STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (HEALTH DEPT),
Public Employer-Respondent,

Case No. C02 D-084

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 25 AND
LOCAL 457,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Shannon A. Holmes, Esq., Assistant Corporation Counsel, for the Respondent

Robert A. Donald, Esq., for the Charging Party

DECISION AND ORDER

On February 6, 2003, 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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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APPEARANCES:

Shannon A. Holmes, Esq., Assistant Corporation Counsel, for the Respondent

Robert A. Donald, 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 and 423.216, this case was heard at Detroit, Michigan on August 19, 2002, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Respondent on October 1, 2002,[1] I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The American Federation of State, County and Municipal Employees (AFSCME), Council 25 and Local 457, filed this charge against the City of Detroit on April 9, 2002. Charging Party represents employees of the Respondent, including public health sanitarians employed in Respondent's health

[1] Although Charging Party's counsel indicated at the hearing that he intended to file a brief, I did not receive a brief from Charging Party.

department. Charging Party alleges that on or about January 1, 2002, Respondent violated its duty to bargain under Section 10(1)(e) of PERA by unilaterally modifying the sanitarians' work schedule to avoid paying them overtime when they are assigned to work on weekends. Charging Party also alleges that Respondent unlawfully ignored Charging Party's subsequent demands to bargain over this change.

Facts:

Public health sanitarians conduct routine inspections of restaurants, schools, bars, and other facilities within the City of Detroit where food is served to the public. The sanitarians inspect the level of sanitation, food storage methods, and other aspects of the operation relevant to public health. The sanitarians' regular work hours are Monday through Friday, 8:00 a.m. to 4:30 p.m. Sanitarians may also be assigned to work on weekends. This occurs regularly during the summer months, when many weekend outdoor festivals are scheduled. Prior to November 2001, sanitarians worked weekends after working their regular hours, and were paid overtime for the weekend work.

In November 2001, Respondent informed the sanitarians at their monthly meeting that the sanitarian assigned to work Noel Night, a weekend festival held in December, would receive two days off during the preceding week instead of overtime. Local 457 President Theresa McCurtis filed a grievance on behalf of the sanitarian involved.

Article 2(B) of the parties' current collective bargaining agreement states:

> The City shall have the right to determine reasonable schedules of work and to establish the method and processes by which such work is performed, provided they do not conflict with the terms of this Agreement. The Union shall have the right to grieve on the interpretation and application of these provisions.

Article 21 reads:

> Wages, hours and conditions of employment and current proper practices which are beneficial to the employees at the execution of this Agreement shall, except and provided and improved herein, be maintained during the term of this Agreement. Changes must be mutually agreed upon by the City and the Union.

In January 2002, the health department was told by the mayor's office to reduce its overtime costs. Sometime during that month, Respondent notified McCurtis that in the future, sanitarians would not be paid overtime for weekend work, but would instead be scheduled off on the Monday and Tuesday of the preceding week. McCurtis requested a special conference under the contract to discuss the change.

McCurtis also began filing grievances each time a sanitarian was assigned to a weekend event.2

The special conference was held on February 7, 2002. McCurtis and Council 25 Staff Representative Jimmy Hearns were present, as was Duane Yuille, a human resources manager for the health department. Charging Party took the position that if the sanitarians worked the weekend, they should receive overtime pay. It argued that the change violated several provisions of the contract, including Article 21. It also stated that Respondent had an obligation to bargain over the change, and that until the parties reached impasse or agreement, Respondent should continue to pay the sanitarians overtime for weekend work. Respondent's position was that it had a right under the contract to alter the work schedule, and that it would not pay overtime. The parties did not reach agreement.

On February 27, Hearns sent Yuille a letter demanding to bargain over "the change in hours and your sudden change in the payment of overtime." On March 15, Hearns sent Yuille a second letter repeating his request to bargain. Respondent did not contact Charging Party to arrange for bargaining sessions. However, between March and June, the parties restated their respective positions on the issue at several meetings held to discuss the grievances McCurtis had filed. In August 2002, after Charging Party filed the instant charge, Respondent's Labor Relations Director sent Hearns a letter chastising him for directing his demand to Yuille instead of to Respondent's Labor Relations Division. The Labor Relations Director offered to bargain with Charging Party over the "impact of the Health Department's decision to institute the reasonable change of work schedule."

Discussion and Conclusions of Law:

Under PERA, an employer commits an unfair labor practice if, before bargaining, it unilateral alters or modifies a term or conditions of employment, unless the employer has fulfilled its statutory obligation or has been freed from it. An employer may defend against a charge that it has unilaterally altered working conditions by arguing that it has fulfilled its duty to bargain, or that the union has waived its right to demand bargaining. An employer fulfills its duty to bargain by negotiating for a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining. In that case, the matter is "covered by" the agreement. Alternately, the employer may be freed from its duty to bargain if the union has waived its rights to demand bargaining. A waiver of the right to bargain must be clear and unmistakable. *Port Huron EA v Port Huron SD,* 452 Mich 309, 317-320 (1996).

The evidence establishes that in January 2002 Respondent unilaterally altered the established sanitarians' established work schedule when it announced that in the future sanitarians would be scheduled off on the Monday and Tuesday of the preceding week whenever they were assigned to work a weekend. I conclude, however, that in Article 2(B) Charging Party clearly and unmistakably waived its right to bargain

2 Some of these grievances were settled when Respondent agreed to pay the sanitarian overtime for some weekend hours worked. For example, Respondent paid some sanitarians who were required to work six days in the same "payroll service week," as defined in Article 26 of the contract.

over changes in the way work is scheduled. Article 2 (B) gives Respondent the right to make such changes without bargaining, although it imposes two important restrictions. First, the new schedules must be "reasonable." Secondly, the schedules must not conflict with any other provision of the contract. Article 2 (B) explicitly gives Charging Party the right to grieve both the issues. Under Article 2 (B), Respondent has no duty to bargain with Charging Party. However, if the new schedules are unreasonable, or conflict with another term of the agreement, then Respondent has violated the contract.

The Commission has held that it will not find a violation of the duty to bargain based on an alleged contract breach when the parties have a bona fide dispute over the interpretation of their contract. *Village of Romeo*, 2000 MERC Lab Op 296; *Central Michigan Univ.*, 1997 MERC Lab Op 501; *City of Detroit (Wastewater Treatment Plant)*, 1993 MERC Lab Op 716. Such disputes should be resolved through the grievance procedure. *Central Michigan Univ.*, 1995 MERC Lab Op 112. Here, Charging Party asserts that the change in the sanitarians' work schedule was unreasonable. It also maintains that the change violated Article XXI and other provisions of the parties' current agreement. I conclude that the parties' have a bona fide dispute over the interpretation of their contract, including the meaning of Article XXI. This dispute does not present an unfair labor practice issue and should be resolved through the contractual procedure for resolving such disputes.

As discussed, above, I conclude that Respondent had no duty to bargain over the decision to change the sanitarians' work schedule. It is unclear whether Charging Party is also alleging that Respondent violated its duty to bargain over the impact of the schedule change. However, while Charging Party made several demands to bargain over the change itself, I find no indication that it ever requested that Respondent discuss the impact of the change.

In accord with the findings of fact, discussion, and conclusions of law set forth above, I conclude that Respondent did not violate its duty to bargain under Section 10(1)(e) of PERA. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____