STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SAGINAW VALLEY STATE UNIVERSITY,
Public Employer - Respondent,

Case No. C04 A-027

-and-

RODNEY CHAPPEL,
An Individual - Charging Party.
_____/

APPEARANCES:

Braun Kendrick Finkbeiner P.L.C., by E. Louis Ognisanti, Esq., and Scott C. Strattard, Esq., for Respondent

Law Offices of Robert J. Krupka, by Robert J. Krupka, Esq., for Charging Party

DECISION AND ORDER

On May 10, 2005, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order dismissing Charging Party Rodney Chappel's unfair labor practice charge against Respondent Saginaw Valley State University. The ALJ found that Respondent did not unlawfully deny Charging Party the right to become a member of the bargaining unit represented by the Saginaw Valley State University Support Staff Association (Union). The Decision and Recommended Order was served upon the parties in accordance with Section 16 of PERA. Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order, and Respondent filed a timely brief in opposition to those exceptions.

In his exceptions, Charging Party asserts that the ALJ relied on improper factual findings in rendering his decision and that he misinterpreted the applicable legal standard. We have carefully and thoroughly considered the record in this matter and agree with the ALJ that Charging Party failed to establish that Respondent committed an unfair labor practice.

Factual Summary:

We accept the factual findings of the ALJ and summarize them here as necessary. Respondent Saginaw Valley State University and the Saginaw Valley State University Support Staff Association are parties to a collective bargaining agreement covering a bargaining unit that includes all full-time and regular part-time secretarial/clerical and plant/business services division employees. Article 10 of that agreement defines four categories of employees: full-

time, part-time, probationary, and temporary. Temporary employees are further defined at section 10.104 as substitute, short-term, seasonal, and long-term. Section 10.203 of the contract states: "Any person employed in a substitute temporary position beyond one hundred twenty (120) calendar days shall become a member of the bargaining unit."

Respondent hired Charging Party on May 28, 2002, assigning him to work in the maintenance department to fill in for employees on vacation and to paint and repair student housing apartments during the summer. Charging Party was subsequently relocated to the heating and cooling department in the fall of 2002, where he worked full time until December of 2002, substituting for employees on vacation or sick leave. Respondent refers to Charging Party as a "pool employee." Pool employees work on an "as needed" basis to fill temporary vacancies and are not included in the bargaining unit.

From January 3, 2003, to September 26, 2003, Charging Party was assigned to the grounds department where he worked full time. Although he claimed that he was to fill in for a grounds keeper, Dorleen Byerline, who was on a leave of absence, Charging Party admitted during the hearing that he was never told that he was to take another employee's place or to fill a particular position in the grounds department. Respondent's witness, on the other hand, testified that Charging Party was not assigned to replace any particular employee and was assigned to the grounds department because of a general staffing shortage in that department.

Byerline did not return from her leave of absence, and, on July 30, 2003, Charging Party asked to join the Union and become a bargaining unit member, believing that he had filled in for Byerline for over 120 days. The Union advised him that he had not been filling in for any particular position and was not eligible to join the Union. He also was told that the Union would not file a grievance on his behalf because he was not a bargaining unit member.

On September 26, 2003, Respondent transferred Charging Party from the grounds department to the maintenance department, thereafter replacing Byerline with a member of the bargaining unit.

Discussion and Conclusions of Law:

Charging Party disputes the ALJ's findings of fact, contending that he had been placed in the grounds department to replace Byerline. The ALJ credited Respondent's explanation, finding that Charging Party was not assigned to fill in for a particular person. We will not disturb that finding in the absence of clear evidence to the contrary. See *Bellaire Pub Schs*, 19 MPER 17 (2006); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507; *Michigan State Univ*, 1993 MERC Lab Op 52, 54.

