relevant to the present dispute, the contract provided for a 2% wage increase effective July 1, 2020. The Employer, despite claims made within its pleadings that it would implement the 2% wage increase effective July 1, 2020, had not done so at the time of oral argument in this matter on August 14, 2020. Moreover, as of the date of the ALJ's Decision and Recommended Order, there had been no notification from either party that the Employer had implemented the wage increase.

B. Measures Imposed as a Result of COVID-19

In early March 2020, Governor Gretchen Whitmer declared a State of Emergency in response to the novel coronavirus (COVID-19) that had been, and continues to impact, both the state and the country. Shortly after this, the President of the United States, Donald J. Trump, declared a national emergency due to COVID-19.

While recognizing the existence of COVID-19 as a pandemic is appropriate for purposes of establishing the context in which the actions outlined herein occurred, the ALJ did not find it necessary, for purposes of his decision and recommended order, to recite with specificity and/or highlight the magnitude by which COVID-19 affected the City of Detroit.

On or about April 14, 2020, the Union's president, Robyn Brooks, received a letter from the Employer that had been sent to its various unions. The letter indicated that the Employer would be imposing several measures because of COVID-19. Specifically, it provided in relevant part:

> The unprecedented events surrounding the COVID-19 pandemic has caused an economic crisis throughout the United States, Michigan, and the City of Detroit (City).
>
> The City's revenue collections have suffered due to COVID-19, as casino and business closures diminish the City's gaming, income tax, and other revenues.

Specifically, the City is facing a projected $154 million dollar revenue shortfall for this fiscal year and projects a $194 million revenue shortfall next year. The City has already taken steps to address this deficit by restricting discretionary spending, renegotiating contracts with major suppliers, halting cash capital projects, instituting a hiring freeze and curtailing of overtime. However, additional steps are necessary.

As a direct result, the City has determined that there must be a reduction in workforce, either by the number of our employees and/or work hours. The City will be in negotiations with the unions to remove the July 1, 2020 pay increases for all City employees. The City has explored the following options to ensure the continuation of essential services:

A. 10% Workers. Furlough Option for full time employees whose work cannot easily be performed due to the COVID-19 shutdown. This allows employees to work enough reduced hours to cover the employee's health care contributions, while collecting underemployment benefits to make up a portion of lost wages. Under the Federal Pandemic Unemployment Compensation (FPUC) Employees may qualify for an additional $600 per week until July 30, 2020.

B. 80% Workers. Michigan Work Share Program allows employees to work reduced hours, while collecting unemployment benefits to make up a portion of lost wages. Under the Federal Pandemic Unemployment Compensation (FPUC), Employees may qualify for an additional $600 per week until July 30, 2020.

C. 95% Workers. Elected Officials, appointees and full-time employees making more than $125,000 per year will share in the sacrifice through pay cuts.

D. 100% Workers. Employees will continue to work 100% of the time with their current pay.

E. Layoff. Layoff of some TASS, Seasonal and part time employees. Laid off employees will receive unemployment benefits for which they qualify. Under the Federal Pandemic Unemployment Compensation (FPUC) Employees may qualify for an additional $600 per week until July 30, 2020.

It is the City's intent, that even with the reduction of hours, most permanent employees may be able to maintain their healthcare coverage.

Within the next week, Labor Relations will be contacting you to discuss the various options for union members.

> It is the City's hope that the economy will rebound, and that the City can resume its previous level of operations.

According to the Union, on April 16, 2020, Union President Brooks received two emails from the Employer informing her of its decision regarding the reduction in work force. According to Brooks' affidavit:

> I was informed on April 16, 2020, that the City of Detroit would be implementing the reduction in the Association's bargaining unit effective April 20, 2020. Later that day, I received an email containing lists of bargaining unit members, attached as Exhibit C. One list identified members who were being reduced to 10% "furlough" status, which I understood to mean that the Attorneys in this group would have their regular hours of work reduced by 90% to 10%. The other lists identified members whose hours of work would be cut to 80% ("workshare" status) in fiscal years 2020 and 2021.

On April 17, 2020, the Employer's Corporation Counsel, Lawrence Garcia, held a virtual meeting with leaders from the City's various unions, including President Brooks. According to the Union, Garcia indicated that the Employer would begin to reduce its bargaining unit members to either "10% status" or "80% status". The Union claims Garcia stated that the percentage "status" reflected the assigned work hours and the amount of contractually required pay or salary that the unit member would receive. The Union further claims that Garcia indicated that seniority was not considered in the City's plan; that seniority did not enter into the calculations; and that there was no target cost reduction for the plan.

