STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF PUBLIC WORKS),
Respondent-Public Employer,

Case No. C99 H-138

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 229,
Charging Party-Labor Organization.
_____/

APPEARANCES:

City of Detroit Law Department, by Valerie Colbert-Osamuede, Esq., for Respondent

L. Rodger Webb, Esq., for Charging Party

DECISION AND ORDER

On April 13, 2000, Administrative Law Judge Nora Lynch issued her 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

_____
Maris Stella Swift, Commission Chair

_____
Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Date: _____

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APPEARANCES:

Valerie Colbert-Osamuede, City of Detroit Law Department, for the Public Employer

L. Rodger Webb, for the Charging Party

DECISION AND RECOMMENDED ORDER OF
ADMINISTRATIVE LAW JUDGE

A charge in the above entitled matter was filed on August 2, 1999, pursuant to a referral to administrative processes by the Wayne County Circuit Court on June 17, 1999. The charge came on for hearing on January 10, January 24, and March 7, 2000, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. On March 8, 2000, after partial testimony had been taken, the undersigned ordered that the parties show cause as to why the case should not be dismissed for lack of jurisdiction. Charging Party filed a response on March 24, 2000. Based upon the record made to date, as well as consideration of Charging Party's legal arguments, the undersigned issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge sets forth the background of the dispute as follows:

> In the early 1990's the City determined to require members of the AFSCME unit to obtain and hold commercial drivers licenses (CDLs) as a condition of employment. This requirement constituted a significant change in existing terms and conditions of employment . .

. .

> The City of Detroit undertook this requirement under the premise that it was mandated to do so by amendments to state and/or federal law, and that, therefore, the change was not subject to collective bargaining.
>
> AFSCME Council 25 and Local 229 filed a suit for declaratory judgment in Wayne County Circuit Court in June 1993 seeking declaratory judgment that the relied-upon law did not mandate the indicated change, and injunctive relief. After considerable court litigation, including recourse to the Michigan Court of Appeals, the circuit court issued an opinion that the subject unit employees were not subject to the relied-upon law, and ultimately set the case for trial on the Union's demand for injunctive relief and damages. In respect of the City's motion to refer to administrative processes, the Court on June 17, 1999 issued its declaratory judgment and order granting the City's motion to refer. Specifically, the Court ordered that the City was not legally compelled by state or federal law to require CDLs of certain AFSCME-represented classifications as a condition of employment, that said requirement wrongfully changed the relations between the parties, for which the Union had no adequate administrative processes, and referred the Union's request for injunctive relief and damages to administrative processes, with the pertinent statutes of limitations commencing as of the date of the order.
>
> AFSCME now invokes its rights to the remedies afforded under the Act for the City's wrongful unilateral change in material terms and conditions of employment, pursuant to the cited sections of the Act. WHEREFORE, AFSCME Council 25 and its affiliated Local 229 request the Commission upon hearing to enter its order finding that the City has violated PERA by its unilateral acts, and directing the City to make the Union and all subject unit employees, including probationary employees, whole, with interest.

The Circuit Court Order:

After a week-long evidentiary hearing, Wayne County Circuit Court Judge Kathleen McDonald issued an opinion and order on May 27, 1997, pursuant to the Union's action requesting the Court to declare the statutory amendments to the Michigan Motor Vehicle Code, and the subsequent City directive requiring CDLs, not applicable to Local 229 employees. This order

concluded as follows:

> This Court is sympathetic to the labor shortages experienced within the DPW. However, the changes in the statutes cannot be used to create new conditions of employment. These conditions should be resolved through the collective bargaining process. The only conclusion, supported by the evidence, is in favor of plaintiffs. With the exception of the ASAs, the affected employees of AFSCME Local 229 are not regularly employed as drivers and therefore exempt from the CDL requirement. IT IS SO ORDERED.