Charging Party asserts that Respondent's refusal to include him in the bargaining unit interfered with his right to join a labor organization and discriminated against him in violation of Section 10(1)(a) and (c) of PERA. We disagree. In this case, the Employer and the Union agreed on a definition of the bargaining unit and set forth conditions under which a temporary employee could become a unit member at section 10.203. Charging Party was denied unit membership because Respondent and the Union determined that he did not meet the requirements for

inclusion in the bargaining unit set forth in that section. Both Respondent and the Union interpret section 10.203 to require that a temporary employee fill in as a substitute for a particular person or position for more than 120 days in order to become a bargaining unit member. Both Respondent and the Union agree that Charging Party did not fill in for a particular person or position.

We have long held that where an employer and a union concur as to the interpretation of the contract, their construction governs. *City of Detroit*, 17 MPER 47 (2004); *Detroit, Wastewater Treatment Plant*, 1993 MERC Lab Op 716; *Muskegon Co*, 1992 MERC Lab Op 356, 363. Accordingly, we find that the Employer acted reasonably and did not discriminate against Charging Party or interfere with any rights protected by Section 9 of PERA. *Mt Morris Sch Dist*, 1984 MERC Lab Op 419, 420-22. We therefore affirm the findings of the ALJ and adopt his recommended order.

We have carefully considered each of the arguments set forth by Charging Party, but find them unpersuasive. Accordingly, we find that Respondent did not violate Section 10(1)(a) or (c) of PERA.

ORDER

We hereby adopt the Administrative Law Judge's Decision and Recommended Order as our final Order in this case and dismiss the unfair labor practice charge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
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Law Offices of Robert J. Krupka, by Robert J. Krupka, Esq., for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on June 9, 2004, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and post-hearing briefs filed by October 21, 2004, I make the following findings of facts and conclusions of law.

The Unfair Labor Practice Charge:

On January 28, 2004, Charging Party Rodney Chappel filed unfair labor practice charges against Saginaw Valley State University and the Saginaw Valley State University Support Staff Association (Union).[1] Charging Party alleged that Saginaw Valley State University violated Section 10(1)(a) and (c) of PERA by denying him the right to become a bargaining unit member. Respondent filed an answer denying the allegations and a motion for summary disposition on April 12, 2004. The motion was denied on April 29, 2004.

Findings of Fact:

Respondent Saginaw Valley State University and the Saginaw Valley State University Support Staff Association (Union) are parties to a collective bargaining agreement that covers the period July 1, 2003 to June 30, 2006. Respondent recognizes the Union as the exclusive

[1]On April 15, 2004, Charging Party withdrew the charge against the Union.

bargaining representative of all full-time and regular part-time secretarial/clerical division and plant/business services division employees. Four categories of employees are included in the bargaining unit: full-time, part-time, probationary and temporary (substitute, short-term, seasonal and long-term). A long-term temporary employee is defined as a person hired to fill a temporary position in accordance with Article 10.200 of the agreement. Sub-section 10.203 of Article 10.200, Long Term Temporary Position, states that any person employed in a substitute temporary position beyond one hundred twenty (120) calendar days shall become a member of the unit.

Respondent hired Charging Party on May 28, 2002. Charging Party described his status as a "pool employee" assigned to work in the maintenance department to "fill in for vacation people, work during the summer when college is off . . . and go through and re-patch and paint and fix apartments where students live in student housing." In the Fall of 2002, Charging Party was transferred to the heating and cooling department where he worked full-time filling in for employees on vacation or sick leave until December 2002.

In January 2003, Charging Party was assigned to the grounds department where he worked full time until August 2003. On direct, re-direct and re-cross examination, he testified that his supervisor, Dave Mrozinski, assigned to him to the grounds department to fill in for [grounds keeper] Dorleen Byerline, who was on a leave of absence. However, on cross-examination he answered "No," when asked whether he was told that he was going over to the grounds department to take someone's place or to fill a particular position. When asked, "And would it be correct for me to say that you were filling in for the people that were gone in the grounds department in the same manner that you filled in for people who were gone in the maintenance department, correct?" Charging Party replied: "I guess you could say that."

On July 30, 2003, Charging Party contacted union president Shawn Strobel and told her that he wanted to join the union since he had filled in for an employee for over 120 days. According to Charging Party, Strobel told him that she did not believe that he had been filling in for one position and he, therefore, was not eligible to join the union. She also told Charging Party that she would not file a grievance for him because he was not a union member.

