STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Respondent-Public Employer,

Case No. C99 I-171
-and- (Compliance for Case No. C92 A-12)

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
LOCAL 1583,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Office of the Vice President and General Counsel, by Gloria A. Hage, Esq., for Respondent

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by Michael J. Bommarito, Esq., and John G. Adam, Esq., for Charging Party

DECISION AND ORDER ON COMPLIANCE

On October 5, 2000, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Compliance in the above case. This matter arises from a decision issued by this Commission on May 26, 1994, finding that Respondent University of Michigan violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. In that decision, we found that Respondent had unlawfully removed ten animal aide positions from the collective bargaining unit represented by Charging Party Michigan AFSCME Council 25, AFL-CIO, and reclassified the employees who had filled those positions as "animal techs." See *University of Michigan*, 1994 MERC Lab Op 391. As part of the remedial order in that case, we ordered Respondent to restore the position formerly entitled animal aide to the bargaining unit, to make whole all affected employees for wages lost as a result of the transfer of unit work, and to make the Union whole for the loss of dues and/or fees as a result of the Employer's unlawful action.

The Court of Appeals affirmed our Decision and Order in *University of Michigan v AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 1996 (Docket No. 176332). On August 2, 1996, Respondent filed an application for leave to appeal to the Michigan Supreme Court. The Supreme Court denied leave to appeal in an order entered on July 22, 1997. *University of Michigan v Michigan AFSCME Council 25*, 455 Mich 867 (1997). More than two years later, in a letter dated September 2, 1999, Charging Party asked this Commission to conduct a compliance hearing pursuant to Rule 68(3), R 423.468(3), of the General Rules and Regulations of the Employment Relations Commission. The Union indicated in its request that the

parties had been unable to agree on what constitutes compliance with the Commission's May 26, 1994, order. A formal petition for a compliance hearing was filed by Charging Party on September 10, 1999. Following an agreement by the parties to stipulate to the facts in lieu of a formal hearing, the ALJ issued a Decision and Recommended Order in which she concluded that compliance with our earlier decision in this matter requires the Employer to; (1) restore the position now titled animal tech I to Charging Party's unit; (2) arbitrate the grievance filed over the discharge of a formal animal aide worker; and (3) pay Charging Party a sum equivalent to the dues that ten animal tech Is, employed at a salary equivalent to University pay grade 08, would have paid the Union had they not been unlawfully removed from the unit. Respondent filed timely exceptions the ALJ's Decision and Recommended Order on November 13, 2000. Charging Party filed timely cross- exceptions to the recommended order on November 29, 2000.

Discussion and Conclusions of Law:

Under Section 16(b) of PERA, when a violation of the Act is found, the Commission has the power to order a party to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. Its power in this regard is remedial, to restore the situation to that which would have been had the violation not occurred, and to make whole employees for earnings and other compensation lost as a result of the violation. See e.g. *Nick's Fine Foods*, 1968 MERC Lab Op 307; *Sheriff of Washtenaw County*, 1968 MERC Lab Op 364. In our original decision in this matter, we ordered Respondent to "Restore the position of Animal aide [sic] to the Michigan AFSCME Council 25, Local 1583 bargaining unit." As noted by the ALJ, however, Respondent has not used the title "animal aide" at its Unit for Laboratory Animal Medicine (ULAM) since July of 1991, when the position was unlawfully removed from the unit. Of the ten individuals who were employed as animal aides prior to the unlawful removal of bargaining unit work, three are currently working as animal tech Is, four are holding other positions within the bargaining unit, one was demoted from animal tech I to the position of animal attendant and was on medical leave at the time the record was closed in this case, and two were discharged for reasons unrelated to the unfair labor practice charge. Prior to the reclassification of the animal aide position, there were eleven individuals working for the University as animal tech Is. By January of 2000, there were thirty individuals employed in that position. Thus, the significant passage of time since the issuance of our original order in this case greatly complicates the task of determining what constitutes compliance with that order.[1]

In the recommended order issued on October 5, 2000, the ALJ held that compliance with our 1994 decision requires Respondent to "[r]estore the position formerly titled animal aide, now animal tech I," to the bargaining unit represented by Charging Party. In reaching this conclusion, the ALJ interpreted our original decision in this matter as standing for the proposition that the animal aide position was "in effect merged with the position animal tech I" when the former classification was eliminated by the Employer in July of 1991. After reviewing our prior decision, as well as the entire record in this case, we conclude that the order recommended by the ALJ is inconsistent with our

[1] The fact that the parties are still arguing over what constitutes compliance with a decision issued almost eight years ago is truly unfortunate, and we regret that neither the Employer nor the Union sought to bring this dispute to our attention sooner.

