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

In the Matter of:

LAPEER COUNTY and LAPEER COUNTY TREASURER,
Public Employers-Respondents,

-and-

Case No. C03 C-065

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_______________________________________________/

APPEARANCES:

Howard L. Shifman, Esq., for the Respondents

Rudell & O'Neill, P.C., by Wayne Rudell, Esq., for the Charging Party

## DECISION AND ORDER

On March 25, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter, finding that Respondent Lapeer County (the Employer) did not refuse to bargain in violation of Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e) when it removed a position from Charging Party's bargaining unit. The ALJ found that Charging Party Teamsters Local 214 agreed to the removal of the chief deputy treasurer position from its unit pursuant to language in the 2001-2002 collective bargaining agreement. The ALJ also concluded that the unfair labor practice charge had been timely filed, reasoning that the statute of limitations in Section 16(a) runs from the Union's last demand for recognition, because each refusal to recognize the Union as bargaining representative for the position in dispute is a separate unfair labor practice.

The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order on May 10, 2005. On July 15, 2005, Respondent filed an answer to the exceptions and cross-exceptions.

In its exceptions, Charging Party argues that the ALJ erred in finding that the Employer's removal of the position from the bargaining unit was permitted by the collective bargaining agreement and that she should have found that the Employer violated PERA by failing to satisfy its obligations to bargain in good faith. In response, the Employer asserts that the matter was

already bargained and covered by contract and that it has already been resolved in an arbitration proceeding. The Employer also maintains in its cross exceptions that the ALJ should have found the charge to be untimely, since the Union was aware of the Employer's action in August 2002 when the grievance was filed; accordingly, the Commission has no jurisdiction in this matter.

Discussion:

The six-month statute of limitations is jurisdictional and cannot be waived. *Police Officers Labor Council*, *Local 355*, 2002 MERC Lab Op 145, 146; *Walkerville Rural Communities Schs*, 1994 MERC Lab Op 582; *Shiawasee Co Rd Comm*, 1978 MERC Lab Op 1182. In cases involving an alleged unilateral change in working conditions or the removal of bargaining unit work, we have found that the statutory period begins to run when an employer gives notice of the change to the bargaining agent. We have specifically rejected the theory that the removal of bargaining unit work constitutes a continuing violation. *Reese Pub Schs*, 1989 MERC Lab Op 476; *Livonia Pub Schs*, 1983 MERC Lab Op 992; *Cass Co Sheriff*, 1993 MERC Lab Op 455 (no exceptions). Filing a grievance does not toll the statute. *Wayne Co*, 1993 MERC Lab Op 560; *Ann Arbor Pub Schs*, 1992 MERC Lab Op 257.

We disagree with the ALJ's finding that a continuing violation theory applies to the Employer's removal of the chief deputy treasurer from the bargaining unit. The Union was on notice of the Employer's action in July of 2002, or at the very latest in August of 2002, when it filed a grievance. The unfair labor practice charge was not filed until March 21, 2003, approximately seven months later. We find that the charge was not timely filed and must be dismissed on that basis.

**ORDER**

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Nino Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _______________

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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 March 26, 2004, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including evidence submitted at the hearing and on May 3, 2004, and post-hearing briefs filed by the parties on or before November 22, 2004, I make the following findings of fact, conclusions of law, and recommended order.[1]

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this charge against Lapeer County on March 21, 2003. Charging Party represents a bargaining unit of nonsupervisory county employees. This unit has historically included positions, including deputy treasurers, in the office of the Lapeer County

[1] The parties agreed before the hearing to the admission of forty-three joint exhibits. At the hearing they discovered that neither had a copy of two of the joint exhibits. I agreed to the admission of these documents on the condition that the parties provide me with copies after the hearing. Neither did so. Therefore, these exhibits – a letter from Charging Party's counsel to Arbitrator Ruth Kahn sent sometime between November 20 and December 19, 2003, and a copy of Charging Party's brief to the Commission in Case No. UC95 F-33 – are not part of the record. On May 4, 2004, Respondent sought to reopen the record to admit Kahn's supplemental award, issued April 23, 2004. On May 5, I wrote to Charging Party indicating that unless Charging Party raised an objection before May 18, 2004, I would admit the new evidence. Charging Party did not respond. The supplemental award is therefore part of the record.

