

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

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer-Respondent,

- and -

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS
AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA,
AFL-CIO, LOCAL 395,
Labor Organization-Charging Party in Case No. C05 C-073,
Petitioner in Case No. R05 C-054

APPEARANCES:

David J. Masson, Esq., Assistant General Counsel, for the Public Employer

Klimist, McKnight, Sale, McCloy & Canzano, P.C., by Ellen F. Moss, Esq., for the Labor Organization

DECISION AND ORDER

On December 16, 2005, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter recommending the dismissal of the representation petition and the unfair labor practice charge filed by Charging Party, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO, Local 395 (IATSE). The ALJ found that IATSE's members were not employees of Respondent, University of Michigan (the University), and that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, by refusing to recognize Charging Party as the exclusive bargaining representative of its members who work for Respondent.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On February 8, 2006, after receiving an extension of time in which to file, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. Respondent received an extension of time in which to file its Brief in Support of the ALJ's Recommended Decision and Order, and filed same on March 17, 2006.

In its exceptions, IATSE alleges that the ALJ made several errors in his findings of fact and in his conclusions of law. Principally, IATSE cites as error the ALJ's conclusion that the

stagehands are not employed by Respondent. IATSE asserts that the ALJ erred in failing to identify the employer of the stagehands if the University is not the employer. Upon review of Charging Party's exceptions, we find that they have merit.

Factual Summary

For over twenty years, the University and IATSE have been parties to agreements under which IATSE has provided stagehands for the University's theatrical and musical productions. The agreement at issue, which extended from January 1, 2005 through August 31, 2007, recognizes IATSE as the "duly authorized representative of all employees referred by IATSE, whom the University engages to perform stage work." The contract defines the scope of the work to be performed by IATSE's members, describes their general duties and responsibilities, and establishes their hourly wage rates and the methods by which the wages are to be calculated for each call to work. The contract notes that the University is not required to call IATSE to staff its productions and that IATSE may accept or reject such a call.

The University provides IATSE with temporary employment forms and related materials such as tax, dues check-off, and I-9 immigration forms for distribution to the stagehands. Each stagehand must complete the forms before working for Respondent for the first time, but stagehands do not have to fill out the forms each time they accept a call to work on a production. Periodically, the University purges its system and requests that stagehands submit new paperwork. Charging Party is responsible for returning the forms to the University after they have been completed by the stagehands.

The agreement between the parties also establishes procedures for initiating calls to work and staffing. When the University requires stagehands to assist with a production, a University employee from the division sponsoring the production notifies IATSE's business agent of the number and kinds of stagehands needed and delineates the times that the stagehands should report for work. IATSE's business agent is responsible for selecting the individuals to perform the services required by Respondent. It is his job to match the needs of the University with the skills available in the IATSE members. However, the University frequently requests a particular individual for an event and that request is honored if the individual is available. Although the agreement provides that IATSE's business agent is to appoint department heads, witness testimony established that, generally, persons requested by the University are not only given work assignments, they are also appointed as department heads. Individual stagehands requested by the University are free to decline assignments without adverse action by the University.

On rare occasions, the University refuses to accept individual stagehands assigned by IATSE. Upon providing an explanation and documentation as specified in the parties' agreement, the University has the authority to reject a stagehand selected by IATSE, or may request that a stagehand be dismissed during a call. The contract also gives the University the right to predetermine that an individual is disqualified for an event or for a period of time upon appropriate written notification to the IATSE business representative. When the University has concerns about the performance of individuals, but does not wish to request their removal from a job, those concerns are raised with the IATSE business agent. On one occasion, University officials sent a letter to the business agent describing an incident in which some equipment was

damaged. The letter asked IATSE to ensure that people working as loaders know that such damage should be reported to the University representative on site or the steward of the call. The business agent raised the matter in a Union meeting and received instructions from the Union membership on how it should be handled.

IATSE's business agent is responsible for appointing department heads. However, in most cases the University requests that a specific person be assigned as department head. As with regular stagehands, the University also has the authority to reject a particular person as department head. The department heads act as team leaders for the stagehands within their respective departments. The departments include electrical, carpentry, properties, wardrobe, sound, and video.

IATSE's business agent is also responsible for appointing a steward for each call. The contract provides for three classifications of stewards, the steward above the call, the working steward, and the steward as crew head. Each steward is responsible for recording and reporting the hours worked and is responsible for the performance of each individual in the group. The working steward and steward above the call also serve as team leaders for the department heads. Additionally, the steward above the call, upon agreement by the University, has the authority to designate any working stagehand as a loader/hand during a call.

