STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WATERFORD SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C05 A-016

-and-

WATERFORD FEDERATION OF SUPPORT PERSONNEL, MFT & SRP, AFT, AFL-CIO,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, PC, by William Albertson, Esq., for Respondent

Mark H. Cousens, Esq., for Charging Party

DECISION AND ORDER

On November 30, 2006, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WATERFORD SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C05 A-016

-and-

WATERFORD FEDERATION OF SUPPORT PERSONNEL, MFT & SRP, AFT, AFL-CIO,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, PC, by William Albertson, Esq., for Respondent

Mark H. Cousens, Esq., for 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, this case was heard at Detroit, Michigan on May 16, 2005, by Administrative Law Judge (ALJ) Roy L. Roulhac, and on June 22, 2006, by ALJ Julia C. Stern for the Michigan Employment Relations Commission.1 Based upon the entire record, including post-hearing briefs filed by the parties on or before August 4, 2005 and supplemental briefs filed on or before August 7, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Waterford Federation of Support Personnel, Michigan Federation of Teachers and School Related Personnel (MFT & SRP), American Federation of Teachers (AFT), AFL-CIO filed this charge against the Waterford Public Schools on January 18, 2005. The parties stipulated that the charge was served on Respondent on February 4, 2005. Charging Party represents a bargaining unit of Respondent's educational support employees. In May 2004, the parties ratified their first

1 On September 15, 2005, ALJ Roulhac ordered the hearing reopened to allow Charging Party to present testimony on the statute of limitations issue raised by Respondent in its post-hearing brief. After ALJ Roulhac's retirement from state service, the case was reassigned to ALJ Stern.

collective bargaining agreement. Charging Party alleges that Respondent violated its duty to bargain in good faith when it repudiated its contractual obligations toward bargaining unit members laid off before the effective date of this contract. Specifically, Charging Party alleges that Respondent unlawfully refused to pay laid off employees the retroactive pay due them under the contract. It also alleges that Respondent unlawfully refused to recall laid off employees to vacant unit positions as required by the contract.

Facts:

The Collective Bargaining Agreement

On April 22, 2002, Charging Party was certified as the collective bargaining representative for a unit of Respondent's full-time and part-time paraprofessionals, classroom aides, transportation aides, clerical aides, noon attendants, hall monitors, administrative technicians, and childcare employees. Until Charging Party's certification, these employees were unrepresented. The parties began negotiations for a first contract in about January 2003. Sometime in March 2004, they reached a tentative contract agreement. On April 8, the parties signed a written document memorializing their agreement. Charging Party's membership ratified the agreement on May 15, 2004, and Respondent's school board ratified on June 3, 2004. The parties executed a written contract on June 4, 2004. The contract provided that it would become effective on July 1, 2004 and would remain in effect through June 30, 2006 and thereafter until notice by either party to terminate.

The contract contained a grievance procedure culminating in binding arbitration. It included a detailed description of the powers of the arbitrator, including a provision requiring grievances for back pay to be filed within five calendar days of the date of the alleged violation and limiting Respondent's liability for backpay in most cases to seven calendar days prior to the date the grievance was filed.

Article X of the agreement stated that seniority would be by job/pay classification in accord with the employee's last day of hire. This article set out the conditions under which employees would lose their seniority, including discharge not reversed through the grievance procedure and layoff for twelve consecutive calendar months. It described the order in which "layoffs pursuant to a reduction in positions" would be made: by classification seniority with probationary employees laid off first and employees with seniority in another classification allowed to bump the lowest seniority employee in that classification. Article X also stated, "Laid-off employees shall be recalled in reverse order of layoff to their former pay classification."

An appendix to the agreement covered wage increases, including a wage increase retroactive to July 1, 2003. The first sentence of the appendix read, "From July 1, 2003 thru June 30, 2004 – present employees shall receive a 2% increase of [sic] their hourly rate."

