STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ANN ARBOR,
Public Employer - Respondent,

Case No. C03 L-292

-and-

WILLIE STEVENSON,
An Individual Charging Party.
_____/

APPEARANCES:

Nancy L. Niemela, Assistant City Attorney, for the Public Employer

Osetek & Associates, P.C., by Peter J. Osetek, for the Charging Party

DECISION AND ORDER

On November 28, 2006, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges. The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act. Pursuant to Rule 76, R423.176 of the General Rules of the Employment Relations Commission, exceptions to the Decision and Recommended Order were due on December 21, 2006. On that date, Charging Party made a timely request for a thirty-day extension of time in which to file his exceptions. We granted the request and issued an order extending the time for filing exceptions to the Administrative Law Judge's decision to January 22, 2007.

No exceptions were filed on or before the specified date. Instead, we received Charging Party's request for a second extension of time on January 22, 2007. Rule 176 of the Commission's General Rules, 2002 AACS, R 423.176, provides:

> One extension of not longer than 30 days will be granted to the moving party upon the filing of the request. Subsequent extensions will be granted only upon a showing of good cause. Good cause does not include inexcusable neglect by a party or a representative thereof.

Charging Party's request for a second extension of time alleged that additional time was needed because Charging Party's attorney had been out of the office on work related issues for the preceding two weeks and had been unable to locate a copy of the transcript from the first day of hearing. The request did not indicate whether Charging Party had ordered a copy of the transcript from the court reporter, in accordance with established practice. Accordingly, we find that Charging Party did not establish good cause for an additional extension of time. Therefore, we adopt the recommended order of the Administrative Law Judge as our final order and dismiss the charges.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. 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 February 15, 2005 and March 3, 2005, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before May 13, 2005, I make the following findings of fact, conclusions of law, and recommended order.

Overview:

Charging Party, a temporary/seasonal employee of the parks and recreation department of the City of Ann Arbor, contends that the Employer discriminated against him in violation of PERA by denying him contract benefits and conspiring with AFSCME Local 369 to deny him unit membership. From 1992 to 2002, Charging Party worked year round for the City, alternating between various temporary/seasonal positions within the parks and recreation department each year. During that time, the contract between the City and AFSCME provided that seasonal employees who worked ten months a year in one position could continue to work for the City in another position in a different season.

In December of 2002, a new contract became effective which prohibited the City from employing temporary/seasonal employees for more than ten months within any twelve-month period, but which allowed such employees to be rehired after a minimum two-month break in

employment service. Charging Party was terminated in February of 2003 after working the previous ten months as a park ranger. He was rehired by the City two months later and continued to work for the next ten months as a park ranger. During that time, Charging Party wrote various letters to the City complaining about the "unfair" treatment of temporary/seasonal employees. Charging Party was terminated once again in January of 2004 and rehired approximately three months later.

I conclude that Charging Party has failed to establish any PERA violation with respect to the City of Ann Arbor. Although the City has effectively prevented Charging Party from becoming a member of the bargaining unit, first by transferring him from one position to another within a twelve-month period, and later by terminating his employment and then rehiring him several months later, its actions were undertaken with the union's acquiescence. Therefore, I conclude that Respondent did not discriminate against Charging Party or interfere with his rights protected by Section 9 of PERA. Even if I were to conclude that the City's actions in this regard constituted unlawful discrimination or interference within the meaning of the Act, I find that Charging Party knew or should have known of the violation as early as 1993, the first time he worked twelve consecutive months for the City. Thus, the charge is time barred under Section 16(a) of PERA.

The Unfair Labor Practice Charge and Background Matters:

On December 29, 2003, Charging Party Willie Stevenson filed an unfair labor practice charge against his Employer, the City of Ann Arbor, and AFSCME Local 369.1 With respect to the Employer, the charge, which was filed by Stevenson *in pro per*, alleged "retaliation, conspiracy to commit retaliation and breach of the collective bargaining agreement."

On February 4, 2004, Charging Party was directed by the undersigned to file a more definite statement in conformance with Rule 151(c) of the Commission's General Rules and Regulations, 2002 AACS R423.151. In his March 2, 2004, response, Stevenson asserted that the Employer denied him the opportunity for overtime in retaliation for his filing a civil rights lawsuit against the City, and that the Employer and AFSCME conspired to "get rid of [his] temporary ranger job." The response also invoked Article 12 of the collective bargaining agreement between the City and AFSCME, which pertains to supervisory employees doing bargaining unit work, and Article 22, pertaining to the use of temporary supervisors.