The University notifies the IATSE business agent of the work location and the time that the stagehands are to report for work for each call. The contract sets the minimum hours paid for each call, determines the point at which breaks should be given and the amount of additional compensation to be paid if breaks are not given at the agreed upon point. Although some calls require stagehands to be paid for more than four hours, the minimum number of hours paid for a call, as specified in the contract, is four. The contract also sets the minimum number of hours that must be paid after a break, if a break is given. The parties do not keep records of the hours worked by individual stagehands as they are paid for a set number of hours based on the type of call; records are only kept showing the amount of pay each stagehand earned. A stagehand may work the set number of hours for which he or she is entitled to be paid or may work less than that if the work to be done can be accomplished in less than the designated time. The contract sets the length of breaks, which on certain calls may be longer if Respondent does not provide the stagehands with food for their meal break. The contract prohibits the steward or department head from initiating a break without consulting with and obtaining the agreement of Respondent. The contract also gives Respondent the right to have a department head or steward dismiss certain stagehands from the call when Respondent determines that they are no longer needed. Certain other staff reductions may only be done upon mutual agreement between the University and the steward of the call. If it is determined that the amount of time allotted for a particular call is insufficient, the IATSE steward cannot authorize the stage hands to work additional time. Permission to extend the time must be obtained from the appropriate University representative. If a traveling show is involved, the matter must be resolved by consultation between the representative of the traveling show and the University, as they must determine the liability for the additional costs.

When stagehands initially report to work on a call for a new show, they receive their instructions from the technical director of the University division presenting the show. That

individual informs the department heads of the work that needs to be accomplished that day and provides plans showing where lights and other items are to be installed. The department heads then use the plans to assign individual stagehands to particular tasks. If the show is a traveling show, the show arrives the day after the stagehands have begun their work. If a traveling show has its own road crew, the road crew determines the work that needs to be done and the sequence in which should be done. Generally, communications between road crews and IATSE stagehands are from the department heads of the road crews to IATSE department heads. The IATSE department heads and stewards direct the work of the other stagehands. If issues arise during a call, IATSE has requested that University officials communicate with the stagehands only through the department heads and stewards to ensure that information flows through the chain of command.

Although the contract between the parties does not specify liability for worker's compensation coverage in the event of an injury, it dictates the extent of the University's obligation to pay wages to the injured worker. The contract requires any injured stagehand to report the injury to the steward or department head and to the University representative for the production. However, the University's "Instructions for Temporary Employment Form" provides that temporary employees are covered by workers compensation, social security, and unemployment compensation.

Pursuant to the terms of the parties' agreement, the University pays the stagehands directly with appropriate withholding for taxes through its bi-weekly payroll system. The contract provides that the University will deduct an amount from the stagehands' pay for union dues and remit the amount to IATSE on a monthly basis. In addition to the agreed-upon wages, the contract provides that Respondent is required to "make contributions on behalf of each employee for retirement annuity and health care."

The record contains no evidence as to the actual number of hours worked by individual stagehands as no such records are kept by the parties. The parties' records merely show the number of hours for which individuals were paid, which under the parties' agreement may be more than the number of hours actually worked. The record includes copies of time sheets covering the period September 8, 2002 through December 12, 2004, and summaries of hours paid, by production, were submitted with the post-hearing briefs. The events on which the stagehands work occur during the academic year, from September through April or May, a period of less than 40 weeks.

Compensation received by individual stagehands varied from two to 175 hours for a single call, with most calls paying between four and twenty-five hours. Many of the stagehands on IATSE's rolls did not work for Respondent at all during a given year, but others worked fairly often. Most stagehands worked only sporadically. The records show that there were 163 stagehands on IATSE's rolls during the 2002-2003 season, which lasted from September 8, 2002 through May 3, 2003, a total of thirty-five weeks. Of that number, 126 were paid for less than one hundred hours during the 2002-2003 season. Thus, the overwhelming majority of the stagehands on IATSE's rolls during that period were compensated for an average of less than three hours per week during the thirty-five week season. Nine stagehands were compensated for more than one hundred but less than two hundred hours, averaging less than six hours per week.