Treasurer. Respondent Lapeer County and Respondent Lapeer County Treasurer are co-employers of these employees. According to the charge, on July 25, 2002, Respondents replaced a bargaining unit position, deputy treasurer, with a position titled "chief deputy treasurer." Some time thereafter, Charging Party learned that Respondents did not recognize the chief deputy as part of Charging Party's bargaining unit. Charging Party asserts that there are no significant differences between the job duties of the deputy treasurer and the so-called chief deputy position. It alleges that Respondents violated Section 10(1) (e) of PERA by removing a position from its unit without its agreement, and by subsequently refusing to bargain over the terms and conditions of employment of that position.

Facts:

Deputy and Chief Deputy Treasurer Positions

Since at least 1988, the Lapeer County Treasurer's office has consisted of the elected treasurer, three full-time clerical positions in Charging Party's bargaining unit, and a fourth position excluded from this unit as an irregular part-time position. The unit positions have had a variety of different job titles over the years, including chief deputy treasurer.

On June 6, 1995, Respondent Lapeer County filed a unit clarification petition (Case No. UC95 F-33) seeking to remove the position of deputy treasurer from Charging Party's bargaining unit on the grounds that it was supervisory.[2] At that time there was no position titled chief deputy. The Commission dismissed the petition, finding insufficient evidence that the deputy treasurer exercised effective ongoing daily supervisory authority over unit employees. The Commission noted that the fact that the deputy treasurer substituted for the treasurer when the treasurer was not in the office was not in itself sufficient to make the position a supervisor. *Lapeer Co,* 1997 MERC Lab Op 149.

In mid-2000, a contractor hired to conduct a comprehensive job study of Lapeer County positions presented the County with its report. Shortly thereafter, the Lapeer County Board of Commissioners adopted new job descriptions for the employees in the treasurer's office. One employee retained the title deputy treasurer, and the other two were given the title account clerk-treasurer. All three positions continued to be part of Charging Party's unit.

In 1999, the legislature changed the process by which counties collect delinquent property taxes. Lapeer County opted to handle the entire process itself under the new statute. As a result of this choice and the new legislation, sometime in 2000 the Lapeer County Treasurer acquired new responsibilities which required her to spend much more time out of the office. It is not clear from the record, but the deputy treasurer may also have acquired new responsibilities around this time.

Sometime in early 2002, the deputy treasurer retired. On July 25, 2002, the Lapeer County Board of Commissioners approved two new job descriptions. One was a revised description for the position of account clerk-treasurer. The other was a job description for "chief deputy county treasurer." The Board did not adopt a job description for a "deputy county

[2] Under the law at this time, the treasurer was not an employer of the deputy treasurers.

treasurer," and this position was effectively abolished. Sometime between July 25 and August 23, Charging Party learned that Respondents did not recognize the chief deputy county treasurer position as part of its unit.[3] Respondents subsequently filled the chief deputy position with one of the employees who had previously been an account clerk-treasurer.

As discussed more fully below, on August 23, 2002, Charging Party filed a grievance protesting these changes. According to the uncontradicted testimony of Charging Party's business representative, Les Barrett, during meetings on this grievance Charging Party asked Respondents to "agree to negotiate what they were doing," but Respondents refused. According to Barrett, Charging Party's last demand to bargain was made at the third step grievance meeting held sometime between mid-October and November 8, 2002.

Neither party presented evidence to establish the actual job duties or responsibilities of the deputy treasurer on July 25, 2002, or the actual job duties or responsibilities of the chief deputy treasurer after that date. Charging Party asserts that the duties of the deputy treasure/chief deputy did not change significantly in July 2002. In an arbitration brief admitted as a joint exhibit, Respondents' counsel stated that the July 2002 job description and new title for the deputy/chief deputy position reflected duties that the position was already performing and authority that it already possessed.