original findings in this matter. The 1994 decision was based upon our determination that there was "no substantive change in job content" following the reclassification of the ten animal aide workers. In so holding, we relied heavily upon the testimony of one of the former animal aides, Sylvia Yakich, who asserted that her duties, and those of the other aides who became animal technicians, were essentially identical before and after July of 1991. It does not necessarily follow, however, that the individuals employed as animal technicians prior to the reclassification had precisely the same duties and responsibilities as the former animal aides. While there was some evidence indicating an overlap between the positions before the reclassification, none of the other animal technicians testified at the hearing, and questions concerning their duties, wages, hours and working conditions, both before and after the unfair labor practice, were not fully explored. Similarly, there is nothing in the record to suggest that any or all of the thirty animal tech Is employed by the University as of January 2000 are now merely animal aides working under a different title. On this basis, we must conclude that the ALJ erred in ordering Respondent to "restore" each of those individuals to Charging Party's bargaining unit.

Having determined that the record does not support the ALJ's recommended order, we must still determine what Respondent must do to comply with our original directive to restore the position of animal aide to the AFSCME unit. Respondent contends that it fully complied with that order when it made unconditional offers of reinstatement to the seven former animal aides who were still employed by the University as of 1999. It is true that reinstatement offers are often sufficient to make affected employees whole for losses resulting from the unlawful removal of bargaining unit work. In the instant case, however, reinstatement would have resulted in a lateral transfer and/or pay reduction for any individual who accepted the Employer's proposal. Moreover, reinstatement of seven animal aides would not have fully restored the status quo with respect to the Union. Given those facts, and in light of the many changes which have occurred at ULAM since the unfair labor practice, we conclude that the remedy which best satisfies our obligation to ensure that all parties are made whole and provides the most equitable and just relief possible under the circumstances is one which focuses not on the titles of the various positions or on the specific individuals holding those positions, but rather on the specific work removed from the unit. At the time the animal aide position was eliminated, the primary responsibilities and duties of that position were of a non-technical nature, and they included feeding and watering animals and cleaning and maintaining cages and facilities. To comply with our prior order in this case, Respondent must ensure that those duties are performed by members of Charging Party's unit. In addition, Respondent must, upon demand, bargain with the Union over the terms and conditions of employment of the individuals now performing that work. The precise method by which compliance with our order is achieved is a matter for the Employer to determine.

Next, Respondent contends that the ALJ erred in ordering the parties to arbitrate the grievance filed over the 1993 discharge of Paula Thomas, a former animal aide who had been working as an animal tech I at the time of her discharge. As noted, the purpose of the make-whole remedy in this case was to return the parties to their status quo. With respect to individual employees, the make whole remedy is intended to protect that individual's right to engage in collective activities. See *Ecorse Public Schools*, 1991 MERC Lab Op 206, citing *Nicks Fine Foods*, *supra*. Prior to the unfair labor practice, Thomas was a member of the bargaining unit represented

by Charging Party and was covered by a collective bargaining agreement containing a grievance arbitration provision. But for the unilateral transfer of bargaining unit work, this employee would have still been employed as an animal aide and, thus, been able to pursue her rights under the contract. Section 16(b) of PERA, MCL 423.216(b), authorizes this Commission, upon the finding of an unfair labor practice, to issue a remedy which will effectuate the policies of the Act. We conclude that in order to make this employee whole, and thereby protect her right to engage in concerted activities, an appropriate remedy in this case is to permit the employee in question to have her grievance resolved on its merits pursuant to the grievance procedure negotiated by the parties.

Finally, both parties argue on exception that the ALJ erred when she determined that Respondent owes Charging Party a sum equivalent to the dues that ten animal tech Is, employed at a salary equivalent to pay grade 08, would have paid Charging Party from the time of Respondent's unlawful action. We agree that the ALJ's finding with respect to the calculation of dues owed was erroneous. Before the unilateral change was committed here, the parties had negotiated a collective bargaining agreement which specified that animal aides would be paid at grade 04. After the position was reclassified, the bargaining unit work which was the subject of that contract was still being performed by some or all of the animal technicians, and it is presumably still being performed by those individuals to this day. Had Respondent not unlawfully removed the work from the unit, we must assume that it would still have been performed by animal aides and compensated at pay grade 04. Therefore, we conclude that that to best effectuate the purpose of PERA, and in accordance with our above findings, Respondent shall be required to reimburse Charging Party for the loss of dues that would have been paid by those employees who have performed the bargaining unit work previously assigned to the position titled animal aid since July 16, 1991, and until that work is restored to the unit, at a salary equivalent to University pay grade 04.

