STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C02 G-169

-and-

DETROIT ASSOCIATION OF EDUCATIONAL OFFICE EMPLOYEES
Labor Organization-Charging Party.
_____/

APPEARANCES:

Gordon Anderson, Esq., for the Respondent; Eric Cholack, Esq., Roumell, Lange & Cholack, P.L.C., on exceptions

Mark H. Cousens, Esq., and John E. Eaton, Esq., for the Charging Party

DECISION AND ORDER REMANDING TO ADMINISTRATIVE LAW JUDGE

On April 22, 2004, Administrative Law Judge (ALJ) Julia Stern issued her Decision and Recommended Order in the above matter, finding that Respondent had not violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), as alleged in the charges, and recommending that the charges be dismissed. The ALJ found that the Employer had not refused to bargain with Charging Party over the disputed position of support services clerk because it was a substantially new position and the Employer had appropriately placed it in the bargaining unit represented by the American Federation of State, County and Municipal Employees, Local 345 (AFSCME). The Decision and Recommended Order of the ALJ was served upon the parties in accordance with Section 16 of PERA. On June 16, 2004, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order. On July 9, 2004, Respondent filed a brief in support of the ALJ's Decision and Recommended Order.

In part, the exceptions allege that the ALJ erred in finding that the position of support services clerk was a new position with significantly different job duties, and in failing to take into consideration the historic placement of the work in Charging Party's bargaining unit. Charging Party also asserts that the ALJ had no authority to make a unit placement decision in the context of an unfair labor practice proceeding.

Upon review of the record presently before us, it appears that this dispute is essentially one of unit placement. In the past, we have permitted unit placement issues to be addressed in unfair labor practice proceedings and we find it appropriate to resolve the unit placement of the support services clerk position in the case before us. See *Charlotte Sch Dist*, 1996 MERC Lab Op 193, 198-99; *Waterford Twp*, 1995 MERC Lab Op 484, 487. However, it is evident that AFSCME Local 345 has an interest in the unit placement of the support services clerk and was not provided with notice of these proceedings. Because we find that before a final decision is rendered in this matter AFSCME must be given notice and an opportunity to be heard, we remand this matter to the ALJ for further proceedings in accordance with the Order below.

ORDER

We hereby remand this matter to the ALJ to notify the American Federation of State, County and Municipal Employees, Local 345 of these proceedings and to give AFSCME twenty days from the date of the notice to indicate whether it wishes to supplement the record in this matter. If AFSCME indicates a desire to do so, the ALJ shall schedule this matter for a hearing forthwith and, upon the conclusion of said hearing, shall expeditiously issue a supplemental recommended order. Following service of the supplemental order on the parties, the provisions of R423.176 through R423.179 of the Commission's Rules and Regulations shall be applicable. If AFSCME does not choose to supplement the record or file a brief, we shall issue a decision based on the present record.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated: _____

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APPEARANCES:

Gordon Anderson, Esq., for the Respondent

Mark H. Cousens, Esq., and John E. Eaton, 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 April 16, 2003, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on June 5, 2003, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Background:

The Detroit Association of Educational Office Employees filed this charge against the Detroit Public Schools on July 22, 2002. Charging Party represents a bargaining unit of Respondent's clerical and other office employees, including messengers, purchasing agents, equipment technicians, and storekeepers. The charge, as filed, alleged that Respondent unilaterally implemented changes in job titles, working conditions and pay rates of certain bargaining unit employees and subsequently refused to meet with Charging Party to negotiate these issues. The proposed changes were part of Respondent's plan to reorganize its Finance Division and its Division of Contracting and Procurement. After the charge was filed, Respondent agreed to bargain with Charging Party. It also agreed to refrain from implementing any of its proposed changes until the parties reached agreement, or the Commission ruled on the

remaining issues. The parties subsequently resolved all issues except Respondent's proposal to abolish three unit positions, create a new position titled support services clerk, and place this position in a bargaining unit represented by AFSCME Local 345.

At the hearing and in its brief, Charging Party makes two allegations. It alleges, first, that Respondent violated its duty to bargain in good faith by announcing changes in job duties, job titles and pay rates without giving Charging Party adequate notice and an opportunity to demand bargaining. Charging Party also alleges that Respondent unlawfully bargained to impasse over a nonmandatory subject of bargaining, i.e. unit placement, by insisting on placing the support services position in the AFSCME unit.

