STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY, HEALTH DEPARTMENT,
Respondent-Public Employer,

Case No. C98 E-89

-and-

MICHIGAN AFSCME COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AND AFSCME LOCAL 25,
Charging Parties-Labor Organizations.
_____/

APPEARANCES:

John L. Miles, Esq., Assistant Labor Relations Director, for the Employer

Miller Cohen, P.L.C., by Gail M. Wilson, Esq., for the Labor Organizations

DECISION AND ORDER

On February 10, 1999, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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APPEARANCES:

John L Miles, Atty, Ass't Labor Relations Director, for the Public Employer-Respondent

Miller Cohen, P.L.C., by Gail M. Wilson, Atty, for the Labor Organizations-Charging Parties

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

The hearing in this case was held at Detroit, Michigan on September 3, 1998, before James P. Kurtz, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to a complaint and notice of hearing dated May 11, 1998, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216, MSA 17.455(16). Based upon the record and the post-hearing briefs of the parties filed on or before November 17, 1998, the undersigned makes the following findings of fact, conclusions of law, and recommended order under Section 16(b) of PERA:

Charge and Background Matters:

This unfair labor practice charge was filed on May 4, 1998 by Charging Parties, AFSCME Council 25 and its Local 25, collectively referred to as the Union, alleging that the public employer, the County and its health department, had unilaterally changed the working hours and shifts at one of its clinics on March 3, 1998, without notice or bargaining with the Union, in violation of PERA and the collective bargaining agreement. This change resulted in the loss of overtime by employees represented by Local 25. No answer was filed by the Respondent-Employer, but at the hearing it contended that the issue raised by the charge was contractual rather than an unfair labor practice, and

that it should be resolved through the grievance-arbitration procedures under the collective bargaining agreement.

Factual Findings:

Local 25, AFSCME, is one of six locals that represents certain classifications of nonsupervisory employees employed by the County, all of whom are included in a broad nonsupervisory bargaining unit under the overall supervision of Michigan Council 25, AFSCME. The employees are divided into the locals based upon such factors as their classifications, job duties, authority, or the County department or agency where they are employed. Local 25 represents some of the nonsupervisory technical employees of the health department involved in this case. Another of the six nonsupervisory locals, Local 1659, represents clerical employees at the health department clinics, but it is not a party to this charge.

The above nonsupervisory unit was covered by a master contract from December 1, 1993 through November 30, 1996, which was replaced by a new contract dated December 1, 1996 through November 30, 2000. This new agreement was being negotiated by Council 25 and the six locals that make up the unit during the events covered by this charge, which occurred in 1997 and early 1998, until the change in hours at the Highland Park clinic on March 3, 1998. At the time of the hearing local bargaining agreements were still being negotiated. Neither party raised any issue at the bargaining table relative to the change in hours involved in this matter.

Both the expired and the new collective bargaining agreements contain, in addition to the usual grievance-binding arbitration clauses, a management rights clause that provides: " . . . The Employer possesses the exclusive right to manage the affairs of the County, including but not limited to the right to: establish starting and quitting time; . . ." There are separate articles in the contracts dealing with workweek, work hours, and overtime, but none of these articles explicitly refer to a change in starting and quitting times. The overtime article of the contract states that, "Overtime compensation shall be paid in accord with the current practice and this Agreement."

The health department operates about 10 health centers or clinics throughout the County, which administer various health programs. These programs are for the most part funded by the State, which sets the standards to qualify for such funding. The regular hours of the clinics and the employees assigned thereto were from 8:00 a.m. to 4:30 p.m. each day. In the years prior to this proceeding, if clinics had to remain open after 4:30, they were staffed by employees working voluntary overtime. The no-show rate of clients was worst in the mornings, as compared with the afternoon or early evening. This forced the Employer to schedule clinic hours after 4:30, thereby incurring the payment of overtime. Beginning in 1996, the State began to request that the County service more clients, which would require extended hours or work on Saturday.

In July 1996, the Employer and the two local unions involved, Local 25 and Local 1659, met in a special conference relative to scheduling problems, and a second similar meeting was held on February 7, 1997. The Employer took the position that the issue was not negotiable under the management rights clause of the contract, but it wanted to involve the bargaining representatives

before notifying the employees affected by any change. The Union, on the other hand, took the position that prior to any change in scheduling, the parties must reach mutual agreement. The bargaining representatives suggested that the Employer add additional staff to cover the extended hours, whereas the Employer discussed the possibility of using temporary personnel. In a letter dated February 28, 1997, the Local 25 president summarized the positions of the parties and expressed her concerns with the use of temporary employees. She also indicated that any scheduling changes could be negotiated "during local contract negotiations, or sooner if necessary." In the same letter she also referred to a meeting scheduled for the following week. In these various meetings, numerous schedules were proposed and discussed, but no agreement was reached by the parties.

In response to funding pressures and client needs, particularly in what is known as the WIC and immunization programs, the Employer decided to launch a pilot program extending the traditional hours of operation at its health centers in Westland, Dearborn, and Taylor, beginning April 14, 1997 for a six-month period. A notice to this effect was posted by the Employer on March 19, and employees were asked to volunteer for five different options relative to starting and quitting times. The options ranged from the traditional 8:00-4:30 shift to a choice of four ten-hour days. On April 15, the Local 25 president sent a letter to the department director, protesting that some of the options in the pilot program were "somewhat different" than the ones discussed at the meetings between the parties, and stating that she did not concur with them. She contended that some of the shifts were "an attempt to avoid paying overtime, and changing the clinic to a seven-day operation schedule." She also expressed her understanding that a memorandum was to have been drawn up and signed by all bargaining units before the implementation of the pilot program, and she requested a meeting to clarify the pilot program and its impact on her unit.