Subsequently, the Union received another email which revised the earlier provided lists of bargaining unit members and the "status" under which they would fall.

On April 18, 2020, Brooks sent the Employer a cease and desist letter stating that the Union opposed the Employer's proposed plans. Brooks further informed the Employer that its plans violated the parties' contract, were unlawful under PERA, and that the Union demanded that the Employer cease implementation of the plan.

According to the Union, shortly thereafter, the Employer implemented its proposed plan and placed members of the bargaining unit on either "10% status" or "80% status."

Discussion:

A. Legal Standards

Section 15 of PERA requires a public employer to bargain collectively with the recognized representative of its public employees. Certain issues including "wages, hours and other terms and conditions of employment" are considered to be mandatory subjects of collective bargaining. *Detroit Police Officers Ass'n v. Detroit*, 391 Mich 44, 54-55, 214 N.W.2d 803 (1974). Unilateral action on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute an unfair labor practice under § 10(1)(e) of PERA.

Historically, although the Commission has recognized that an employer's breach of a collective bargaining agreement is not per se an unfair labor practice under Section 10 of PERA, *City of Detroit (Pension Bureau)*, 34 MPER 27 (2020), the Commission will find that a party violated its duty to bargain in good faith when a party's actions constitute a "repudiation" of the collective bargaining agreement. The Commission has defined "repudiation" as a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ,* 1997 MERC Lab Op 501.

In order for the Commission to find a repudiation: (1) the contract breach must be substantial, and have a significant impact on the bargaining unit, and (2) there must be no bona fide dispute over interpretation of the contract. *Wayne Co*, 19 MPER 61 (2006) (a dispute as to the meaning of a contract does not constitute repudiation of the contract). Repudiation warranting Commission involvement can be found only when there has been a substantial abandonment of the collective bargaining agreement or the relationship. *AFSCME Council 25*, 22 MPER 102 (2009) (even if the Commission considered that the Union's actions in filing civil litigation were a violation of the parties' contract, such a contract violation, without the assertion of facts sufficient to establish a repudiation of the contract, does not violate PERA).

If the collective bargaining agreement covers the subject matter in dispute, however, the parties have fulfilled their statutory duty to bargain and further bargaining on that subject is foreclosed. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 327 (1996). In that instance, the parties are left to their negotiated contract resolution mechanism to resolve any disputes over the meaning or application of the language to the involved issue or action.

In *Macomb Co v AFSCME Council 25*, 494 Mich 65, 80-81 (2013), the Michigan Supreme Court affirmed its prior holding in *Port Huron Ed Ass'n* and held that where a contract between the parties covers the matters in dispute, and the contract contains grievance procedures, "the details and enforceability of the [contract] provision [at issue] are left to arbitration." The Court in *Macomb Co.* set forth a clear process to be followed when a party alleges an unfair labor practice arising from the failure to bargain over a mandatory subject of bargaining. It stated:

> [The Commission] ordinarily does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration. However, when a charging party claims that a respondent has failed to bargain over a mandatory subject of bargaining, the MERC must determine whether the agreement 'covers' the dispute. As a result, it is often necessary for the MERC ... to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. If the agreement covers the term or condition in dispute, then the details and enforceability of the provision are left to arbitration. The MERC itself has recognized this limitation on its scope of authority, which we reaffirm today: when the parties have agreed to a separate grievance or arbitration process, the MERC's review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim.

Id. at 80-81, quoting *Port Huron Ed. Ass'n,* 452 Mich at 321 (footnotes omitted).

In other words, the Michigan Supreme Court emphasized that the grievance process set forth in the parties' contract will be the process utilized to resolve the parties' disputes over matters of contract interpretation, and where parties include language in the contract that recites their resolution of a particular subject, they have satisfied their duty to bargain. *Macomb Co.,* 494 Mich at 79.

In *Macomb Co*, the charging party unions claimed that it was an unfair labor practice for the respondent employer to alter the actuarial tables that it used for determining retirement benefits. At issue in the case was whether the respondents were obligated to bargain with the charging parties before changing the actuarial tables employed. The Michigan Supreme Court recognized that the applicable county ordinance did give the respondent discretion to adopt and maintain actuarial calculations, and that eight of the nine collective bargaining units at issue in that case expressly incorporated the terms of the retirement ordinance on the subject of calculating retirement benefits, and the remaining agreement did so implicitly. *Id*. at 83-87. Under such circumstances, the Michigan Supreme Court stated, in pertinent part, as follows:

> Because the collective bargaining agreements cover the calculation of retirement benefits, we conclude that the grievance procedure is the appropriate avenue for the charging parties' claims arising out of the parties' rights under their respective collective bargaining agreements. Id. at 87 and fn. 62.