A comparison of the job description for the chief deputy treasurer and the job description for the deputy treasurer adopted in 2000 indicates that the bulk of the duties are the same. The language setting out the positions' general supervisory responsibilities was changed as follows:

> *Deputy Treasurer*:
>
> Assists the County treasurer with staffing decisions including interviewing applicants for employment, employee evaluations, and recommending disciplinary action or termination. Assists in training staff, makes job assignments, intercedes with difficult customers, and assists with operational or procedural inquiries.
>
> *Chief Deputy Treasurer*:
>
> Assists the County treasurer with staffing decisions including interviewing applicants for employment, employee evaluations, and recommending disciplinary action or termination. Supervises training of staff, makes job assignments, manages employee vacation schedules, has authority to schedule part-time employee to work additional hours for back-up as needed, intercedes with difficult customers, and assists with operational or procedural inquiries.

In addition, where the deputy treasurer's job description states that it "assists with" or "oversees," certain duties, the chief deputy's job description uses the phrase "assigns employees

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[3] Charging Party asserts that it did not learn of this fact until sometime in October or early November 2002. However, on August 23, 2002 Charging Party filed a grievance over the changes in job classifications that asserted that bargaining unit duties had been improperly removed from its unit.

to assist with" or "supervises." While the job description for the deputy treasurer required that position to perform all the duties of the account clerk-treasurer, the chief deputy's job description states it must be "able to perform all of the duties of an account clerk-treasurer as needed for supervision and back-up." The July 2002 job descriptions also transferred responsibility for handling computer problems within the office and keeping track of active bankruptcy cases from the account clerk to the chief deputy treasurer. The chief deputy's job description lists one entirely new duty not included on either the account clerk's or deputy treasurer's job descriptions - assisting the treasurer with the annual auction of foreclosed properties.

The Collective Bargaining Agreement, Grievance, and Arbitration Decision

Until 2001, the provision entitled "Union Rights" in the parties' collective bargaining agreements read as follows:

> Teamsters Local 214 is certified under Article II of the collective bargaining agreement and the County agrees that no classifications and/or work listed under the present certification will be removed from the bargaining unit or re-assigned to non-bargaining unit employees.

During negotiations for what became the parties' 2001-2002 collective bargaining agreement, Respondents proposed to delete the above provision. The parties eventually agreed to modify the language as follows:

> The Employer agrees that no classification and/or work listed under the present certification will be removed from the bargaining unit or reassigned to non-bargaining unit employees by the County if it will cause a layoff or a reduction in pay for a bargaining unit member. This will not include Statutory or Court mandated changes.

On August 23, 2002, after Respondents adopted the new job descriptions for the treasurer's office, Charging Party filed a grievance that read:

> Teamsters Local 214 objects to Motion 321-02 (change of job descriptions) which was approved by the Lapeer County Board of Commissioners in their minutes of Meeting dated 7-25-02. The County of Lapeer and the Lapeer County Treasurer obstrusively [sic] violated our written contract.
>
> Remedy Requested: Cease and desist violating our written contract. Rescind Motion 321-02. Bargaining unit duties are not to be removed from the bargaining unit, nor are they to be performed by supervisory positions.

The grievance cited the "Union Rights" provision and a provision requiring Respondents to give Charging Party 30 days' notice before altering or modifying classifications covered by the contract.

Respondents denied the grievance. Among the reasons they gave were (1) their actions were consistent with the "Union Rights" provision; (2) the chief deputy was a supervisory position; and (3) the grievance procedure was not the proper forum to resolve a dispute over supervisory status.

Ruth Kahn was selected by the parties to arbitrate the grievance. At the arbitration hearing, Respondents argued that the dispute between the parties was really a unit clarification dispute, that Charging Party should have filed a petition with the Commission instead of filing a grievance, and that the arbitrator thus lacked jurisdiction. Charging Party argued that the arbitrator needed to determine whether the chief deputy was a supervisor in order to fashion appropriate relief.