At the annual state of the department meeting held with employees on January 20, 1998, the Employer announced its need for "expanded accessibility" and its proposed extended hours to the staff. Another special conference with the two Locals was held three days later on January 23 to discuss the proposed changes, which involved some employees being scheduled on certain days from 11:00 a.m. to 7:30 p.m., with the payment of shift premium required by the contract. There would be no change in the five-day work week, and overtime would still be possible to cover absences. On January 27, and again on February 16, the Local 25 president wrote to the labor relations department of the County, contending that the matter of alternate work schedules was on the bargaining table and demanding that the status quo be maintained until the completion of the bargaining.

One or two additional meetings were held with the Locals, including one on February 16 with the labor relations department. By this time the master contract had been ratified, and only local negotiations remained. The Employer continued to emphasize in its meetings with the Union that it had to make the changes to keep its funding and its client base. Local 25 maintained that the right under the master contract to have a multi shift operation applied only to the former Wayne County General Hospital, and did not apply to the health clinics. On February 24 the Employer announced to its Highland Park clinic staff that beginning Tuesday, March 3, the clinic would be on extended hours from 11:00 a.m. to 7:30 p.m. every Tuesday.

Discussion and Conclusions:

The Union argues that the Employer violated its bargaining obligation under PERA by the change in hours at its health clinics and by failing to bargain the impact of such change, and that the contractual waiver relative to starting and quitting times is not applicable in this case. Even without the contractual waiver issue, I would have difficulty finding that the Employer failed in its obligation to bargain under the facts of this case. The Union was put on notice by the Employer almost two years before the change that there was a need for more flexible or extended hours of operation due to funding and client problems. The Employer presented a number of proposals at the various meetings between the parties over the two-year period without resolution of the problem. These meetings were the Union's opportunity to bargain the proposed hours' change or the impact thereof on the employees, irrespective of the fact that neither party raised the issue at the main bargaining table, or the fact that the Employer took the position that it had no duty to bargain the matter.

The discussion of the change in hours at meetings separate from the ongoing negotiations makes no difference in regard to fulfilling the bargaining obligation of each of the parties. Once the Union was apprized of the intent and position of the County relative to a change in hours, the obligation to demand bargaining or to raise the issue at the main table negotiations was that of the Union, and it could not sit back and assume that no change was possible without its agreement. *Capital Area Transp. Auth.*, 1994 MERC Lab Op 921, 925, 933. The language of the contract granting the County the right to "establish starting and quitting time" constitutes a clear and unmistakable express waiver of the Union's right to bargain such changes. *St. Clair County Rd Comm'n*, 1992 MERC Lab Op 533, 535, 538-539, *aff'd* Mich App No. 155534 (Unpub., 11-29-94); *cf. Ann Arbor Fire Fighters, Local 1733*, 1990 MERC Lab Op 528, 538-540. The Union's argument that the absence of any resolution of the hours' change in the contract negotiations means that there was no meeting of the minds on the issue presupposes that the waiver language had been left unresolved or eliminated from the contract. Instead, the management rights language was carried over into the new agreement without change.

The contention that the language in the contract allowing the Employer to "establish starting and quitting time" applies only to multi shift operations, such as the closed Wayne County General Hospital, and that it has never been applied to a one-shift operation such as the health clinics, is without evidentiary foundation. Similarly, the argument that there must be evidence that the Union knew that the contractual waiver included clinic personnel, and that it made a conscious decision to allow the language to remain in the agreement, is self-serving and without legal basis. The Union is responsible for all of the language in its contracts, and any necessary clarification thereof. Any ambiguity, including the effect of the overtime language on the management rights clause, can only be resolved through the bargaining process or the grievance- arbitration procedure. *Highland Park School Dist.*, 1998 MERC Lab Op 288, 293-294.

The contention that the contractual language was supplanted by a long-standing "past practice" of running the clinics on a steady 8:00-4:30 basis and then paying employees overtime for any extended hours is also without merit. The difficulty with the Union's position is that a past

practice cannot amend unambiguous contract language unless the practice is "mutually accepted by both parties," and the parties "intentionally chose to reject the negotiated contract and knowingly acted in accordance with the past practice." *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 345 (1996), *aff'g* 1993 MERC Lab Op 424, and *Port Huron Ed. Ass'n v Port Huron Sch. Dist.*, 452 Mich 309, 325-330 (1996); see also *St Clair School Dist. v IEA/MEA*, 458 Mich 540, 563-572 (1998), *aff'g* 218 Mich App 734 (1996), and 1993 MERC Lab Op 101. There is no evidence in this case that the Employer ever knowingly and intentionally intended or agreed to forgo its unambiguous management right to set starting and quitting times.

The fact that the County had always operated the clinics on a standard Monday through Friday 8:00-4:30 shift, and paid overtime for any excess hours, does not constitute a past practice that can overcome the explicit contract language of the management rights clause of the contracts. Under the above Supreme Court and Commission decisions, a binding past practice cannot be established merely by default, silence, or inaction of a party, but overt consent to act contrary to contract language must be present and proven. In *Macomb County, Civil Service Comm'n*, 1998 MERC Lab Op 344, 349, ALJ Rouhlac found that the County's unexercised discretion over promotions granted in the management rights clause did not prevent it from modifying a promotional procedure that had been in effect some 20 years. In conclusion, the Union's attempt to hold on to its overtime cannot prevail without evidence that the County intentionally and unequivocally relinquished its right to set starting and quitting times of its employees. No such proof was proffered in this case.

Accordingly, I recommend that the Commission issue the following order:

ORDER DISMISSING CHARGE

Based upon the findings of fact and conclusions of law set forth above, the unfair labor practice charge filed in this matter is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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James P. Kurtz
Administrative Law Judge

Dated:_____