STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

MERC Case No. 20-A-0190-CE

-and-

AMALGAMATED TRANSIT UNION DIVISION 26,
Labor Organization-Charging Party.
_____/

Appearances:

The Allen Law Group, P.C., by Shaun P. Ayer and Amy M. Robertson, for Respondent

Cousens Law, by Mark H. Cousens, for Charging Party

DECISION AND ORDER

In August 2019, the City of Detroit (Department of Transportation) (Respondent or Employer) notified the Amalgamated Transit Union Division 26 (Charging Party or Union) that it intended to unilaterally modify the bargaining unit's pay periods from weekly to bi-weekly. The Union filed an unfair labor practice charge alleging that the Employer refused to bargain over a mandatory subject, and that it had unilaterally modified the bargaining unit employees' pay periods, in violation of § 10(1)(e) of the Public Employment Relations Act (PERA). The Employer argued that the Union did not make a timely demand to bargain, and that because the change to pay frequency had not yet been implemented the matter was not ripe for Commission adjudication.

Administrative Law Judge (ALJ) Travis Calderwood concluded that the Employer had announced the change as a *fait accompli,* and had refused to bargain with the Union. He further found that the Employer had implemented the modification of pay periods, and that the foregoing change and refusal to bargain constituted a violation of Section 10(1)(e) of PERA.

In its exceptions, Respondent argues that the ALJ erred: (1) when he failed to consider whether the Union made a timely demand to bargain; (2) in relying on the doctrine of *fait accompli* and (3) in concluding that the matter was ripe for adjudication.

For the reasons set forth below, we affirm the ALJ's determination that Respondent violated Section 10(1)(e) of PERA by refusing to bargain with the Union concerning a mandatory subject. Contrary to the ALJ however, we find that Respondent had not implemented the change

to the payroll period as of the close of the hearing. Accordingly, we affirm the ALJ's Decision and Recommended Order only to the extent set forth herein, and as modified below.

Procedural History:

The Union filed the instant unfair labor practice charge on January 29, 2020. The charge alleged that, in August 2019, Respondent notified Charging Party that it intended to unilaterally modify pay periods so as to pay each employee on a bi-weekly basis rather than on a weekly basis; that Charging Party notified Respondent that the issue was a mandatory subject of bargaining, and; that Respondent refused to bargain with respect to the change in violation of Section 10(1)(e) of PERA.

An evidentiary hearing was held on October 7, 2020, and, on April 28, 2021, the ALJ issued a Decision and Recommended Order.[1]

On June 14, 2021, Respondent submitted a Motion to Reopen the Record and, on June 17, 2021, Respondent filed exceptions to the ALJ's Decision and Recommended Order.

On June 22, 2021, Charging Party submitted a brief in reply to Respondent's exceptions and a brief opposing Respondent's Motion to Reopen the Record.

Facts:

Charging Party ATU Division 26 represents a unit of Transportation Equipment Operators (bus drivers) employed by the City of Detroit's Department of Transportation. The Employer and Union are parties to a collective bargaining agreement that was effective from 2014 through December 31, 2018. At the hearing, the Union asserted that the parties were working under a "bridge agreement pursuant to Section 13(c) of the Urban Mass Transportation Act", such that a contract remained in effect while the parties continued bargaining toward a successor collective bargaining agreement. In that regard, Article 57 of the agreement further provides:

> In the event the parties fail to arrive at an agreement on wages, fringe benefits, other monetary matters, and non-economic items by December 31, 2018, this Agreement will remain in effect on a day-to-day basis. Either party may terminate the Agreement by giving the other party ten (10) calendar day's written notice on or after December 31, 2018.

Bargaining on a successor agreement began in November 2018 and the parties reached a tentative agreement in or about late June of 2019, however, the Union's membership did not ratify the tentative agreement. Although the 2014-2018 agreement does not explicitly address the frequency with which employees are to be paid, Article 56, Maintenance of Conditions, provides:

[1] MOAHR Hearing Docket No. 20-002865

> Wages, hours and conditions of employment expressly provided in this agreement shall not be changed unless mutually agreed by the City and the Union. During the course of negotiations there was considerable discussion as to the interpretation and intent of Article 56. The parties agree that this article is intended to include those proper practices and minor benefits not covered by specific language in the contract.

In October 2018, the Employer began implementing a new payroll system in several departments.[2] According to the Employer, the software associated with this new payroll system requires a uniform approach to payroll periods. As a result, throughout 2018 and 2019, the Employer converted departments, and employees working in such departments, which were on a weekly pay schedule to a bi-weekly pay schedule. Charging Party's bargaining unit is the only employee group that remains on a weekly pay schedule.