Terminations/Layoffs

On April 6, April 14, April 19, and April 30, 2004, Respondent sent termination notices to a total of twenty-eight members of Charging Party's bargaining unit. Employees receiving these notices included noon aides, child care assistants, the child care coordinator, the child care assistant coordinator, P.E. assistants, library assistants, special education classroom assistants, adult and community education classroom assistants, and nonspecialized classroom assistants. The notices were identical except for the effective date. They read as follows:

> This is to advise you that the decision was made to terminate your position with the Waterford School District, effective _____, 2004. This action is necessary at this time because the level of State Aid for schools provides insufficient revenue and because of the current economic conditions. This is the third year in a row that we have not received an increase in the foundation grant.
>
> This letter is sent with regret, but with the anticipated revenues, there must be a reduction in staff. This action should not be considered as a reflection on your performance but it has been taken because of the above mentioned reasons. Since we believe that the earliest possible notice is in your best interest, you are receiving this notification now.

The majority of the terminations were effective April 30, 2004. One was effective May 7 and three others were effective June 11, 2004. On May 10, Julie Prahler, a classroom assistant and president of Charging Party's local association, received the above notice stating that her position was terminated effective May 14. Two other bargaining unit members received memos dated April 26 stating simply that their services were no longer needed as of April 30.

On April 29, 2004, Liz Duhn, field representative for the MFT & SRP and Charging Party's chief negotiator, sent Respondent a letter demanding to bargain over "the decision to lay off employees and the impact of those layoffs." The parties met on May 25, 2004. Respondent told Charging Party that it considered the individuals who had received notices to be terminated, not laid off. Charging Party said that it was its position that these employees were laid off and subject to the recall provisions of the negotiated agreement. Respondent stated that the contract that was to go into effect on July 1 would cover the employees who were employed on that date, and that employees terminated before that date would have no rights under that contract. The parties terminated the meeting without reaching agreement.

On May 19, 2004, Charging Party filed an unfair labor practice charge, Case No. C04 E-127, asserting that the layoffs/terminations violated Sections 10(1)(a) and (c) of PERA. On August 7, 2006, the Commission affirmed the finding of the administrative judge that Charging Party had failed to establish that the layoffs were motivated by anti-union animus and adopted his recommendation that the charge be dismissed. See *Waterford Sch Dist*, 18 MPER 60 (2006).

Refusal to Pay Retroactive Wage Increases

On June 25, 2004, Respondent issued paychecks to members of Charging Party's unit that included monies representing their two percent wage increase retroactive to July 1, 2003. Respondent did not issue checks to any of the thirty-one employees who had received termination notices in April and May 2004. It also did not issue a check to a unit member who had quit during this period. Thereafter, a few of the terminated employees called Duhn to ask when they would be receiving their retroactive checks. Duhn could not recall when she received the first telephone call. According to Duhn, the calls "trickled in." Duhn testified that Respondent's payroll department had a history of errors, and that she assumed there was a problem in the payroll department. Somewhere between the middle and the end of July 2004, Duhn called Respondent to inquire about the missing checks. Soon thereafter, and before August 1, Respondent assistant superintendent Penni Aldrich told Duhn that Respondent was not going to pay retroactive pay to employees who had been terminated. Aldrich said that Respondent did not consider them to be present employees. Charging Party did not file a grievance over Respondent's failure to pay retroactive pay to these employees. According to Charging Party, it concluded that this would have been futile because of the time limitations on an arbitrator's authority to award backpay.

Posting of Vacancy Notices and Refusal to Recall

In August 2004, Respondent posted eleven vacancy notices on its website for positions within Charging Party's bargaining unit. An additional thirty-four vacancy notices were posted on the website between the beginning of September and the beginning of December 2004. The postings included positions in job classifications held by the employees who had been laid off/ terminated in the spring of 2004. In addition, on August 6, 2004, Respondent posted the position of child care assistant coordinator as an internal posting for bid by members of the bargaining unit. Respondent did not send recall notices to any of the employees who lost their positions in the spring of 2004. According to Respondent, it did not send recall notices because it considered these employees to have been terminated and not laid off. Charging Party did not file a grievance over Respondent's failure to recall these employees.