ORDER

Respondent University of Michigan, its officers and agents shall:

1. Restore the duties previously performed by the position titled animal aide to the bargaining unit represented by AFSCME Council 25, Local 1583, and bargain with that labor organization over the terms and conditions of employment of employees now performing that work.

2. Upon demand, arbitrate the grievance filed by Charging Party on April 1, 1993, over the discharge of Paula Thomas on February 4, 1993.

3. Make AFSCME Council 25, Local 1583 whole for the loss of dues/fees resulting from Respondent's unlawful removal of the animal aide position from the bargaining unit by paying Charging Party a sum equivalent to the dues that those employees who have performed the work previously assigned to the position titled animal aide would have paid at a salary equivalent to University pay grade 04 from July 16, 1991, until such time as employees performing the bargaining unit work begin paying Charging Party either dues or agency fees, less any monies Respondent has already paid Charging Party toward the

satisfaction of this obligation.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Chair

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Harry W. Bishop, Member

_____
C. Barry Ott, Member

DATED: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
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MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
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APPEARANCES:

Gloria A. Hage, Office of the Vice President and General Counsel, for the Respondent

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by Michael J. Bommarito and John G. Adam, for the Charging Party

DECISION AND RECOMMENDED ORDER
ON
COMPLIANCE

On May 26, 1994, the Michigan Employment Relations Commission issued its Decision and Order in Case No. C92 A-12, finding Respondent University of Michigan guilty of violating its duty to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10). See *University of Michigan*, 1994 MERC Lab Op 391. On September 2, 1999, Charging Party asked the Commission to conduct a hearing pursuant to Commission Rule 68(3), R 423.468(3). Charging Party stated in its request that the parties had been unable to agree on what constituted compliance with the Commission's order. A formal petition for a compliance hearing was filed on September 10, 1999 and was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission.2 The parties agreed to submit stipulations of fact in lieu of a hearing in this matter. Pursuant to the parties' stipulation, the record on compliance consists of the record in Case No.C92 A-12, stipulations of fact filed by the parties on February 3, 2000, exhibits submitted jointly by the parties on or before February 29, 2000, and briefs and response briefs filed by both parties on or before April 3, 2000. Based on this record, I make the following findings of fact, conclusions of law, and recommended order.

History of the Case:

The charge in Case No.C92 A-12 was filed on January 16, 1992. Charging Party alleged that Respondent violated its duty to bargain by removing work/positions from AFSCME's unit. It alleged that in July 1991, Respondent eliminated the bargaining unit classification "animal aide," created ten new "animal technician" positions outside the bargaining unit, and assigned to these positions the work formerly performed by animal aides. The positions in question were employed in Respondent's Unit for Laboratory Animal Medicine (ULAM), and cared for animals used for medical and scientific research at the University of Michigan.

2 The petition was given a separate case number, C99 I-171.

Administrative Law Judge Bert J. Wicking issued a Decision and Recommended Order in this case on February 24, 1994. In his findings of fact, the ALJ noted that prior to July 1991 Charging Party represented two classifications in ULAM, animal aide and animal attendant. He also noted that prior to July 1991, animal care was provided by animal aides and animal technicians I and II. The ALJ found no change in the job duties or content of the positions formerly titled animal aide after Respondent reclassified them as animal technicians in July 1991. He found, however, that at the time of the reclassification Respondent began requiring animal technicians to adhere stringently to the rules (protocols) for animal care imposed by federal regulations. The ALJ found that before July 1991 Respondent had not closely monitored its employees' compliance with these rules. The ALJ concluded that these additional requirements changed the nature of the animal aide position so that it was no longer the same job. He concluded, therefore, that Respondent did not have a duty to bargain with Charging Party over the positions now titled animal tech I, and he recommended that the Commission dismiss the charge.

Charging Party filed exceptions to the Administrative Law Judge's decision and the Commission issued its Decision and Order on May 26, 1994. The Commission found that the work performed by the disputed position was basically the same both before and after July 1991. The Commission noted that bargaining unit placement is neither a mandatory subject of bargaining nor a matter of managerial prerogative, but a matter reserved to the Commission by Section 13 of PERA. The Commission held that Respondent had no right to remove bargaining unit work from the bargaining unit without Charging Party's agreement where no substantive change in job content had occurred. The Commission concluded that the ALJ had erred, and that Respondent continued to have a duty to bargain with Charging Party over the position formerly titled animal aide. The Commission issued the following remedial order:

Order

Respondent, University of Michigan, its officers and agents shall:

1. Restore the position of Animal aide [sic] to the Michigan AFSCME Council 25, Local 1583 bargaining unit.

2. Make whole all employees affected by the transfer of bargaining unit work for wages lost as a result of University of Michigan's unlawful action, including interest at the rate of five (5%) per year computed quarterly.