Seven were compensated for more than two hundred but less than three hundred hours, less than nine hours per week. Four were compensated for more than three hundred but less than four hundred hours, less than twelve hours per week. Three were compensated for more than four hundred but less than five hundred hours. Seven were compensated for more than five hundred but less than one thousand hours and seven others were compensated for more than one thousand hours during the thirty-five week season.

The 2003-2004 season ran from September 11, 2003 through May 15, 2004, approximately thirty-six weeks. Of the 152 stagehands on the IATSE rolls during the 2003-2004 season, twenty-seven averaged more than four hours per week, working at least 144 hours during that thirty-six week season. Of that group, twelve were compensated for more than five hundred hours and two for more than one thousand. Nine of the fourteen stage hands who were compensated for more than five hundred hours during the 2003-2004 season were also in the group who had been compensated for more than five hundred hours during the 2002-2003 season. For the 2004-2005 season, the parties submitted data for the period of September 23, 2004 through December 12, 2004, twelve weeks. Of the 164 stagehands on the rolls for that period, seventeen averaged at least four hours per week, as they were compensated for at least forty-eight hours, of that group, twelve were compensated for more than one hundred hours, and four for more than two hundred hours.

In October 2004, Respondent refused IATSE's request to recognize it as the exclusive bargaining representative for all stagehands employed by the University. IATSE filed the unfair labor practice charge in this matter on March 24, 2005, and on March 29, 2005, IATSE filed the representation petition seeking an election in a bargaining unit of all stagehands working for Respondent.

Discussion and Conclusions of Law

The issue is whether the IATSE members who work as stagehands during the University's productions are public employees within the meaning of PERA, and if they are, whether the University committed an unfair labor practice by failing to recognize IATSE as their exclusive bargaining representative. Charging Party claims that the agreement between the parties constitutes de facto recognition and hence the University's refusal to recognize it as the stagehands' exclusive bargaining representative is an unfair labor practice. Respondent contends that the facts demonstrate that the stagehands are not employees. However, Respondent argues that if the stagehands are found to be employees of the University, the stagehands work on a casual and irregular schedule, have no expectation of permanent or regularly scheduled employment, and, therefore, cannot be included in a bargaining unit.

We agree with the ALJ that the general characteristics of employers are that they (1) select and engage the employee; (2) pay the wages; (3) have power of dismissal; and (4) have power and control over the employees' conduct. *Saginaw Stage Employees, Local 35 IATSE v City of Saginaw*, 150 Mich App 132 (1986), rev'g 1984 MERC Lab Op 668; *AFSCME v St Clair Co*, 136 Mich App 721, 736 (1984), aff'd in part, rev'd in part 425 Mich 204 (1986); *Wayne Co Civil Service Comm v Wayne Co Bd of Supervisors*, 22 Mich App 287, 294 (1970), rev'd in part 384 Mich 363 (1971). When the question to be decided is "which of two or more public entities

is the employer of a group of employees?” that question is properly determined by the test identified by the ALJ. However, the question here is not the identity of the employer of the stagehands; the question is whether the stagehands constitute an appropriate bargaining unit. The task of determining whether there is an appropriate collective bargaining unit requires us to first determine which, if any, individuals in the group of workers at issue are employees within the meaning of PERA. See *City of Detroit v Salaried Physicians Professional Ass'n, UAW*, 165 Mich App 142, 146; 418 NW2d 679, 681 (1987); *Michigan Ed Support Personnel Ass'n v Southfield Pub Sch*, 148 Mich App 714, 716-717; 384 NW2d 768, 769 (1985).

Stagehands' Status as Employees

The test used to determine whether an individual is an employee or an independent contractor is whether the employer maintains control over the means and method of performing the work as well as the end to be achieved and whether the work done by the individual can be characterized as an integral part of a common task. *City of Detroit v Salaried Physicians Professional Ass'n, UAW*, 165 Mich App 142, 147-148; 418 NW2d 679, 682 (1987), aff'g *City of Detroit*, 1986 MERC Lab Op 395; *Lansing Charter Twp*, 18 MPER 12 (2005); *City of Saginaw*, 1984 MERC Lab Op 668, 674. An employment relationship exists when the person or organization for which the services are performed has the right to control the manner and means by which the result is to be accomplished. Where such control has not been reserved, the relationship is that of an independent contractor. See *City of Detroit*, 1986 MERC Lab Op 395, 397.

Though applying a different test, the ALJ recognized that a key factor is whether Respondent has retained control over the stagehands' conduct. He found that Respondent has not retained such control. We disagree. The contract between the parties contains numerous indications that control has been retained by Respondent.