On June 17, 1999, the court granted the City's motion to refer damages issues relating to the court's declaratory judgment to administrative processes. This motion was granted pursuant to the following rules and provisos:

> (a) The Court does have jurisdiction to enter injunctive relief and to award damages under its constitutional and statutory powers, but it also has authority and discretion to refer proceedings on said issues to administrative processes;
>
> (b) The Court chooses, pursuant to defendant's request, to exercise its discretion in the circumstances at bar;
>
> (c) In so ordering the Court finds and holds that the statute of limitations applicable to AFSCME's administrative remedies at arbitration and at the Michigan Employment Relations Commission under the Public Employment Relations Act, MCL 423.201 et seq, commence as of the date of the entry of this order;
>
> (d) The Court enters this order with the stipulation of the City of Detroit to waive any statute of limitations arguments it may have relative to arbitration and/or MERC proceedings.
>
> The Court finds that the parties retain any and all legal rights and remedies should the Court enter injunctive relief and award damages.

Discussion:

Charging Party states in its March 24 response that what was intended by the court's order was that the matter for purposes of PERA did not accrue until the entry of its order, and that

therefore the statute of limitations commenced as of that date. Charging Party also contends that the rights of the parties under PERA were contingent upon the construction of statutory and regulatory amendments and therefore the issue was properly one for the court, not the Commission as an administrative agency.

Section 16(a) of PERA states that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Commission and service of a copy thereof upon the person against whom the charge is made. . . ." The statute of limitations is jurisdictional in nature; when the action complained of occurred more than six months prior to the filing of a charge, Section 16(a) conclusively bars the finding of a violation. *Shiawassee County Road Comm,* 1978 MERC Lab Op 1182. In *City of Adrian*, 1970 MERC Lab Op 579, the Commission adopted the holding of the U.S. Supreme Court in *Local Lodge 142 v NLRB (Bryan Mfg Co)*, 362 US 411, 45 LRRM 3212 (1960), which rejected the doctrine of a continuing violation if the inception of the violation occurred more than six months prior to the filing of the charge. In construing the language of Section 10(b) of the National Labor Relations Act which contains a six-month limitations period similar to Section 16(a) of PERA, the Supreme Court stated that Congress "barred the Board from dealing with the past conduct after that period even at the expense of the vindication of statutory rights."

The Commission has repeatedly indicated that the limitations period cannot be waived by the parties and is not tolled by the pursuit of other remedies. *Washtenaw County*, 1992 MERC Lab Op 471 (claim pending in circuit court); *Intl Assoc of Firefighters, Local 352*, 1989 MERC Lab Op 522 (civil service proceedings); *Detroit Fed of Teachers Local 231, AFT, AFL-CIO*, 1989 MERC Lab Op 882 (pendency of union appeal process); *Detroit Public Schools*, 1982 MERC Lab Op 1058 (state tenure commission proceedings); *Livonia Public Schools*, 1975 MERC Lab Op 1010 (settlement efforts). Based upon the above precedent, I find that the circuit court had no power to alter the statutory limitations period, and the charge is therefore untimely under Section 16(a) of PERA.

Filing an action in circuit court did not preclude Charging Party from simultaneously pursing a PERA remedy. *Southfield Public Schools*, 1984 MERC Lab Op 1048. Charging Party could have invoked the jurisdiction of the Commission in a timely manner when the City initially implemented the CDL requirement approximately seven years ago.[1] After the complaint was issued, under Section 16(h) of PERA Charging Party could also have petitioned the circuit court for appropriate temporary relief or restraining order while the charge was being pursued before the

[1]There are numerous Commission decisions in which an employer's defense to a charge is based upon state or federal statutory requirements. See, *City of Detroit (Dept of Transp)*, 1998 MERC Lab Op 205; *County of Muskegon,* 1995 MERC Lab Op 125; *City of Westland,* 1979 MERC Lab Op 166.

Commission. Charging Party instead chose the circuit court as its forum and sought a declaratory judgment as to the legality of the imposition of the CDL requirement. Accordingly, the remedy must also be sought in that court, where a lengthy record has been made, and which under the terms of its order has retained jurisdiction in this matter.

The Commission's remedial power is predicated upon a finding of an unfair labor practice and is limited to an order which will effectuate the policies of the Act. The Commission has no statutory authority to hear matters initiated in, and referred from, the courts. Either the Commission exercises its primary jurisdiction upon the timely filing of a charge, or it is powerless to remedy the alleged unlawful action. It is therefore recommended that the Commission dismiss the charge for lack of jurisdiction and issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch
Administrative Law Judge

DATED: _____