3. Make whole Michigan AFSCME Council 25, Local 1583 for the loss of dues/fees as a result of the transfer of work outside the bargaining unit.

4. Post the attached notice to employees in conspicuous places on its premises including all locations where notices to employees are customarily posted, for a period of thirty (30) days. Copies of said notice, after being duly signed by an authorized representative of Respondent shall remain posted for a period of thirty (30) consecutive days. A signed copy of the notice shall be returned to the Michigan Employment Relations Commission.

On June 25, 1994, Respondent appealed the Commission's Decision and Order. The Court of Appeals affirmed the Commission in an unpublished opinion issued July 12, 1996 (Docket No. 176332). On August 2, 1996, Respondent filed an application for leave to appeal to the Michigan Supreme Court. The Supreme Court denied leave to appeal on July 22, 1997. *University of Michigan v Michigan AFSCME Council 25, AFL-CIO*, 455 Mich 867 (1997).

Facts:

At the time the unfair labor practice was committed, Charging Party and Respondent were

parties to a collective bargaining agreement which expired on June 20, 1992. This agreement was replaced by successive contracts for the terms 1992-1994 and 1994-1997. At the time the stipulations of fact were submitted, Charging Party and Respondent were parties to a collective bargaining agreement with the expiration date of August 4, 2001. The description of the unit in these contracts read as follows:

> All service-maintenance employees at all facilities of the University of Michigan, excluding temporary employees, student employees, professional employees, teaching faculty, research staff, clerical employees, security officers, traffic enforcement officers, barbers, technical employees, supervisors, administrative staff and all employees in Unit A and Unit B found to be appropriate in Michigan Labor Mediation Board Case Number R65 H-25 and R65 H-28, decided September 27, 1967.

All these contracts contained grievance procedures with provisions for binding arbitration of unresolved disputes.

Prior to July 1991, ULAM had three classifications of employees responsible for direct animal care. The classification animal aide was included in the AFSCME bargaining unit and paid in accord with the AFSCME contract at pay grade 04. The classifications animal tech I & II were unrepresented positions. At all times relevant to this proceeding, the classification animal tech I has been assigned University pay grade 08, and all animal tech Is have been paid the same or more than the classification animal aide. A fourth classification, animal attendant, works in a cage washing room; animal attendants do not remove animals from their cages or otherwise handle them directly. Animal attendants are included in the AFSCME bargaining unit. They are paid at grade 03.

Between March and October 1990, several animal aides filed grievances under the AFSCME contract claiming that they were being worked outside their classification by being assigned duties previously performed by animal techs. In an answer to one of these grievances Respondent admitted that there was no clear distinction between the work assigned to animal techs and that assigned to animal aides. In this answer, dated October 15, 1990, Respondent stated:

> Work assignments are made between Technical and Union employees based on . . . levels of responsibility, technical involvement, investigator interaction, and supervision required . . . there is currently an effort to distinguish Technical and Union work responsibilities and assignments. That staff . . . will be apprised [sic] as we progress in that effort.

In the months prior to July 1991, Charging Party filed grievances claiming that the animal techs were doing AFSCME bargaining unit work and asserting that the tech positions should be recognized as part of its bargaining unit. These grievances were still pending at the time of the unfair labor practice in July 1991.

In July 1991, ten employees were employed as animal aides. They were Sandra Dilworth, Tonda Hackney, Paula Reese, Alex Richardson, Daniel Sinclair, Paula Thomas, Allen Tumath, Anna Tumath, Shelly Yakich, and Sylvia Yakich. All ten were employed on a full-time basis. When ULAM decided to abolish the classification of animal aide, Respondent offered all ten employees the opportunity to transfer to other positions within the AFSCME bargaining unit. The ten employees were also given the alternative of being reclassified as an animal tech I.

Effective July 22, 1991, Allen Tumath, Anna Tumath, Shelley Yakich, Sylvia Yackich, Sandra Dilworth, and Paula Thomas were reclassified as animal tech Is. In July or August 1991, Tonda Hackney, Paula Reese, Alex Richardson, and Daniel Sinclair transferred to other positions in the AFSCME bargaining unit. All of these position were at or above a pay grade 04.

Sylvia Yakich returned to the bargaining unit by transferring to a position outside ULAM on

or about August 11, 1992. Upon her return to the unit, she assumed a position at or above a pay grade 04. As of February 2000, she was currently, and had been continuously, employed in the AFSCME bargaining unit at or above a pay grade 04.

