

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

In the Matter of:

COUNTY OF WASHTENAW and WASHTENAW
COUNTY TREASURER,
Public Employers - Respondents,

Case No. C04 F-162

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 2733,
Labor Organization - Charging Party.

APPEARANCES:

Gallagher & Gallagher, P.C., by Paul T. Gallagher, Esq., for Respondent County of Washtenaw

Catherine McClary, Respondent Washtenaw County Treasurer, *In Propria Persona* before the Administrative Law Judge; Allan Falk, P.C. by Allan Falk, Esq. for Respondent Washtenaw County Treasurer on Exceptions

Miller Cohen, P.L.C., by Eric I. Frankie, Esq., for Charging Party

DECISION AND ORDER

On July 28, 2006, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent Washtenaw County Treasurer (Treasurer) violated her bargaining obligation under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(3). Finding that the Treasurer waived the right to assert her bargaining authority as a co-employer of the bargaining unit represented by Charging Party, American Federation of State, County, and Municipal Employees, Council 25, Local 2733 (AFSCME or the Union), the ALJ held that the Treasurer is estopped from rejecting the contract ratified by her co-employer, Respondent County of Washtenaw (County), and AFSCME. The ALJ concluded that the Treasurer violated Section 10(1)(e) of PERA when she refused to allow a member of the bargaining unit to bump into a position in her office pursuant to the superseniority provision of the contract. The ALJ also found that the Treasurer did not violate Section 10(1)(c) of PERA as there was no

evidence that, in reaching her decision, she was motivated by anti-union animus or hostility to employees' exercise of their protected rights. He also found a technical violation of Section 10(1)(e) by the County because it eliminated two positions to which the bargaining unit member should have been allowed to transfer pursuant to the contract.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On August 21, 2006, Respondent Treasurer filed exceptions to the ALJ's Decision and Recommended Order. After receiving an extension of time in which to file, Charging Party timely filed a Brief in Support of the ALJ's Decision and Recommended Order on October 5, 2006.¹

Both Charging Party and Respondent Treasurer request oral argument. Because we find that oral argument will not materially assist us in this matter, the requests are denied.

In her exceptions, the Treasurer contends that the ALJ erred in finding that she was bound by the collective bargaining agreement between AFSCME and the County. She claims that the contract was unlawful, that she did not sign it or accept its terms, and that she is not bound by it. She also asserts that the ALJ erred in finding the matter to be justiciable. She contends that the Board of Commissioners' decision to eliminate the positions in question before the filing of this charge makes it impossible to fashion a remedy and, therefore, renders the matter moot. The Treasurer argues that she cannot have committed an unfair labor practice with respect to a position that has ceased to exist. Upon review of Respondent Treasurer's exceptions, we find them to be without merit.

Procedural Matters:

On October 11, 2006, Respondent Treasurer filed a reply brief in support of her exceptions. On that date, she also filed a Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order. On October 18, 2006, Charging Party filed a Response to Respondent Treasurer's Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order and Counter Motion to Strike. On the same date, Charging Party filed a Supplemental Brief in Support of the ALJ's Decision and Recommended Order. Respondent Treasurer filed a Reply in Support of Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order and Answer in Opposition to Counter Motion to Strike Reply Brief on October 23, 2006.

We have not considered the reply brief filed by Respondent Treasurer in support of her exceptions because the General Rules of the Michigan Employment Relations Commission do not permit the filing of a reply to the response to exceptions. See Rule 176 of the Commission's General Rules, 2002 AACS, R 423.176. For the same reason, our review of Respondent Treasurer's Reply in Support of Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order and Answer in Opposition to Counter Motion to Strike Reply Brief, must be limited to the portion of that

¹ We note that Respondent County did not file exceptions, a brief, a response, or any other pleading.

document answering Charging Party's counter motion to strike. Similarly, Charging Party's Supplemental Brief in Support of ALJ's Decision and Recommended Order has not been considered, as it is not permitted under the Commission Rules. See R 423.176.

