STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF WAYNE,
Respondent-Public Employer,

MERC Case No. 20-L-1801-CE

-and-

WAYNE PROFESSIONAL FIRE FIGHTERS UNION, LOCAL 1620, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, PC, by John C. Clark and Geoffrey S. Wagner, for Respondent

Michael L. O'Hearon PLC, by Michael L. O'Hearon and Brendan J. Canfield, for Charging Party

DECISION AND ORDER

On April 17, 2020, Wayne Professional Fire Fighters Union, Local 1620, International Association of Fire Fighters (Union) filed a Petition for Act 312 arbitration. In its last offer of settlement, the Union asked the Arbitrator to award a vested, lifetime, non-modifiable healthcare stipend to bargaining unit members upon and after retirement. The City of Wayne (Employer) ultimately refused to participate in the Act 312 arbitration. Thereafter, it filed an action in Circuit Court seeking injunctive relief to stay the Act 312 proceeding, and challenging the arbitrator's authority and jurisdiction to award the Union's requested healthcare stipend. In response to the Employer's actions, the Union filed an unfair labor practice charge asserting a refusal to bargain.

In a Decision and Recommended Order[1] Administrative Law Judge (ALJ) Peltz found that an Act 312 arbitrator has the authority to consider the Union's last offer regarding the lifetime retiree healthcare stipend, and that the Employer violated its duty to bargain under Section 10(1)(e) of PERA by refusing to participate in Act 312 arbitration and frustrating the bargaining process, including by filing an action in circuit court to enjoin the arbitration proceeding.

In its exceptions, the Employer argues that the ALJ erred by concluding that an Act 312 arbitrator can grant a lifetime non-modifiable healthcare stipend to retirees during Act 312 proceedings. Additionally, the Employer contends that the ALJ's decision conflicts with the 2011

[1] MOAHR Hearing Docket No. 20-025801

Amendments to Act 312, and that the ALJ erred by improperly comparing a municipality's vested pension obligation with retiree healthcare.

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

Procedural History:

The Union filed the instant charge on December 2, 2020, asserting that the Employer repudiated an agreement to submit certain issues concerning retiree healthcare for current employees to Act 312 arbitration by filing a complaint in Wayne County Circuit Court seeking to enjoin the hearing from proceeding. The charge further asserted that the Employer's actions constituted a refusal to submit to compulsory arbitration on a mandatory subject of bargaining, which was tantamount to a refusal to bargain in violation of Sections 10(1)(a) and 10(1)(e) of PERA.

In response, the Employer argued that an Act 312 arbitrator has no jurisdiction to compel agreement on the healthcare stipend sought by the Union because the proposal involved a management prerogative which was not a mandatory subject of bargaining, and that the requested stipend was contrary to the 2011 amendments to Act 312, which require that an arbitrator give priority consideration to an employer's financial ability to pay.

On January 14, 2021, the parties signed a Memorandum of Agreement pursuant to which the Union withdrew its petition for Act 312 arbitration and the Employer withdrew its Circuit Court action. The parties further agreed to have the Commission rule on the jurisdictional question they believed was involved in this dispute, which appeared to them to be a matter of first impression.

At a prehearing conference held before the ALJ on January 28, 2021, the parties agreed to waive an evidentiary hearing on the unfair labor practice charge and have this case decided on the basis of a stipulated record. The parties then submitted a "Stipulation of Facts with Exhibits" on February 12, 2021. The parties further agreed that the only issue to be determined by the ALJ was whether the retiree healthcare proposal included by the Union in its Act 312 submission constituted a mandatory subject of bargaining.

On March 29, 2021, the Employer submitted a Position Statement, and, on March 29, 2021, the Union submitted a Brief to the ALJ. On April 12, 2021, the Employer and the Union each submitted a reply brief, and, on May 27, 2021, the parties appeared before the ALJ for oral argument.

On January 18, 2022, the ALJ issued a Decision and Recommended Order in which he found that the Employer's conduct constituted a refusal to bargain in violation of Section 10(1)(e) of PERA. The ALJ further recommended that the Commission order the Employer to cease and desist from violating its duty to bargain in good faith with the Union by refusing to participate in

Act 312 arbitration regarding mandatory subjects of bargaining, including by filing an action in circuit court to enjoin the arbitration proceeding.

On March 14, 2022, the Employer filed exceptions to the ALJ's Decision and Recommended Order. The Union did not file a response to the Employer's exceptions.

Facts:

The stipulated facts and joint exhibits submitted by the parties establish the following:

Charging Party Wayne Professional Fire Fighters Union, Local 1620, International Association of Fire Fighters represents a bargaining unit that consists of professional firefighters, excluding the Fire Chief, employed by Respondent City of Wayne.

The parties' 3-year collective bargaining agreement expired on June 30, 2019. The parties engaged in negotiations for a successor agreement both prior to, and following, the agreement's expiration, and ultimately reached a tentative agreement on all issues with the exception of healthcare benefits to be afforded current bargaining unit employees upon and after retirement (Stipulation 4).

On March 9, 2020, the Union and the Employer entered into a written agreement "regarding Act 312 issues" which provided, in part, that "the only issues to be submitted to arbitration under Act 312 for the July 1, 2019 through June 30, 2022 collective bargaining agreement are issues related to retiree healthcare" (Stipulation 7). The agreement further provided that "neither party waives any claim or defense, including any argument that issues related to retiree healthcare benefits are not mandatory subjects of bargaining" (Joint Ex. 2).

On April 17, 2020, the Union filed a petition for Act 312 arbitration and, pursuant to Act 312, the parties submitted Final Offers of Settlement to the Arbitrator (Stipulations 6 and 8, Joint Exhibits 4 and 5). Consistent with its prior proposals, the Union requested that the Arbitrator award a vested, lifetime, non-modifiable healthcare "stipend" to current bargaining unit employees who were eligible for retirement and elected to retire during the term of the 2019-2022 agreement, along with their eligible spouses and dependents.