Effective February 4, 1993, Paula Thomas was discharged from the University. She was classified as an animal tech I at the time of her discharge. On April 1, 1993, AFSCME filed a grievance protesting her discharge. On June 23, 1993, Respondent notified Charging Party that it would not schedule a hearing on the grievance since Thomas was not a member of AFSCME's bargaining unit. In July 1998, after Respondent had exhausted its appeals of the Commission's order, Charging Party made a formal decision to take Thomas' grievance to arbitration.

Effective March 25, 1994, Alex Richardson was discharged from the University. He was a service station attendant in the AFSCME bargaining unit (pay grade 04) at the time of his discharge. Charging Party filed a grievance protesting his discharge. On or about December 14, 1994, AFSCME Council 25 informed Respondent that it had decided not to take Richardson's grievance to arbitration, and that it would be withdrawn. Charging Party never formally withdrew the grievance, but it took no further action to move the grievance forward.

Effective February 1997, Sandra Dilworth was demoted from animal tech I to animal attendant in lieu of termination. Dilworth still holds the title of animal attendant. However, sometime after her demotion Dilworth went on a medical leave of absence. As of the date of the stipulations, Dilworth was still on leave.

During the pendency of the charge and its subsequent appeals, Respondent did not attempt to implement the Commission's May 26, 1994 remedial order. When all appeals were exhausted in 1997, the parties began prolonged settlement discussions. The parties agreed that during the pendency of these discussions, Respondent would not be obligated to implement the Commission's order. However, Charging Party did not waive its right to insist on full compliance with the Commission's order if these settlement discussions failed. There was also no agreement that Respondent's liability would be tolled during the pendency of these discussions.

In the late spring of 1999, the parties agreed that further settlement discussions would not be productive. Respondent and Charging Party then began discussing the implementation of the May 26, 1994 order. In September 1999, Charging Party filed the petition for a compliance hearing. On December 30, 1999, Respondent notified Charging Party that it had or was taking the actions set out below, and that it considered these actions to constitute full compliance with the Commission's order.

On December 21, 1999, Respondent sent certified letters to Tonda Hackney, Paula Reese, Daniel Sinclair, Anna Tumath, Allen Tumath, Shelly Yakich and Sylvia Yakich offering them the position of animal aide, pay grade 04, in the AFSCME bargaining unit. Respondent did not make offers to Paula Thomas or Alex Richardson because they had been discharged from the University. An offer was not extended to Dilworth because she was on a leave of absence. All seven employees who received offers to return to the animal aide position declined the offer. Other than extending the offers as noted above, Respondent has taken no action to open or fill animal aide positions, and has notified Charging Party that it does not intend to do so.

Respondent posted signed and dated copies of a notice to employees in the ULAM department and in the Medical Campus Human Resources department. The notice posted was the notice attached to the Commission's May 26, 1994 decision and order. This notice remained posted from December 27, 1999 to January 26, 2000.

Article IV, Section 3 of the constitution for AFSCME Local 1583 establishes the dues of each member as "one hour of his/her base pay each pay period, except during the months of July and August, the dues of each member shall be one and one-half hours of his/her base pay each pay period." A pay period consists of two weeks, so that there are 26 pay periods in a year. This dues

formula has been in effect at all times relevant to this proceeding. Based on this section of the AFSCME Constitution, Respondent calculated the amount of back dues it owed to Charging Party through the end of 1999 as $12,430.14. In the parties' stipulations of fact filed on February 7, 2000, Respondent indicated that it was about to issue a check to Charging Party for this amount.

The current status of the ten employees employed as animal aides in June 1991 is as follows: Allen Tumath, Anna Tumath, and Shelly Yakich are classified as animal technicians. Tonda Hackney, Paula Reese, Daniel Sinclair and Sylvia Yakich work in the AFSCME bargaining unit at a pay grade 04 or higher. Sandra Dilworth works in the AFSCME bargaining unit at a pay grade 03, and is currently on leave of absence. Alex Richardson and Paula Thomas are no longer employed by the University.

Staffing levels for the animal aide and animal tech classifications in ULAM for the years 1991 through the present were as follows:

ULAM
# of Staff in Classification
(Note: not all staff full-time equivalent)

date	**Animal Aide**	**Animal Technician I**	**Animal Technician II**
7/91	10	11	9
7/92	0	20	8
7/93	0	24	9
7/94	0	22	11
7/95	0	23	11
7/96	0	25	9
7/97	0	25	13
7/98	0	29	10
7/99	0	33	6
1/00	0	30	5

Issue I - Restoration of the Position of Animal Aide to the Unit:

Positions of the Parties

The first issue is whether Respondent has complied with the first paragraph of the Commission's order requiring it to "restore the position of animal aide to the Michigan AFSCME Council 25, Local 1583 bargaining unit." Respondent's position is that it complied with this part of the Commission order by sending letters to Tonda Hackney, Paula Reese, Daniel Sinclair, Anna Tumath, Allen Tumath, Shelly Yakich and Sylvia Yakich offering them the position of animal aide, pay grade 04, in the AFSCME bargaining unit. According to Respondent, after these individuals declined

Respondent's offer, Respondent had no further obligation under paragraph one of the Commission's order.