Respondent sets the hours of the stagehands and, if it is determined that a particular job will take more time than originally expected, Respondent must approve any increase in the stagehands' hours. Respondent determines the length of meal breaks and must give permission for breaks to begin. Such control over the time spent by the stagehands is consistent with an employment relationship, but is not characteristic of an independent contractor. See *City of Detroit v Salaried Physicians Professional Ass'n, UAW*, 165 Mich App 142, 148-149; 418 NW2d 679, 682 (1987); *Livonia Pub Sch*, 1988 MERC Lab Op 1068, 1081-1082.

We note that the ALJ appears to give great weight to the fact that the stagehands receive direction from department heads and stewards appointed by IATSE. However, the department heads and stewards are hired by Respondent under the same contract as the other stagehands and are selected by the same means as the other stagehands. Nothing in the record supports a finding that Respondent has less authority to control the department heads and stewards than it has with the other stagehands. Indeed, the department heads and stewards receive at least some of their instructions directly from Respondent. While working on traveling shows, stagehands, including department heads and stewards, may also receive some instructions from the road crews. That is due to the road crews' experience and expertise in managing their particular production. When road crews are not part of the production, the stewards and department heads receive their

instructions directly from Respondent. They then pass on instructions to their subordinate stagehands in accordance with the established chain of command. The use of a chain of command for assigning tasks and passing on instructions is typical of employment settings.

Respondent has control over the choice of stagehands that will work for it. While Respondent has delegated the task of selecting individual workers to IATSE, Respondent often selects stagehands itself and has the right to reject those whom it does not want. The fact that Respondent rarely exercises its right to reject workers selected by IATSE does not diminish Respondent's right to do so. See *Southfield Pub Sch*, 2002 MERC Lab Op 53. Although the agreement between the parties does not expressly state that Respondent has the right to discipline employees, it does provide that Respondent may request the dismissal of a stagehand during a call and may notify Charging Party that an individual stagehand is not to be assigned to a particular event or for a designated period. Thus, the contract effectively gives Respondent the authority to suspend employees.¹ Therefore, it is evident that Respondent has control over the manner and means of the stagehands' work as well as the end to be achieved. Moreover, since the services provided by the stagehands are necessary for Respondent's theatrical and musical productions to succeed, we can characterize those services as an integral part of a common task. Accordingly, we find that the stagehands are employees.

For two reasons, we find this case to be distinguishable from the cases relied upon by the ALJ, *Saginaw Stage Employees, Local 35, IATSE v City of Saginaw*, 150 Mich App 132 (1986), rev'g *City of Saginaw*, 1984 MERC Lab Op 668 and *Greater Lansing Convention/Exhibition Authority*, 1987 MERC Lab Op 948 (no exceptions). First, the ALJ misunderstood the holdings of those cases. In reviewing the holdings of both cases, the ALJ concluded that the Court of Appeals, in *Saginaw Stage Employees*, and the ALJ, in *Greater Lansing Convention/Exhibition Authority*, found that the stagehands in those cases were not employees. In fact, the Court held that the "City of Saginaw was not the employer of the Union members." Similarly, in *Greater Lansing Convention/Exhibition Authority*, the ALJ also found that the stagehands were not employed by the respondent. It is to be noted that neither decision found the stagehands to be independent contractors. They were simply found not to be employees of the respondent in question.

Secondly, the facts of both cases relied upon by the ALJ are distinguishable from those before us. In both cases, the stagehands were retained to perform services for tenants of the respective cities' convention centers when producing the tenants' events required more personnel than the convention centers' employees. In both cases, the tenants were ultimately responsible for determining the work that would be done by the stagehands and compensating the stagehands for their services. Unlike those cases, the stagehands in this case receive instructions from Respondent, perform services for Respondent on events produced by Respondent, and are paid directly by Respondent from Respondent's funds.

¹ We note the ALJ's conclusion that "IATSE retains the right to discipline stagehands and recently exercised that authority when two loaders failed to report that they had damaged some equipment." The record merely establishes that the matter was addressed at a Union meeting and the membership determined the action that would be taken. The record does not reveal whether the two loaders were disciplined. However, assuming IATSE has the authority to discipline its members, that authority does not diminish Respondent's authority to take action that, for all practical purposes, is discipline.