In *Wayne County v Michigan AFSCME Council 25,* 30 MPER 47 (2017), the employer amended a retirement ordinance in a manner that resulted in a significant reduction in the distribution of retirement funds called the "thirteenth check." As a result, the union filed an unfair practice charge alleging that the employer repudiated the lieutenants, sergeants, and supervisory bargaining units' agreements by amending the retirement ordinance. In our original decision reported at 29 MPER 1 (2015), the Commission held that the matter involving the two bargaining units of law enforcement employees should be resolved through the parties' contractual grievance procedure because the parties' dispute stemmed from a difference in contract interpretation. The Michigan Court of Appeals affirmed the Commission's decision. The court held that according to *Macomb County v. AFSCME, Council 25*, the Commission correctly concluded that the grievance process constituted the appropriate forum for resolving the dispute over the applicability of the retirement ordinance to the employees.

Although the charging party in *Wayne County* argued that *Macomb Co* was not applicable because a contract repudiation argument was not made in that case, the Court disagreed and held that "the Michigan Supreme Court has rendered a clear pronouncement concerning the procedure to be followed when the CBA covers the issue of interpretation to be decided, and it is governing precedent in these appeals." *Id*. at 3-4.

B. The Employer's "Workforce Reduction"

In the present case, the parties have presented the Commission with arguments regarding two separate articles of the contract concerning the decision to change bargaining unit members represented by the Union to "10% status" or "80% status."

In its exceptions, the Union contends that the reduction in bargaining unit members' regular hours of work constitutes a repudiation of the contract. According to the Union, the contract provides in Article 12(A) that seniority shall serve as a basis for determining the order of employees subjected to a reduction in force, and Article 14 of the CBA further specifies how a reduction-in-force is to be implemented and applied. Under Section 14(A), the Employer must give 14 days prior notice to the Union if practical, and it must meet with the Union and discuss the reduction. Article 14(E) provides that any reduction in force must be imposed in accordance with the City's Human Resources Department Rules adopted by the Detroit Civil Service Commission. Under the Civil Service Rules, a reduction-in-force is imposed on employees based on their seniority.

In response, the Employer contends that there was no reduction in force in the present dispute, but instead, a reduction in work schedules/shifts that is "specifically allowed under Management Rights, Article 3(C)." According to the Employer, the language set forth in Article 3 of the contract vests the Employer with the power to make changes in work schedules/shifts, determine personnel reduction, and otherwise determine the methods, means, and employees necessary for departmental operations. As such, the Employer contends it was contractually privileged to reduce the hours worked by staff. The Employer further notes that the parties incorporated Civil Service Rule 10 into their agreement, and that Civil Service Rule 10 defines a reduction-in-force as "a reduction in the number of employees in a given class in a department of the City for lack of work, lack of funds, restructuring, or reasons other than the acts or delinquencies of employees." Finally, the Employer points out that the contract does not contain any requirement that it must reduce hours worked based on seniority.

The parties' assertions all involve conflicting interpretations of various provisions of the agreement. While the Union argues the Employer has violated certain contract provisions, the Employer conversely argues that its actions were sanctioned by other contract provisions. As such, there exists a plethora of contract grist ripe for interpretation by an arbitrator. As noted earlier, the Michigan Supreme Court has made clear that it is not within the purview of the Commission to determine whether or not a collective bargaining agreement was violated. Although the Union asserts that the change in work schedules/shifts constitutes a repudiation of the contract, there is a bona fide dispute over both the meaning, and applicability, of contract terms bearing on these issues. Accordingly, we find that no repudiation by the Employer has occurred, and the issue should be handled through the parties' grievance procedure. See *City of Detroit*, 33 MPER 29 (2019) (employer did not repudiate its agreement with the union because a bona fide dispute existed over the parties' interpretation of the agreement).

The Union also asserts in its exceptions that Article 27(A) of the agreement prohibits the Employer from discriminating on the basis of race, and that Article 27(A) should be interpreted to prohibit practices that are neutral on their face, but which operate to produce a disparate impact on a protected group. The Union presumably relies on cases interpreting the Civil Rights Act such as *Griggs v. Duke Power Co*., 401 U.S. 424 (1971). The Union argues that the Employer's "reduction-in-force" presented a "facial violation" of the contract's anti-discrimination clause because the reductions have fallen disproportionately on African American attorneys. In response, the Employer correctly notes that this issue was not raised in the Charge (which only alleges

violations of Articles 12, 14, and 45 of the agreement) and, as such, that the Commission should not consider the argument. Although the Employer is correct that the Union's allegations regarding Article 27(A) of the agreement are outside the scope of the charge, even if they were timely raised, they would be without merit as to the instant unfair labor practice claim. The Union's proposed interpretation of the agreement simply poses another instance of a contract dispute that should be handled through the parties' grievance procedure. Moreover, even if Article 27 were interpreted as the Union suggests it should be, a "facial violation" of a provision is not sufficient to establish a repudiation of the agreement.

The Union also argues for the first time in its exceptions that bargaining unit members are salaried employees whose compensation does not depend on whether they work thirty hours or eighty hours per week and, that by paying them less than 40 hours per week, the employer violated and repudiated the agreement. In *Birmingham Public Schools*, 33 MPER 12 (2019), however, we affirmed our prior rulings that we will not consider issues that have not been raised before the Administrative Law Judge:

> In accordance with our previous findings, we will not consider new issues that have not been raised before the Administrative Law Judge. *Pontiac Sch Dist*, 27 MPER 52 (2014); City of Detroit, 1993 MERC Lab Op 131, 132; *Teamsters Local 580,* 1991 MERC Labor Op 575, 576; *City of Detroit (Fire Department),* 1987 MERC Labor Op 417, 420; *SEMTA,* 1985 MERC Labor Op 316.

See also *City of Detroit (Fire Department) and Detroit Fire Fighters Association Local 344*, 34 MPER 43 (2021). Consequently, the Union's untimely contention will not be considered by the Commission.

In its cross exceptions, the Employer urges that the unique and unprecedented crisis resulting from the COVID-19 pandemic warrants that the Commission adopt an economic exigency standard and apply it to the current case, and that the ALJ erred when he failed to rule on the propriety of its economic exigency defense. In support of its position, the Employer cites to the decision of the National Labor Relations Board (Board) in *Seaport Printing,* 351 NLRB 1269 (2007), in which the Board held: "An exception to that rule exists if an employer can demonstrate that 'economic exigencies compelled prompt action.' If an employer can satisfy that burden, the Board will excuse the employer's failure to bargain with the union prior to implementing its decision."

Unlike the Board however, the Commission has consistently held that even a bona fide financial crisis does not justify a public employer's unilateral repudiation of its obligations under a collective bargaining agreement. *City of Detroit*, 1984 MERC Lab Op 937, aff'd, 150 Mich App 605 (1985); *Wayne Co. Bd. of Comm'rs*, 1985 MERC Lab Op 1037; *Wayne Co,* 24 MPER 25 (2011); *36th Dist Court,* 21 MPER 19 (2008); *Wayne Co*, 29 MPER 1 (2015); *City of Allen Park, and City of Allen Park International Association of Fire Fighters, Local 1410*, 28 MPER 22 (2014) (no exceptions).

Furthermore, in *Hurley Medical Center*, 31 MPER 41 (2018), we recently noted that, while federal precedent under the NLRA is often given great weight in interpreting PERA, at least where

PERA's language is identical to that of the NLRA, MERC is not bound to follow "every turn and twist" of NLRB case law. *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co Health Dep't*, 1993 MERC Lab Op 901, 906. This is especially true where NLRB precedent conflicts with that of the Commission, the Michigan Courts, or with other NLRB precedent. See also *Kent County*, 21 MPER 61, 221 (2008); *Seventeenth District Court (Redford Twp)*, 19 MPER 88 (2006); and *Michigan Technological Univ.* (no exceptions). Consequently, we are not bound to follow the Board's decision in *Seaport Printing* in deciding the issues before us and find no compelling reason to deviate from established MERC precedent on these matters. Accordingly, we conclude that the ALJ did not err when he found it unnecessary to rule on the Employer's "economic exigency" argument, particularly since he noted that he had "carefully considered all other arguments as set forth by the parties in this matter and conclude that they do not warrant a change in the result."

The foregoing notwithstanding however, we acknowledge that the COVID-19 pandemic resulted in a unique and unprecedented crisis that is distinguishable from the crises involved in the Commission decisions cited above. While the impact of the unanticipated and uncontrollable circumstances associated with the COVID-19 pandemic may, in certain cases presenting extraordinary circumstances, justify a deviation from the strict application of Commission precedent, we do not find it necessary to do so to resolve the present case. See *American Federation of State, County & Municipal Employees, Michigan Council 25, Local 101*, 35 MPER 4 (2021).

C. <u>The Employer's Elimination of the Scheduled 2% Pay Increase</u>

The Employer does not dispute that it was contractually obligated to provide a 2% wage increase to employees on July 1, 2020, or otherwise contend that it timely did so. Additionally, the Employer does not argue that economic exigencies relieved it of its obligation to grant the wage increase. In its cross exceptions however, the Employer argues that the wage increase was paid retroactively at some point after July 1, and that it was its understanding that prior to the close of the hearing the ALJ had instructed the Union, rather than the Employer, notify him both of whether the wage increase was ultimately paid, and, if so, whether the payment was satisfactory. Contrary to the Employer's assertion however, the transcript of the hearing establishes that it was the responsibility of both parties to notify the ALJ by September 1, 2020 if the 2% wage increase had been paid (Tr. 22):

> JUDGE CALDERWOOD: Okay. So back on the record. We've had some off-the-record discussions, namely dealing with the possibility of settlement, but in talking through some of the after-effects if MERC decides to rule on this, then in either direction. The parties have agreed first off that it would be a good idea to wait two weeks to see whether the 2 percent has actually been paid out to the satisfaction of what the Union believes it should have been. So, what's going to happen is the parties are going to contact my office by September 1 letting me know whether the 2 percent has been, you know, began to be paid out.

Despite the ALJ's clear directive, neither party provided notice by September 1, 2020 of whether the wage increase had been implemented by the Employer. For whatever reason,

Respondent chose not to do so, and instead relied on the assumption that the Union would undertake that responsibility. Furthermore, as noted previously, the mid-term modification was undisputed by Respondent, and there is no record evidence supporting Respondent's most recent assertion that the wage increase was subsequently paid in full retroactively, as required by the contract. Accordingly, we find that the ALJ did not err in ruling that the Employer repudiated the parties' contract when it failed to provide the July 1, 2020 wage increase at the prescribed time.

Although we are somewhat reluctant to create precedent which may encourage parties to file charges claiming a contract repudiation over a single contract provision rather than utilize the agreed upon contractual grievance mechanism to address those issues, we recognize that in *County of Wayne*, 2011 WL 2178650 (2011), the Commission held:

> Respondent asserts the ALJ erred by finding that it repudiated the terms of the MOAs. Respondent alleges instead that it was not obligated to pay out the annual service adjustments beginning June 1, 2009 because the parties had reached impasse on the issue during negotiations of the 2008-2011 successor agreements. As indicated by the ALJ, this Commission has consistently held that repudiation exists where a party's actions extensively rewrites or disregards a written bargaining obligation *(Central Michigan Univ,* 1997 MERC Lab Op 501), so long as the alleged breach is substantial and does not involve a reasonable dispute on the agreement's interpretation or meaning. *Plymouth Canton Cmty Sch,* 1984 MERC Lab Op 894. Since Respondent has not raised contract interpretation as a defense to the Union's non-payment complaint, we need not discuss it here. Instead, we concur with the ALJ's conclusion that the terms of the two MOAs unequivocally provide those eligible employees in the covered bargaining units would begin receiving a two percent annual service adjustment effective June 1, 2009. Further, Respondent's refusal to implement the payments on June 1, 2009 caused a substantial impact on both units in light of the number of Charging Party's members denied the added income from the anticipated payments.

In view of the foregoing, and under the specific facts and circumstances of this case, we find that the Employer's admitted refusal to implement an undisputed provision of the parties' agreement constituted a repudiation of the contract. In addition, we would note that the Employer's conduct additionally constituted a mid-term modification to the terms of the contract which, regardless of whether a repudiation exists, would constitute an independent violation of PERA.

Based on the above, we find that the ALJ properly granted summary disposition in favor of the Employer and dismissed the allegation concerning the Union's claim that the Employer's implementation of its "reduction in force" plan repudiated the collective bargaining agreement, and properly granted summary disposition to the Union finding a violation of PERA by the Employer concerning the allegation that the Employer repudiated the collective bargaining agreement by withholding the July 1, 2020 wage increase.