On October 3, 2019, the Employer's Human Resources Director, Denise Starr, met with Charging Party's President, Glen Tolbert, for a "breakfast meeting." During that meeting, the parties discussed the payroll system and Starr informed Tolbert of the Employer's intention to "switch from weekly to biweekly pay."

Thereafter, Starr and Labor Relations Administrator Krista Smith were invited to attend a meeting with Charging Party's membership on October 26, 2019. During the meeting, the Employer representatives proposed a change in the frequency with which employees would be paid. Tolbert stated that he was opposed to the change and asked for something in writing from the Employer. Tolbert further testified that, in December 2019, he sent a letter via email to the Employer's Director of Labor Relations, Hakim Berry.[3] The letter requests dates from the Employer to finalize negotiations for the successor agreement, and notes the following regarding Article 56, Maintenance of Conditions, and the proposed change in pay frequency:

> …according to Article 56 of the Master Agreement, the proposed switch from being paid every week, to being paid every two weeks, is a subject of bargaining.

On January 7, 2020, the parties met to bargain over the successor contract. Tolbert testified that he attempted to discuss the issue regarding pay frequency during that session but was informed by the Employer that they wished to discuss it "outside the contract," meaning outside of the meetings held to bargain over a successor agreement. The parties did not reach any agreement concerning pay frequency at the January 7 meeting.

After the meeting, the Employer posted a memo to the bargaining unit employees. The memo provided:

---

[2] Following the Employer's emergence from bankruptcy in 2014, it decided that one focus for cost savings would be to overhaul and revamp its payroll system. As a result, in 2015 the Employer began the task of programming new payroll software and technology.

[3] Although the letter was dated August 1, 2019, Tolbert testified that the date was a typo and that it should have read December 1, 2019.

> Effective Monday, February 10, 2020, all Department of Transportation (DDOT) employees that are paid weekly will be transitioned to a bi-weekly pay schedule. The first bi-weekly check will be issued Friday, February 28, 2020.

The memo further informed employees that, effective Monday, February 10, 2020, in accordance with Article 11(E) of the Master Agreement, the work week would begin on Monday and end on Sunday.

Later that day, Tolbert sent an email response to Labor Relations Administrator Smith, and copied Starr, Berry and others. That email articulated the Union's position with respect to the pay frequency issue as follows:

> As mentioned in my letter requesting the negotiations that took place this afternoon Jan. 7, 2020, and as mentioned this afternoon in negotiations, ATU Local 26 considers the changing of our pay from weekly to bi-weekly, a subject of mandatory bargaining.
>
> In accordance with Article 11(D) of the Master Agreement between the City of Detroit and ATU Local 26, you are well within your rights to change our work week from Monday to Sunday, without any objection from Local 26. However, in accordance with the same aforementioned Master Agreement, Article 56 Maintenance of Conditions reads: Wages, hours and conditions of employment expressly provided in this agreement shall not be changed unless mutually agreed by the City and the Union. During the course of negotiations there was considerable discussion as to the interpretation and intent of Article 56. The parties agree that this article is intended to include those proper practices and minor benefits not covered by specific language in the contract. The parties further agree that this article is not intended to conflict with the express terms of the contract or to interfere with the department's ability to modify work rules and procedures that in the department's judgement support safe and efficient bus service to customers.
>
> Changing the pay schedule has nothing to do with delivering safe and efficient service to our customers. However, the Union considers our weekly pay schedule a change in condition of employment and a minor benefit, therefore we asked to bargain. Furthermore, we had this discussion at negotiations and our understanding was we were going to receive some figures and continue negotiating. We need an understanding; does the City intend to take this hard line stance on this subject? If so, it needs to be clearly communicated to the Union. I don't believe it is clear, because we were lead [sic] to believe we were still negotiating the subject this afternoon.

On January 14, 2020, Smith responded to Tolbert's January 7 email and acknowledged the Union's position regarding the Employer's stated plan of changing the pay frequency. The email further proposed two dates to bargain the issue – January 21, 2020, and January 22, 2020.

According to Tolbert, the Union declined to bargain the change on either of those two proposed dates and, instead, brought the matter up at a bargaining session held on January 23, 2020. Although Tolbert testified that the Union made a written proposal at the session regarding pay frequency, the document was not offered as an exhibit and there was no testimony concerning the substance of the proposal.

On February 6, 2020, Smith sent Tolbert a letter as a follow up to the Union's January 23, 2020 proposal regarding pay frequency. That letter stated:

> Previously the City requested to meet with you regarding the payroll change with the dates of January 21 and January 22, 2020 offered. The Union declined those dates and preferred to use a date to which the parties were scheduled for a formal collective bargaining session (regarding the failed ratification of the successor agreement) that occurred on January 23, 2020. Prior to the commencement of negotiations, the Union presented its position regarding the change in pay frequencies from weekly to bi-weekly, citing that it is a benefit that you wish to maintain. The City presented to you the numerous reasons why all 9,000 plus employees of the City need to be on the same pay frequency in the new system including your bargaining unit of approximately 500 active employees.
>
> With this stated, the City would like to continue bargaining regarding the pending change and the need to properly educate your bargaining unit as well as to answer any questions in addition to alerting our Payroll Department of any extenuating circumstances that may be presented because of the change.
>
> We are available to meet any day and time the week of February 10, 2020. Please let us know as soon as possible to accommodate schedules. It is the City's intention to effectuate this change in the first pay period in March, with the first bi-weekly pay period on March 6, 2020.