As noted above, the issues in *Saginaw Stage Employees* and in *Greater Lansing Convention/Exhibition Authority*, as held in the final decisions in those cases, were not whether the stagehands were employees or independent contractors, as here, but whether the respective respondents or the respondents' tenants were the stagehands' employer. Although there are clearly similarities between those cases and the present one, the key distinction is that those cases involved a third party who received the benefit of the stagehands' services, determined the work to be performed by the stagehands, and was responsible for the stagehands' compensation. Indeed, in *Greater Lansing Convention/Exhibition Authority*, the respondent argued that the stagehands were employees of the tenants who received the benefit of their services. While it is not evident that the respondent made that argument in *Saginaw Stage Employees*, the ALJ found in that case that the tenants were the stagehands' employers. The Commission reversed the ALJ, only to be reversed itself by the Court of Appeals, who apparently concurred with the ALJ's conclusion. In the case before us, there is no third party who could reasonably be viewed as the stagehands' employer. It is evident that the stagehands' employer is Respondent.

Criteria for Including Employees in a Bargaining Unit

Upon finding that the stagehands are employees of Respondent we must turn to the question of whether it is appropriate to include the stagehands in a bargaining unit. Inclusion in any bargaining unit is limited to those employees having a substantial and continuing interest in the terms and conditions of their employment. In this case, both the evidence and the arguments of the parties focus primarily on the issue of whether the stagehands are employees. We find that additional evidence, as well as argument from the parties, is necessary before we determine whether any of the stagehands have a reasonable expectation of continuing employment and a sufficient interest in the terms and conditions of that employment to qualify for inclusion in a bargaining unit.

The Record Must Include Sufficient Evidence to Establish Whether Stagehands have a Reasonable Expectation of Continuing Employment

Temporary employees lack a continuing interest in the terms and conditions of their employment and therefore, are not included in bargaining units. A temporary employee is an employee hired for a specific period or specific project who has no reasonable expectation of further employment. *Wayne Co Cmty College Dist*, 20 MPER 4 (2007); *City of Sterling Heights*, 1993 MERC Lab Op 230. An employee whose tenure has no projected end date is not temporary, even if the employer does not consider his or her position to be permanent. *Big Bay de Noc Sch Dist*, 17 MPER 81 (2004); *Wayne Co Cmty College Dist*, 20 MPER 4 (2007).

In the matter before us, each call to work accepted by a stagehand is a temporary assignment. However, that does not necessarily mean that each stagehand is a temporary employee. As we recently stated in *City of Livonia*, 20 MPER 106 (2007), "Employees in temporary assignments are not temporary employees if they have a reasonable expectation, based on the employer's practices, that they will receive another assignment." See also *Chelsea Sch Dist*, 1994 MERC Lab Op 268, 275. In *City of Livonia*, the Commission found the employer's need for temporary part-time employees to be reasonably stable, as such employees provide the bulk of the services that the Department offers. Inasmuch as IATSE and the University have

been engaged in a series of contracts for the provision of the services of stagehands for over twenty years, it is apparent that Respondent's need for IATSE's stagehands is reasonably stable.

While each call accepted by a stagehand has a specific end date, the stagehands remain on the University's rolls after the call is completed; they do not have to complete a new employment application for each successive assignment. It is evident that some of the stagehands worked, and therefore received, numerous calls throughout the academic years for which data was supplied. Thus, it appears that those stagehands may have a reasonable expectation of continued employment. It is also evident that other stagehands worked very few calls. However, since stagehands may choose to decline work, it is not possible to determine from the record whether those who worked very few hours for Respondent did so because they were unavailable for work or because work was not offered to them. The record does not indicate whether individual stagehands generally receive approximately the same number of calls from year to year. The record does not indicate whether there is a greater need for stagehands in some departments than others or if certain categories of stagehands, such as those eligible to work as department heads or stewards, are more likely to receive more calls to work. We cannot tell from the record whether the disparity in hours results from the type of work available, the skills of individual stagehands, the method of assigning work, the choice of the individual stagehands, or other factors not evident from the record. Without additional evidence, we cannot determine which, if any, of the stagehands have a reasonable expectation of continued employment. Accordingly, this matter must be remanded to an ALJ for the taking of such additional evidence.