Upon review of Respondent Treasurer's Motion to Strike Charging Party's Brief in Support of ALJ's Decision and Recommended Order, we find that Respondent's motion is without merit. Respondent's motion contends that Charging Party's response to the exceptions is untimely. Respondent asserts that her exceptions were served on the other parties by first class mail on August 21, 2006. Therefore, the response to the exceptions or a request for an extension of time to file the response was originally due September 5, 2006. That date was calculated by counting ten days from the date of service pursuant to Rule 176(6), plus an additional three days under R423.183 because service was by mail. But for provisions of Rule 183 that preclude setting the filing deadline on a Saturday, Sunday, or legal holiday, the due date would have been September 3, 2006, the Sunday before the Labor Day holiday. Accordingly, the original deadline for filing the response to the exceptions was the next business day, September 5, 2006. Charging Party filed a timely request for a thirty day extension of time on August 31, 2006. An extension of time is calculated by adding the amount of time requested to the original due date, provided the requested extension is for thirty days or less. Thus, the Commission order, issued to all three parties on September 5, 2006, extended the time within which Charging Party could file its response to the exceptions until October 5, 2006.

Respondent Treasurer also complains in her motion to strike that Charging Party's brief does not comply with the formatting requirements of Rules 176 and 184. To the extent that the cited rules are applicable to Charging Party's brief, we find any noncompliance with those rules to be insufficient to justify striking a party's brief.

Factual Summary:

We adopt the factual findings of the Administrative Law Judge and recite them only as necessary here. Charging Party is the certified collective bargaining representative of two separate bargaining units of Washtenaw County employees, only one of which is involved in this matter. That unit consists of all nonsupervisory professional employees of the County, but excluding employees of the circuit, probate, and district courts, the prosecuting attorney's office, the public defender's office, the corporation counsel's office, and the human resources department.

In January of 1997, Catherine McClary took office as Washtenaw County Treasurer. She has been reelected twice, most recently for the 2003-2007 term of office. During McClary's tenure in office, Charging Party and the County have entered into two successive collective bargaining agreements covering the periods 1998-2002 and 2003-2007. Although the County traditionally bargained contracts on behalf of all of its elected officials and its bargaining team represented a cross-section of County departments, neither McClary nor any member of her department was present for the negotiation of either of these agreements. However, McClary was present at

departmental meetings at which the status of negotiations was discussed. Further, she was aware that some employees in her office were in the bargaining unit and that they paid membership dues to the Union. Nevertheless, she refused to sign the negotiated agreements when requested to do so by the County's labor relations director.

Due to a reorganization in April of 2004, Donald Bilbey's position as an accountant I/II/III in the County's support services department was eliminated. Bilbey was a member of Charging Party's bargaining unit and, since early 2003, he has served as the Union treasurer. Article 15 of the 2003-2007 collective bargaining agreement contained a "superseniority" clause that placed Charging Party's officers at the top of the unit's seniority list for the purpose of layoff. When Bilbey attempted to exercise his right under Article 15 to bump into the least senior accountant I/II/III position in the Treasurer's office, McClary called Charging Party's president and stated that she would not allow Bilbey to bump because she had never agreed to the collective bargaining agreement and believed it was unfair for a "new officer" to displace one of her employees.

On May 19, 2004, the Board of Commissioners voted to eliminate the accountant position into which Bilbey sought to bump and, instead bumped him into a different accountant position in the Treasurer's office. McClary again refused to allow Bilbey to bump into a position in her office. In response, the Board of Commissioners eliminated the latter position and bumped him into an accountant position in the County's finance department.

At the hearing before the ALJ, witnesses for Charging Party provided testimony in support of its assertion that McClary was bound by the contracts negotiated by Charging Party and the County. For example, McClary participated in the negotiations with Charging Party that resulted in the settlement of a matter involving employee discipline. On another occasion, she accepted the resolution of a disciplinary issue that had been negotiated by representatives of the County and the Union. She also allowed an employee in the IT department to bump into the Treasurer's office pursuant to the procedure set forth in the collective bargaining agreement. Finally, when an employee of the Treasurer's office with health problems needed to retire, McClary called a conference pursuant to the AFSCME contract seeking to reach a resolution that would provide the employee with health insurance.