On December 19, 2003, Arbitrator Kahn issued her award. Kahn noted that her jurisdiction was limited to determining the meaning or application of the contract. She stated that to the extent that PERA might be determinative of the issues in dispute, including whether the chief deputy treasurer was a supervisor under the Act, the parties needed to present their dispute in another forum. Addressing the issues before her, Kahn held that Respondents violated their contractual obligation to provide Charging Party with notice before removing duties from the deputy treasurer position. She found no other contract violation. With respect to the "Union Rights" provision, Kahn expressed sympathy for Charging Party's argument that the contract's protections would be illusory if that provision were read to allow Respondents the unilateral right to remove bargaining unit work and/or classifications from its scope. However, emphasizing that her jurisdiction was limited to the contract language, she concluded that Respondents had the right to take the actions they did because no bargaining unit employee had been laid off or suffered a reduction in pay.

Arbitrator Kahn retained jurisdiction to determine the appropriate remedy for the notice violation if the parties were unable to do so. They were, and on April 23, 2004, Kahn issued a memorandum of decision requiring Respondents to reimburse Charging Party for dues lost up to the date of her original award. She rejected Charging Party's argument that the notice violation required restoration of the status quo, i.e. the return of the deputy/chief deputy position to the bargaining unit.

Positions of the Parties:

Respondents' position is, first, that this claim involves only a contractual dispute. Respondents assert that the bargaining history of the "Union Rights" provision establishes, and Arbitrator Kahn's award affirms, that the parties' explicitly agreed to give Respondents the right to remove the deputy treasurer's work and/or position from Charging Party's unit. Second, Respondents maintain that the charge is untimely under Section 16(a) of PERA because the alleged unfair labor practice occurred on July 25, 2002, while the charge was not filed until March 21, 2003. Third, Respondents assert that they had no obligation to bargain over the removal of work or a position from the unit because Charging Party never made a demand to bargain.

Charging Party's position is that Respondents bear the burden of establishing that the employee who now holds the title of chief deputy treasurer has duties, responsibilities or functions that are different from those of her predecessor. According to Charging Party, since Respondents failed to show that the chief deputy position is a new position, or that it supervises unit employees, the Commission should find that Respondents committed an unfair labor practice by removing the deputy treasurer position from the unit without Charging Party's agreement. In response to Respondents' claim that the charge was untimely, Charging Party asserts that it did not know until October or November 2002 that Respondents were removing the chief deputy/deputy treasurer position from the unit. Charging Party does not address Respondents' argument that the "Union Rights" provision in the contract constitutes an agreement to allow Respondents to remove the position.

Discussion and Conclusions of Law:

An employer's transfer of unit work to a position outside the union's bargaining unit may be a mandatory subject of bargaining if the tests set forth in *City of Detroit (Dep't of Water & Sewerage),* 1990 MERC Lab Op 34, are met. However, the composition of a bargaining unit is neither a matter of management prerogative nor a mandatory subject of bargaining, but a permissive subject of bargaining; the composition of the unit is ultimately a matter for the Commission to decide under Section 13 of PERA. *Detroit Fire Fighters Ass'n, Local 344 v Detroit,* 96 Mich App 543, 546 (1980); *Wayne Co,* 15 MPER ¶ 33009 (2001); *Michigan State Univ,* 1993 MERC Lab Op 345. Because the composition of the unit is not a mandatory subject, an employer cannot bargain to impasse on the removal of a position from the bargaining unit. An employer violates its duty to bargain if it removes a position from the unit without the union's agreement or an order from the Commission clarifying the bargaining unit. *Livonia Pub Schs,* 1996 MERC Lab Op 479; *Northern Michigan Univ,* 1989 MERC Lab Op 139. This is the case even if the job duties of the position have undergone a gradual change. *Ingham Co,* 1993 MERC Lab Op 808. However, an employer may defend against a charge that it has unlawfully removed a position from a bargaining unit by demonstrating that the position is in a nonsupervisory unit but supervises unit employees, or that it is an executive. See, e.g., *Bloomfield Hills Sch Dist,* 2000 MERC Lab Op 363; *Lake Co,* 1992 MERC Lab Op 24; *Manistee Co,* 1991 MERC Lab Op 74 (no exceptions).