The Record Must Include Sufficient Evidence to Determine Whether Stagehands have a Substantial Interest in the Terms and Conditions of Employment

Irregular part-time and casual employees may be excluded from collective bargaining if their employment is minimal or sporadic. The determination of casual status is made on a case-by-case basis. *Wayne Co Cmty College Dist*, 20 MPER 4 (2007); *Chelsea Sch Dist*, 1994 MERC Lab Op 268; *Southfield Pub Sch*, 1984 MERC Lab Op 162, 168. We have found part-time employees who generally work on call to be casual employees when: (1) their assignments are short and of irregular duration; (2) they do not commit to work beyond the duration of one assignment; (3) they may decline assignments without adverse consequences; and (4) they are available to work for other employers in the same week, month, or semester. *Wayne Co Cmty College Dist*, 20 MPER 4 (2007).

There is no fixed number of hours that an employee must work to have a sufficient interest in employment. However, an employee who works a very small number of hours may lack a substantial interest in his or her employment and, as a result, be ineligible for inclusion in a bargaining unit. *Village of Centreville*, 1992 MERC Lab Op 71, 74; *Holland Pub Sch*, 1989 MERC Lab Op 584, 588. We have considered the question of whether employees work enough hours to have a sufficient interest in continued employment in several recent cases. See *City of Livonia*, 20 MPER 106 (2007); *Hastings Area Sch Dist*, 17 MPER 55 (2004); *Macomb Cmty College*, 16 MPER 35 (2003). Each of those cases involved part-time employees whose schedules were subject to periodic changes depending on the needs of the employer and, in *City of Livonia*, and *Macomb Cmty College*, who had the right to decline work assignments without

adverse consequences. We determined that despite the fluctuation in their work hours, those who worked more than a certain amount had a sufficient interest in continued employment to be included in the bargaining unit.

In the matter before us, many of the stagehands worked very few hours or worked sporadically. While the parties in this case have offered some argument on the issue of whether stagehands work sufficient hours to be included in a bargaining unit, it is our opinion that they should be given the opportunity to fully brief this issue, particularly in the light of the *City of Livonia*, and *Macomb Cmty College* cases. They must also be given the opportunity to present such additional evidence as may be necessary to show the number of hours per pay period or other relevant work period that must be earned by each stagehand to have a sufficient interest in continued employment.

Pursuant to Rule 176(9) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS R 423.176(9), this matter is remanded for further development of the record in accordance with this decision. Therefore, we remand this matter to an ALJ assigned by the State Office of Administrative Hearings and Rules² for further proceedings in accordance with the Order below. It should be noted that this decision to remand should not discourage any party from seeking a mutually acceptable resolution of the underlying dispute through negotiation, for which the Commission's mediation services are available.

ORDER

The charge and representation petition are hereby remanded to an ALJ for an evidentiary hearing and the submission of briefs by the parties. The ALJ shall schedule this matter for a hearing forthwith and, upon the conclusion of said hearing, shall expeditiously make findings of fact and conclusions of law, and issue a supplemental recommended order. Following service of the supplemental order on the parties, the provisions of R 423.176 through R 423.179 of the Commission's General Rules shall be applicable.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Dardarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

² ALJ Roulhac retired subsequent to the issuance of his Decision and Recommended Order in this matter. Therefore, this matter must be assigned to a different Administrative Law Judge on remand.

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

UNIVERSITY OF MICHIGAN,
Respondent–Public Employer,

- and -

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS
AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA,
AFL-CIO, LOCAL 395,
Charging Party-Labor Organization in Case No. C05 C-073,
Petitioner in Case No. R05 C-054.

APPEARANCES:

David J. Masson, Esq., Assistant General Counsel, for the Public Employer

Klimist, McKnight, Sale, McClow & Canzano, P.C., by Ellen F. Moss, Esq., for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on June 7, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10, 13 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, 423.213 and 423.216. Based on the record and post-hearing briefs filed by August 1, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge and Petition:

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO, Local 395 (IATSE), filed an unfair labor practice charge in Case No. C05 C-073 against the University of Michigan (the University) on March 24, 2005, alleging that the Employer violated PERA by refusing to recognize it as the exclusive bargaining representative of its members who work for the University as stagehands during theatrical productions. In a petition filed on March 29, 2005, IATSE seeks an election in a bargaining unit of all stagehands.

Findings of Fact:

For over twenty years, the University and IATSE have entered into agreements that require IATSE to provide stagehands for the University's theatrical and musical productions.

The latest agreement covers the period January 1, 2005 through August 31, 2007. It defines the scope of work to be performed by IATSE's members;³ describes their duties and responsibilities; establishes procedures for initiating calls to work and staffing; contains pay rate and benefits information; and covers miscellaneous matters such as breaks, dues deductions and parking.