On August 19, 2003, Charging Party asked his supervisor, Dave Mrozinski, about the meaning of Section 10.203 of the collective bargaining. According to Charging Party, Mrozinski told him that Section 10.203 was a gray area and that he would obtain an answer for him. He never did. Mrozinski testified that Charging Party was a "pool employee," filling in for employees on sick leave, vacation or leaves of absence, during the entire time of his employment. On average, Mrozinski testified, two and a half employees were absent each day in the grounds department and Charging Party was assigned to the grounds department because they were shorthanded, and not to fill a particular position or to fill in for a specific employee.

On September 26, 2003, after the Employer had posted and filled Byerline's grounds keeper position with a bargaining unit member, Charging Party was reassigned to the maintenance department where he worked sporadically until December 3, 2003.

Conclusions of Law:

Charging Party claims that Respondent interfered with his right to join a labor organization in violation of Section 10(1)(a) of PERA by refusing to include him in the Union. According to Charging Party, it is undisputed that he worked in the grounds department as a

substitute temporary for a full time employee who was on leave for 120 calendar days. Therefore, Charging Party argues, since he met the criteria outlined in Section 10.203 of the collective bargaining agreement, it was mandatory for Respondent to place him in the bargaining unit.

To violate PERA, the exclusion of a classification or an employee from a bargaining unit must be unreasonable and arbitrary. Great weight is given to the past practice and agreements of the parties relative to the definition of the bargaining unit. *Mt Morris Sch Dist*, 1984 MERC Lab Op 419, 420-22, 426-428; *City of Grosse Pte Park*, 1983 MERC Lab Op 837, 842-44; *Grosse Pte Bd of Edu*, 1990 MERC Lab Op 613, 621. In the latter case, the collective bargaining agreement defined persons employed for 120 days or less as seasonal or temporary employees who were considered not to be employees covered by the agreement. In an unfair labor practice charge, two temporary employees, relying on the language in the contract between the union and the employer, alleged that the employer's refusal to include them in the union after 120 days of employment, or to pay them contractual benefits, violated their rights under Section 9 of PERA. The Administrative Law Judge (ALJ) found that the employer could rely on the employer's and union's past practice of excluding temporary/seasonal employees even after their employment exceeded 120 days and upon the employees' original hiring status, rather than on the length of employment, to define temporary status.[2]

In this case, both the Union and the Employer interpret Section 10.203 to mean that in order for a long-term temporary employee to become a bargaining unit member, an employee must fill in as a substitute for a particular person or in a particular position for more than 120 days. The record reveals that Charging Party did not fill in for a particular person or position. Rather, he filled in for absent employees in the grounds department in the same manner that he filled in for absent employees in the maintenance and HVAC departments. Moreover, he was never told that he was transferred to fill in for a particular position or for a particular person. I, therefore, find that Charging Party's exclusion from the bargaining unit was not unreasonable or arbitrary since it was based on the Respondent's and the Union's agreement concerning a temporary employee's eligibility for inclusion in the bargaining unit. I have carefully considered all other arguments advanced by the parties and conclude they do not warrant a change in the result. Based on the above findings of fact and conclusions of law, I recommend that the Commission issue the order set forth below:

[2]In rejecting the employer's claim that it was inappropriate for the Commission to decide the contract dispute as an unfair labor practice charge, the ALJ found that the charging parties could press a demand under PERA, rather than under the contract, for unit membership and the concomitant contractual benefits. Enforcement and interpretation of collective bargaining agreements, *per se*, are not the functions of the Commission. However, the Commission has long held that it has jurisdiction to interpret a collective bargaining agreement where necessary to determine whether an unfair labor practice has been committed. *Univ of Mich*, 1971 MERC Lab Op 994; *City of Ann Arbor*, 1990 MERC Lab Op 528, 538; *City of Detroit (Dept of Public Works)*, 2001 MERC Lab Op 234, 236.

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____