When a union does not claim to represent the nonunit position to which unit work has been transferred, but only claims a right to bargain over the transfer itself, the alleged unfair labor practice is the unilateral transfer. In that case, the statute of limitations under Section 16(a) begins to run when the union knows, or should know, of the transfer. *Livonia Pub Schs,* 1983 MERC Lab Op 992; *City of Fraser,* 1973 MERC Lab Op 375. However, when the thrust of the charge is that the employer has a continuing duty to recognize the union as the bargaining representative for the position in dispute, the statute of limitations runs from the union's last demand for recognition because each refusal to recognize is a separate unfair labor practice. *Wayne Co Comm College,* 1987 MERC Lab Op 981; *City of Ironwood,* 1985 MERC Lab Op 62.

In the instant case, Charging Party's claim is that Respondents gave a unit position, deputy treasurer, a new title and refused thereafter to recognize it as part of its bargaining unit. Thus, the statute of limitations runs from the date of Charging Party's last demand to bargain

over the position, not the date the work was removed from the unit. Contrary to Respondents' claim, the record indicates that Charging Party did demand to bargain over the removal of the position. According to Barrett's testimony, Charging Party last made a demand to bargain during the third step meeting on its grievance, sometime between mid-October and November 8, 2002. Since this period is within six months of the date the charge was filed, I find that the charge was timely under Section 16(a) of PERA.

As discussed above, neither party presented evidence as to the actual job duties or responsibilities of the chief deputy treasurer. I find that the job description for the position, although it makes several references to the chief deputy's responsibility to "supervise" employees or work, is not sufficient to establish that the chief deputy is a supervisor of the account clerks as the Commission defines that term.

Respondents' remaining argument is that Charging Party did agree to the removal of the deputy/chief deputy position from its unit. According to Respondents, in the "Union Rights" provision of the contract, the parties agreed to allow Respondents to remove bargaining unit work or classifications from the unit unless bargaining unit employees were laid off or lost pay as a result.

If a topic is an illegal subject of bargaining, a contract provision embodying that subject is unenforceable. However, a permissive subject is one that the parties need not bargain over but may bargain by mutual agreement. *Michigan State AFL-CIO v Michigan Employment Relations Commission,* 212 Mich App 472, 486 (1995); *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 54-55 n 6 (1974). Since unit placement is a permissive subject, the parties can bargain on this topic and enter into a binding contract that reflects their agreement. The Commission has not read broad management rights language as an agreement by the union to the removal of positions from its unit. For example, in *City of Warren,* 1994 MERC Lab Op 1019, 1023-1024, the Commission held that a contract provision that gave the employer the right to unilaterally transfer bargaining unit work to a nonunit employee did not constitute an agreement by the union to remove an existing position from its unit. In *Michigan State Univ,* 1992 MERC Lab Op 120, the Commission held that a contract provision granting the employer the right to "establish, eliminate or change classifications" did not give the employer the right to remove a position from the bargaining unit.

The "Union Rights" provision here, however, is highly unusual; it allows Respondents to remove both work <u>and</u> classifications from the bargaining unit under certain defined circumstances. Since Respondents failed to demonstrate that the deputy/chief deputy treasurer position has acquired supervisory authority, without the so-called "Union Rights" provision, its removal of this position from Charging Party's unit would violate the Act. By agreeing to the language in the current contract, therefore, Charging Party put itself in a worse position than if it had accepted Respondents' initial proposal to remove this provision from the contract entirely. However, I find the language of the provision to be unambiguous, and I can see no reason why the Commission should not honor the parties' agreement. I find that Charging Party agreed to the removal of the deputy/chief deputy treasurer position from its unit when it agreed to the "Union Rights" language in the parties' 2001-2002 collective bargaining agreement. I conclude,

therefore, that Respondents did not violate their duty to bargain by refusing to recognize Charging Party as the bargaining agent for this position after July 2002.

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

## RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

______________________________________________

Julia C. Stern
Administrative Law Judge

Dated: _______________