Stagehands perform entertainment work as carpenters; electricians; sound, property, video, makeup and wig technicians; wardrobe; loaders; riggers and forklift operators. Department heads serve as team leaders and coordinate the work of stagehands assigned to the electrical, carpentry, properties, wardrobe, sound and video departments. The agreement provides, and the parties stipulated, that department heads are appointed by IATSE's business agent. However, the business agent testified that if the University asks that a particular individual be assigned, that person is designated as department head. During those times when a department head is needed in programs produced by University Production, the University appoints the department head for the electricians. Stewards, also appointed by the business agent, serve as the team leader for stagehands, are responsible for recording and reporting their hours worked, and for their performance. Recently, after the University complained that two IATSE loaders failed to report that some equipment had been damaged, IATSE, not the University, handled the matter in a "privileged" union meeting in accordance with the membership's instructions.

All productions are presented during the school year, between September and May. At least twenty-eight days before a performance, the University notifies IATSE of the type and estimated number of stagehands needed. If IATSE accepts the call, members identified by the business agent may accept or reject the work assignment without retribution by the University. The University is not required to accept an individual selected by the business agent and does not require that any person become an IATSE member. Although it rarely happens, after providing an explanation and the documentation specified in the parties' agreement, the University has the right to reject a member that the business agent selects.⁴ The University may also request that a particular person be assigned to a production and that person is generally designated as a department head. At the beginning of a show the road crew or University official may explain the show's set up to the stagehands. However, business agent Gary Smith testified that he has asked University officials to communicate with IATSE members only through the stewards or department heads.

The University supplies IATSE with temporary employment forms and related materials, such as tax, dues check-off and I-9 immigration forms. IATSE's business agent is responsible for ensuring that members complete the forms, which he forwards to the University. Pursuant to the parties' agreement, the University pays the stagehands' directly, with appropriate withholding for taxes and union dues, through its bi-weekly payroll system. The agreement also provides for the University to pay a percentage of the stagehands' wages into health and pension funds. IATSE members are assigned employee identification numbers, are issued W-2 forms, and they may purchase parking permits and use the University's parking lots.

³The word "member" may include a stagehand who is not a member of IATSE but who pays dues/fees to Local 395 pursuant to the parties' agreement.

⁴The University last asked the business agent not to assign a particular member to a production in the fall of 2004.

No records exist that show the actual number of hours worked by any IATSE member individually, or as a group. Time records may show that an individual was paid for 5.5 or 6.5 hours. But the stagehands may have actually worked less hours since the parties' agreement provides, under certain circumstances, for the payment of a minimum number of hours. Time sheets covering the period September 20, 2002 – December 12, 2004, and summaries of hours worked, by production, were introduced. The parties have vastly different interpretations of these records. The University characterizes the hours worked by the stagehands as short and of an irregular duration. It notes that from 2002-2003, they averaged less than five hours per week, and, in some years, a substantial number did not work at all. The Union, on the other hand, indicates that the records show that individuals worked anywhere from 5 to over 1,000 hours per year. During the period September through December 2004, the Union calculates that 12 stagehands averaged over 6 hours per week (over 90 total hours) and 17 averaged 4 hours a week (over 60 total hours). Using all hours worked in 2004, the Union figures that 7 stagehands averaged over 10 hours per week (or more than 520 hours); 17 averaged over 6 hours per week (or more than 312 hours); 20 averaged over 4 hours per week (or over 208 hours); and that totals for the other years are similar.

In October 2004, the University refused IATSE's request to recognize it as the stagehands' bargaining representative. In March 2005, IATSE filed the unfair labor practice charge and the representation petition that are at issue in this case.

Conclusions of Law:

The issue presented in this case is whether IATSE members who work as stagehands during the University's theatrical and musicals productions are employees within the meaning of PERA, and, if they are, whether the University committed an unfair labor practice by failing to recognize IATSE as their exclusive bargaining representative. Charging Party claims that the agreements between the parties constitute de facto recognition and the University's refusal to recognize it is an unfair labor practice. In the alternative, Charging Party asserts that an election should be held among the stagehands. Respondent asserts that the facts clearly demonstrate that the stagehands are not employees. It argues that any employment relation that may exist between Local 395's members and the Employer is casual and irregular and, therefore, the stagehands are casual employees who have no expectation of permanent or regularly scheduled employment.