Discussion and Conclusions of Law:

A county treasurer is a co-employer, with the county, of her appointed deputies. MCL 48.37; *Branch Co Bd of Comm'rs v UAW*, 260 Mich App 189 (2003); *Berrien Co*, 1987 MERC Lab Op 306. As a co-employer, the Treasurer has the right to bargain and to approve any agreement pertaining to her deputies. *Wexford Co*, 1992 MERC Lab Op 444, 446. As a public employer, the Treasurer has the duty under Section 15 of PERA to bargain in good faith over terms and conditions of the employment of her deputies with the union representing the bargaining unit in which the deputies are included. Generally, an employer's duty to bargain under PERA is conditioned on a request or demand to

bargain from the union. *St Clair Prosecutor v AFSCME Local 1518*, 425 Mich 204, 242 (1986); *SEIU Local 586 v Village of Union City*, 135 Mich App 553, 558 (1984). However, the requirement of a bargaining demand can be waived by a public employer – either expressly or by implication. *St Clair Prosecutor*, at 242-243. Waiver may be implied where a co-employer leads the other parties to believe that it considers itself to be bound by an agreement struck by the other participating parties. *Id.*

There is no claim that Charging Party demanded to bargain with the Treasurer or that McClary expressly authorized the County to bargain for her. In this case, however, it was the County's practice to negotiate on behalf of its elected officials. Although McClary apparently disagreed with that practice, it was not until Bilbey sought to bump into the Treasurer's office that she informed Charging Party that she did not agree with the collective bargaining agreement and objected to the superseniority provision.

McClary's actions indicate that she acquiesced to the terms of the contract ratified by her co-employer, the County, and by the exclusive representative of her deputies, AFSCME. McClary failed to timely advise Charging Party of any objection to the contract although she knew that the County had been engaged in collective bargaining with the Union over an agreement covering employees in her office and she knew that some of her employees were dues paying members of the Union. Moreover, McClary had engaged in negotiations with AFSCME concerning a matter involving the removal of an employee from her job in the Treasurer's Office and concerning the continuance of health insurance benefits for a retiring employee. She did not object when the County bumped an employee into the Treasurer's Office pursuant to the contract. Nor did she oppose a grievance settlement negotiated between Charging Party and the County regarding her decision to terminate an employee. Consequently, we agree with the ALJ that, by her actions, the Treasurer is estopped from challenging the ratified contract. She waived the right to assert her bargaining authority as a co-employer of her deputies. *Wexford Co*, 1992 MERC Lab Op 444.

Respondent Treasurer also argues that the charge should be dismissed because the contract's Article 15, conferring superseniority, is unlawful. Superseniority for purposes of layoff and recall violates Sections 10(1)(a) and (c) and 10(3)(a)(i) and 10(3)(b) of PERA when granted to union officers who do not perform steward or other on-the-job contract administration functions. See e.g. *Warren Consolidated Sch*, 18 MPER 163 (2006) and *Grand Rapids Bd of Ed*, 1985 MERC Lab Op 802. However, because no evidence was presented to the ALJ concerning whether Bilbey performs contract administration duties as Charging Party's treasurer, and there is no unfair labor practice charge challenging Article 15, we decline to address this issue.

We agree with the ALJ that Washtenaw County Treasurer violated her bargaining obligation under PERA. Further, we adopt the ALJ's finding of a technical violation of Section 10(1)(e) by the County in the absence of any exception to that finding.

Finally, all other arguments presented by the parties have been considered; we conclude that they would not change the results in this case.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Dardarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
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In the Matter of:

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AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 2733,
Charging Party-Labor Organization.

APPEARANCES:

Paul T. Gallagher, Esq., for Respondent County of Washtenaw

Catherine McClary, Washtenaw County Treasurer, *In Pro Per*

Miller Cohen, P.L.C., by Eric I. Frankie, 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 and 423.216, this case was heard at Detroit, Michigan on March 15, 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 Charging Party and Respondent Washtenaw County Treasurer on or before May 12, 2005, I make the following findings of fact, conclusions of law, and recommended order.²

The Unfair Labor Practice Charge:

On June 21, 2004, Charging Party American Federation of State, County and Municipal Employees (AFSCME) Council 25, Local 2733, filed an unfair labor practice charge against the County of Washtenaw. On August 18, 2004, the Union amended the charge to include the Washtenaw County Treasurer as a Respondent. The charge, as amended, alleges that Respondents violated Section 10 of PERA by repudiating a collective bargaining agreement

² Respondent County of Washtenaw did not file a post-hearing brief in this matter.

entered into by the parties in 2002. Specifically, AFSCME contends that the Washtenaw County Treasurer, Catherine McClary, prevented bargaining unit member Donald Bilbey from bumping into a position in the Treasurer's Office to which he was entitled pursuant to a "superseniority" provision in the contract. At the hearing, Charging Party once again amended the charge to include an allegation that the Washtenaw County Treasurer was motivated by anti-union animus in refusing to allow Bilbey to bump into a position in her department.