On February 12, 2020, Tolbert responded to Smith noting "we are still in disagreement of the meaning of Article 56 Maintenance of Conditions." The Employer ultimately did not implement the payroll period change on March 6, 2020 although the record is unclear as to the reason.

According to Tolbert, bargaining was suspended from on or about February 12, 2020, until March 7, 2020. The parties met again on either March 7 or 9, and on either September 7 or 23, 2020, in mediation session(s) with a Commission mediator. The gap in bargaining from March until September appears to have been due to the COVID-19 pandemic. It is not clear the extent to which the issue regarding pay frequency was discussed at the March and September mediation sessions because the ALJ declined to allow testimony concerning the specific positions and proposals of the parties. Tolbert did testify however, that the issue of pay frequency was discussed during one or both of those sessions.

Sometime in September 2020, the Employer notified the bargaining unit employees that it would now be implementing the change in pay frequency effective September 21, 2020. Subsequently however, on September 11, 2020, the Employer notified the bargaining unit that the September 21, 2020 effective date would be postponed "until further notice."

On October 19, 2020, the Employer, via a letter from Smith to Tolbert, advised that the pay frequency change would be implemented on November 16, 2020. That same day Smith sent an email to Tolbert asking for his availability to continue bargaining over the issue. The record before us does not contain any evidence or assertion by either party that Respondent thereafter implemented the change to the payroll period.

Discussion:

I. The Employer's Plan to Change the Bargaining Unit's Pay Periods from Weekly to Bi-Weekly.

A. Legal Standards

The Public Employment Relations Act (PERA) imposes a duty to bargain on public employers and unions only with respect to those matters which constitute "mandatory subjects of bargaining." *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215; 324 NW2d 578 (1982). A mandatory subject of bargaining is one which has a material or significant impact upon "wages, hours and other terms and conditions of employment." *Southfield Police Officers Ass ' n v Southfield*, 433 Mich. 168, 177; 445 NW2d 98 (1989); *Port Huron Area School District*, 28 MPER 45 (2014). Issues falling outside mandatory subjects of bargaining are classified as either permissive or illegal. *Southfield Police Officers Ass ' n* at 178. What constitutes a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass 'n*, at 178. In *Metropolitan Council No. 23 and Local 1277, AFSCME v City of Center Line*, 414 Mich 642, 660 (1982), the Michigan Supreme Court held that matters that impinge upon a city's fundamental right to make decisions regarding the size and scope of municipal services based on factors such as need, available revenues, and the public interest are permissive, not mandatory, subjects of bargaining.

The Commission has also recognized that certain types of employer decisions fall within the scope of its inherent managerial prerogative and are permissive subjects of bargaining. See e.g., *Ishpeming Supervisory Employees v City of Ishpeming*, 155 Mich App 501 (1986). Nonetheless, even where there is no bargaining obligation with respect to a particular decision, an employer may have a duty to give the union an opportunity for meaningful bargaining over the effects of that decision. *Center Line*, at 661-662; *Ishpeming*, at 508.

An employer violates Section 10(1)(e) when it takes unilateral action on a mandatory subject of bargaining before the parties reach impasse. *Detroit Police Officers Ass'n v Detroit,* 61 Mich App 487, 490 (1975); *International Ass'n of Firefighters Local 1467, AFL-CIO v Portage*,

134 Mich App 466, 473 (1984); *Pinckney Community Schools*, 9 MPER 27085 (1996). Impasse has been defined as the point at which the parties' positions have so solidified that further bargaining would be futile. *Redford Union School District*, 23 MPER 32 (2010), *Oakland Cmty Coll*, 2001 MERC Lab Op 273, 277; 15 MPER 33006 (2001); *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw*, 1982 MERC Lab Op 727. Once the parties have reached impasse, an employer is usually free under Section 10(1)(e) to take unilateral action on an issue as long as its action is consistent with its offer to the union. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 56 (1974); *Kalkaska Co Rd Comm*, 29 MPER 65 (2016); *Macomb County Rd. Commission* 1979 MERC Lab Op 939; *Highland Park Cmty Sch Dist*, 1992 MERC Lab Op 186 (no exceptions).