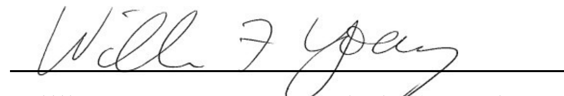
We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge in Case No. 20-D-0755-CE is adopted and shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair



William F. Young, Commission Member

Issued: September 10, 2021

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

In the Matter of:

CITY OF DETROIT (LAW DEPARTMENT),
Public Employer-Respondent,

Case No. 20-007845-CE
-and- Docket Number. 20-D-0755-MERC

UAW 2211, PUBLIC ATTORNEYS ASSOCIATION,
Labor Organization-Charging Party.
____/

APPEARANCES:

Jason McFarlane, City of Detroit Law Department, for the Respondent

Nickelhoff & Widick, PLLC, by Andrew Nickelhoff and Marshall J. Widick, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON
MOTION FOR SUMMARY DISPOSITION

On April 20, 2020, the UAW 2211, Public Attorneys Association, (Charging Party or Association) filed the present unfair labor practice charge against the City of Detroit, Law Department (Respondent or Employer). Pursuant to 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, acting on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

Charging Party claims that the Respondent's announcement on April 14, 2020, of its intention to undertake "reductions in force or other cuts" on its bargaining unit to address a claimed budgetary shortfall, repudiated the parties' contract. More specifically, Charging Party points to Respondent's stated intention to not implement an agreed upon 2% wage increase due on July 1, 2020, as well as its plans to make reductions in bargaining unit members' hours.

During a telephone pre-hearing conference call held with the parties on May 19, 2020, Charging Party indicated that it would be considering the possibility of filing an amended charge to add certain other allegations. Also, during that call, the parties agreed that the matter could be handled through motions and briefs. On May 27, 2020, Charging Party indicated through email that it would not be filing an amended charge. Following that email, a motion schedule was established and communicated to the parties.

Initial motions were filed by the parties on July 10, 2020. Response briefs were filed on July 24, 2020. Oral argument was conducted before the undersigned on August 14, 2020. Upon consideration of the entire record, including the parties' filings and the transcript of the August 14, 2020, oral argument, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

The following findings of fact are derived from the parties' pleadings and are not in dispute.

The Association represents a bargaining unit comprised of certain attorneys employed within the City's Law Department (Department). The parties are subject to a collective bargaining agreement effective from September 22, 2017, through December 31, 2020.

Article 3 of the contract provides the managements rights clause, and states in the relevant part:

> C. The City will have the right and obligation to determine and establish the policies, goals and scope of its operations. Consistent with its operational needs, the City may reasonably determine and implement: work schedules/shifts, vacation schedules, flex time, the goals and methods and processes by which such work is performed, the qualifications of employees assigned to do the work and the below listed rights and obligations provided they do not conflict with the terms of this Agreement. Except as specifically limited by the terms of this Agreement or applicable law, these rights and obligations include, but are not limited to:
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> * * *
>
> 1. Determine personnel hiring and reductions;
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> * * *
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> 15. Determine methods, means and employees necessary for departmental operations; and
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> 16. Control the departmental budget.

Article 8 of the contract provides the parties' agreed upon grievance procedure. The grievance procedure encompasses a multi-step process and ends in binding arbitration.

Article 12 of the contract provides the terms regarding seniority. Under that Article, seniority, as defined by the contract, operates to provide the order by which bargaining unit members are to be laid off in the event of a "reduction in force."

Section 14 provides the contract's provisions regarding "reductions in force." Section 14(b) of the contract provides:

> If as a result of a reduction in force in the Law Department, it is necessary to reduce the number of employees in a classification represented by the Union, such reduction in force shall be in accordance with the reduction in force provisions provided in the Human Resources Department Rules as adopted by the Civil Service Commission in effect January 1, 2014.

Rule 10 of the City's Human Resources Department Rules is entitled, "Reduction in Force." Section 1(a) of that rule defines the term "reduction in force" as:

> [A] reduction in the number of employees in a given class in a department of the City for lack of work, lack of funds, or reasons other than the acts or delinquencies of employees.

Article 45 of the contract provides several wage provisions. Under Section A of that article, members of the bargaining unit were contractually entitled to several wage increases following the contract's initial ratification. Relevant to the present dispute, the contract provided for a 2% wage increase effective July 1, 2020. The City, despite claims made within its pleadings that it would implement the 2% wage increase effective July 1, 2020, had not done so at the time of oral argument in this matter, August 14, 2020. Moreover, as of the issuance of the Decision and Recommended Order, there has been no indication from either party that the City has in fact implemented the wage increase.

In early March, Governor Gretchen Wilson declared a State of Emergency in response to the novel coronavirus (COVID-19) that had been, and continues to impact, both the state and the country as a whole. While recognizing the existence of COVID-19 as a pandemic is appropriate for purposes of establishing context in which the actions outlined herein occurred, it is not necessary for purposes of this decision and recommended order to recite with specificity and/or highlight the magnitude by which COVID-19 affected the City.

On or around April 14, 2020, the Charging Party's president, Robyn Brooks, received a letter from the City that had been sent to its various unions. That letter indicated that the City would be imposing several measures as a result of COVID-19. More specifically that letter provided in the relevant part the following:

> The unprecedented events surrounding the COVID-19 pandemic has caused an economic crisis throughout the United States, Michigan, and the City of Detroit (City).
>
> The City's revenue collections have suffered due to COVID-19, as casino and business closures diminish the City's gaming, income tax, and other revenues. Specifically, the City is facing a projected $154 million dollar revenue shortfall for this fiscal year and projects a $194 million revenue shortfall next year. The City has already taken steps to address this deficit by restricting discretionary spending, renegotiating contracts with major suppliers, halting cash capital projects, instituting a hiring freeze and curtailing of overtime. However, additional steps are necessary.

As a direct result, the City has determined that there must be a reduction in workforce, either by the number of our employees and/or work hours. The City will be in negotiations with the unions to remove the July 1, 2020 pay increases for all City employees. The City has explored the following options to ensure the continuation of essential services:

A. 10% Workers. Furlough Option for full time employees whose work cannot easily be performed due to the COVID-19 shutdown. This allows employees to work enough reduced hours to cover the employee's health care contributions, while collecting underemployment benefits to make up a portion of lost wages. Under the Federal Pandemic Unemployment Compensation (FPUC) Employees may qualify for an additional $600 per week until July 30, 2020.

B. 80% Workers. Michigan Work Share Program allows employees to work reduced hours, while collecting unemployment benefits to make up a portion of lost wages. Under the Federal Pandemic Unemployment Compensation (FPUC), Employees may qualify for an additional $600 per week until July 30, 2020.

C. 95% Workers. Elected Officials, appointees and full time employees making more than $125,000 per year will share in the sacrifice through pay cuts.

D. 100% Workers. Employees will continue to work 100% of the time with their current pay.

E. Layoff. Layoff of some TASS, Seasonal and part time employees. Laid off employees will receive unemployment benefits for which they qualify. Under the Federal Pandemic Unemployment Compensation (FPUC) Employees may qualify for an additional $600 per week until July 30,2020.

It is the City's intent, that even with the reduction of hours, most permanent employees may be able to maintain their healthcare coverage.

Within the next week, Labor Relations will be contacting you to discuss the various options for union members.

It is the City's hope that the economy will rebound and that the City can resume its previous level of operations.

According to Charging Party, on April 17, 2020, the Association’s president, Robyn Brooks, received two emails from the City informing her that beginning on April 20, 2020, certain bargaining unit members would have their weekly pay reduced to 10% of its normal amount while other members would have their pay reduced to 80% of its normal amount.

Also, that same day, the City’s Corporation Counsel, Lawrence Garcia, held a virtual meeting with leaders from the City’s various unions, including Charging Party. According to

Charging Party, Garcia indicated that the City would begin to reduce their bargaining unit members to either "10% status" or "80% status". Charging Party claims Garcia stated that the percentage "status" reflected the assigned work hours and the amount of contractually-required pay or salary that the unit member would receive. Charging Party further claims that Garcia indicated that seniority was not considered in the City's plan, that seniority did not enter into the calculations, and that there was no target cost reduction for the plan.

Sometime following the above virtual meeting, the Association received another email which revised the earlier provided lists of bargaining unit members and which "status" they would fall under.

On April 18, 2020, Brooks sent the City a cease and desist letter clearly indicating that the Association opposed the City's proposed plans. In that letter, Brooks informed the City that its plans violated the parties' contract, was unlawful under PERA, and demanded that the City cease implementation of the plan. Shortly thereafter, the City implemented its proposed plan placing members of the bargaining unit on either the "10% status" or "80% status."

Discussion and Conclusions of Law:

Section 15 of PERA requires a public employer to bargain collectively with the recognized representative of its public employees. Certain issues including "wages, hours and other terms and conditions of employment" are considered to be mandatory subjects of collective bargaining. *Detroit Police Officers Ass'n v. Detroit*, 391 Mich 44, 54-55. Issues falling outside of this category are classified as either permissive or illegal subjects of bargaining. *Id* at 652. Unilateral action on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute an unfair labor practice under § 10(1)(e) of PERA. See *Berrien County and Berrien County Sheriff,* 33 MPER 30 (2019).

The above notwithstanding, if the collective bargaining agreement covers the subject matter in dispute, the parties have fulfilled their statutory duty to bargain. As the Michigan Supreme Court stated in *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 327 (1996): "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. When the matter is covered by the agreement, further bargaining on that subject is foreclosed because the parties have fulfilled their statutory duty to bargain. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 79 (2013). More simply put, as the Commission stated in *Berrien County*, supra., "the germane question in determining whether the contract covers an issue is if the agreement contains provisions that can be reasonably relied on for the actions in dispute."

Regarding the enforcement of collective bargaining agreements, our Commission has consistently held that it will not involve itself with purely contractual disputes or decide questions of mere contract interpretation. To that end, where the alleged unfair labor practice amounts to no more than an isolated breach of a contract and not a repudiation of the collective bargaining agreement, the charges will be dismissed. *C.S. Mott Community College*, 1982 MERC Lab Op 1478. The Commission has defined repudiation as an attempt to rewrite the parties' contract, a

refusal to acknowledge its existence, or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501. An alleged breach of contract will be considered a repudiation when (1) the contract breach is substantial and has significant impact on the bargaining unit and, (2) no bona fide dispute exists over interpretation of that contract. See *Plymouth Canton Community School District*, 1984 MERC Lab Op 894.

Throughout the history of this proceeding and even during the August 14, 2020, oral argument, the City has maintained its intention to implement the July 1, 2020, wage increase. Nonetheless, as of the date of this Decision and Recommended Order, there has been no indication that the City made good on that pledge. As such, consideration of the City's failure under the guise of an unfair labor practice charge is not only appropriate but required under PERA. I note that the Employer never proffered any defense to its failure to implement the increase as of July 1, 2020. There is no question that the parties' contract unequivocally required that the City provide several wage increases according to a preset schedule and that the City repudiated the parties' contract when it failed to provide the July 1, 2020, raise at the prescribed time. I find that the City's failure violated its duty to bargain in good faith.

Addressing next the City's decision and implementation of the "reduction in force" plan as outlined above, I find that the parties' contract clearly covers the dispute at issue. The language set forth in Article 3 of the contract clearly vests the power to make changes in work schedules/shifts, determine personnel reduction, and otherwise determine the methods, means, and employees necessary for departmental operations with the Employer. As such, the City could make the decision to reduce hours worked by staff and/or the number of staff needed on its own. Charging Party does not appear to challenge that decision, rather Charging Party claims that the City should have implemented its "reduction in force" plan by way of seniority. However, the contract clearly incorporates and relies upon the definition of "reduction in force" as set forth in Rule 10 of the City's Human Resources Department Rules. That definition limits the term to situations where the "number of employees" is reduced. Here, the City did not reduce the number of employees in the Department. Instead, it reduced the number of hours worked by those employees. As such, I find that the Employer could have reasonably relied upon the terms of the parties' contract when it chose to implement its actions by a means other than seniority. For this reason, I conclude that the Charging Party's allegations relative to the City's "reduction in force" do not constitute an unfair labor practice and that the dispute should instead proceed by way of the parties' grievance procedure.

I have carefully considered all other arguments as 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:

RECOMMENDED ORDER

Respondent City of Detroit, its officers and agents, are hereby ordered to:

1. Cease and desist from repudiating the collective bargaining agreement between itself and the UAW 2211, Public Attorneys Association, relative to contractually set wage increases.

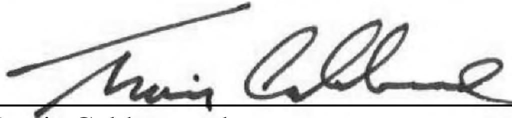
2. Take the following affirmative action necessary to effectuate the policies of the Act:

    a. If it has not already done so, implement the July 1, 2020, wage increase.

    b. Make whole the employees in the bargaining unit for any monetary losses they have suffered as a result of its delay in implementing the July 1, 2020, wage increase, together with interest at the statutory rate.

    c. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Date: February 17, 2021

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY THE **CITY OF DETROIT (LAW DEPARTMENT)**, THE COMMISSION HAS FOUND THE **CITY OF DETROIT** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL cease and desist from repudiating the collective bargaining agreement between itself and the UAW 2211, Public Attorneys Association, relative to contractually set wage increases.

WE WILL take the following affirmative action to effectuate the purposes of the Act:

1. If we have not already done so, implement the July 1, 2020, wage increase.

2. Make whole the employees in the bargaining unit for any monetary losses they have suffered as a result of our delay implementing the July 1, 2020, wage increase, together with interest at the statutory rate.

CITY OF DETROIT

By: ____

Title: ____

This notice must be posted for a period of thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.