A prehearing conference was held on May 27, 2004, at which Charging Party, now represented by counsel, sought to further clarify the charges. Charging Party now asserted that the City had violated PERA by preventing him from becoming a member of the AFSCME bargaining unit, and by denying him benefits to which he was entitled under the collective bargaining between the City and the union. At the conclusion of the conference, I directed Stevenson to show cause why his charge against the City of Ann Arbor should not be dismissed as untimely under Section 16(a) of PERA, and for failure to state a claim upon which relied could be granted.

Charging Party filed a brief in response to the order to show cause on August 17, 2004. The City filed a reply to Charging Party's brief on September 2, 2004. Oral argument was held

1 Stevenson later withdrew the charge against the Union.

concerning the order to show cause on September 9, 2004. At the conclusion thereof, I directed the parties to file supplemental pleadings on the order to show cause. Charging Party filed his supplemental brief in response to the order show cause on October 12, 2004. The City filed its supplemental brief on October 26, 2004. Thereafter, I concluded that there were disputed questions of fact and directed the parties to appear for an evidentiary hearing beginning on February 15, 2005.

Findings of Fact:

I. Background

AFSCME, Local 369 represents nonsupervisory employees of the City of Ann Arbor in various departments, including Administrative Services, Finance, Solid Waste, Public Services, Planning and Parks and Recreation. AFSCME-represented positions within the Parks and Recreation Department include park ranger and parks maintenance worker. The City employs both permanent and temporary/seasonal employees in the park ranger and park maintenance worker classifications. Temporary/seasonal employees are not included within the AFSCME bargaining unit.

The most recent collective bargaining agreement between AFSCME and the City was executed by the parties in December of 2002 and covers the period July 1, 2001 to June 30, 2006. Article 1, Section 1 of that agreement defines the term "temporary/seasonal employee" as an employee "who is hired to perform bargaining unit work which is unique to the season of the year." Under the contract, temporary/seasonal employees may be hired to perform bargaining unit work "for a period not to exceed ten (10) months within twelve (12) months of the date the position was originally filled." If the temporary/seasonal position is still occupied at the end of the ten-month period, the contract requires the City to eliminate the temporary/seasonal position. However, the contract further provides that the City can rehire such an employee once he or she has had at least a two-month break in employment service. Pursuant to Article 1, Section 1 of the agreement, this new term of employment may not exceed ten consecutive months from the subsequent date of hire.

The prior contract, which covered the period July 1, 1998 to June 30, 2001, also contained limitations on the City's use of temporary and seasonal employees. However, that agreement was somewhat less restrictive than the current contract. With respect to seasonal employees, the expired contract provided:

> A seasonal employee is an employee who is hired to perform bargaining unit work which is unique to a season of the year and is for a period not to exceed ten (10) months within twelve (12) months of the date the position was originally filled. Once an employee has completed work in a particular seasonal position, that employee shall not be prohibited from working in another position in a different season.

The City's personnel rules also contain language pertaining to temporary employees. The rules, which were first published in 1988 and remain in effect, provide that after a temporary employee has completed one year of service, he or she must be released or reclassified to a permanent employee.

II. Stevenson's Employment History

Charging Party began working as a temporary/seasonal employee in the City of Ann Arbor's parks and recreation department on August 14, 1987. Over the course of the next four years, the City repeatedly terminated Charging Party's employment, only to rehire him again several days later. This pattern continued through December 31, 1991, when Charging Party's employment with the City was once again terminated. Charging Party was rehired as a non-union temporary/seasonal employee in March of 1992, and he continued to work in that capacity year round through February 1, 2003. During the course of each year, the City transferred Charging Party from a position as a seasonal park ranger to a seasonal park maintenance worker position.

The duties which Charging Party performed as a seasonal park ranger were substantially similar to the tasks assigned to Stevenson as a seasonal park maintenance worker, with the differences attributable mainly to the time of year in which the work was performed. Stevenson typically worked as park ranger from April 1 to December 31 of each year. In that capacity, he was required to open the gates of the City's parks in the morning and close the gates in the evening. He also opened and closed the public restrooms, performed general park maintenance work and issued citations to park visitors whom he discovered engaging in illegal activities. Charging Party was generally assigned to work as a seasonal park maintenance worker during the winter months, from February 1 to March 31, when there were fewer parks open to the public. Stevenson's duties as a seasonal park maintenance worker included opening and closing parks, cleaning and maintaining restrooms and shoveling snow from sidewalks. Stevenson was paid less when working as a park maintenance worker due to what he testified were the "lower responsibilities" of that position.

In April of 2002, Charging Party was transferred from his position as a seasonal park maintenance worker to a seasonal park ranger position within the parks department. Around that time, AFSCME and the City were engaged in negotiations on a contract to replace the 1998-2001 collective bargaining agreement. The prior contract remained in effect while negotiations continued. The parties ultimately reached a successor agreement which was executed in December of 2002. Upon execution of the contract, the City's field operations manager, Teresa Rynard, notified temporary/seasonal employees, including Charging Party, that they would be laid-off after working for ten consecutive months. On February 1, 2003, Charging Party's employment with the City was terminated following the completion of his tenth month working as a seasonal park ranger. Charging Party was rehired by the City on April 1, 2003, and he continued to work as a seasonal park ranger for another ten-month period. He was terminated on January 11, 2004 and then once again rehired by the City on April 26, 2004.

Charging Party has never held a permanent position during the 18-plus years he has worked for the City, nor has he ever been included within the AFSCME bargaining unit. In order for a temporary/seasonal employee to attain a permanent position with the City, he or she must apply when such a position is posted to the general public. Charging Party has applied for permanent positions three times since 1997. The last time he applied for a permanent position was in 2004, when he sought a position as a truck driver with the City. Charging Party was interviewed for the position but was not hired because he did not possess the requisite commercial drivers license

(CDL). There have been other permanent positions posted by the City for which Charging Party was qualified but did not apply.

The record indicates that AFSCME has filed two grievances pertaining to the City's use of temporary/seasonal employees, both of which were later withdrawn. In the first grievance, which was filed sometime in 2002, the union requested that the City terminate all temporary/seasonal employees who had worked for the City for more than 10 months. On March 19, 2004, AFSCME filed a grievance seeking to have a number of temporary/seasonal employees, including Stevenson, reclassified into permanent positions within the bargaining unit. The union withdrew that grievance after determining that it lacked merit.

III. Stevenson's 2003 "Grievance" Letters

Throughout the summer and fall of 2003, Charging Party sent a number of letters to the City in which he complained that he was being unfairly treated. The letters pertained to specific incidents in which Charging Party had allegedly been denied overtime. In a letter dated July 25, 2003, Charging Party requested that the City compensate him for the overtime work which he was allegedly denied, and he sought "to meet with management on ways to stop the unfair treatment of temps and seasonal workers here at 415 West by some members of Local 369." Charging Party concluded the letter by stating that he hoped someone in labor relations would show "a concern for temps and seasonal workers."

Charging Party testified that he wrote the July 25, 2003 letter on behalf of the other temporary/seasonal employees of the City and that part of his intent in taking such action was to encourage Respondent to make overtime work available to those employees. At the hearing, two of Charging Party's co-workers, Brandon Jennings and Lisa Roberts, testified that they believed Charging Party was acting on their behalf in writing the letter. However, neither individual saw the July 23rd letter before Charging Party submitted it to Respondent. Moreover, although Roberts asserted that Charging Party spoke with her about filing a complaint and that she gave him permission to take action on her behalf, she was unable to recall whether that conversation occurred before or after Stevenson sent the letter to the City.

Discussion and Conclusions of Law:

The gravamen of this dispute is Charging Party's contention that the City of Ann Arbor conspired with AFSCME to prevent him from becoming eligible for membership in the bargaining unit or from securing benefits under the union contract, and that such conduct constituted discrimination and interference with Stevenson's protected rights in violation of Section 10(1)(a) of PERA. I find this allegation to be time-barred. Pursuant to Section 16(a) of the Act, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. A cause of action accrues when the charging party knows, or has reason to know, of the facts which provide notice of an alleged breach of the Act. *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836; *Wines v Huntington Woods*, 97 Mich App 86 (1980). See also *Washtenaw County*, 1992 MERC Lab Op 471, and cases cited therein.

Charging Party asserts that Respondent violated PERA by refusing to recognize his standing as a member of the AFSCME bargaining unit once he had worked for twelve consecutive months as a temporary/seasonal employee. Charging Party completed his first year of continuous employment with the City in March of 1993. I find that Charging Party knew or should have known of the alleged PERA violation at that time. Yet, the charge was not filed until December 29, 2003, more than ten years later. The Commission has held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. Although Charging Party contends that the City engaged in multiple repeated acts of discrimination by continuing to deny him membership in the union and coverage under the contract, the Commission has specifically rejected this sort of "continuing violation" argument. *City of Adrian*, 1970 MERC Lab Op 579, 581, adopting the U.S. Supreme Court ruling in *Local Lodge 1424, Machinists v NLRB (Bryan Mfg Co)*, 362 US 411 (1960). See also *County of Lapeer*, 19 MPER 45 (2006); *Detroit Bd of Ed*, 16 MPER 29 (2003); *City of Flint*, 1996 MERC Lab Op 1, 9-11. Nor is there any merit to Charging Party's contention that the charge is timely because he sent a letter to the City complaining about its "unfair treatment" of temporary/seasonal employees within the statutory period. As noted, the statute of limitations begins to run when the charging party knows or should know of the facts giving rise to a PERA violation. Because no action by the City has taken place within the statutory period which would give rise to a new unfair labor practice, the charge must be dismissed as untimely.

Even assuming arguendo that the charge was timely filed, I find that Stevenson has failed to raise any issue cognizable under PERA. Respondent and AFSCME agreed upon a definition of the bargaining unit which excluded temporary/seasonal employees from the unit and set forth limitations on the City's use of such employees to perform bargaining unit work.2 These provisions were obviously intended, from the union's perspective, to protect bargaining unit work and to encourage the City to utilize permanent, rather than temporary/seasonal, employees to perform such work. The record indicates that Respondent's refusal to include Charging Party in the unit was consistent with the language of those agreements. Article I of the 1998-2001 AFSCME contract allowed Respondent to employ temporary/seasonal employees such as Stevenson on a year-round basis, provided that no employee worked more than ten months in any one temporary/seasonal position. Although the successor agreement limited the City's use of temporary/seasonal employment to no more than ten consecutive months, that contract did not go into effect until December of 2002. Thereafter, on February 1, 2003, the City terminated Charging Party at the end of his tenth month of employment as a seasonal park ranger.

The Commission has long held that where an employer and a union concur as to the interpretation of the contract, their construction governs. *Saginaw Valley State Univ*, 19 MPER 36 (2006); *City of Detroit*, 17 MPER 47 (2004). To that end, the Commission has consistently refused to find violations by a union or employer based upon an agreement to exclude certain groups of employees from the bargaining unit, despite the fact that those employees might have been included by the Commission in a unit determination. See *City of Grosse Pointe Park*, 1983 MERC Lab Op

2 There is nothing in the record to indicate that the union ever filed a petition seeking to accrete employees such as Stevenson to the bargaining unit or that it otherwise affirmatively disputed the City's interpretation or application of either agreement. Although AFSCME filed two grievances concerning the City's use of temporary/seasonal employees, both were withdrawn by the union.

837, 842-843, in which it was held that an employer's refusal to include certain temporary employees in the bargaining unit did not constitute unlawful discrimination, regardless of the fact that the employees had worked for the employer beyond the period defined as temporary in the agreement. See also *Grosse Pointe Bd of Ed*, 1990 MERC Lab Op 613 (no PERA violation where employer refused to grant full employee status to employee based upon contractual exclusion of substitutes); *City of Battle Creek*, 1988 MERC Lab Op 909, 916 (reduction in hours for the purpose of keeping employee from remaining eligible for membership in the unit not evidence of discriminatory motive); *Mt. Morris Sch Dist*, 1984 MERC Lab Op 419 (employer had reasonable basis upon which to exclude employee from unit).

In the instant case, the record establishes that Respondent's refusal to include Charging Party in the AFSCME bargaining unit was in no way "baseless." See *Mt. Morris Sch Dist*, *supra* at 422, quoting *City of Grosse Pointe Park*, *supra* at 843. To the contrary, the City justifiably relied upon the language of its contracts with AFSCME, as well as that union's tacit agreement to allow the City to exclude temporary/seasonal employees such as Stevenson from the bargaining unit. *Id*. Accordingly, I conclude that Respondent acted reasonably and did not discriminate against Charging Party or interfere with any rights protected by Section 9 of PERA.

Charging Party devotes considerable attention in his post-hearing brief to the issue of whether his "grievance" letters constitutes protected concerted activity. Presumably, this argument pertains to an allegation that the City retaliated against Charging Party for writing the letters. However, the record establishes that after the letters were submitted, the City continued to refuse to recognize Charging Party as a member of the AFSCME bargaining unit -- just as it had done for over a decade. There is no evidence suggesting that the City's actions in that regard were in any way retaliatory, nor is there any indication in the record that that Respondent harbored anti-union animus or hostility toward Charging Party's protected concerted rights, a required element of discrimination or retaliation claim under the Act. See e.g. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. In fact, the City rehired Stevenson several times after receiving his "grievance" letters. It should also be noted that nowhere in his post-hearing brief does Charging Party identify any other specific act of retaliation by the City which would form the basis for a claim under the Act.

I have carefully considered all other arguments of the parties and conclude that they do not warrant a change in the result of this case. For the reasons discussed above, I hereby recommend that the Commission dismiss the charge in its entirety.

RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____