STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case Nos. C06 L-290, C06 L-291,
C06 L-292, C06 L-293 & C07 E-109

-and-

ORGANIZATION OF CLASSIFIED CUSTODIANS,
Labor Organization-Charging Party,
_____/

APPEARANCES:

Roumell, Lange & Cholack, P.L.C., by Eric W. Cholack, Esq., for the Respondent

Linda Harris, Recording Secretary, and Carnell G. Butler Sr., Vice President, for the Charging Party

DECISION AND ORDER

On June 21, 2007, 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, 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

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Roumell, Lange & Cholack, P.L.C. by Eric W. Cholack, for the Respondent

Linda Harris, Recording Secretary, and Carnell G. Butler Sr., Vice President, for the Charging Party

DECISION AND RECOMMEND ORDER ON SUMMARY DISPOSTION

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 assigned to David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. This matter comes before the Commission on unfair labor practice charges filed on December 11, 2006 (Case Nos. C06 L-290, C06 L-291, C06 L-292 & C06 L-293) and May 22, 2007 (Case No. C06 E-109) by the Organization of Classified Custodians (OCC) against the Detroit Public Schools.

The four charges filed on December 11, 2006, read, in pertinent part:

Case No. C06 L-290

> In July of 2005 the union informed the district of the violation the district made concerning the laying off of Officers and Stewards. The district [sic] reply was that we were no longer recognized as a union with the district. The union informed the district that the action was just a lay off and recall rights were still in effect. The district ignored our request for the recall of the officers.
>
> On [sic] August of 2006, the union filed a grievance to the effect that the district violated Article 17. The district stood firm on not honoring our contract. Therefore we charge the district with violating Article 17 of our contract.

Case No. C06 L-291

In June of 2004 and July of 2005 the [district] laid off members according to total accumulation of service in the bargaining unit since the last date of appointment. However the contract contained a protection from the clause for members that were already in the bargaining unit prior to the signing of the year 2000 contract.

This protection states that members already in the union prior to the year 2000 would follow the seniority of their hire date. The district instead . . . laid off every member by the district's interpretation and not by the contract, thereby laying off members that should not have been laid off in [the] year 2004.

Case No. C06 L-292

In June of 2004 the district of the Detroit Public Schools announced that there would be a staff reduction of twenty percent (20%) from every department. Instead the district laid off 193 of 270 employees from the Organization of Classified Custodians which is approximately 70% of our union with the highest seniority of the department. And did not touch other departments or other unions in the same department.

[In] December of 2004 the CEO of the district again announced that the district laid off twenty percent (20%) from every department only to eliminate the remaining 30% of our membership, again employees with the highest departmental seniority. We find that the district's actions violated our seniority clause Article #17 of our contract. When the union grieved this issue, the district indicated that we were not recognized as a union for the district.

The district has hired hundreds of new departmental [employees] yet still has not called this bargaining unit back [and] the district told us that we were not a recognizable union with the district.

Case No. C06 L-293

The Organization of Classified Custodians hereby requests a Stay of a document that would remove the union from being recognized by the Detroit Public Schools. The union feels justified in making this request due to the violations specifically Article II – Change and Terminations & Letter of Understanding Pg. 5 (Severance). The district committed these violations in order to remove the Union. Furthermore, the district has violated every aspect of our contract. The union believes a stay of termination of said document is warranted for the following reasons:

The district laid off the entire bargaining unit in July of 2005 and immediately refused to hear any of our grievances because they indicated that the OCC was no longer recognized as a union. One (1) year passed and the district did not recognize us as a union of the district . . . . The union then filed a lawsuit against the district and an unfair labor practice [charge] on unlawful layoff against the district.

> On July 20th, 2006, the district sent a letter of termination as a union from the district, however the notice was not certified nor was the letter prior to intended layoffs of the entire bargaining unit. The district started to negotiate with the union for 1/10 of the membership to return under a different capacity contingent upon the union settlement and release of any arbitration/ULP's that the union had against the district. The union then requested that if the letter of termination was postpone[ed] we would consider their request, [but] the district refused.
>
> The district also refused to meet to discuss severance due to the massive layoffs [and] no buy outs were discussed. Instead the district told us that we were not a recognizable union with the district.