Finding of Facts:

Charging Party is the certified collective bargaining representative of approximately 700 employees of Washtenaw County. AFSCME Local 2733 members are organized in two bargaining units, referred to by the parties as Units A and B. Unit A consists of all nonsupervisory professional employees of the County, excluding employees of the circuit, probate and district courts, the prosecuting attorney's office, the public defender's office, the corporation counsel's office and the human resources department. Unit B is comprised of all non-degreed County employees.

Catherine McClary took office as Washtenaw County Treasurer in January of 1997. She has since been reelected to that office twice, most recently for a term covering the period 2003-2007. Since McClary took office as Washtenaw County Treasurer, AFSCME Local 2733 and the County have been parties to successive collective bargaining agreements covering the periods 1998-2002 and 2003-2007.

The lead negotiator for the County during negotiations on the 1998-2002 contract with Unit A was labor relations director Diane Heidt. The remainder of the County's bargaining team consisted of representatives from the juvenile detention, juvenile court, environmental health and friend of the court. McClary was not present during the negotiations, nor was any member of her department. AFSCME's representatives did not question the absence of the treasurer because it appeared to them that the Employer's bargaining team represented a cross-section of County departments, and because the County had traditionally bargained contracts on behalf of all its elected officials.

After an agreement had been reached between Charging Party and the County's negotiating team, Heidt called McClary and asked her to sign a copy of the contract. McClary refused to sign the agreement, indicating to Heidt that she felt uncomfortable because she "didn't have anything to do with it." The 1998 to 2002 contract was ultimately signed by the chair of the Washtenaw County board of commissioners, the clerk/register of deeds, the drain commissioner, the sheriff and the prosecuting attorney. There was no signature line for the Washtenaw County Treasurer on the final agreement.

The County's bargaining team for the 2003-2007 contract consisted of Heidt and representatives from public health, juvenile detention and the trial court. Once again, neither McClary nor any representative of the Treasurer's Office were present for the negotiations. McClary was aware that bargaining was ongoing, however, as there were brief discussions about the status of negotiations during the departmental meetings which McClary attended. In addition, McClary knew that some of her employees were in Charging Party's bargaining unit

and that they paid membership dues to AFSCME. On or about March 18, 2003, Heidt presented McClary with a copy of the 2003-2007 contract for her signature, but McClary again refused to add her signature to the document. The contract was ultimately signed by the chair of the board of commissioners, the clerk/register of deeds, the drain commissioner, the sheriff and the prosecuting attorney. The final version of the agreement contains a line for McClary's signature which was left blank, as was a space intended for the signature of a member of the Union's negotiating team.

The incident which gave rise to this dispute involved Donald Bilbey, an Accountant I/II/II in the County's support services department. Bilbey served as an AFSCME steward for a number of years and, in early 2003, was elected to the position of Union treasurer. Due to a reorganization which occurred in April of 2004, Bilbey's position in the support services department was eliminated.

Article 15 of the 2003-2007 contract contains a "superseniority" clause which provides that officers of Local 2733, the chapter chairperson, secretary and all stewards shall head the seniority list of the unit for the purpose of layoff during their term of office. By letter dated April 8, 2004, the County notified Bilbey of his right under Article 15 to bump into the least senior Unit A accountant I/II/II position in the Treasurer's Office, a position which was held at the time by Jihong Shi, an employee with more overall seniority than Bilbey.

Bilbey accepted the bump and Shi was removed from her position in the Treasurer's Office. Bilbey was scheduled to begin working in the position formerly held by Shi on or about May 3, 2004. Prior to that date, McClary called Charging Party's president, Robert Brabbs, and told him that she was not going to allow Bilbey to bump into a position in her department because she had never agreed to the AFSCME contract and did not believe it was fair for a "new officer" to displace one of her employees. That same day, the Union filed a grievance asserting that Bilbey was being denied his bumping rights under Article 15 of the contract.

On May 5, 2004, the County's corporation counsel sent a letter to McClary requesting that she confirm that it was her position that the Washtenaw County Treasurer was not bound by the contract negotiated between AFSCME and the County. Specifically, the letter stated, in pertinent part:

It has come to my attention that you have taken the position that you are not bound by the AFSCME Local 2733 collective bargaining agreements. This takes place after several years of accepting and abiding by the terms and conditions of the collective bargaining agreements. You have specifically refused to acknowledge the seniority provisions of the agreement regarding the placement and transfer of employees in the case of a lay-off. [I]t also appears that you are now repudiating the entire collective bargaining agreements between the Board of Commissioners and AFSCME Local 2733.

McClary responded to the corporation counsel by memorandum that same day. The memorandum provided, in relevant part:

[T]his will confirm that I cannot repudiate the collective bargaining agreement between the Board of Commissioners and AFSCME Local 2733 as I have never negotiated nor been a meaningful party to the agreement. Although I have the legal status as a co-employer with the Board of Commissioners, I am not a party to the agreement because AFSCME has never asked me to bargain with it on terms and conditions of employment within the Office of County Treasurer, nor did I authorize anyone to bargain on behalf of the Treasurer.

I fully support unionized work forces and I am a firm believer in the underlying concepts of collective bargaining. Even so, I do not believe that a Union officer of only a few weeks duration should bump a long-term, highly skilled, experienced employee with more seniority who is supporting two children.

As Washtenaw County Treasurer, I am asking Corporation Counsel's Office to represent me in this challenge by AFSCME. I have neither acquiesced nor agreed to "super seniority." AFSCME has an affirmative obligation and burden to submit to the Treasurer a demand to bargain on non-economic terms and conditions within the Treasurer's Office, including seniority. I have never been afforded the opportunity to negotiate, nor accepted or abided by, "super seniority" bumping rights into the Office of County Treasurer. [Emphasis in original.]

That evening, the Washtenaw County Board of Commissioners voted unanimously to adopt a resolution which conveyed to the County administration its "support of their execution" of the collective bargaining agreement and called for the faithful execution of "all clauses of all of the County's bargaining agreements."

On May 19, 2004, the Board of Commissioners voted to eliminate the accountant position in the Treasurer's Office into which Bilbey was supposed to have bumped. The County then bumped Bilbey into a different accountant position in the Treasurer's Office, effective June 11, 2004. The employee who held that position, Jacco Gelderloos, was moved to a position in another department. Once again, however, McClary refused to allow Bilbey to bump into a position in the Treasurer's Office. In response, on or about June 2, 2004, the Board eliminated the position in the Treasurer's Office formerly held by Gelderloos and bumped Bilbey to an accountant position in the County's finance department, where he remained at the time of hearing in this matter. Thereafter, on August 18, 2004, the Union filed the instant charge against the County and the Treasurer.

At the hearing in this matter, Charging Party's witnesses testified about various incidents that occurred between 1998 and 2005 which purportedly caused the Union to believe that McClary was bound by the terms and conditions set forth in the contracts negotiated by the County. For example, during bargaining on both the 1998-2002 and 2003-2007 contracts, the County and the Union agreed to reclassify several positions, including positions within the Treasurer's Office.

In 2000, Betty Mastichelli, an employee of the Treasurer's Office and a member of AFSCME Local 2733 Unit B, was disciplined. McClary asked the County's human resources

department to transfer Mastichelli out of the Treasurer's Office. Negotiations ensued between McClary, Brabbs and representatives from the County's human resources department. Ultimately, the County and the Union agreed that Mastichelli would be moved to another department and that her wages would be red-circled. Brabbs believed that the settlement agreement had been approved by McClary since the terms of the agreement were fully implemented and Mastichelli was ultimately relocated to a position outside of the Treasurer's Office.

Another employee of the Treasurer's Office, Stephanie Battle, was terminated by McClary for poor performance. AFSCME filed a grievance over the termination and, pursuant to the terms and conditions set forth in the AFSCME contract, it went directly to Heidt, who is Step 3 of the grievance procedure. The grievance was ultimately settled as a result of negotiations which took place involving Heidt and Brabbs. Although McClary did not participate in these discussions, Brabbs testified credibly that Heidt held herself out as a representative of both the County and the Treasurer's Office for purposes of resolving the dispute. McClary was aware of the settlement, but took no action to oppose it. At hearing, McClary testified "[Heidt] told me it was less expensive to settle [than] to go to arbitration. And I didn't sign anything or agree to it or not agree to it, if it's cheaper for the County that's what they decided to do."

On another occasion, McClary consulted with Heidt and Vera McDaniel concerning a problem employee. On the advice of Heidt and McDaniel, McClary began imposing progressive discipline on the employee. In addition, McClary started documenting the employee's conduct by filling out "union performance evaluation" forms. Ultimately, McClary went to Heidt and asked for the County's assistance in getting the employee moved to another department. Heidt indicated to McClary that there was an employee in the IT department, Lois Merritt, who was eligible to bump into the position. Merritt was transferred to the Treasurer's Office in 2003 pursuant to the bumping procedure set forth in the AFSCME contract.

A few years prior to the hearing in this matter, a part-time employee of the Treasurer's Office began experiencing medical problems and needed to retire. In an attempt to find a way to get health insurance for this employee, McClary called a conference with Brabbs and a representative of the County's labor relations department. According to Brabbs, this conference was held pursuant to the terms and conditions set forth in the AFSCME contract.

Discussion and Conclusions of Law:

Charging Party contends that the refusal of the Washtenaw County Treasurer to honor the collective bargaining agreement's "superseniority" language and allow Bilbey to bump into a position in the Treasurer's Office constitutes a repudiation of the agreement in violation of Section 10 of PERA. The treasurer, McClary, argues that as a co-employer of Charging Party's members, she is bound by the collective bargaining agreement only with respect to economic terms and conditions of employment, such as wages and fringe benefits. McClary contends that she is not obligated to abide by provisions in the agreement relating to non-economic terms and conditions because she did not participate in the negotiations which resulted in the contract, and because she was not a signatory to that agreement. McClary further contends that no repudiation

of the contract occurred in the instant case because the superseniority provision agreed to by the County and AFSCME is unlawful on its face.

It is well-established that a county treasurer is a co-employer of her appointed deputies. MCL 48.37; *Branch County Bd of Commissioners v UAW*, 260 Mich App 189 (2003); *Berrien Co*, 1987 MERC Lab Op 306. As a co-employer, the treasurer has the right to bargain and to approve any agreement pertaining to her deputies. *St. Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204 (1987). With this right, however, comes certain obligations, including the obligation to bargain in good faith with the certified representative of her employees. *County of Wexford*, 1992 MERC Lab Op 444; *St. Clair County Sheriff*, 1976 MERC Lab Op 708. The employer's bargaining duty is set forth in Section 15 of PERA, which provides:

A public employer shall bargain collectively with the representatives of its employees as defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

It is a violation of Section 10(1)(e) of PERA for a public employer to refuse to bargain collectively with the representatives of its employees. However, PERA does not require the employer to initiate bargaining. Rather, an employer's duty to bargain under the Act is conditioned on there being a request to bargain from the employees or the employee representative. *St. Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204, 247 (1986); *Local 586, SEIU v Union City*, 135 Mich App 553, 558 (1984). The requirement that there be a bargaining demand can be impliedly or expressly waived by a public employer. *St. Clair Prosecutor, supra* at 247-248 (1986). Waiver may be implied by acquiescence that would reasonably lead the other parties to believe that a co-employer considered herself to be represented by another employer during negotiations and ultimately to be bound by the agreement struck by the other participating parties. *Id.*

In the instant case, there is no dispute that AFSCME Local 2733 did not make any request to bargain with the Washtenaw County Treasurer and that McClary never directly authorized the County to bargain over her employer prerogatives. However, I find that that Charging Party reasonably believed that the Treasurer was bound by the contracts it negotiated with the County. The record indicates that it was the practice of the County to negotiate on behalf of its elected officials. Although McClary apparently disagreed with this practice, as evidenced by her refusal to sign the 1998-2002 and 2003-2007 collective bargaining agreements, these objections were never disclosed to the Union until Bilbey attempted to bump into a position in the Treasurer's Office in May of 2004. McClary's silence is particularly troubling given her knowledge that certain employees in her department were dues paying members of

AFSCME Local 2733 and that the County was engaged in negotiations with the Union on collective bargaining agreements covering those employees.

Further indication that an implied waiver by acquiescence occurred in this case comes from McClary's conduct after the 1998-2002 and 2003-2007 contracts went into effect. On at least two occasions during her tenure as Washtenaw County Treasurer, McClary engaged in negotiations or discussions with Union representatives concerning issues relating to employees within her department, including a matter involving the removal of an employee from her job in the Treasurer's Office. McClary also raised no objection when the County bumped an employee into a position in the Treasurer's Office pursuant to the terms and conditions set forth in the AFSCME contract. On another occasion, McClary took no action to oppose a grievance settlement negotiated by the Union and the County relating to McClary's decision to terminate one of her employees. Based upon these facts, I find that McClary waived the right to assert her bargaining authority as a co-employer of Charging Party's members. See e.g. *Wexford, supra* (treasurer estopped from denying agreement where he failed to communicate his dissatisfaction with disputed clause until six months after contract had been ratified and implemented). Cf. *St. Clair Prosecutor, supra* (waiver of bargaining authority did not occur where prosecutor did nothing which would have led parties to believe that he took a different position than his predecessor with respect to his employer prerogative to bargain over the terms and conditions of employees within his office).

Respondent Washtenaw County Treasurer contends that the charge should be dismissed because Article 15 of the contract is itself unlawful. The Commission has held that superseniority for purposes of layoff and recall violates Sections 10(1)(a) and (c) and 10(3)(a)(i) and 10(3)(b) of PERA when granted to union officers who do not perform steward or other on-the-job contract administration functions. See e.g. *Warren Consolidated Sch*, 18 MPER 163 (2006) and *Grand Rapids Bd of Ed*, 1985 MERC Lab Op 802. In the instant case, McClary failed to present any evidence on the issue of whether Bilbey is required to perform contract administration duties in connection with his position as treasurer of Local 2733. More importantly, there is no unfair labor practice charge presently before this tribunal challenging the legality of Article 15. While I question whether that provision would survive such a challenge, I need not pass on the issue at this time given my conclusion that McClary is obligated to honor the terms of the contract negotiated by Charging Party and the County.

While I agree with the Union that Respondent Washtenaw County Treasurer is estopped from rejecting the collective bargaining agreement as implemented by Washtenaw County, I find no evidence that McClary's conduct in connection with this matter constituted unlawful discrimination in violation of Section 10(1)(c) of PERA. McClary testified credibly that she did not want Bilbey to bump into a position in the Treasurer's Office because such a move would have been pursuant to a collective bargaining agreement which she neither negotiated nor signed, and because the action would have resulted in the displacement of another union member who was more qualified and who had more overall seniority than Bilbey. There is simply nothing in the record to suggest that McClary was motivated by anti-union animus or hostility to employees' exercise of protected rights in attempting to prevent Bilbey from bumping into a position in the Treasurer's Office. *City of Grand Rapids (Fire Department)*, 1998 MERC Lab Op 703, 707; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696.

For the reasons stated above, I find that the Washtenaw County Treasurer violated her bargaining obligation under PERA and, therefore, is estopped from challenging the contract as ratified by the County and AFSCME Local 2733, including Article 15, the “superseniority” provision. Although there is no evidence that Respondent Washtenaw County likewise refused to honor the superseniority provision, the County, as a co-employer of Charging Party’s members, was responsible for the elimination of two accountant positions to which Bilbey should have been allowed to transfer pursuant to that provision. I, therefore, find a technical violation of Section 10(1)(e) on the part of the County in connection with this matter.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The County of Washtenaw, the Washtenaw County Treasurer, and their officers, agents and representatives shall hereby:

1. Cease and desist from refusing to bargain in good faith with AFSCME Council 25, Local 2733, the duly certified bargaining agent of its employees, by refusing to recognize the 2003-2007 collective bargaining agreement.
2. Upon demand, reinstate Donald Bilbey to an accountant position in the Treasurer’s Office.
3. Post the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the COUNTY OF WASHTENAW and the WASHTENAW COUNTY TREASURER, public employers under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), have been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT refuse to bargain in good faith with AFSCME Council 25, Local 2733, the duly certified bargaining agent of our employees, by refusing to recognize the 2003-2007 collective bargaining agreement.

WE WILL upon demand, reinstate Donald Bilbey to an accountant position in the Treasurer's Office.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

COUNTY OF WASHTENAW

By: _____

Title: _____

WASHTENAW COUNTY TREASURER

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.