**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

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

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

## DECISION AND ORDER ON RECONSIDERATION

On May 15, 2008, we issued our Decision and Order in the above-captioned matter finding that Respondent Washtenaw County Treasurer (Treasurer) and Respondent Washtenaw County violated their respective duties to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). We ordered Respondents to cease and desist from refusing to bargain in good faith and to take affirmative action to remedy the unfair labor practice.

In accordance with Section 16 of PERA, our Decision and Order was served on Respondent County of Washtenaw, Charging Party American Federation of State, County, and Municipal Employees, Council 25, Local 2733, and their respective attorneys. It was also served on Respondent Washtenaw County Treasurer Catherine McClary, but as the result of an administrative clerical error, it was not served on her attorney on that date.

On June 9, 2008, Respondent Treasurer filed a motion for reconsideration. In her motion, the Treasurer argues that the Commission erred by failing to timely provide a copy of our Decision and Order to her attorney. The Treasurer further contends that the Commission erred by denying her request for oral argument. She also claims the Commission erred by refusing to consider her Reply in Support of Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order. The Treasurer also asserts that we erred by refusing to address the merits of her argument that the superseniority provision of the collective bargaining agreement is invalid. Neither Respondent Washtenaw County nor Charging Party has responded to the Treasurer's motion for reconsideration.

Section 85 of the Administrative Procedures Act (APA), 1969 PA 306, as amended, MCL 24.285, provides that a copy of MERC's final decision or order shall be delivered or mailed to each party *and* to his or her attorney of record. Inasmuch as our Decision and Order was not served on the Treasurer's attorney as required by the APA, our Decision must be set aside. Accordingly, the motion for reconsideration is granted on these grounds.

In our Decision and Order, we denied Respondent's request for oral argument. In her motion, Respondent Treasurer contends that the Commission lacks the authority to deny a request for oral argument because Rule 178 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.178, does not expressly state that we may do so. Respondent Treasurer relies on *Bohannon v Sheraton-Cadillac Hotel*, 3 Mich App 81 (1966) in support of her contention that our denial of oral argument constitutes error. Respondent's reliance on *Bohannon* is misplaced as that case involved an appeal from a Worker's Compensation Appeal Board decision in which the appeal board inadvertently failed to grant a request for oral argument. In *Bohannon*, the applicable rule required the appeal board to schedule a hearing upon the filing of a request for oral argument. The Rules governing proceedings on exceptions before this Commission do not require the granting of oral argument. The Commission's General Rules contain three provisions regarding oral argument: Rule 178, which applies to oral argument before the Commission; Rule 173, which governs oral argument before an Administrative Law Judge (ALJ); and Rule 161(4), which addresses oral argument on motions. While Rule 173 expressly provides that, upon request, a party has a right to oral argument at the close of a hearing before an ALJ, no such right is provided in Rule 178 or Rule 161(4). Indeed, it is implicit in the language of Rules 178 and 161(4) that the request for oral argument may be granted or denied. Pursuant to Rule 178, the Commission has retained the discretion to grant or deny oral argument in matters on exceptions following an ALJ's Decision and Recommended Order. After reviewing the record in this matter, we concluded that oral argument was not likely to provide us with assistance in resolving this matter and exercised the discretion to deny both Charging Party's and Respondent Treasurer's requests for oral argument.

The Treasurer also claims that the Commission erred by refusing to consider her Reply in Support of Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order. In our Decision and Order, we explained that we

would not consider Respondent Treasurer's Reply in Support of Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order, because such supplemental filings are not permitted under the Commission's General Rules.[1] See *Brownstown Twp*, 20 MPER 2 (2007); *City of Grand Rapids*, 19 MPER 69 (2006). Where a party has filed a motion, Rule 161 permits any other party to file a brief in opposition to the motion. However, there is no provision to allow the moving party to reply to the opposing party's brief in opposition to the motion. *Michigan State Univ Admin-Prof'l Ass'n, MEA/NEA*, 20 MPER 45 (2007). See also *Kent Co Sheriff & Kent Co*, 1996 MERC Lab Op 294, 300-301.

Respondent Treasurer contends that if we had considered her Reply in Support of Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order, we would have found that Charging Party's Brief in Support of the ALJ's Decision and Recommended Order was untimely. The timeliness of Charging Party's brief was raised in Respondent Treasurer's Motion to Strike Charging Party's Brief and was discussed in our Decision and Order. We explained the procedure mandated by our Rules for calculating the filing deadline for a response to exceptions when an initial extension has been granted. In accordance with that procedure, we found Charging Party's brief timely. Respondent's motion for reconsideration does not raise any new arguments that could justify our reconsideration of our conclusion as to the timeliness of Charging Party's brief. See Rule 167. See also *Essexville-Hampton Pub Sch*, 2002 MERC Lab Op 209.

The Treasurer also contends that we erred by refusing to address the merits of her argument that the superseniority provision of the collective bargaining agreement is invalid. As we explained in our Decision and Order, Respondent Treasurer failed to present evidence to support her contention that the disputed provision is invalid. In her motion for reconsideration, she contends that Charging Party had the burden of proving the validity of the superseniority provision of the contract. On the contrary, Respondent's argument that the contract provision is invalid functions as an affirmative defense to the charge. The burden is, therefore, on Respondent Treasurer to produce evidence in support of her argument.

The remaining arguments raised in the motion for reconsideration merely restate issues addressed in our Decision and Order. Thus, those arguments do not provide a basis for granting reconsideration. See Rule 167; *Wayne Co Airport Auth*, 20 MPER 58 (2007).

With the exception of our administrative clerical error in failing to issue the Decision and Recommended Order in accordance with Section 85 of the APA, we find no basis for reconsidering the decision in this matter and adopt the findings of fact and conclusions of law contained therein.

[1] For the same reason, we also declined to consider Respondent Treasurer's Reply Brief in Support of her Exceptions and Charging Party's Supplemental Brief in Support of ALJ's Decision and Recommended Order.

## ORDER

The motion for reconsideration is granted. Our May 15, 2008 Decision and Order is hereby set aside as it was not issued in accordance with the requirements of Section 85 of the Administrative Procedures Act (APA), 1969 PA 306, as amended, MCL 24.285. A copy of that Decision and Order, with a new date of issuance, is attached hereto and incorporated herein by this reference.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION[2]

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Nino E. Green, Commission Member

_____

Eugene Lumberg, Commission Member

Dated: _____

[2] Commission Chair Christine A. Derdarian was unable to participate in the decision in this matter.

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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.[3]

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

[3] 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. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____