Facts:

Charging Party represents nonsupervisory clerical and office employees at Respondent's central distribution center (CDC), which is part of Respondent's Division of Contracting and Procurement. The CDC contains a warehouse that services Respondent's many facilities, centralized mail operations, and a print shop. AFSCME Local 345 represents certain other nonsupervisory employees at the CDC, including stores clerks, material handlers and custodians. There are two bargaining units of supervisors at the CDC. Some of the supervisors who supervise members of the AFSCME unit at the CDC also supervise Charging Party's members.

In April 2002, Respondent informed members of Charging Party's bargaining unit in its Finance Division and its Division of Contracting and Procurement that it intended to eliminate certain job titles and create new generic positions each encompassing several existing positions.[1] Respondent told some employees that their retitled positions would be moved to other bargaining units. After members of Charging Party's unit informed it of the proposed changes, Charging Party made a demand to bargain. Respondent agreed to meet, and the parties held their first bargaining session on August 19, 2002. As set out above, the parties resolved most of their differences. However, the parties were unable to reach agreement on the creation or unit placement of the support services clerk position. At some point between April 2002 and the date of the hearing, Respondent indicated to Charging Party that it would not continue to discuss this issue. Respondent, however, agreed to refrain from implementing the new position pending the Commission's decision in this matter.

The proposed new position, support services clerk, combines the duties of the stores clerk position in the AFSCME Local 345 unit with the duties of three positions in Charging Party's unit. The positions in Charging Party's unit are varitype machine operator, duplicating device operator, and storekeeper. The varitype machine operators and duplicating device operators work in the print shop. According to the positions' job descriptions, the varitype machine operator manually sets type for large printing machines and performs other print shop tasks, while the duplicating device operator prints materials on large mimeograph style machines and operates photocopiers. However, the actual duties of these positions have changed over time. Currently, the varitype machine operators and the duplicating device operators interchangeably operate the

[1] Charging Party President Rudy Newbold testified that Respondent made this announcement in April 2001. However, Newbold's testimony conflicts with statements in the charge, as well as with other evidence in the record.

print shop's equipment, including cutting machines, two large photocopiers, and three large duplicating machines that use the ink and stencil method of reproduction.

Three storekeepers represented by Charging Party work in the warehouse area of the CDC. These storekeepers work alongside stores clerks who are in the AFSCME unit. Storekeepers receive materials and do inventory counts. They notify their supervisors when materials come in. Storekeepers receive order lists from their supervisors, and select and ship out equipment, books and supplies to locations within the district. At one time, the storekeepers mostly maintained records and directed the work of the stores clerks, who mostly performed the physical labor of shifting stock. However, the duties of the storekeepers and stores clerks have altered over time. Both storekeepers and stores clerks now both perform clerical work and physically move stock, including operating lifts and other material handling machinery. The storekeepers in the warehouse continue to perform the more complicated record keeping tasks. In addition to the storekeepers in the warehouse area, there are two storekeepers assigned to the mailroom at the CDC. Together with stores clerks, the storekeepers sort mail and operate postal meters and other equipment. As in the warehouse, storekeepers typically perform tasks requiring more experience. Both stores clerks and storekeepers are required to have a high school diploma or GED. Storekeepers must also have two years of experience as a stores clerk.

According to Respondent's proposed job description for the new position of support services clerk, its purpose is "to provide labor for the operations of the CDC, the printing and publications department, and the mail services department." Under Respondent's proposal, the employees in the new position will continue to do the same work they have been doing on a day-to-day basis in the warehouse, the print shop and the mailroom. However, all support services clerks will be cross-trained to perform the duties of all four abolished positions. Respondent will then be able to move employees from job to job as needed, e.g. to cover absences, or to work overtime when the workload in one area is unusually heavy. As noted above, Respondent intends to place the support services clerk in the AFSCME unit.

Discussion and Conclusions of Law:

Bargaining unit placement is not a mandatory subject of bargaining under PERA, but a matter ultimately reserved to the Commission under Section 13 of that Act. *Local 128, AFSCME v City of Ishpeming,* 155 Mich App 501, 515 (1986); *Detroit Fire Fighters Assoc, Local 344 IAFF v City of Detroit,* 96 Mich App 542 (1980); *City of Warren*¸ 1994 MERC Lab Op 1019. Therefore, an employer cannot lawfully alter the unit placement of a position without the union's agreement by bargaining the issue to impasse. *Michigan State University,* 1993 MERC Lab Op 345.

The Commission, however, generally defers to the agreement of the parties concerning unit placement, unless the agreed-to unit is contrary to statute. *Michigan State University,* 1984 MERC Lab Op 807. The Commission does not remove a position from its established bargaining unit unless it is demonstrated that a community of interest between the position and this unit no longer exists. *Henry Ford Community College,* 1996 MERC Lab Op 374, 379; *City of Kalamazoo,* 1983 MERC Lab Op 249. An employer commits an unfair labor practice if it simply changes the title of a position and transfers it from one bargaining unit to another without a

significant change in job duties or other conditions of employment. *Northern Michigan Univ.,* 1989 MERC Lab Op 189. See also *Livonia P.S.,* 1996 MERC Lab Op 479 (employer not justified in removing two secretarial positions from their bargaining unit when they continued to perform essentially the same job duties, even though their supervisors' job responsibilities had been altered during a reorganization.)

If the duties of a position have changed substantially so that the position is effectively new, and the placement of the new position is in dispute, the Commission resolves the dispute based on traditional community of interest factors. These include similarities in duties, skills, and working conditions; similarities in wages and employee benefits; amount of interchange or transfer between groups of employees; promotional ladders; and common supervision. See, e.g., *Covert Public Schools,* 1997 MERC Lab Op 594; *Grand Rapids Public Schools,* 1997 MERC Lab Op 98. If the Commission determines that a new or substantially altered position may share a community of interest with more than one collective bargaining unit, and the employer has placed the position in one of these units, the Commission generally defers to the employer's unit placement decision. *City of Lansing,* 2000 MERC Lab Op 380; *Lakeview Schools,* 1998 MERC Lab Op 424.

The Commission has held that an employer is not justified in changing the unit placement of a position based on changes in job duties occurring ten years before the change, even though the employer was allegedly attempting to "rationalize" its classification system. *City of Detroit (Dept of Health, Herman Kiefer Complex),* 1986 MERC Lab Op 485. In *Ingham County,* 1993 MERC Lab Op 808, the Commission held that an employer could not lawfully change the unit placement of a position based on changes in job duties that occurred gradually over a period of years. The Commission noted that despite the changes in duties, the parties continued to include the position in its original bargaining unit, and that the position had not undergone any significant changes immediately before the employer removed it from this unit.

According to Charging Party, Respondent cannot lawfully move the varitype machine operator, duplicating device operator, and storekeeper positions to another unit without Charging Party's agreement, since Respondent does not propose to make any substantial changes in the job duties of these positions.

I find the support services clerk to be a new position with significantly different job duties than the positions which Respondent proposes to abolish. The new support services clerk position includes the duties currently performed by the varitype machine operators, duplicating device operators, storekeepers, and stores clerks, even though the support services clerks will not be expected to perform all these duties on a regular basis. I conclude that, unlike the employer in *Henry Ford Community College, supra.* Respondent is not merely proposing to expand the education and/or skill requirements of an existing position. In this case, the employees will new job duties as well as a new job title.

I also conclude that the support services clerk shares a community of interest with the bargaining unit represented by AFSCME Local 325. Like positions in the AFSCME unit, the support services position requires only basic education. The skills required for these positions, while different, are of a similar level. The support services clerk is to work in close proximity to other AFSCME Local 325 members in the CDC, and share common supervision with some

members of that unit. Based on these factors, I conclude that the Commission should defer to Respondent's decision to place the support services position in the AFSCME unit. I find no merit to Charging Party's argument that the support services position must be included in its unit because the majority of the work to be performed by that position has historically been performed by its members.

For reasons set forth above, I conclude that Respondent did not have a duty to bargain with Charging Party over the new support services clerk position at the CDC. Since I find that Respondent was not required to bargain with Charging Party over its decision to place this new position in the AFSCME unit, I find Charging Party's claim that Respondent unlawfully insisted to impasse on this issue to be without merit. Therefore, I recommend that the Commission dismiss this aspect of the charge.

Charging Party also argues that the Commission should find that Respondent violated its duty to bargain by failing to give Charging Party notice of its intention to reorganize bargaining unit positions. The duty to bargain in good faith requires the employer to give the union notice and an opportunity to demand bargaining over changes in mandatory subjects of bargaining. See, e.g. *City of Detroit*, 1992 MERC Lab Op 474. In April 2002, Respondent, without giving Charging Party notice, announced not only its intention to create the Support Services Clerk position, but also its intention to change the wages and job duties of existing unit positions. However, after Charging Party made a demand to bargain, Respondent agreed to bargain and delayed implementing any of the proposed changes pending satisfaction of its obligations under the Act. I conclude that Respondent did not violate its duty to give Charging Party adequate notice and an opportunity to bargain over proposed changes in mandatory subjects of bargaining. I recommend that the Commission also dismiss this aspect of the charge.

In accord with the findings of fact and discussion and conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____