

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

DETROIT JUDICIAL COUNCIL,
Respondent-Public Employer,

-and-

36TH DISTRICT COURT,
Respondent-Public Employer,

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 25 and
LOCAL 917,
Charging Party-Labor Organization in Case No. C99 B-24
Petitioner in Case No. UC99 B-44.

APPEARANCES:

David J. Masson, Esq., City of Detroit Law Department, for Detroit Judicial Council

Constance J. Allen, Esq., for 36th District Court

Miller Cohen, P.C., by Bruce A. Miller, Esq., and Eric I. Frankie, Esq., for the Labor Organization

DECISION AND ORDER

On December 16, 1999, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above-entitled matter, finding that Respondents have engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge. In addition, the ALJ recommended that this Commission grant the Union's petition for unit clarification.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a

period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Date: _____

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Charging Party - Labor Organization in Case No. C99 B-24
Petitioner in Case No. UC99 B-4

APPEARANCES:

For 36 th District Court:	Constance J. Allen, Esq.
For Detroit Judicial Council:	City of Detroit Law Department By David J. Masson, Esq.
For Labor Organization:	Miller Cohen, P.C. By Bruce A. Miller, Esq. and Eric I. Frankie, Esq.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10, 13, and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10) *et seq.*, these consolidated cases were heard in Detroit, Michigan on April 30, 1999, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC). The proceedings were based upon an unfair labor practice charge and a unit clarification petition filed by the American Federation of State, County and Municipal Employees, Council 25, and its affiliate, Local 917 (AFSCME), against the 36th District Court and the Detroit Judicial Council (Respondents) on February 3, 1999. Based upon the record, and briefs filed by June 30, 1999, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Charge and Unit Clarification Petition:

In the unfair labor practice charge, the Union alleges that in July 1998, Respondents began to hire court officers to perform bailiffs' work, purportedly as independent contractors, and unilaterally transferred the bailiffs' work to them. It claims that Respondents' actions reduced the number of jobs in its bargaining unit and cost its members work opportunities. In its unit clarification petition, the Union seeks to include the court officers in its bargaining unit because their duties and responsibilities are the same as the bailiffs it represents.

Findings of Fact:

In 1981, as part of a major court reorganization, the legislature amended the Revised Judicature Act, MCL 600.1 *et seq.*, and created two classes of court officers to serve process in the 36th District Court. The first group included forty-two bailiffs - thirty in the civil division and twelve in the real estate division - who had been employed by the former Detroit Common Pleas Court. These bailiffs, members of the Union's bargaining unit, became employees of the State Judicial Council (SJC) and were assigned to the newly created 36th District Court (Court). They were granted: (1) lifetime tenure, subject to misfeasance or malfeasance in office; (2) a \$20,000 salary plus fees for serving process; (3) a \$100,000 surety bond (4) retirement benefits; (5) rotating assignments. They were also required to submit to annual financial audits. The second class of court officers was those to be appointed by the chief judge to fill future bailiff vacancies. These court officers would also become SJC employees.¹

By July 1998 thirty-three bailiffs had retired, died, or resigned and the chief judge appointed nine court officers. They each signed a three-year contract which described their relationship with Respondents as independent contractors. Unlike the "grandfathered" bailiffs, court officers are not paid a salary and do not receive retirement benefits. Their income is derived from statutory fees for serving process, and mileage and fees they negotiate with litigants for performing certain services, e.g., evictions. Their contract is subject to automatic renewal unless it is breached, the court officer materially neglects his or her duties, or commits acts of gross negligence, dishonesty, fraud, or misrepresentation. The court officers are prohibited from representing themselves as Court employees, but must carry and display identification and use their best efforts to promote the Court's interest.

The court officers share offices in the Court with bailiffs and are free to use the Court's resources to complete their work. The bailiffs and court officers have purchased two-way radios which permit them to communicate with each other and a base station at the Court. Directives and policies issued by the Court are applicable to both court officers and bailiffs. A February 1999 memo warned them that their work would be more carefully scrutinized and they would not be paid for untimely or improper

¹In 1996, the legislature amended the Revised Judicature Act, MCL 600.1 *et seq.*, and all employees of the SJC serving in the Court became employees of the Detroit Judicial Council. The legislature also repealed MCL 600.8322(4) which had provided that court officers appointed to fill bailiff vacancies would be employed by the SJC. Subsequently, the provision naming the Detroit Judicial Council as the employer of court employees was ruled unconstitutional. *Judicial Attorneys Ass'n v State of Michigan*, 459 Mich 291, 304 (1998). Now, the Court is the employer, the City of Detroit is the funding unit, and the Detroit Judicial Council serves as their liaison.

return of service. In April 1999, the court administrator received a memo from a judge who complained that several bailiffs and court officers were not following her alternative service orders.

The court officer contract incorporates an eight-page document entitled, *Guidelines & Requirements for Court Officers (Guidelines)*, which governs the manner that court officers perform their work. It requires court officers to enter into rotational work assignments, inform the bailiffs' office if they will be unavailable for service for more than two days, and notify the clerical staff when exchanges of work occur. The *Guidelines* also contain four pages of general procedures for service and return of process and writs, including detailed time limits for completing various tasks.

Court officers, like bailiffs, have considerable independence in establishing their work schedules, but are expected to report to the Court each day to get their work assignments and to discuss any problems which may arise with their immediate supervisor. One court officer has been admonished for missing an instructional class, has been required to give daily reports of her activities, has had twenty-seven of her cases reassigned, and on the day of the hearing had an appointment with the court administrator to discuss her performance. The deputy court administrator has recommended to a three-judge panel that this officer's contract be terminated.