An Employer's duty to bargain is conditioned on a timely demand to bargain having been made by the union. See e.g., *St. Clair Prosecutor v. AFSCME*, 425 Mich 204, 242 (1986) (PERA makes it an unfair labor practice for the employer "to *refuse* to bargain collectively with the representatives of its public employees"...It does not require the employer to initiate bargaining); *Detroit Water and Sewerage Department v Sanitary Chemists and Technicians Association*, 34 MPER 18 (2020), affirming *City of Detroit (Water & Sewage Dept.)*, 33 MPER 13 (2019); *Decatur Public Schools*, 27 MPER 41 (2014), affirmed by the Court of Appeals in *Van Buren Co Ed Ass 'n & Decatur Ed Support Pers Ass ' n, MEA/NEA v Decatur Pub Sch*, 309 Mich App 630; 28 MPER 67 (2015); *City of Dearborn*, 20 MPER 110 (2007); *SEIU Local 586 v Village of Union City*, 135 Mich App 553 (1984); *Charter Township of Meridian*, 3 MPER 21048 (1990), affirmed by the Court of Appeals in Docket No. 130093; *Holland Pub Sch,* 1989 MERC Lab Op 346, 355; *Leelanau County Board of Com'rs*, 1 MPER 19118 (1988). A union, however, has no duty to demand bargaining if the unilateral action on the bargaining subject is presented by the employer as a *fait accompli*. See *Detroit Water and Sewerage Department*, at 26 (a demand is unnecessary when the employer's unilateral decision has already been implemented), *Inter Urban Transit Partnership*, 21 MPER 47 (2008); *City of Highland Park*, 17 MPER 86 (2004).

B. Application to the Present Dispute

The Employer does not dispute that frequency of pay is a mandatory subject of bargaining. See also *Dearborn Public Schools*, 19 MPER 73 (2006); *Children's Aid Society*, 1994 MERC Lab Op 323, 327. It is less clear whether the Employer disputes the Union's assertion that issues concerning the payroll period are either "proper practices" or "minor benefits" to which the prohibition on change absent mutual agreement applies under Article 56, Maintenance of Conditions.

In its exceptions, Respondent argues that the Union failed to make a timely demand to bargain and that the ALJ erred in his reliance on the doctrine of *fait accompli*. We disagree.

The Employer presented its intention to switch the bargaining unit from a weekly pay period to a bi-weekly period not as an action that it would like to implement, or an action that it would like to discuss with Union, but as an action that it had every intention of implementing, with

the only question being the precise date on which the implementation would occur. Specifically, the Employer's January 7, and September, 2020 notices to employees set forth a date certain upon which the change would occur – the first notice coming after a bargaining session in which the Union attempted to discuss the issue regarding pay frequency but was informed by the Employer that it wished to discuss the matter "outside the contract." Although the Employer did not actually implement the change on any of the stated dates, we agree with the ALJ that this is immaterial to a determination on the refusal to bargain allegation since there was no claim by the Employer that it delayed the change because of the Union's objection. To the contrary, the Employer repeatedly announced unilaterally determined implementation dates for the change. Consequently, we believe that the Union was relieved of any obligation to demand bargaining over the decision and associated change which were announced as a *fait accompli*.

However, even assuming, *arguendo*, that the Employer's decision was not announced as a *fait accompli*, we find that the Union made a timely demand to bargain through its December 1st letter.

Respondent also contends that the ALJ erred in finding that Charging Party's claims were ripe for adjudication. As noted by the Employer, the requirement that a claim be ripe is designed to prevent "the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Huntington Woods v Detroit,* 279 Mich App 603, 615-16 (2008). A charge would not be ripe where the charging party seeks "'a decision in advance, about a right before it has been actually asserted and tested, or judgment upon some matter which, when rendered, for any reason cannot have practical legal effect upon the then existing controversy.' This doctrine applies to questions arising in the context of PERA (citations omitted)." *Southfield Police Officers Ass' n v Southfield*, 162 Mich App 729, 735 (1987), rev'd on other grounds, 433 Mich 168 (1989).

With regard to the refusal to bargain allegation, we find that that Charging Party's claim was ripe for adjudication, and that the Employer failed to bargain in good faith over the decision to change the payroll period, at least as of the close of the ALJ hearing. In that regard, the Employer refused to bargain over the matter during two main table bargaining sessions, while continuing to stridently assert that the change would be implemented. Moreover, the Employer has continually maintained that its intention was to implement the change, and on more than one occasion, the Employer gave the Union a definitive implementation date. Although the implementation ultimately did not occur, the Employer neither asserts, nor does it otherwise appear from any record evidence, that the delay was a result of the Union's objections to the action. Accordingly, based on the entirety of the record, we find that the Employer did not bargain in good faith regarding the payroll period change, and we and affirm the ALJ on that determination.

Contrary to the ALJ however, we find that as of the close of the hearing, the Employer had not implemented any change to the pay period.

In *Pinckney Community Schools*, 9 MPER 27085 (1996), the Commission dismissed a charge alleging that the Respondent violated its obligation to bargain with the Union by unilaterally adopting an early retirement incentive program. In dismissing the charge, the

Commission found that, although the Respondent may have announced that it intended to implement an early retirement incentive program, the unilateral change was never actually made.

Here, the record does not support a determination that a unilateral change had been implemented. To the contrary, there is no dispute that the Employer had not implemented the payroll changes as of the close of the record. Consequently, we find that the ALJ erred when he recommended that the Employer "return the bargaining unit to a weekly pay schedule" and "[m]ake whole the employees in the bargaining unit for any monetary losses they have suffered by reason of the City's implementation of a bi-weekly pay schedule." As such, we have modified the ALJ's recommended order to reflect our determination that no implementation had occurred based on the record before us.

II. Respondent's Motion to Reopen the Record.

In its Motion to Reopen the Record, the Employer asserts that after the close of the ALJ hearing, the parties continued to meet and negotiate regarding the proposed payroll change on November 6, 2020, November 9, 2020, and November 12, 2020. The Employer further asserts that, on November 12, 2020, the parties came to an impasse after the Union demanded the City pay it $900,000 for the payroll changes.

Under Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166, a Motion to Reopen the record will be granted only where all of the following requirements are met:

> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
> (c) The additional evidence, if adduced and credited, would require a different result.

The facts asserted by the Employer all involve events that occurred subsequent to the close of the hearing. They are not newly discovered facts, or facts which occurred prior to the hearing of which the Employer was unaware, or which the Union prevented the Employer from ascertaining, or fraudulently concealed. See *Service Employees International Union (SEIU), Local 517M*, 27 MPER 47 (2013); *Birmingham Public Schools*, 33 MPER 12 (2019). Accordingly, we deny Respondent's request to reopen the record. If the Employer has now implemented the payroll change, or does so at some point in the future, and a charge is filed by the Union, the Employer is free to assert the facts contained in its Motion to Reopen the Record as a defense to its implementation.

We would note however, that the Union asserts that this matter involves the application of Article 56, Maintenance of Conditions, and that such provision governs the Employer's rights and obligations concerning its desired changes to the bargaining unit employees' payroll period. Although the record is not entirely clear, it appears that Respondent disagrees at least to some

extent with the Union's contention concerning the applicability of Article 56, however it does not assert that there exists any other contract language privileging it to take unilateral action.

It is well established that where a collective bargaining agreement covers a mandatory or permissive subject of bargaining, any issues concerning that matter should be resolved through the parties' negotiated dispute resolution mechanism. *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996); *Macomb Cty v. AFSCME Council 25*, 494 Mich. 65 (2013) (any doubt about whether a subject matter is covered by a collective bargaining agreement should be resolved in favor of having the parties arbitrate the dispute); *Cty. of Wayne v. Michigan AFSCME Council 25*, 28 MPER 23 (2014) (scope of Commission's authority in reviewing a claim of refusal-to-bargain when the parties have a separate grievance or arbitration process is limited to whether the agreement covers the subject of the claim); *Gogebic Cmty Coll Michigan Educ Support Pers Ass ' n v. Gogebic Cmty. Coll*., 246 Mich. App. 342 (2001); *Dearborn Public Schools*, 19 MPER 73 (2006); and *St. Clair Co Rd Comm,* 1992 MERC Lab Op 533. A subject need not be explicitly mentioned in an agreement in order for the subject to be "covered by" the agreement. *Port Huron Educ. Ass ' n*, 452 Mich at 323 n 16; *City of Royal Oak*, 23 MPER 107 (2010).

Accordingly, the question remains whether the Employer's unilateral implementation of a change to the payroll period is appropriate for determination through an unfair labor practice proceeding or should more properly be addressed through the parties' negotiated grievance process under the "covered by" doctrine.

Here, if the Union maintains its position that the provisions of Article 56 concerning "proper practices" or "minor benefits" apply to issues involving the established payroll period, then the proper forum for resolving the Employer's unilateral implementation of a change to the payroll period is through the grievance-arbitration procedure of the collective bargaining agreement, provided there remains a valid contract in effect which contains the aforementioned provision, or some other provision concerning the matter in dispute. Conversely, if the Union and Employer agree that Article 56 does not cover matters concerning the payroll period, and if that issue is not addressed elsewhere in the parties' contract, then the legality of the Employer's unilateral action may be appropriate for resolution through a MERC proceeding. See *Dearborn Public Schools*, 19 MPER 73 (2006) and the other decisions cited above.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, we affirm the ALJ's Decision and Recommended Order only to the extent set forth herein and issue the following modified order.