The Union's demand states:

> Notwithstanding the expiration date of this collective bargaining agreement, for employees who separate from service on or after [Date of Act 312 Award] and are entitled to retiree medical benefits and/or stipends pursuant to Part II, Section(6)(K) of this agreement, the medical coverage and/or stipends provided for the retirees, their spouses and families following separation from service comprise a vested, fixed and unalterable right as set forth. The retired employees, their spouses and families, as applicable, are entitled to said medical coverage and/or stipends through

> the retiree's lifetime and that of his/her eligible spouse, and dependents as provided herein.
>
> The medical coverage and or stipends upon separation from service established in Part II, Section 6(K) of this Agreement may not be impaired in any way by a collective bargaining agreement entered into after the eligible employee's separation from service, nor, to the full extent legally feasible by any other mechanism. (Joint Exhibit 5, pp. 10-12).[2]

The Employer's demand requested the Arbitrator to maintain the status quo in terms of retiree health care benefits. (Stipulation 10).

After exchanging Last Offers of Settlement and exhibits for the Act 312 hearing, the Employer filed a complaint in Wayne County Circuit Court on October 29, 2020, seeking a declaratory judgment, along with injunctive relief staying the Act 312 proceeding. The relief requested by the Employer included a declaratory ruling by the Court that the arbitrator lacked jurisdiction to award a lifetime non-modifiable retiree health care benefit, and the imposition of a temporary restraining order enjoining the Act 312 proceedings pending a ruling by the Court on the arbitrator's jurisdiction. (Joint Exhibit 9). On November 5, 2020, the parties stipulated to a stay of the Circuit Court proceedings (Joint Exhibit 10). Thereafter, the instant unfair labor practice proceedings ensued.

Discussion:

A. Legal Standards

Strikes by public employees are forbidden by Section 2 of PERA. Section 15 of PERA requires a public employer to bargain collectively with the representatives of its employees "with respect to wages, hours, and other terms and conditions of employment…" Issues falling into those categories are deemed to be mandatory subjects of bargaining, while all other matters are considered to be permissive bargaining subjects. *Local 1277, Metropolitan Council No 23, AFSCME, AFL-CIO v. Center Line,* 414 Mich 642, 652*;* 327 NW2d 822 (1982). Because "[c]ompulsory arbitration in police and fire disputes was seen as a necessary tradeoff for the prohibition against striking," the Legislature enacted the compulsory arbitration statute, 1969 PA 312 (Act 312). *Local 1277,* at 650-651. Act 312 "is separate and distinct from PERA, dealing with the particular problems of labor disputes with policemen and firemen." *Metropolitan Council No 23, Local 1277, AFSCME, AFL-CIO v. Center Line,* 78 Mich App 281, 284. "Given the fact that Act 312 complements PERA and that under § 15 of PERA the duty to bargain only extends to mandatory subjects," it follows that an Act 312 arbitration panel "can only compel agreement as

[2] The language is intended to apply to both Tier 1 and Tier 2 employees. See Joint Exhibit 4, Issues 7 and 8. That is, employees that are entitled to retiree medical benefits and/or stipends pursuant to either Part II, Section (6)(K) or Section (6)(Q) of the agreement.

to mandatory subjects," *Local 1277*, supra at 654. When the question of whether a matter is mandatorily bargainable arises in an Act 312 arbitration proceeding, the Commission, noting the availability of ultimate judicial review, has historically recognized that the arbitration panel has jurisdiction to resolve that question prior to, or as part of, the panel's consideration of disputed contract issues. The Commission however, retains both jurisdiction and authority to address the issue either before or following the Act 312 award.

In *City of Jackson*, 9 MPER 27050 (1996), aff'd *Jackson Fire Fighters Ass'n, Local 1306 v. City of Jackson*, 227 Mich App 520; 575 NW2d 823 (1998), the Commission found that the Union violated its duty to bargain under Section 10(3)(c) of PERA by bargaining to impasse over, and submitting to Act 312 arbitration, its proposed manning requirements, a permissive subject of bargaining. Although the Union argued that the Commission was bound by the decision of the Act 312 panel that the minimum daily staffing provision was a mandatory subject of bargaining, the Commission disagreed and held:

> It is well established that MERC has exclusive jurisdiction over unfair labor practice cases. *Rockwell v. Board of Education for Crestwood School District*, 393 Mich 616, 630; 227 NW2d 736, 742 (1975); *Lamphere Schools v. Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 NW2d 818, 824 (1977). Frequently, as here, whether an unfair labor practice has been committed turns on the question of whether a particular subject is a mandatory rather than merely a permissive subject of bargaining. This question may arise in an Act 312 arbitration proceeding as well, because the arbitration panel has jurisdiction to rule only on mandatory subjects of bargaining. *Local 1277, AFSCME v. City of Center Line*, 414 Mich 642, 654; 327 NW2d 822 (1982). In order to expedite these proceedings the Commission has adopted an administrative policy of permitting Act 312 proceedings to go forward when a party argues that a proposal before the arbitration panel is not a mandatory subject of bargaining. In these circumstances, the arbitration panel makes a determination as to whether or not the proposal involves a mandatory bargaining subject prior to or as part of its consideration of disputed contract issues. *City of Detroit*, 1990 MERC Lab Op 561 and 1990 MERC Lab Op 859. The panel has jurisdiction independent of MERC to decide this issue. *City of Detroit v. Detroit Fire Fighters Assoc*., supra at 551. See also *City of Alpena v. Alpena Fire Fighters*, 56 Mich App 568 (1974), *lv. den.* 394 Mich 761 (1975); *City of Roseville v. Local 1614 IAFF, AFL-CIO*, 53 Mich App 547, *lv. den.* 393 Mich 759 (1974).

In *City of Detroit*, 27 MPER 6 (2013), the Commission noted that it also has jurisdiction to determine whether an Act 312 arbitration should proceed by ascertaining whether the employees in the bargaining unit are eligible for Act 312 arbitration and that, where an employer has no duty to bargain under PERA and has not voluntarily consented to Act 312 arbitration, the arbitration panel has no authority to issue an award binding that employer. See also *Oak Park Public Safety Officers Association v. City of Oak Park*, 20 MPER 95 (2007), affirming *Oak Park Public Safety*

Officers Association, 19 MPER 50 (2006) (union breached its duty to bargain in good faith when it submitted non-mandatory subjects of bargaining to Act 312 arbitration).

In *Allied Chemical and Alkali Workers v Pittsburgh Plate Glass Co*., 404 US 157, 185 (1971), the Supreme Court held that retirees are not employees under the NLRA, and that issues relating to nonemployees are not mandatory subjects of bargaining unless they "vitally affect" the terms and conditions of employment of bargaining unit members. The Court determined that health insurance benefits for retired workers do not meet this test. Conversely, the Court determined that "the future retirement benefits of active workers are part and parcel of their overall compensation, and hence, a well-established statutory subject of bargaining." *Id.* at 180.

The Commission and the Court of Appeals have applied the holding and rationale of *Pittsburgh Plate Glass* to cases arising under PERA. See *West Ottawa Ed. Ass'n. v West Ottawa Pub. Schs*., 126 Mich. App. 306, 327-330 (1983), *aff'g* 1982 MERC Lab. Op. 629 (school district had no duty to bargain under PERA over a plan to employ retired teachers as consultants); *Village of Holly*, 17 MPER 48 (2004) (no exceptions), *City of Grosse Pointe Park*, 2001 MERC Lab. Op. 195 (no exceptions); and *City of St. Clair Shores*, 22 MPER 50 (2009) (no exceptions).

B. Application to the Present Case

The Employer concedes that retiree health benefits for active employees is a mandatory subject of bargaining. However, the Employer argues that the lifetime duration of the retiree health benefit sought by the Union transformed an otherwise mandatory subject of bargaining into a permissive subject of bargaining.

Specifically, the Employer argues that a lifetime, non-modifiable benefit is a matter of managerial prerogative because the scope and breadth of such a provision would restrict the Employer in its ability to effectively manage its affairs and would constitute a burden on the citizens of the City. The Employer also maintains that the Union's requested lifetime retiree health benefit implicates a "seismic" policy question concerning the Employer's ability to afford the expense of such a benefit, and must, therefore, be resolved "outside" of the collective bargaining process. Lastly, the Employer asserts that the Union's proposal is not appropriate for Section 312 arbitration because the award of such a benefit would conflict with the 2011 amendments to PERA, MCL 423.239(2), which mandate that the Section 312 arbitration panel give the greatest significance to the financial ability of the unit of government to pay, provided such a determination is supported by competent, substantial and material evidence.

Initially, and contrary to the Employer's position, we agree with the ALJ and find that a collective bargaining agreement may vest unalterable lifetime retirement healthcare benefits for employees retiring during the term of that agreement. Furthermore, should the language conferring the benefit remained unchanged in future collective bargaining agreements, then it would confer the same benefit on employees retiring under those subsequent agreements as well. Notably, nothing in the Union's proposal seeks either a collective bargaining agreement of unlimited

duration, or the imposition of a benefit for future pre-retirement bargaining unit employees that could not be re-negotiated in future contracts. The benefit sought by the Union is limited to vested retiree healthcare for employees retiring under the term of the 2019-2022 agreement. If such a provision were awarded by the Section 312 arbitration panel, the Employer would be free during negotiations over a successor agreement to seek to modify the provision or eliminate it in its entirety for future retirees retiring under the term of subsequent agreements.

Although contractual obligations typically cease upon termination of a collective bargaining agreement, that principle does not preclude the provision of lifetime retiree health benefits. To the contrary, both the U.S. Supreme Court and our own Michigan Supreme Court have indicated that such provisions would be upheld provided the language in the agreement was explicit and unambiguous concerning the parties' intent that such benefits continue beyond the expiration date of the agreement for employees who had retired.

In *M&G Polymers USA, LLC v Tackett*, 574 US 427, 442 (2015), the United States Supreme Court rejected the presumption of lifetime vesting where a contract is silent or ambiguous as to the duration of retiree benefits. In so doing, the Court overturned the Sixth Circuit's long-standing decision in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v Yard-Man, Inc*, 716 F2d 1476 (CA 6 1983), where the Court of Appeals had found that despite ambiguous language, the contract nevertheless should be interpreted as having conferred a lifetime retiree health benefit. Among the reasons cited by the Court, were that retirement benefits are "status" benefits that carry an inference of continued application provided the recipient continues to meet any necessary prerequisites.

The *Tackett* Court however, determined that the correct analysis concerning the duration of any such disputed language should be undertaken according to "ordinary principles of contract law." In determining that the retiree health benefits at issue were not negotiated as lifetime benefits, the Court relied upon the "traditional principle" that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement unless the contract can be interpreted as explicitly and unambiguously granting such a benefit based upon ordinary principles of contract law. *Id*. at 441-442. Since the language of the parties' collective bargaining agreement did not explicitly provide that those benefits would survive the contract's expiration, the Court determined that the benefits had expired with the expiration of the agreement such that the employer was not restricted in its ability to make alterations to them.

Subsequent to *Tackett*, the Sixth Circuit, in *Fletcher v Honeywell Int'l, Inc*, 892 F3d 217, 223 (CA 6 2018), held that a contract's general durational clause applies to retiree healthcare benefits unless it contains clear, affirmative language indicating the contrary. Similarly, in *Int'l Union, United Auto., Aerospace & Agric. Implement Workers Of Am. v. Honeywell Int'l, Inc.,* 954 F.3d 948, 955 (6th Cir. 2020), the Court explained that such disconnecting language would likely include language that explicitly provides an alternative end date for health benefits:

> Our post-*Tackett* caselaw offers clues about what disconnecting language looks like. That language probably includes statements saying "clearly and affirmatively that the relevant general durational clause doesn't control the termination of healthcare benefits—whether by reference to the general durational clause itself or by other language stating explicitly that healthcare benefits continue past the relevant agreement's expiration." *Id.*; *see also Fletcher*, 892 F.3d at 224. It also likely includes language that explicitly provides an alternative end date for health benefits. *See Cooper*, 884 F.3d at 617 ("[B]ecause the *Gallo* CBA did not specify an alternative end date for healthcare benefits, the CBA's general durational clause controlled.").

See also *Cooper v. Honeywell Int'l, Inc.*, 884 F.3d 612, 617–18 (6th Cir. 2018) and *Stone v Signode Industrial Group*, 943 F3d 381, 385 (CA 7 2019).

In *Kendzierski v Macomb County*, 503 Mich 296, 315 (2019), our Supreme Court, in following *Tackett* and the subsequent Court of Appeals decisions, held that the collective bargaining agreement in dispute guaranteed retiree healthcare benefits only until it expired. *Kendzierski* involved a class action claim on behalf of retired employees alleging that the county breached a series of collective bargaining agreements by reducing and altering their healthcare benefits. Each of the contracts contained a general three-year durational clause and there was no language in any of the agreements expressly granting a vested right to lifetime and unalterable retirement healthcare benefits. Relying on *Tackett*, as well as the Supreme Court's subsequent decision in *CNH Industrial N.V. v Reese*, 138 S Ct 761 (2018), the Court held that the collective bargaining agreements must be interpreted in accordance with ordinary contract principles which require that unambiguous language must be interpreted and enforced as written. Applying that principle, the Court concluded that because none of the agreements specified an alternative ending date for healthcare benefits, their general durational clauses control. *Kendzierski* at 315.

None of the cases discussed above suggest that the subject of lifetime retiree health care benefits is a permissive rather than mandatory subject of bargaining. Indeed, the Court in *Yard-Man* noted that both current employees and their bargaining representative would want to secure such vested lifetime retiree healthcare benefits while employees are currently covered by the agreement, since once they retire, they are no longer bargaining unit employees, and an employer has no obligation to bargain further over their terms of retirement. These cases make clear that, not only may a collective bargaining agreement vest unalterable lifetime healthcare benefits for retirees, provided that the agreement is explicit and unambiguous, but they also underscore that the only point in time during which a union can compel an employer to bargain over such lifetime retiree health benefits is prior to the point at which active employees retire.

Securing lifetime retirement healthcare benefits is often a matter of great significance to active employees and their bargaining representative. We find no support in the law to warrant the conclusion that this term and condition of employment should be treated differently than any other mandatory subject of bargaining. Consequently, we find no merit to Respondent's assertion that a

proposal which would obligate it to provide such benefits involves a permissive subject of bargaining that an Act 312 Arbitrator lacks the authority to award.[3]

Next, we disagree with the Employer's assertion that the ALJ's decision conflicts with the 2011 Amendments to Act 312. Act 312 directs an arbitration panel to consider various factors in reaching its decision, including the financial ability of the unit of government to pay, the lawful authority of the employer, and a comparison of the wages, hours, and conditions of employment of the employees involved in the arbitration proceeding to other employees performing similar services, and financial information provided in written form by a financial review commission. See MCL 423.239(1). As noted earlier, the 2011 amendment to Act 312 requires that the arbitration panel treat the financial ability of the employer to pay as the most significant factor, provided that the determination is supported by competent, material and substantial evidence. *See* MCL 423.239(2). Although the 2011 amendment may be relevant to a determination concerning the enforcement of an Act 312 award, we do not find the amendment to constitute a restriction on an Act 312 panel's authority to issue an award obligating an employer to provide lifetime retiree health benefits to members of the bargaining unit under the terms of a particular collective bargaining agreement.

Contrary to the Employer's suggestion, the cost of any lifetime retiree healthcare benefit granted by the Act 312 panel for the parties' 2019-2022 agreement will remain a factor to be considered by any Act 312 panel deciding the terms of future agreements. Even if the benefit were eliminated for employees retiring under future agreements, the panel would still be compelled by the statutory amendments to consider the cost of the lifetime retiree health benefits under this contract for purposes of assessing the Employer's ability to pay in all subsequent agreements negotiated between the parties. In other words, the economic cost of any lifetime retiree healthcare benefits to which the Employer is obligated will always be a component included in an arbitration panel's evaluation of the Employer's financial status and ability to pay. For these reasons, provided that the arbitration panel complies with the 2011 amendment and gives full consideration to the other factors set forth in MCL 423.239(1), and provided that its determination is supported by competent, material and substantial evidence, a decision adopting the Union's proposal would not run afoul of Act 312.

The Employer also maintains that the ALJ erred when he relied on certain decisions of Act 312 panels, such as *In re City of Detroit*, Case No. D09 G-0786 (2011) and *In re Village of Beverly Hills*, Case No. D10 A-0090 (2011), to establish that the healthcare stipend requested by the Union is within an Act 312 arbitrator's jurisdiction. According to the Employer, the issue in those cases involved the continuation of an existing pension plan, rather than the issue of retiree health insurance. Consequently, the Employer contends that those decisions are inapposite, and that the

[3] As noted by the ALJ, whether the Union's last offer of settlement contains language sufficient to create an obligation on the part of the Employer to provide lifetime healthcare benefits to Charging Party's members based upon the standards set forth in *Tackett* is a question which is not at issue in the instant case.

ALJ's reliance on them to support his decision in this case was erroneous and misguided. After reviewing the ALJ's decision, however, we believe that he cited to those decisions merely to point out that Act 312 panels routinely issue awards impacting the benefits employees are entitled to receive upon retirement. The ALJ did not rely on the decisions either to establish that the healthcare stipend requested by the Union is within an Act 312 arbitrator's jurisdiction, or for the premise that such a lifetime benefit is a provision customarily awarded by an Act 312 panel. Consequently, we do not find that the ALJ's citation to the Act 312 decisions constituted "reversible error."

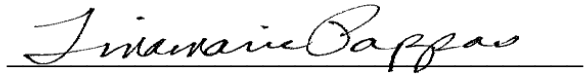
Having concluded that an Act 312 arbitration panel has the authority under the Act to consider Charging Party's last offer of settlement which implicates a mandatory subject of bargaining, we agree that Respondent's conduct obstructed the bargaining process of which Act 312 arbitration is a component. To be clear, we are not ruling that the mere filing of a lawsuit constitutes an unfair labor practice. In this case, however, the Employer's overall conduct frustrated the bargaining process. The Employer could have filed a charge with the Commission alleging that the Union was seeking to arbitrate over a permissive subject of bargaining, or could have proceeded with the Act 312 proceedings and, thereafter, challenged the award through the legal process. The Employer elected not to avail itself of these options and, instead, refused to proceed with the Act 312 proceedings and engaged in conduct that frustrated and delayed the bargaining process. Accordingly, we find that the Employer violated its duty to bargain under Section 10(1)(e) of PERA.

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

ORDER

The Decision and Recommended Order of the Administrative Law Judge is affirmed and adopted in its entirety as our final Order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: May 10, 2022

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

In the Matter of:

CITY OF WAYNE,
Respondent-Public Employer,

Case No. 20-L-1801-CE;
Docket No. 20-025801-MERC

-and-

WAYNE PROFESSIONAL FIRE FIGHTERS UNION, LOCAL 1620, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
Charging Party-Labor Organization.

_____/

APPEARANCES:

Giarmarco, Mullins & Horton, PC, by John C. Clark and Geoffrey S. Wagner, for Respondent

Michael L. O'Hearon PLC, by Michael L. O'Hearon and Brendan J. Canfield, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed on December 2, 2020, by the Wayne Professional Fire Fighters Union, Local 1620, International Association of Fire Fighters (the Union) against the City of Wayne (the 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 case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission).

The Unfair Labor Practice Charge and Procedural History:

Charging Party represents a bargaining unit which consists of all firefighting and fire prevention employees, excluding the Fire Chief. This matter concerns a petition for compulsory arbitration filed by the Union on April 17, 2020, pursuant to Public Act 312 of 1969, as amended, MCL 423.231 et seq (Act 312). Among the issues submitted to Act 312 arbitration was a Union proposal to award a fixed and unalterable lifetime retiree healthcare stipend payable beyond the expiration of the collective bargaining agreement. Following submission of the Union's proposal to the Act 312 panel, the City filed a complaint in Wayne

County Circuit Court seeking an injunction to stay the Act 312 proceeding and challenging the authority of the panel to award the benefit sought by the Union. The Union then filed the instant charge asserting that the City's actions constitute a refusal to submit to compulsory arbitration on a mandatory subject of bargaining and a repudiation of a prior agreement between the parties to submit issues relating to retiree healthcare to Act 312 arbitration. The City contends that the Act 312 panel has no jurisdiction to compel agreement on a healthcare stipend for retirees because the Union's proposal is not a mandatory subject of bargaining and that the requested stipend is contrary to the 2011 amendments to Act 312, which require that the arbitration panel give priority consideration to the employer's financial ability to pay.

A prehearing conference was held before the undersigned on January 28, 2021, following which the parties agreed that the Act 312 petition, as well as the case before the Wayne County Circuit Court, would be withdrawn by the Union and the City respectively, both without prejudice. In addition, the parties consented to waive an evidentiary hearing on the unfair labor practice charge in this matter and instead have this case decided on the basis of a stipulated record. The parties submitted a stipulation of facts and exhibits on February 12, 2021. Briefing in this matter was completed on April 12, 2021. On May 27, 2021, the parties appeared before the undersigned for oral argument.

Facts:

The most recent collective bargaining agreement between the Union and the City expired on June 30, 2019.[1] By the spring of 2020, Charging Party and Respondent had negotiated a series of tentative agreements which were to be incorporated into a new three-year contract covering the period July 2019 through June 30, 2022. The only issues which remained outstanding at the conclusion of the negotiations related to retiree healthcare benefits. Specifically, the parties were unable to reach agreement regarding healthcare benefits to be afforded to current members of the bargaining unit upon and after their retirement.

On March 9, 2020, the Union and the City entered into a written agreement "regarding Act 312 issues." The parties stipulated that the series of tentative agreements which formed the basis of the 2019-2022 proposed contract would be incorporated into the award issued by the Act 312 panel and that "the only issues to be submitted to arbitration under Act 312 for the July 1, 2019, through June 30, 2022, collective bargaining agreement are issues related to retiree healthcare." The agreement further provided that "neither party

[1] While negotiations on a successor contract were ongoing, the Court of Appeals issued a decision in *Wayne Retirees v City of Wayne*, unpublished opinion per curium of the Court of Appeals, issued October 15, 2019 (Docket Nos. 343522 & 343916). That matter involved a decision by the City to eliminate all healthcare benefits for retirees, including members of the bargaining unit at issue in the instant case. The plaintiffs, retired employees of the City, filed a class action claim alleging that they had a vested right to receive healthcare benefits under collective bargaining agreements and other agreements in effect when each employee retired. The Court of Appeals affirmed the trial court's order granting summary disposition in favor of the City, finding that there was no language in the contracts which would establish that the parties intended to extend healthcare benefits beyond the duration of the agreements.

waives any claim or defense, including any argument that issues related to retiree healthcare benefits are not mandatory subjects of bargaining."

On April 17, 2020, the Union filed a Petition for Act 312 arbitration. In its last offer of settlement, the Union asked the Act 312 panel to award a vested, lifetime, non-modifiable healthcare "stipend" to its members upon and after retirement. The proposal would obligate the City to make such stipend payments on a monthly basis for the lifetime of all current bargaining unit members who retire during the effective term of the 2019-2022 collective bargaining agreement and their eligible spouses and dependents. The City would also be obligated to make stipend payments for those bargaining unit members who retire after the term of the 2019-2022 contract, unless the relevant retiree healthcare language is modified through future negotiations or subsequent Act 312 proceedings. In its last offer of settlement, the City asked the arbitration panel to maintain the status quo with respect to retiree healthcare benefits.

After the parties exchanged their last offers of settlement and primary hearing exhibits, the City filed a complaint in Wayne County Circuit Court. In the complaint, which was filed on or about October 29, 2020, the City sought injunctive relief to stay the Act 312 proceeding and asked the circuit court to issue a declaratory ruling that the Act 312 panel "lacks the authority to award a lifetime, non-modifiable benefit to the Union." In response to the complaint, the Union filed the instant unfair labor practice charge.

Discussion and Conclusions of Law:

Strikes by public employees are forbidden under Section 2 of PERA. In consideration of that fact, the Legislature enacted Act 312 as a "necessary tradeoff" for the prohibition against striking. *Local 1277, Metropolitan Council No 23, AFSCME, AFL-CIO v. Center Line*, 414 Mich 642, 650-651. Act 312 reflects the Legislature's concern that employees of police and fire departments have a binding procedure for resolving labor disputes which is more expeditious, more effective and less extensive than the courts. *Capital City Lodge No. 141, Fraternal Order of Police v Ingham County Bd of Comm'rs*, 155 Mich App 116, 118 (1986); *City of Manistee v MERC*, 168 Mich App 422 (1988). The purpose of the statute is set forth in Section 1 of the Act, MCL 423.231, which states:

> It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of such disputes and to that end *the provisions of this act, providing for compulsory arbitration, shall be liberally construed.* [Emphasis supplied.]

Thus, under Act 312, if the public employer and the union representing its police and fire employees have not reached an agreement concerning a mandatory subject of bargaining, and mediation proves unsuccessful, either party may initiate binding arbitration in order to avert a strike. *Detroit Fire Fighter's Ass'n IAFF Local 344*, 482 Mich 18, 29-30 (2003). A majority decision of the arbitration panel, if supported by competent, material, and substantive evidence on the record, is binding on the parties and may be enforced, at the

insistence of either party or the panel, in circuit court. MCL 423.240. Pursuant to Section 12 of the Act, the decision is reviewable by the circuit court "but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar unlawful means." The pendency of a review by the circuit court "shall not automatically stay the order of the arbitration panel." MCL 423.242.

Section 8 of Act 312, MCL 423. 238, sets forth the procedure for the identification of economic issues in dispute in the compulsory arbitration proceeding:

> The arbitration panel shall identify the economic issues in dispute and direct each of the parties to submit to the arbitration panel and to each other its last offer of settlement on each economic issue before the beginning of the hearing. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic is conclusive. The arbitration panel, within 30 days after the conclusion of the hearing, or within up to 60 additional days at the discretion of the chair, shall make written findings of fact and promulgate a written opinion and order. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9.

Act 312 directs the arbitration panel to consider various factors in reaching its decision, including the financial ability of the unit of government to pay, the lawful authority of the employer and a comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding to other employees performing similar services and financial information provided in written form by a financial review commission. See MCL 423.239(1). Pursuant to a 2011 amendment to Act 312, the panel is required to treat the financial ability of the employer to pay as the most significant factor, provided that the determination is supported by competent, material and substantial evidence. MCL 423.239(2).

Act 312 is intended to supplement PERA. MCL 423.244; *Center Line*, 414 Mich at 652; *Kalamazoo County*, 23 MPER 22 (2010). Section 15 of PERA requires a public employer to bargain collectively with the representatives of its employees. Pursuant to Section 15, to bargain collectively "is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours, and other terms and conditions of employment*." (Emphasis added.) MCL 423.215. Issues that fall into that category, including healthcare benefits and coverage, are deemed to be mandatory subjects of bargaining. *Ranta v Eaton Rapids Pub Sch*, 271 Mich App 261, 270 (2006); *Taylor Sch Dist*, 1976 MERC Lab Op 693; *Houghton Lake Ed Ass' n v Houghton Lake Bd of Ed*, 109 Mich App 1, 7 (1981). In contrast, permissive subjects of bargaining are those subjects that fall outside the scope of those designated as mandatory subjects. *Center Line*. It is only with respect to mandatory subjects that there is a duty to bargain under Section 15 of PERA. The distinction drawn between mandatory and permissive subjects of bargaining determines the scope of the Act 312 panel's authority. Given that the parties have no duty to bargain over a permissive subject, it is axiomatic that

an Act 312 arbitration panel has the authority to compel agreement only as to mandatory subjects. *Id*.; *Wayne County*, 29 MPER 26 (2015); *City of Detroit*, 27 MPER 6 (2013). The Commission has jurisdiction to determine, in an unfair labor practice proceeding, whether subjects of bargaining brought before an Act 312 panel, are mandatory or permissive. *City of Detroit*, 27 MPER 6 (2013).

It is well-established that issues relating to individuals who are not employees are permissive subjects of bargaining, and that an employer generally has no obligation to bargain concerning such matters unless they "vitally affect" the terms and conditions of employment of bargaining unit members. In *Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157 (1971), the leading case regarding this issue, the Supreme Court concluded that because retirees were not "employees" within the meaning of Section 2(3) of the National Labor Relations Act (NLRA), and their benefits did not "vitally affect" the terms and conditions of employment of bargaining unit employees, the retirees' insurance benefits were not a mandatory subject of bargaining. In reaching this conclusion, however, the Court made it clear that "the future retirement benefits of active workers are part and parcel of their overall compensation and, hence, a well-established statutory subject of bargaining." *Id.* at 180. The Commission has adopted the holding of the Supreme Court in *Pittsburgh Plate Glass* and held that retirement benefits which have been promised to active employees as a term or condition of employment constitute a mandatory subject of bargaining. *Wayne Co*, 29 MPER 1 (2015). See also *City of Trenton*, 24 MPER 26 (2011) (no exceptions); *City of St. Clair Shores*, 22 MPER 50 (2009); *St Clair County*, 20 MPER 9 (2007); *31st Circuit Court (St. Clair County)*, 19 MPER 40 (2006) (no exceptions); *Village of Holly*, 17 MPER 48 (2004) (no exceptions).

In its brief filed in this matter, Respondent does not dispute that the healthcare benefits active employees will receive upon their retirement is a mandatory subject of bargaining. See Position Statement of the City of Wayne, p 5, fn 3. Nor is the City able to cite to any provision in Act 312 which would explicitly prohibit an arbitration panel from considering a proposal of the type submitted by the Union in the instant case. Rather, the City contends that the Act 312 panel has no authority to consider the Union's last offer of settlement because the proposal for a fixed and unalterable lifetime retiree healthcare stipend would represent a "seismic" policy question which would effectively tie the hands of future administrations. On that basis, the City asserts that the subject matter of the Union's proposal pertains to a subject that is within the scope of its managerial prerogative, rather than a mandatory subject of bargaining. I find the City's argument specious at best.

Under PERA, a public employer has the managerial prerogative to make decisions regarding the size and scope of the services it provides. *Metropolitan Council No. 23 v City of Center Line*, 414 Mich 642, 660 (1982). For example, it is well established that a labor organization cannot demand to bargain over staffing levels because the employer has the inherent managerial prerogative to determine the level of service available to its citizens. See e.g. *City of Portage*, 1976 MERC Lab Op 790; *City of Grosse Pointe Woods*, 1975 MERC Lab Op 241. There is no correlation between the duration of Respondent's obligation to provide a vested retiree healthcare benefit to its current employees upon retirement and the range or extent of services offered to City residents. Rather, the Union's proposal focuses squarely on terms or conditions of employment for members of Charging Party's bargaining unit. To accept the City's argument would essentially render the concept of bargaining over

mandatory subjects, including the overall compensation received by employees, a nullity. To that end, it should be noted that it is customary for an Act 312 panel to issue an award impacting the benefits employees are entitled to receive upon their retirement, including pensions and retiree health insurance. See e.g. *In re City of Detroit*, Case No. D09 G-0786, issued April 5, 2011; *In re Village of Beverly Hills*, Case No. D10 A-0090, issued March 28. 2011; *In re City of Birmingham*, Case No. D07 C-0591, issued August 11, 2009; *In re City of Holland*, Case No. L05 A-9005, issued June 25, 2007; *In re City of Bay City*, Case No. L05 K-3012, issued May 11, 2007.

Respondent next argues that the Act 312 panel may not consider the Union's last offer of settlement due to the potential duration of the City's obligation to retired employees created by that proposal. The Employer contends that unalterable lifetime benefits are contrary to public policy and ordinary principals of contract. It is true that contractual obligations typically cease upon the termination of the bargaining agreement. See e.g. *Litton Financial Printing Div., Litton Business Systems, Inc. v NLRB*, 501 US 190, 207 (1991). However, it is also well-established that such a principle does not preclude parties from agreeing to vest lifetime benefits for retirees In *M&G Polymers USA, LLC v Tackett*, 574 US 427, 442 (2015), the United States Supreme Court rejected the presumption of lifetime vesting where a contract is silent as to the duration of retiree benefits as established by the Sixth Circuit in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v Yard-Man, Inc*, 716 F2d 1476 (CA 6 1983), in favor of the application of "ordinary principles of contact law." The Court in *Tackett* relied upon the "traditional principle" that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement unless the contract can be interpreted as explicitly and unambiguously granting such a benefit based upon ordinary principles of contract law. *Id*. at 441-442.

Post-*Tackett*, the Sixth Circuit has settled on a clear rule for determining whether a collective bargaining agreement vests rights to lifetime and unalterable retirement benefits. A contract's general durational clause applies to retiree healthcare benefits unless there is clear and affirmative language disconnecting specific benefits from that durational clause. *Fletcher v Honeywell Int'l, Inc*, 892 F3d 217 (CA 6 2018). In *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v Honeywell*, 954 F3d 948 (CA 6 2020), the Court explained that such disconnecting language would likely include statements indicating that the "relevant durational clause does not control the termination of healthcare benefits—whether by reference to the general durational clause itself or by other language stating explicitly that healthcare benefits continue past the relevant agreement's expiration." Other circuits have endorsed a similar approach, finding that healthcare benefits survive the expiration of the contract where the language specifies that the benefits will continue notwithstanding the expiration of the agreement. See e.g. *Stone v Signode Industrial Group*, 943 F3d 381 (CA 7 2019); *Keffer v H.K. Porter, Co*, 872 F2d 60, 63 (CA 4 1989); *United Steelworkers of America, AFL-CIO-CLC v Connors Steel Co*, 855 F2d 1499, 1505 (CA 11 1988).

Our Supreme Court has reached essentially the same conclusion in *Kendzierski v Macomb County*, 503 Mich 296 (2019). *Kendzierski* involved a class action claim on behalf of retired employees alleging that the county breached a series of collective agreements by reducing and altering their healthcare benefits. Each of the contracts contained a general

three-year durational clause and there was no language in any of the agreements expressly granting a vested right to lifetime and unalterable retirement healthcare benefits. Relying on *Tackett*, as well as the Supreme Court's subsequent decision in *CNH Industrial N.V. v Reese*, 583 US ___; 138 S Ct 761 (2018), the Court held that the collective bargaining agreements must be interpreted in accordance with ordinary contract principles which require that unambiguous language must be interpreted and enforced as written. Applying that principle, the Court concluded that because none of the agreements explicitly granted the plaintiffs a vested right to lifetime and unalterable retirement healthcare benefits, the contractual right to such benefits terminated when the individual agreements expired.

As the cases cited above make clear, a collective bargaining agreement may vest unalterable lifetime healthcare benefits for retirees, provided that the agreement is explicit and unambiguous. Accordingly, I find no merit to Respondent's assertion that a proposal which would obligate the City to provide such benefits is somehow contrary to public policy or ordinary contract principles.[2]

I also reject Respondent's contention that the Union's proposal is improper because the City "never expressed a willingness to bind itself beyond the duration of the new CBA" during negotiations. It is the role of the arbitration panel to try to provide an award which approximates agreements that would have been reached in the normal course of collective bargaining. *Warren Police Officers Ass'n v City of Warren*, 89 Mich App 400 (1979). In making that determination, the Court in *Warren* examined whether the subject of a last offer of settlement was of the type "normally included in a private-sector bargaining agreement." In contrast, the arbitration panel in *In re Commerce Township*, Case No. D05 A-0065, issued January 23, 2007, looked at the issue subjectively by examining whether the township would likely have agreed to the union's last offer of settlement. Either way, such a determination is for the Act 312 panel to make based upon the evidence presented by the parties during the arbitration proceeding. Likewise, the 2011 amendment to Act 312, which mandates that the arbitration panel give primary significance to the employer's financial ability to pay, has no bearing on the issue of whether the panel has the authority to grant an award obligating the City to provide vested lifetime benefits to Charging Party's members. As long as the arbitration panel complies with the 2011 amendment and gives full consideration to the other factors set forth in MCL 423.239(1), and provided that its determination is supported by competent, material and substantial evidence, a decision adopting the Union's proposal would not be outside the purview of Act 312.

Having concluded that an arbitration panel has the authority under the Act to consider Charging Party's last offer of settlement, the final issue is whether the City violated its duty to bargain under Section 10(1)(e) of PERA by virtue of its conduct in this matter. Upon the filing by the Union of its petition for Act 312 arbitration and the submission to the panel of its last offer of settlement, the City brought an action in circuit court seeking a declaratory ruling that the arbitration panel "lacks the authority" to award the benefit sought by the Union. Notably, there is no provision within the Act authorizing a party to seek such relief.

[2] Whether the Union's last offer of settlement contains language sufficient to create an obligation on the part of the City to provide lifetime healthcare benefits to Charging Party's members based upon the standards set forth in *Tackett* and its progeny is a question which is not at issue in the instant case. The only question to be decided here is whether an Act 312 panel may give consideration to the Union's proposal as written.

Although Section 16(h) of PERA, MCL 423.2216(h), empowers the Commission or a charging party to petition the circuit court for appropriate temporary relief or a restraining order upon the issuance of an unfair labor practice complaint, no such language is included within Act 312. Rather, the circuit court's role under the Act is limited to review or enforcement of the majority decision of the arbitration panel. One of the narrow grounds for review is a determination of whether the Act 312 panel "was without or exceeded its jurisdiction." MCL 423.242. Notably, the panel's decision is not automatically stayed during the pendency of such review.[3]

Arbitration under Act 312 is an extension of the bargaining process under PERA. *City of Ann Arbor*, 1990 MERC Lab Op 528. As noted, the process is intended to provide an expeditious and effective means of resolving a labor dispute involving police officers and firefighters. In fact, the Legislature, in an effort to further accelerate the process, amended the Act in 2011 to require that the arbitration hearing be completed, and post hearing briefs filed, no later than 180 days after the commencement of the proceeding. In addition, the 2011 amendment added a requirement that the arbitration panel issue its written decision within 30 days after the conclusion of the hearing, or within up to 60 additional days at the discretion of the chair. In the instant case, Respondent, in reliance upon an entirely unsupported claim that the Act 312 panel lacked jurisdiction to consider a proposal for retiree healthcare benefits for active employees, brought an action in circuit court seeking a determination on an issue the Legislature has explicitly reserved for review by the circuit court subsequent to the issuance of the panel's decision. I conclude that Respondent's conduct frustrated the intent of the Legislature by obstructing the arbitration process. For this reason, I find that the City violated its duty to bargain under Section 10(1)(e) of PERA. See *City of Jackson*, 1979 MERC Lab Op 1146 (conduct which seriously interferes with the Act 312 arbitration process may constitute a violation of the duty to bargain in good faith).

I have carefully considered the remaining arguments set forth by the parties in this matter, including the Union's assertion that the City repudiated its agreement to litigate retiree health care issues through Act 312 arbitration, 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.

[3] The only provision within Act 312 authorizing the involvement of the circuit court prior to the issuance of the arbitration panel's order is Section 7, which empowers the panel or the attorney general to invoke the aid of the court where a person refuses to obey a subpoena, refuses to be sworn or to testify, or if any witness, party or attorney is guilty of contempt while in attendance at the arbitration hearing. MCL 423.237.

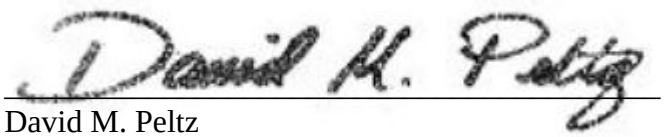
RECOMMENDED ORDER

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

1. Cease and desist from violating its duty to bargain in good faith with the Wayne Professional Fire Fighters Union, Local 1620, International Association of Fire Fighters by refusing to participate in Act 312 arbitration regarding mandatory subjects of bargaining, including by filing an action in circuit court to enjoin the arbitration proceeding.

2. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees in Charging Party's bargaining unit are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: January 18, 2022

NOTICE TO ALL EMPLOYEES

THE CITY OF WAYNE, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the order of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, we hereby notify our employees that:

1. **WE WILL** cease and desist from violating OUR duty to bargain in good faith with the Wayne Professional Fire Fighters Union, Local 1620, International Association of Fire Fighters by refusing to participate in Act 312 arbitration regarding mandatory subjects of bargaining, including by filing an action in circuit court to enjoin the arbitration proceeding.

2. **WE ACKNOWLEDGE THAT** all of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of PERA.

CITY OF WAYNE

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.