Respondents have refused to recognize the Union as the court officers' bargaining representative. In a December 7, 1998 letter, Respondents' attorney told the Union president that the Court was not obligated to bargain because the court officers were independent contractors.

Conclusions of Law:

I. The Unfair Labor Practice Charge

At the hearing, Respondents moved to dismiss the charge. They claimed that it was filed more than six months after the Union learned court officers were performing bargaining unit work. In *City of Ironwood*, 1985 MERC Lab Op 62, the Commission articulated the following tests for determining when the statute of limitations begins to run when a removal of bargaining unit work allegation is set forth in an unfair labor practice case: (1) when unit work has been transferred to persons whom the union does not claim to represent, the alleged unfair labor practice is a unilateral transfer and the statute begins to run on the date the union knows, or should know, of the transfer; (2) when unit work has been assigned to persons whom the union claims to represent, the statute runs from the union's last demand for recognition since each refusal is an unfair labor practice. See also, *Wayne County Community College*, 1987 MERC Lab Op 981.

The gist of the Union's charge is that Respondents committed an unfair labor practice by transferring unit work to court officers and refusing to recognize them as bargaining unit members. Thus, in this case the statute of limitations began to run from the time the Union last demanded recognition. I find that the record contains sufficient evidence to conclude that the Union demanded to be recognized as the court officers' bargaining agent within six months of the February 3, 1999 charge. In a December 7, 1998 letter to the Union, the Respondents refused the Union's request to be recognized as the court officer's bargaining representative. Therefore, Respondents' motion to dismiss the charge as untimely is denied.

The record establishes that Respondents refused the Union's request to represent the court officers because they claim the court officers are independent contractors. Thus, the central question is whether the court officers are employees who should be included in the Union's bargaining unit.

II. The Unit Clarification Petition

The determination of whether individuals should be included in an existing bargaining unit involves two inquiries: first, whether they are 'employees' within the meaning of PERA; second, whether they share a community of interest with employees in the unit. *Michigan Educational Support Personnel Ass'n v Southfield Schools*, 148 Mich App 714, 716-717 (1985). The following test is used by the Commission to distinguish between employees and independent contractors: (1) whether the employer maintains control not only over the end to be achieved, but also the means and method of performing the work; (2) whether the work done can be characterized as an integral part of a larger common task, so that the work done, in its essence, follows the usual path of an employee. A contract which states that individuals are independent contractors is not determinative of employee status. *Detroit v Salaried Physicians Prof Ass'n, UAW*, 165 Mich App 142, 147 (1987), aff'g 1986 MERC Lab Op 394; *Township of Northville*, 1995 MERC Lab Op 586; *State Judicial Council/36th District Court*, 1991 MERC Lab Op 266; *Shiawassee County Health Dep't*, 1990 MERC Lab Op 867; *Detroit Health Dep't*, 1985 MERC Lab Op 920, 923; *State Judicial Council*, 1984 MERC Lab Op 545.

In *State Judicial Council/36th District Court*, *supra*, a case which involved the "grandfathered" bailiffs, the Commission adopted, without exceptions, the Administrative Law Judge's finding that the bailiffs were employees because the Respondents exercised extensive control over them. The record in this case demonstrates that Respondents exercise the same degree of control over court officers as they do bailiffs. Both report to the same supervisors, are subject to annual audits, receive assignments in the same manner, wear Court issued identification, are expected to use their best efforts to promote the Court's interest, and must comply with policies, directives, and the Court-issued *Guidelines*.

Respondents do not question the fact that court officers and bailiffs perform the same work, but argue that the scope of their work is defined in court rules and statutes. Court rules which relate to process servers are contained in MCR 2.103 - 2.105. These rules, however, do not address the manner or means by which persons authorized to serve process must perform their work.² Neither does the legislation which created the bailiff and court officer positions.

Respondents also maintain that court officers are not employees because they do not receive the same statutory protection and benefits as bailiffs. They note that court officers do not receive a \$20,000 salary, retirement benefits, lifetime tenure, or have a statutory right to receive assignments on a rotating basis. These factors, however, are not relevant to a finding of whether individuals are employees or independent contractors. See *Taylor Federation of Teachers v Taylor Board of Education*, 167 Mich App 474 (1988), aff'g 1986 MERC Lab Op 779, 785.

²Rule 2.103 relates to who may serve process in various types of civil actions. Rule 2.104 addresses circumstances when return of service may be made by written acknowledgment, certificate and affidavit. Rule 2.105 deals with due process requirements of service on individuals, partnership, corporations, etc.

Respondents suggest that the court officers are independent contractors because the statute, as amended in 1996, removed the requirement that they become SJC employees. The amendment, however, did not address the court officers' employment status. It merely authorized the chief judge to appoint court officers to fill vacancies. Respondents' decision to designate the court officers as independent contractors is not controlling. *Detroit v Salaried Physicians Prof Ass'n, supra*.

Based on the above discussion, I conclude that the court officers are employees of the Court and should be included in the Union's bargaining unit. I also conclude that Respondents violated their obligation to bargain under Section 10(1)(e) of PERA by refusing to recognize and bargain with the Union over the court officer position. The issue involved in the unfair labor practice case was essentially one of unit clarification. Therefore, I do not recommend a cease and desist order nor a notice to employees to remedy this violation. *Macomb County Road Commission, 1978 MERC Lab Op 848, 853*. I recommend that the Commission issue the order set forth below:

Order

Respondents 36th District Court and the Detroit Judicial Council, and their agents, shall:

1. Recognize the American Federation of State, County and Municipal Employees, Council 25, and its affiliate, Local 917, as bargaining representative for the court officer position.
2. Upon demand, bargain with the above labor organization concerning the court officers' wages, hours, and other terms and conditions of employment.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated: _____