ORDER

Respondent, City of Detroit (Department of Transportation), its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain collectively with Amalgamated Transit Union Division 26 with respect to the bargaining unit's frequency of pay unless an agreement or impasse have been reached.

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

   a. On request, bargain collectively with the Union as the exclusive collective bargaining representative of its employees regarding pay frequency unless an agreement covering the matter or impasse have been reached.

   b. 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

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: September 14, 2021

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY THE **AMALGAMATED TRANSIT UNION DIVISION 26** 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 refusing to bargain collectively with Amalgamated Transit Union Division 26 with respect to the bargaining unit's frequency of pay unless an agreement or impasse have been reached.

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

1. Cease and desist from refusing to bargain collectively with Amalgamated Transit Union Division 26 with respect to the bargaining unit's frequency of pay unless an agreement or impasse have been reached.

2. On request, bargain collectively with the Union as the exclusive collective bargaining representative of its employees regarding pay frequency unless an agreement covering the matter or impasse have been reached.

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.

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

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION),
Respondent-Public Employer, Case No. 20-A-0190-CE
Docket No. 20-002865-MERC

-and-

AMALGAMATED TRANSIT UNION DIVISION 26,
Charging Party-Labor Organization.
_____/

Appearances:

The Allen Law Group, P.C., by Shaun P. Ayer and Amy M. Robertson for the Respondent

Cousens Law, by Mark H. Cousens, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On January 29, 2020, Amalgamated Transit Union Division 26 (Charging Party or Union) filed the present unfair labor practice charge against the City of Detroit, Department of Transportation (Respondent or City). 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 Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission (Commission). Based upon the entire record, including the transcript of the October 7, 2020, hearing, the exhibits entered into the record and the post-hearing briefs filed by the parties, I make the following findings of fact, conclusions of law, and recommended order.[1]

Unfair Labor Practice Charges and Procedural History:

The Union alleges that the City's stated plan of modifying the bargaining unit's pay periods from every week to bi-weekly, amounts to the unilateral change of a mandatory subject of bargaining in violation of Section 10(1)(e) of the PERA.

[1] Following the close of the October 7, 2020, hearing, the parties contacted my office on October 20, 2020, seeking to add two additional exhibits by stipulation – an October 19, 2020, letter and an October 19, 2020, email. Those exhibits are hereby added to this record.

Findings of Fact:

Charging Party represents a unit comprised of bus operators employed with the City of Detroit's Department of Transportation. The parties are signatories to a collective bargaining agreement that was in effect, by its terms, from 2014 through 2018. Despite the contract's apparent expiration, pursuant to Section 13(c) of the Federal Urban Mass Transit Act, 49 U.S.C. 5333(b), there is an agreement in place between the parties pending their negotiations over a successor agreement. At the time of the hearing in this matter the parties were still in negotiation over a successor agreement. The parties had reached a tentative agreement sometime prior to October of 2019, but the Union's membership did not ratify that agreement. The record indicates that neither the past expired contract nor the tentative agreement addressed the unit's frequency of pay.

Beginning in October of 2018 the City rolled out a new payroll system in several departments.[2] According to the City, this new payroll software requires a uniformed approach to payroll periods. Throughout 2018 and 2019, the City undertook the task of converting those departments and employees who were on a weekly pay schedule to a bi-weekly pay schedule. Charging Party's bargaining unit is the only remaining employee group that still operates under the weekly pay schedule.

On October 3, 2019, the City's Human Resources Director, Denise Starr, met with Charging Party's president, Glen Tolbert and another union member, Willie Mitchell. During that meeting, the parties discussed the payroll system and Starr indicated that Charging Party's unit would need to be moved to a bi-weekly pay schedule. As a result of that meeting Starr and Krista Smith, from the City's Labor Relations Department, were invited to attend a meeting with Charging Party's membership. That meeting occurred on October 26, 2019, at which the City indicated that it would be switching the bargaining unit to a bi-weekly pay schedule.

Tolbert testified that sometime during the first week of December 2019, he sent an email to Hakim Berry, the City's Director of Labor Relations, with a letter attached.[3] That letter, among other topics, asserted that the City's stated intent to convert the bargaining unit to a bi-weekly pay schedule was a "mandatory subject of bargaining."

On January 7, 2020, the parties met to bargain over the parties' successor contract. Smith and Starr were present for the City. Tolbert testified that he sought to discuss the issue regarding pay frequency during that session but that he was informed by the City that they wished to discuss it "outside the contract." There is no indication that the parties reached any agreement with respect to that topic at that meeting. After the meeting, the City sent a notice to employees in the Department, including Charging Party's bargaining unit, that read:

[2] Following the City's emergence from its bankruptcy proceeding in 2014, it became apparent to the City that a focus of cost savings would be to overhaul and revamp its payroll system. Accordingly, in 2015 the City began the task of programming new payroll software and technology.

[3] That letter was dated August 1, 2019, however Tolbert testified that the date was a typo and that it should have read December 1, 2019.

> Effective Monday, February 10, 2020 all Department of Transportation ~DOT~ employees that are paid weekly will be transitioned to a bi-weekly pay schedule. The first bi-weekly check will be issued Friday, February 28, 2020.

That same day Tolbert sent an email in response to Smith, Starr, Berry and others. That email stated in the relevant part the following:

> As mentioned in my letter requesting the negotiations that took place this afternoon Jan. 7, 2020, and as mentioned this afternoon in negotiations, ATU Local 26 considers the changing of our pay from weekly to bi-weekly, a subject of mandatory bargaining.
>
> * * *
>
> However, the Union considers our weekly pay schedule a change in condition of employment and a minor benefit, therefore we asked to bargain. Furthermore, We had this discussion at negotiations and our understanding was we were going to receive some figures and continue negotiating. We need an understanding; does the City intend to take this hard line stance on this subject? If so it needs to be clearly communicated to the Union. I don't believe it is clear, because we were lead [sic] to believe we were still negotiating the subject this afternoon.

During the hearing, Berry was asked what was meant by the term "out of contract". Berry testified that the bargaining sessions around that time were meant to address the Union membership's recent refusal to ratify a tentative agreement. Berry effectively stated that because the issue regarding pay frequency had not come up before and had not been a part of the tentative agreement, the City's position was that it would not bargain that aspect in connection with a successor contract.

On January 14, 2020, Smith responded to Tolbert's January 7, 2020, email acknowledging the Union's position as it related to the City's stated plan of changing the pay frequency. That email went on to propose two dates to bargain the issue – January 21, 2020, and January 22, 2020. According to the record, the Union declined to bargain the proposed change on either of those two dates and instead brought the matter up at a bargaining session on January 23, 2020, that was presumably set to bargain the parties' successor agreement. According to Tolbert the Union made a proposal at the session regarding pay frequency.

On February 6, 2020, Smith sent Tolbert a letter as a follow up to the Union's January 23, 2020, proposal regarding pay frequency. That letter stated:

> Previously the City requested to meet with you regarding the payroll change with the dates of January 21 and January 22, 2020 offered. The Union declined those dates and preferred to use a date to which the parties were scheduled for a formal collective bargaining session (regarding the failed ratification of the successor agreement that occurred on January 23, 2020). Prior to the commencement of negotiations, the Union presented its position regarding the change in pay

> frequencies from weekly to bi-weekly, citing that it is a benefit that you wish to maintain. The City presented to you the numerous reasons why all 9,000 plus employees of the City need to be on the same pay frequency in the new system including your bargaining unit of approximately 500 active employees.
>
> With this stated, the City would like to continue bargaining regarding the pending change and the need to properly educate your bargaining unit as well as to answer any questions in addition to alerting our Payroll Department of any extenuating circumstances that may be presented because of the change.
>
> We are available to meet any day and time the week of February 10, 2020. Please let us know as soon as possible to accommodate schedules. It is the City's intention to effectuate this change in the first pay period in March, with the first bi-weekly pay period on March 6, 2020.

The record is silent as to the reason why the City changed its previously stated implementation date from February 10, 2020, to March 6, 2020. The City did not in fact implement the change on March 6, 2020. Here again the record is silent with respect to the delay.

The parties met again sometime in March. After that, the parties did have several mediation session(s) with a Commission mediator. It is not clear whether the issue regarding pay frequency was discussed again at those sessions. Tolbert did testify that the City never changed from its position that it would only discuss the pay frequency issue "out of contract."

Sometime in September 2020, the City again provided a notice to Charging Party's bargaining unit that it would be implementing the change in pay frequency – this time effective September 21, 2020. On September 11, 2020, the City sent another notice to the bargaining unit in which it indicated that the September 21, 2020, effective date would be postponed "due to unforeseen circumstances" and that a new date had not yet been set.

On October 19, 2020, the City, through a letter from Smith to Tolbert, indicated that the pay frequency change would be implemented on November 16, 2020. Also, that same day, Smith sent an email to Tolbert asking for availability to continue bargaining the pay frequency issue. As of November 13, 2020, the date in which the parties submitted their post-hearing briefs in this matter, the City had not yet implemented the pay frequency change.

Discussion and Conclusions of Law:

The Charging Party maintains that the City has clearly stated its unilateral intention to implement a bi-weekly pay frequency without bargaining in violation of Section 10(1)(e) of PERA. The City does not dispute that fact but rather argues that because it has not actually implemented the change the matter is not yet ripe for Commission adjudication. The City goes on to also argue that the Union failed to make a timely demand regarding the change and therefore has effectively waived its right to bargain over the matter. Lastly, the City denies that it has refused to bargain the matter.

Section 15 of the Public Employment Relations Act (PERA) imposes a duty to bargain on public employers and unions with respect to those matters which constitute "mandatory subjects of bargaining." MCL 423.215; *Detroit v Michigan Council 25, AFSCME*, 118 Mich. App 211, 215; 324 NW2d 578 (1982). A public employer's unilateral action, or its refusal to engage in collective bargaining, with respect to a mandatory subject, may constitute an unfair labor practice under Section 10(1)(e) of PERA.

A mandatory subject of bargaining is one which has a material or significant impact on "wages, hours and other terms and conditions of employment." *Southfield Police Officers Ass'n v Southfield*, 433 Mich. 168, 177; 445 NW2d 98 (1989); Port Huron Area School District, 28 MPER 45 (2014). What constitutes a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass'n*, at 178. Both the Commission and the National Labor Relations Board recognize frequency of pay as a mandatory subject of bargaining. See *Dearborn Public Schools*, 19 MPER 73 (2006); Children's Aid Society, 1994 MERC Lab Op 323; See also *Visiting Nurse Services*, Inc., 325 NLRB 1125(1998), enf'd, 177 F3rd 52 (1st Cir, 1999).

The Commission has held that an employer's obligation to bargain is "triggered by a timely demand". *City of Highland Park*, 17 MPER 86 (2004), citing *Local 586, SEIU v Village of Union City*, 135 Mich App 553 (1984); *United Teachers of Flint v Flint School District*, 158 Mich App 138 (1986); *Decatur Public Schools*, 27 MPER 41 (2014); *City of Dearborn*, 20 MPER 110 (2007). The preceding notwithstanding, a union is relieved of its obligation to make a timely demand bargain in situations where an employer has presented the disputed action as a *fair accompli*. See *Inter Urban Transit Partnership*, 21 MPER 47 (2008); *City of Highland Park*, 17 MPER 86 (2004). Here, the City has presented its intention to switch the bargaining unit from a weekly pay period to a bi-weekly period not as an action that it would like to do, or an action that it would like to discuss with Union, but rather as an action that it will do, with the only question being when. This is evident by the City's repeated notices to the Unit indicating the date upon which the switch will occur – the first one occurring after a bargaining session in which the City refused to discuss the matter. That the City did not actually implement the switch on any of its indicated dates is immaterial for purposes of this analysis as there has been no claim by the City that it delayed the switch on account of the Union's objection thereto. Instead, the City continually sets unilaterally determined implementation dates for the switch. It is the opinion of the undersigned that the City's intent with respect to this issue is one that clearly, and unmistakably, falls under the definition of *fair accompli*.

The City claims, in its defense, the preceding notwithstanding, it has in fact not refused to bargain the issue. However, the record is devoid of material evidence that would suggest that the City sought to bargain the issue in good faith. Particularly, I note again, as set forth above, that the City has continually maintained that its intention was to implement this change and that the only question that remained was when. Several times the City has given the Union an implementation date. While that action has not been followed through on, the reasons for delay have never been related to the Union's objections to the action or to allow the parties the opportunity to bargain the issue. Moreover, the record clearly indicates that when the matter was brought up by the Union on separate occasions, the City continually sought to brush the matter aside. Most notably, as the party claiming that bargaining did occur with respect to this dispute,

the City failed to present any evidence that the undersigned could rely upon in making such a determination. Accordingly, taken the evidence presented as a whole, I find that the City did not even attempt to bargain in good faith regarding this issue.

Lastly, the City argues that because it has not in fact implemented the change, the present dispute is not yet ripe for Commission action.[4] I do not find this argument persuasive given the City's conduct, demeanor, and stated intentions with respect to this change. The City has never waivered in its stated intention that this was a change it would implement as opposed to a change it was proposing. Moreover, the City has not asserted, nor does the record bear out, that the many delays in implementation were ever in response to the Union's objections or because the City actually sought to bargain the issue. As such, I find this matter ripe for Commission consideration.

I have considered all other arguments as set forth by the parties and conclude such does not warrant any change to my conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following recommended order.

RECOMMENDED ORDER

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

1. Cease and desist from refusing to bargain collectively with Amalgamated Transit Union Division 26 with respect to the bargaining unit's frequency of pay.

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

    a. If not already in effect, return the bargaining unit to a weekly pay schedule.

    b. On request, bargain collectively with the Union as the exclusive collective bargaining representative of its employees regarding pay frequency.

    c. Make whole the employees in the bargaining unit for any monetary losses they have suffered by reason of the City's implementation of a bi-weekly pay schedule.

[4] The requirement that a claim be ripe is designed to prevent "the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Huntington Woods v Detroit*, 279 Mich App 603, 615-16; 761 NW2d 127, 135 (2008).

d. 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

Dated: April 28, 2021