The general characteristics of employers are that they (1) select and engage the employee; (2) pay the wages; (3) have power of dismissal; and (4) have power and control over the employees' conduct. *AFSCME v St Clair Co*, 136 Mich App 721, 736 (1984), lv granted 422 Mich 856 (1985), quoting from *Wayne Co Civil Service Comm v Wayne Co Bd of Supervisors*, 22 Mich App 287, 294, rev'd in part 384 Mich 363; *Saginaw Stage Employees, Local 35, IATSE v City of Saginaw*, 150 Mich App 132 (1986), rev'g 1984 MERC Lab Op 668.

The Commission has twice considered the question of whether IATSE members who work under somewhat similar conditions as the stagehands in this case are employees. In *Saginaw, supra*, an agreement between the City and IATSE required the City and all tenants to use IATSE members when the City's few full time stagehands were inadequate to staff events. The union's business agent determined which of its members would work a particular show, and,

if the number of members requested reached a predetermined number, would also send a steward who supervised the stagehands. If a steward were not present, a full-time stagehand directed the union members' work. Payment was made to the union and disbursed by the union to its members. The union hired and screened all applicants and the business agent determined the workers' classifications. Occasionally, upon a tenant's request, the city specified union members that they did or did not want to work a show. The city never fired or disciplined a union member.

The Court of Appeals, in overturning a Commission order finding that the stagehands were employees and directing an election, found that the stagehands were not employees because the union determined who worked each show, the tenants paid the union members' wages and the city never fired a union member. The Court observed that the only time the city controlled the conduct of the union members was when a particular show did not require a large enough number of stagehands to merit sending a steward to supervise the union members.

Similarly, in *Greater Lansing Convention/Exhibition Authority*, 1987 MERC Lab Op 948 (no exceptions), the ALJ relying, on *Saginaw*, found that the stagehands were not employees. There the Authority did not have the right to select the stagehands although it could request certain individuals. Additionally, the stagehands worked only during a presentation and as directed by the exhibitor or its agents. The show producer or decorator paid them, or the union was paid and the union paid the stagehands. At times, the Authority paid the members at the union's request.

In this case, I find the insufficient support for Charging Party's argument that the stagehands are employees. The University's direct payment of wages to the stagehands is the only element of an employer-employee relationship that has been established. I find that this characteristic alone does not make the stagehands employees within the meaning of PERA. Power of control is the most important indicia of an employee-employer relationship. *Wayne Co Civil Svc Comm v Wayne Co*, 22 Mich App 287 (1970), aff'd 384 Mich 363 (1971). The business agent is responsible for selecting stagehands to perform the work required by the University. The business agent also selects the stewards and department heads. The University has no authority to determine which stagehands IATSE selects to meet the staffing quota, although the University sometimes requests that a specified individual be assigned to a particular production. Although the University has the authority to reject a stagehand selected by IATSE, this prerogative is rarely exercised.

The parties stipulated, and the record demonstrates, that the University has no power over the stagehands' conduct. The department heads appointed by the business agents coordinate the stagehands' work. The steward, who serves as team leader for all department heads, records and reports their hours of work and is responsible for the stagehands' performance. Except for initial instructions about how the show should be set up, all communications are made through the steward or the department head. Finally, IATSE retains the right to discipline stagehands and recently exercised that authority when two loaders failed to report that they had damaged some equipment.

I conclude that IATSE's members are not employees of the University and the University did not commit an unfair labor practice by refusing IATSE's request to recognize it as their

exclusive bargaining representative. I have considered all other arguments advanced by Charging Party and find that they do not warrant a change in the result. Included is its claim that the stagehands should be found to be employees because they are listed in the University's staff and student directory, may purchase parking passes and park in the University's parking lots and are issued identification numbers. These factors are not characteristics that determine whether an individual is an employee within the meaning of PERA. Moreover, I find no merit to Charging Party's claim that the over twenty-year history of agreements between the parties constitute de facto recognition. Provisions in a contract are not controlling in determining employer status. *State Judicial Council (3rd Judicial Cir Ct)*, 1984 MERC Lab Op 545, 552; *Sanilac Co Comm Mental Health Svcs*, 1984 MERC Lab Op 1180, 1183. Even if they were, the provisions in the latest agreement make clear that the stagehands are not employees. Based on the above discussion, it is unnecessary to determine whether the stagehands are casual employees. I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge and the representation petition are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated: _____