Charging Party disagrees. According to Charging Party, one of the purposes of the order was to remedy harm done to the bargaining unit through the unlawful removal of positions. Therefore, Charging Party asserts, the Commission's order requires Respondent to return ten animal aide positions to the unit whether or not the individual employees affected wish to return to the job. Charging Party maintains that, according to the Commission's findings, the three former animal aides who are still employed as animal techs hold the same job that they did before Respondent unlawfully removed them from the bargaining unit. According to Charging Party, these employees - Allen Tumath, Anna Tumath, and Shelly Yakich - should be reclassified as animal aides and their positions returned to the unit. However, according to Charging Party, it would be unfair to the unit as a whole to require Respondent to do only this. Charging Party maintains that to comply with paragraph one of the Commission's order, Respondent must also post and fill six animal aide positions using the procedure set out in Charging Party's contract. According to Charging Party, anything less would deprive unit employees in pay grades 01 through 03 of their contractual right to pursue job advancement.

Charging Party argues, in addition, that Respondent must agree to arbitrate the grievance of Paula Thomas. According to Charging Party, but for the unfair labor practice Thomas would have been classified as an animal aide and covered by Charging Party's contract at the time of her discharge in 1993. According to Charging Party, if the arbitrator overturns Thomas' discharge, she should be returned to work as an animal aide. Finally, Charging Party argues that if and when Dilworth returns from her medical leave of absence, she must be offered the opportunity to return to an animal aide position.

Respondent asserts that Charging Party is asking the Commission to go beyond the scope of its remedial order by requiring Respondent to create positions and hire new employees to fill them. Respondent also argues it cannot be ordered to arbitrate a grievance over the discharge of Paula Thomas in 1993 because, as an animal tech I, she was not covered by Charging Party's contract at the time of her discharge.

Discussion and Conclusions of Law on Issue I

The Commission found that Respondent unlawfully removed a position from Charging Party's bargaining unit. In paragraph one of the Commission's May 26, 1994 order, it ordered Respondent to restore that position to the unit. I am bound by that finding and by the terms of the Commission's order. Much time has passed since the unfair labor practice. None of the employees who held the title of animal aide in June 1991 wished to accept a lateral transfer or take a pay cut in order to reassume this title in January 2000. This fact, however, is irrelevant. The order requires Respondent to return the position to the unit, not the individual employees.

Unfortunately, while the Commission's order states that Respondent is to "restore the position of animal aide," to Charging Party's bargaining unit, Respondent has not used this title since July 1991. That is, at the time the Commission decided that the content of "the position" had not changed, the record indicated that the individuals performing "the position" were classified as animal tech Is, not animal aides. Moreover, it was also clear that the animal tech classification existed prior to July 1991. I am therefore forced to determine here what position Respondent should return to the AFSCME unit under the terms of the Commission's order.

I agree with Respondent that Charging Party's demand that Respondent hire seven additional animal care employees goes beyond the scope of the Commission's May 26, 1994 order. What Charging Party now seeks is not an order to return "the position" to the unit. Rather, Charging Party wants the Commission to force Respondent to create new positions and fill them with members of its bargaining unit now working in classifications with lower pay.

In its May 26, 1994 Decision and Order, the Commission found that the job duties of the animal tech I classification after July 1991 were the same as the duties which had been performed by the animal aide classification. Contrary to the position taken by Respondent at the time, the Commission found that the bargaining unit position did not undergo any significant change in July 1991. It found that the only change was more stringent enforcement of the protocols for animal care. These protocols were, or should have been, followed by the animal aides prior to July 1991. I conclude that the Commission found that the animal aide position was not eliminated. Rather, it found that the position was in effect merged with the position animal tech I.3 The Commission also found that this position still belonged in Charging Party's bargaining unit. I find that to comply with the Commission's order, Respondent must restore the position now titled animal tech I to Charging Party's unit and bargain with Charging Party over the terms and conditions of employment of the individuals now filling the position. 4

Issue II - The Make-Whole Order:

Positions of the Parties

The second issue in this proceeding is whether Respondent is obligated to take any additional action to comply with paragraph two of the Commission's order. Paragraph two requires Respondent to "make whole all employees affected by the transfer of bargaining unit work for wages lost as a result (of Respondent's) unlawful action, including interest at the rate of five (5%) per year computed quarterly." Respondent's position is that no employee lost wages. Using pay grade 04, the pay grade of the animal aide position on July 7, 1991 as its basis for comparison, Respondent has calculated that during the periods they remained employed by Respondent, all of the former animal aides except Dilworth earned at least the amount they would have earned if they had continued to work at pay grade 04. Dilworth was an animal tech paid at pay grade 08 from July 1991 until February 1997, when she was demoted for performance reasons to animal attendant, pay grade 03. Respondent maintains that it is not obligated to pay Dilworth the difference between the amount she earned after her demotion and the amount she would have earned had she remained an animal aide at pay grade 04. Respondent also asserts that it owes no money to Alex Richardson, who worked as a service station attendant at pay grade 04 from 1991 until his discharge in 1994, or Paula Thomas, who was discharged from her animal tech pay grade 08 position in 1993.

Charging Party asserts, first, that the basis of the Commission's May 26, 1994 order was its finding that after July 1991 the animal aide and animal tech I positions were one and the same. According to Charging Party, in 1991 Respondent upgraded this position to pay grade 08. Charging Party agrees that the three employees who have been continuously employed as animal techs since July 1991 have suffered no wage loss. However, according to Charging Party, the four employees who transferred to other bargaining unit positions in 1991 - Hockney, Reese, Richardson and Sinclair - should have been allowed to remain in the bargaining unit as animal aides at pay grade 08. Therefore, these four are entitled under paragraph two of the Commission's order to receive the difference between what they actually earned and what they would have earned working at in the bargaining unit at a salary equivalent to pay grade 08. According to Charging Party, for Hockney, Reese, Sinclair, and Sylvia Yakich, the cutoff date

3 Even though the animal tech I classification existed prior to July 1991, the record indicates that there was no clear line between the duties performed by animal tech Is and those performed by animal aides. Moreover, although Charging Party's contract excludes technical employees, the Commission rejected Respondent's argument that the position was technical and for that reason should not be included in the AFSCME unit. See 1994 MERC Lab Op 391 at pg. 392, paragraph 4.

4 The record indicates that in January 2000, 30 individuals occupied this position, and that the pay grade of the position was 08.

for back pay would be January 10, 2000, the last date they could have accepted Respondent's offer to return to the position. By Charging Party's calculations, Hockney, Reese and Sinclair are each entitled to about $16,500, plus interest.5 Dilworth and Sylvia Yakich accepted Respondent's offer to become animal techs in July 1991, but later transferred to other positions within the bargaining unit. According to Charging Party, there is no evidence to suggest that these employees would have left their jobs had these jobs been included in AFSCME's bargaining unit. Therefore, according to Charging Party, Dilworth and Sylvia Yakich are entitled to back pay based on the difference between their actual wages earned and what they would have made at pay grade 08 for the periods following their transfers. According to Charging Party, Dilworth is entitled to back pay from the date of her transfer until the date she went on medical leave.

Discussion and Conclusions of Law on Issue II

I conclude that Respondent has no obligation to pay back pay to any employee under paragraph two of the Commission's order.

The Commission held that when the job title animal aide was eliminated there was no change in the content of the job. However, there is no contradiction between the Commission's finding and what is clearly disclosed by the record - Respondent's more stringent enforcement of the animal care protocols meant that the animal aides/techs had to work harder. Charging Party asserts that Richardson, Hockney, Reese, Sinclair, Dilworth and Sylvia Yakich chose not to continue to work as animal techs because Respondent unlawfully refused to recognize the position as a bargaining unit position. Whatever the reasons for their decision, the fact is that these six individuals did not perform the harder, and more highly compensated, job during the periods for which Charging Party claims they should receive back pay. Requiring Respondent to pay back pay in this case would not make the employees whole. Rather, it would put these employees in a better position than they would have been if Respondent had not committed the unfair labor practice, i.e., if it had recognized the animal tech I as a bargaining unit position.

I agree with Charging Party, however, that the Commission's order requires Respondent to arbitrate the grievance filed over Paula Thomas' 1993 discharge. Thomas was working as animal tech I at the time she was discharged. As I have found above, under the terms of the Commission's order Respondent should have recognized this position as a bargaining unit position. The record indicates that Thomas' grievance was not arbitrated because Respondent unlawfully refused to acknowledge that Thomas' position was covered by the arbitration clause of Charging Party's contract. Any back pay that Thomas might be entitled to pursuant to an arbitrator's award therefore falls into the category of "wages lost . . . as a result of (Respondent's) unlawful action."