Discussion and Conclusions of Law:

Respondent argues that the allegation that it violated its duty to bargain by refusing to pay retroactive wage increases to laid off/terminated employees is untimely under Section 16(a) of PERA. It also asserts that the dispute between the parties in this case is entirely contractual, and that the Commission does not have jurisdiction over this dispute.

Under Section 16(a) of PERA, a charge must be filed with the Commission and served on the respondent within six months of the date of the alleged unfair labor practice. The statute of limitations under Section 16(a) is jurisdictional. *Lapeer Co,* 19 MPER 45 (2006); *Police Officers Labor Council, Local 355,* 2002 MERC Lab Op 145, 146; *Walkerville Rural Communities Schs,* 1994 MERC Lab Op 582; *Shiawassee Co Rd. Comm,* 1978 MERC Lab Op 1182. The charging party is responsible for the timely and proper service of a copy of the charge on the respondent. Rule 151(4) of the Commission's General Rules, 2002 AACS, R 423.151(4). The limitations period under Section 16(a) is tolled until the charging party knows or should know of the act which caused his injury and has good reason to believe that the act was improper or done in an improper manner. *Huntington Woods v Wines,* 122 Mich. App 650, 652 (1983).

On June 25, 2004, Respondent issued paychecks containing retroactive pay to members of the bargaining unit. It did not issue them to employees who had been terminated, laid off or who had quit before June 25. The act allegedly constituting a violation of Respondent's duty to bargain, therefore, occurred on June 25, 2004. Respondent did not tell Charging Party at the time it issued these checks that it was not issuing them to laid off or terminated employees, and there is no evidence that Charging Party knew at the time. By the end of July, however, it had learned that Respondent was not going to pay retroactive pay to a group of employees that Charging Party believed had been laid off but that Respondent claimed were terminated. Charging Party argues that Respondent's refusal to pay the retroactive pay should not be viewed as a separate violation of PERA, but rather as one of multiple acts constituting Respondent's repudiation of its contractual obligations with respect to employees laid off in the spring of 2004. It contends that it could not have known that Respondent had repudiated its contract until all of these acts, including Respondent's refusal to recall these employees, had occurred. On May 25, 2004, however, Respondent told Duhn that it was Respondent's position that these employees would have no rights under the contract. In July 2004, Respondent's assistant superintendent, Penni Aldrich, explained to Duhn that Respondent did not believe that it had a contractual obligation to pay retroactive pay to these employees. I conclude that by August 1, 2004, Charging Party knew of Respondent's alleged repudiation of its contractual obligations toward the laid off/terminated employees. Since the charge was not served on Respondent until February 4, 2005, I conclude that the allegation that Respondent repudiated its contract by refusing to pay retroactive pay to laid off/terminated employees in June 2004 is untimely.

Respondent also maintains that it did not repudiate the contract and that the parties' dispute is one of contractual interpretation. The Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its collective bargaining obligations. *University of Michigan,* 1978 MERC Lab Op 994, 996, citing *NLRB v C & C Plywood Corp,* 385 US 421 (1967). However, if the term or condition in dispute is "covered by" a provision in the collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich. 309, 317-321 (1996). As the Commission stated in *St Clair Co Road Comm,* 1992 MERC Lab Op 533 at 538:

> Where there is a contract covering the subject matter of the dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is present.

One exception to this principle is where a party's actions constitute a "repudiation" of the collective bargaining agreement manifesting a disregard for the party's collective bargaining obligations. The Commission has described repudiation as a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ,* 1997 MERC Lab Op 501, 507; *Cass City Pub Sch,* 1980 MERC Lab Op 956, 960. The Commission has held that in order for it to find repudiation: (1) the contract breach must be substantial, and have a significant impact on the bargaining unit, and (2) there must be no bona fide dispute over interpretation of the contract.

Gibraltar Sch Dist, 16 MPER 36 (2003*); Crawford Co,* 1998 MERC Lab Op 17, 21; *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897. In *Plymouth-Canton,* the Commission also held that it would decide claims involving both an alleged contract breach and an alleged unilateral change in terms and conditions of employment when there was no contractual procedure in place for final and binding arbitration of the contract dispute.

Invoking *Plymouth-Canton,* Charging Party asserts that grievance procedure was unavailable to resolve this dispute. It argues that by the time the contract went into effect on July 1, 2004, a grievance seeking relief for Respondent's refusal to pay retroactive pay to its laid off employees would already have been untimely. However, Respondent's posting of vacant unit positions and its refusal to recall the laid off employees occurred after July 1, 2004. Charging Party does not explain why the grievance process with its binding arbitration procedure could not have provided it with the relief it seeks for Respondent's repudiation of the layoff and recall provision of the contract.

Charging Party also maintains that all the elements of repudiation are present in Respondent's refusal to recall laid off employees under the layoff and recall provision of the contract. According to Charging Party, the agreement contained a clear and unequivocal duty to recognize bargaining unit service and restore employees to work in order of seniority. It asserts that Respondent ignored this duty. Finally, according to Charging Party, the layoff and recall provision was "central to the bargaining process," and Respondent's action had a significant impact on the unit. Respondent asserts that there is a bona fide dispute between the parties over whether the contract's layoff and recall provisions were applicable to former employees terminated prior to the parties' first contract becoming effective. It denies that the meaning of the contract is clear, and it maintains that it has made a logical and legitimate argument that employees terminated in the spring of 2004 were not laid off pursuant to a contract clause that was not yet in existence.

In those cases where the Commission has found employer repudiation, the employer's contractual defense has been either spurious or nonexistent. For example, in *City of Detroit*, 1976 MERC Lab Op 652, the employer asserted that its need to implement an affirmative action plan to remedy past racial discrimination justified its refusal to follow clear language in the contract dealing with promotions. In *Jonesville Bd of Ed,* 1980 MERC Lab Op 891, 900-901, the employer justified its decision to alter the contractual wage rate based on economic necessity and a management's rights clause that made no reference to wages. In *Cass City Pub Schs,* 1982 MERC Lab Op 241, the employer insisted on applying a religious exception to a union security clause that did not mention this exception. In *City of Detroit, Dep't of Transportation,* 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985), and *Taylor Bd of Ed,* 1983 MERC Lab Op 77, the employers argued only that they could no longer afford to fulfill their contractual obligations. By contrast, in this case Respondent presented a cognizable argument, based on the language of the agreement, that the employees in dispute were not entitled to recall because they were not "laid off" within the meaning of Article X. I find that the parties had a bona fide dispute over the meaning of their contract that could have been resolved through the contractual grievance arbitration procedure. I conclude, therefore, that Respondent did not repudiate the contract or its collective bargaining obligation in this case.

Charging Party also asserts that after the parties reached tentative agreement, Respondent deliberately pursued a course of conduct that would permit it to permanently terminate employees who had supported the formation of a labor organization. According to Charging Party, this conduct

included Respondent's labeling of the spring 2004 layoffs as terminations, their timing relative to the effective date of the contract, Respondent's decision to issue checks for retroactive pay before the contract's effective date, and its refusal to recognize the laid off employees as having recall rights under the contract. Charging Party's claim that the spring 2004 layoffs violated Sections 10(1)(a) and (c) of PERA was the subject of a previous charge. Here, Charging Party appears to be arguing that Respondent violated its duty to bargain in good faith by structuring the spring 2004 layoffs to avoid having any further contractual obligations toward these employees. However, the parties to a collective bargaining relationship routinely attempt to maximize their rights and minimize their obligations within the confines of their contract language. I conclude that Charging Party has failed to show how Respondent's conduct in this case violated Sections 10(1)(e) of PERA. I recommend, therefore, 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: _____