The charges were consolidated and an evidentiary hearing was scheduled for May 14, 2007. On April 5, 2007, I issued an order adjourning the hearing without date and granting Charging Party fourteen days in which to show cause why the charges should not be dismissed for failure to state a claim upon which relief can be granted under PERA. Charging Party did not file a response to that order. Instead, on May 22, 2007, the Union filed a "new" charge which was assigned Case No. C07 E-109. That charge alleged, in pertinent part:

> The Organization of Classified Custodians hereby charge[s] the Detroit Public Schools with the violation of article #49 (Change and Termination) & a Letter of Understanding covering Severance (page 55) of the collective bargaining agreement between the district and the union.
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> * * *
>
> The district laid off the entire bargaining unit in July of 2005, and immediately refused to hear and act on any grievances that were submitted prior to such layoff because the district indicated that the district no longer recognized our union.
>
> One year has passed and the district still did not recognize us as a union. The union informed the district that we were still recognized because we did not receive any registered correspondence indicating that such an effect [sic] and the district did not follow the articles within our contract.
>
> On July 20th, 2006 the district sent a normal letter of termination to the union. However the letter was not certified nor was it sent prior to the layoffs. The union informed the district of their non-compliance of the contract concerning article #49 and the letter of understanding on page 55 of the agreement. The district stood firm on their actions.
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> The union entered a lawsuit against the district, as a result the district wanted to return 1/10th of the membership to a lesser position. The union wanted to negotiate such offer, however the district wanted to dictate such conditions where every other

union in the department was afforded overtime, while our union was excluded such opportunity.

On December 31st, 2006 the district sent the union a letter stating that we were no longer recognized as a union with the Detroit Public Schools. The union again reiterated to the district that we were not properly informed of such actions and no severance was discussed, the district ignored our request. It is for this reason that we charge the district with an unfair labor practice.

Discussion and Conclusions of Law:

Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools,* 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines,* 122 Mich App 650, 652 (1983). In the instant case, most or all of Charging Party's complaints relate to events which allegedly occurred in 2003, 2004 and 2005, more than six months prior to the filing of the charges in this matter. Accordingly, such allegations are time barred under Section 16(a) of the Act.

With respect to the substantive allegations set forth in the charges, the OCC appears to contend that Respondent acted unlawfully in unilaterally laying off members of its bargaining unit. Both the Commission and the Courts have held that a public employer has an inherent right to determine the size of its work force and the scope of services it will provide to the public. *AFSCME, Local 1277 v City of Centerline*, 414 Mich 642 (1982); *Benzie County,* 1986 MERC Lab Op 55, 59. For this reason, it is well-settled that a public employer has no duty to bargain over its decision to eliminate positions and lay off employees. See e.g. *Ishpeming Supervisory Employees, Local 128, AFSCME v City of Ishpeming*, 155 Mich App 501, 508-516 (1986), aff'g in part 1985 MERC Lab Op 687. To the extent that Charging Party is alleging that the Employer acted unlawfully by refusing to negotiate with the OCC in July and December of 2006, no PERA violation is stated. Charging Party concedes that there are no longer any employees in the bargaining unit, and it is well-established that the Commission does not recognize units consisting of less than two employees. See *City of Hazel Park, Library B*oard, 1996 MERC Lab Op 287; *Int'l Union of Bricklayers and Allied Craftsmen, Local 31, AFL-CIO*, 1992 MERC Lab Op 677.

The charges further allege that Respondent violated PERA by breaching the terms of the collective bargaining agreement between the Detroit Public Schools and OCC. The Commission has held that an employer's alleged breach of a collective bargaining agreement does not, in and of itself, constitute an unfair labor practice. A PERA violation can be established only where the Charging Party has alleged and proven that the employer has repudiated the agreement. A finding of repudiation cannot be based on an insubstantial or isolated breach of contract. *Oakland County Sheriff*, 1983 MERC Lab Op 538, 542. Repudiation exists only when both of the following occur: (1) the contract breach is substantial, and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch,* 1984

MERC Lab Op 894, 897. The Commission will find repudiation only when the actions of a party amount to 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. To the extent that a repudiation has been alleged, the charge would nonetheless be untimely given that the events allegedly giving rise to such a claim occurred in July of 2005.

Despite having been given an opportunity to do so, Charging Party has asserted no facts from which it could be concluded that Respondent violated PERA. I recommend that all of the charges be dismissed as untimely and for failure to state a claim upon which relief can be granted.

RECOMMENDED ORDER

The unfair labor practice charges in Case Nos. C06 L-290, C06 L-291, C06 L-292, C06 L-293 & C07 E-109 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: _____