Issue III - Dues Owed to Charging Party

Positions of the Parties

The amount owed to Charging Party under paragraph three of the order is the third issue in dispute. Under AFSCME's constitution, the dues employees pay is based on their hourly rate. Respondent calculates the sum it owes Charging Party for back dues through the end of 1999 as $12,430.14. Respondent reached this figure by calculating the dues the former animal aides who accepted jobs as animal techs would have paid, based on pay rate 04, during the periods that

5 Charging Party admits that the back pay owed to Richardson should be limited to the period between July 1991 and his discharge on March 25, 1994, unless that discharge is reversed through the grievance process. According to the Charging Party, in December 1994 it told Respondent that it might withdraw Richardson's grievance. However, this was never actually done. Therefore, according to Charging Party, the grievance could still be arbitrated.

each of the employees was classified as an animal tech, plus interest at the rate of 5% per year. Charging Party, however, claims that Respondent owes it the dues ten animal aides would have paid had they been in the bargaining unit, and earning the equivalent of pay grade 08, beginning on July 16, 1991. Charging Party calculates the back dues owed it through January 31, 2000 as $28,309.80. If the Commission determines that the dues owed should be calculated based on pay grade 04, according to Charging Party the corresponding figure would be $27,219.70. Charging Party did not include interest in its back dues calculation, since paragraph three of the Commission's order did not specifically provide for interest. However, Charging Party argues that the inclusion of such interest is logical, since Charging Party has lost interest income due to the loss of dues. Interest at 5% per annum would add about $5,300 to Charging Party's back dues total of $28,309.80, or about $4,800 to a total of $27,219.70.

Discussion and Conclusions of Law on Issue III

Charging Party claims that the back dues owed to it under paragraph three of the Commission's order is the sum that ten animal aides, employed at pay grade 08, would have paid in dues after July 1991. Respondent claims under paragraph three it owes Charging Party the amount that the three former animal aides who became and remain animal techs would have paid in dues if they had worked as animal aides, pay grade 04, from July 1991 until January 2000. Respondent also admits that it owes Charging Party the amount that the three former animal aides who became animal techs, but left or were discharged from that position, would have paid in dues if they had been classified as animal aides, pay grade 04, during the periods they actually worked as animal techs.

The Commission ordered Respondent to make Charging Party whole for the dues it lost as a result of the unlawful removal of the animal aide position from the unit. After the position was reclassified, it was paid at grade 08. As I have indicated above, I interpret the Commission's order as requiring Respondent, after July 1991, to recognize and bargain with Charging Party for the position now titled animal tech I. I see no basis in the Commission's order for basing the calculation of back dues owed on pay grade 04. I also see no basis for limiting Respondent's obligation to the dues which would have been paid by the six animal techs who were formerly called animal aides. As I interpret the Commission's order, Respondent should owe Charging Party the dues all animal tech Is would have paid from the date Respondent unlawfully refused to recognize Charging Party as their bargaining agent in July 1991 to the date on which animal tech Is begin paying Charging Party dues or agency fees. I will not, however, recommend that the Commission order Respondent to pay Charging Party more than the amount Charging Party has sought in this proceeding. Moreover, since the order does not specifically require Respondent to pay interest on the back dues, I do not believe that interest should be part of the award. I find, therefore. that Respondent owes Charging Party a sum equivalent to the dues that ten animal techs Is, employed at a salary equivalent to University pay grade 08, would have paid Charging Party from July 16, 1991 until such time as employees in the animal tech I classification begin paying Charging Party either dues or agency fees.

RECOMMENDED ORDER ON COMPLIANCE

In accord with the findings of fact and discussion and conclusions set forth above, and under the authority of Section 16 of PERA and Commission Rule 68(3), R 423.468(3), I recommend that the Commission issue the following order requiring Respondent to take the additional action as set forth below to comply with the Commission's order in Case No.C92 A-12, issued May 26 1994:

Respondent University of Michigan, its officers and agents shall:

1. Restore the position formerly titled animal aide, now animal tech I, to the bargaining unit represented by AFSCME Council 25, Local 1583, and bargain with

that labor organization over the terms and conditions of employment of employees now in that classification.

2. Upon demand, arbitrate the grievance filed by Charging Party on April 1, 1993 over the discharge of Paula Thomas on February 4, 1993.

3. Make AFSCME Council 25, Local 1583 whole for the loss of dues/fees resulting from Respondent's unlawful removal of the animal aide/animal tech I position from the bargaining unit by paying Charging Party a sum equivalent to the dues that ten animal tech Is, employed at a salary equivalent to University pay grade 08, would have paid Charging Party from July 16, 1991 until such time as employees in the animal tech I classification begin paying Charging Party either dues or agency fees, less any monies Respondent has already paid Charging Party toward the satisfaction of this obligation.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: