STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C04 I-239

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Roumell, Lange and Cholak, P.C., by Gregory Schultz, Esq., for the Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Charging Party

DECISION AND ORDER

On January 9, 2006, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C04 I-239

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Roumell, Lange and Cholak, P.C., by Gregory Schultz, Esq., for the Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on April 6 and May 19, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on August 8, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this charge against the Detroit Public Schools on September 17, 2004. Charging Party represents a bargaining unit of bus drivers, team leaders, dispatchers and schedulers employed by Respondent. Charging Party alleges that in August or September 2004, Respondent violated Section 10(1)(e) of PERA by unilaterally discontinuing payments made to Charging Party's security retirement planning (SRP) trust fund on behalf of bargaining unit members. In its charge, Charging Party asserted that this action constituted an unlawful repudiation of the parties' collective bargaining agreement. At the hearing, however, Charging Party changed its theory. It now argues that through past practice, the payments had become a term and condition of employment independent of any contractual obligation. Charging Party asserts, therefore, that Respondent had an obligation to give Charging Party notice and an opportunity to bargain before terminating this benefit.

Facts:

A private company selected by Charging Party administers the SRP trust fund. From 1990 until 2004, Respondent made an annual payment to the fund of $400 per eligible bargaining unit member, or approximately $200,000 per year. From these payments, the fund provided unit members with whole life insurance and individual accounts that could be drawn upon after retirement.1

Charging Party created the SRP fund in 1989 after Respondent announced that it would make a one-time lump sum payment of $1,200 to each of its employees. The previous year, Respondent had asked all its unions to accept a wage freeze. Respondent's superintendent promised the unions that if he could find the money he would pay a bonus the following year. After Respondent made its announcement, Charging Party and Respondent negotiated a letter of understanding stating that Respondent would pay $400 per employee into the SRP fund on August 1, 1990, and pay the remaining $800 directly to employees in two $400 payments during the 1989-1990 school year.

Sometime thereafter, the parties entered into a new collective bargaining agreement covering the term September 1, 1989 through August 31, 1992.2 Article XXXI of this contract stated:

> 1. Employees on the payroll as of September 1989 and still on the payroll January 15, 1990, shall receive a $400 lump sum payment immediately following Union ratification and board approval. (This is a one-time payment).
>
> 2. a. For the 1989-90 school year, employees on the Board's payroll September 1989 and still in the Board's employ on December 15, 1989, shall receive a lump sum payment of $400 immediately following Union ratification and Board approval. (This $400 payment will be made by December 30 in subsequent years, and will not be added to the base.)
>
> b. A second payment of $400 for the 1989-90 year shall be paid to employees on the Board's payroll as of February 1, 1990 and still on the payroll at the end of the school year two weeks after the regular ten-month year. (This payment will be made in subsequent years based on the same qualifications, and will not be added to the base.)
>
> c. The Union will notify the Board whether the lump sum payments are to be made directly to members or the Union's trust fund.

Charging Party asked Respondent to make all the lump sum payments required by Article

1 Unit employees also have a defined benefit pension plan through the Michigan Public School Employees Retirement Systems (MPSERS). The SRP supplements the MPSERS plan.

2 Charging Party offered into evidence a document purporting to be a collective bargaining agreement covering this period. This document also states that its effective dates are "September 1, 1984 to August 31, 1987." The copy of the document put into evidence is unsigned and undated, and there was no testimony as to when it was ratified. In its brief, Charging Party argues that there was no collective bargaining agreement in effect between 1989 and 1992. However, Charging Party's witness, the chief steward and a member of its bargaining committee since 1979, testified that SRP payments were made pursuant to this document in the early 1990s.

XXXI to the trust fund, and to let the trust fund disburse some of the money directly to employees. Respondent refused. It agreed to make the payments set out in subsection 2(b) to the SRP fund, but insisted on paying the $400 referenced in subsection 2(a) directly to employees. Respondent paid the SRP fund $400 per eligible employee in August or September of 1991 and 1992. It is not clear from the record when, whether or to whom the one-time $400 payment in subsection 1 was paid. The payment referenced in that section may have been the one made to the trust fund in August 1990 pursuant to the letter of agreement.

In 1992, the parties entered into a new contract with an expiration date of August 25, 1994. The record does not indicate when the contract was ratified, but it was executed in November 1992 and made retroactive to August 26, 1991. Article XXXI contained this language:

> B. 1. For the 1989-90 school year, employees on the Board's payroll in September 1989 and still in the Board's employ on December 15, 1989, shall receive a lump sum payment of $400. (This $400 payment will be made by December 30 in subsequent years, and will not be added to the base.)
>
> 2. For the 1992-93 school year, employees on the Board of Education payroll in September 1992 and still on the payroll December 15, 1992 shall receive an additional lump sum payment of $500 by December 30, 1992. (In subsequent years, this payment of $900 will be made based on the same qualifications as above and will not be added to the base.)
>
> C. 1. A second payment of $400 for the 1989-90 school year shall be paid to employees on the Board's payroll as of February 1, 1990, and still on the payroll at the end of the school year two weeks after the regular ten-month year. (This payment will be made in subsequent years based on the same qualifications, and will not be added to the base.)
>
> 2. A second payment of an additional $250 for the 1992-93 school year shall be paid to employees on the Board of Education payroll as of February 1, 1993 and still on the payroll at the end of the school year. (In subsequent years, this payment of $650 will be made based on the same qualification and will not be added to the base.)
>
> D. These lump sum payments are to be made directly to the Union's trust fund.

According to Charging Party, Respondent paid the SRP trust fund only the $400 per eligible employee referenced in subsection C (1). Despite subsection D, Respondent paid the rest of the money referenced in Article XXXI directly to employees. Charging Party apparently did not grieve this action, and Respondent paid the SRP trust fund $400 per eligible unit member in August or September of 1993 and 1994.

The parties' next contract ran from August 26, 1994 to August 15, 1997. In that agreement, Article XXXI read as follows:

A. (3). With the exception of $400.00 to be paid to the Teamsters Security Retirement System in August of each year, the following bonuses will be paid to all regular Board employees on the payroll as of December 15 of any year and said bonus will be paid directly to the employees:

Christmas Break	$300.00
Winter Break	$300.00
Easter Break	$300.00
Return to Work in September	$250.00

The 1994-1997 contract was extended on a day-to-day basis after its expiration date until the parties reached a successor agreement. In June 2000, the parties agreed to a new contract covering the period August 26, 1999 through August 25, 2003. A letter of understanding attached to the contract stated that in return for the elimination of the Christmas break, winter Break, Easter break and return to work bonuses, employees would receive a one-time wage increase in 2000, in addition to the percentage increase due them under other provisions of the contract. The former Article XXXI was eliminated from the 1999-2003 contract, and this document contained no reference to the SRP or the "Union trust fund." After August 25, 2003, the parties agreed to extend their 1999-2003 contract on a day-to-day basis. The contract remained in effect in late 2004 when the alleged unfair labor practice occurred. This contract, like the parties' previous agreements, contains a grievance procedure culminating in binding arbitration.

Despite the elimination of any reference to the SRP in the 1999-2003 contract, Respondent made $400 payments to the SRP fund in August 2000, 2001, 2002 and 2003. In early 2004, Respondent reduced staff in its payroll and finance department. When Respondent did not make an SRP payment in August 2004, the company administering the trust fund made an inquiry to Respondent's payroll department. A payroll auditor then called Gordon Anderson, Respondent's Assistant Director of Labor and Employment, to ask whether payment should be made. Anderson had not participated in the negotiation of the parties' 1999-2003 agreement, and Respondent's chief negotiator had by that time left its employ. Anderson reviewed the contract language, and looked for other documents in the negotiation file that might constitute an agreement to continue the payments. He did not find any. In about November 2004, Anderson directed the payroll department not to make the payment. Respondent did not provide Charging Party with an explanation of why the payment was not made until the hearing in this case in April 2005. Charging Party did not realize until the hearing that the parties' contract no longer contained SRP language.

Discussion and Conclusions of Law:

Respondent asserts that the instant charge should be dismissed because it arguably involves a dispute over the interpretation of the parties' current collective bargaining agreement. It notes that the Commission has held that it will not find a violation of PERA based on the duty to bargain when the parties have a bona fide dispute over the interpretation of their contract and this dispute is subject

to resolution by the parties' grievance arbitration procedure, citing *Eastern Mich Univ,* 17 MPER 72 (2004) and *City of Detroit (Wastewater Treatment Plant),* 1993 MERC Lab Op 716, 719. However, as discussed above, Charging Party changed its theory of the case at the hearing when it learned why Respondent had not made the 2004 payment. Charging Party's claim is not that Respondent breached its contractual obligations in this case, and it is not seeking a determination of the parties' contractual rights. Rather, Charging Party maintains that through past practice, the SRP payments became an established term or condition of employment independent of the contract.

A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment under PERA. *Amalgamated Transit Union, Local 1564 v Southeastern Michigan Transportation Authority (SEMTA),* 437 Mich 441, 454 (1991); *Plymouth Fire Fighters Ass'n v Plymouth,* 156 Mich App 220 (1986). To be binding, the past practice must rest on the tacit consent of both parties to the continuation of the practice. *SEMTA; Port Huron Ed Ass'n v Port Huron Area School Dist,* 452 Mich 309, 312 (1996). As the Court explained in *SEMTA,* at 454-455:

> The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration and the reasonable expectation of the parties may justify its attaining the status of a "term or condition of employment."

Charging Party maintains that while Respondent's fourteen year practice of making an annual payment to the SRP fund is clear and undisputed, the contractual basis for the SRP payment is "sketchy, confused, contradictory and unclear to anyone but those persons who participated in it." The bargaining history, Charging Party asserts, demonstrates the parties' tacit agreement that the SRP payments would continue as a benefit outside of the contract. According to Charging Party, the SRP payment began as an extracontractual benefit in 1989. Respondent then continued to make the SRP payment in 1991 and 1992 even though, according to Charging Party, the parties had no valid collective bargaining agreement during that period. In 1993 and 1994, the parties had a contract. However, according to Charging Party, the $400 per employee per year Respondent actually paid to the SRP fund bore no relationship to the amount Respondent was purportedly required to pay under that agreement. Finally, Respondent continued to make SRP payments in 2000, 2001 and 2003, despite entering into a contract that made no reference to this benefit. This evidence indicates, according to Charging Party, that the parties recognized that the SRP payment existed as term or condition of employment independent of Respondent's contractual obligations.

I find no evidence that between 1990 and 2000, Respondent made any payment to the SRP fund that was not contractually required. In 1989, the parties entered into a letter of understanding – a binding contractual agreement – requiring Respondent to pay $400 per unit member to the SRP fund in the summer of 1990. While Charging Party now argues that there was no valid collective bargaining agreement in August 1991 and 1992, Charging Party's own witness testified that Respondent made SRP payments pursuant to a document that Charging Party had admitted as a collective bargaining agreement covering that period. There is no dispute that by November 1992, the parties had entered into a contract covering the years 1991-1994. Respondent apparently did not comply with the requirement of subsection D of that agreement that it make all lump sum payments

required by the contract to the SRP fund. However, the payments it made to the fund in 1993 and 1994 were clearly required by Article XXXI, subsection C (1) of that contract. From August 1995 through August 1999, Respondent made SRP payments pursuant to Article XXXI, subsection A (3) of the contract that was in effect from August 1994 until June 2000. In sum, I conclude that between 1990 and 2000 the parties did not have a tacit agreement or understanding that Respondent would pay $400 annually per eligible employee to the SRP fund independent of any contractual obligation on Respondent's part.

In June 2000, the parties agreed to a contract that omitted any reference to the SRP. Respondent asserts that the payments it made to the SRP fund in 2000, 2001, 2002 and 2003 were made erroneously. It denies that these payments show even a tacit agreement between the parties to continue the SRP benefit after the 1999-2003 contract was ratified. Charging Party points out that Respondent made no attempt to show how this mistake was made or who among its "departments, officers, bargaining representatives, legal counsel, officers, executives, managers, administrator or auditors" was responsible. It asserts that Respondent has the burden of showing that there was a mistake. It also argues that Respondent's claim that it paid out over $200,000 per year over several years by mistake is ridiculous.

Charging Party has the burden of proving the elements of its case. I believe that, in this instance, this includes the burden of showing that the parties had at least a tacit agreement that the SRP payments would continue after they ceased to be a contractual benefit. Charging Party offered no evidence to counter Respondent's claim that it made the SRP payments in 2000, 2001, 2002, and 2003 by mistake. Obviously, someone in Respondent's payroll and finance department approved these payments. However, this department had been making the same per employee payment to the SRP fund in August or September since 1990. As Charging Party acknowledges, Respondent is a large organization. I find it credible that, in the absence of a specific directive from the labor relations office, its payroll and finance department might continue to make these regular payments. I find that Charging Party did not establish that the parties had an explicit or tacit agreement that Respondent would continue to make SRP payments after June 2000. I conclude, therefore, that Respondent did not unilaterally alter an existing term or condition of employment when it ceased making these payment in 2004, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____