STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No: C08 B-043

-and-

DETROIT POLICE OFFICERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Fraser Trebilcock Davis and Dunlap, PC, by Kenneth S. Wilson, Esq. and Brandon W. Zuk, Esq., for Respondent

Kalniz, Iorio and Feldstein, by Donato S. Iorio, Esq., for Charging Party

DECISION AND ORDER

On September 26, 2008, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On February 15, 2008, the Detroit Police Officers Association (DPOA) filed the above charge with the Michigan Employment Relations Commission against the City of Detroit pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The charge alleged that Respondent violated its duty to bargain in good faith by filing a counterclaim in a circuit court lawsuit that would, if the counterclaim was successful, modify the parties' past and current collective bargaining agreements. In its response to Respondent's motion for summary disposition, although not in the charge, the DPOA also alleges that Respondent's counterclaim violated Section 10(1) (a) of PERA because it was filed to retaliate against the DPOA for exercising its right under PERA to file the original suit.

The charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules pursuant to Section 16 of PERA. On August 5, 2008, Respondent filed a motion for summary disposition under Rule 165(2) (c) and (d) of the Commission's General Rules, 2002 AACS, R 423.165(2). The motion asserted, first, that the charge was untimely filed under Section 16(a) of PERA and, second, that the charge failed to state a claim upon which relief could be granted. Charging Party filed a memorandum in opposition to the motion on September 5, 2008. Neither party requested oral argument on the motion.

The material facts in this case are not in dispute. Based on the facts as set out below, and the arguments made by the parties in their pleadings, I make the following findings and recommend that the Commission issue an order as follows.

Background:

Charging Party represents a bargaining unit of nonsupervisory police officers employed by Respondent. The Coalition of Public Safety (COPS) Employee Health Care Trust is a voluntary employees' beneficiary association (VEBA) that, since 1994, has provided health care benefits to active and retired public safety employees of Respondent, including members of Charging Party, pursuant to collective bargaining agreements between Respondent and unions representing these employees. COPS Trust also provides benefits to public safety employees of some suburban cities. Under the terms of its collective bargaining agreements with its public safety unions, Respondent makes contributions or premium payments to COPS Trust. COPS Trust contracts with an insurance company that provides benefits; COPS Trust is the policyholder of this insurance contract. COPS Trust was the primary provider of health insurance to Charging Party's members under collective bargaining agreements between 1995 and 2004. The parties' most recent collective bargaining agreement, covering the period 2004-2009, came into existence as a result of an arbitration award issued on March 8, 2007 pursuant to 1969 PA 312. Under this contract, Charging Party's members have a range of insurance options, including a COPS Trust plan.

Historically, Respondent and Charging Party have bargained over both the health benefits provided to active employees and retirees and the cost of these benefits to Respondent. However, although the parties agreed to a certain level of benefits, the parties' contracts did not explicitly describe these benefits. Instead, the contracts required Respondent to pay monthly premiums as specified in the agreement, e.g. a specified amount for each active employee electing full family coverage, another amount for an active employee selecting single coverage, a third amount for a retiree without a spouse who was eligible for Medicare, and so on. However, the last benefit year for which Respondent's premium was fixed by contract was 1995. Between 1996 and 2004, the parties' contracts provided only that Respondent would pay a certain percentage of the premium increases needed to maintain the existing level of benefits, with the remainder of the increase being paid by the employees themselves. Under these contracts, COPS Trust, as the primary provider of benefits, determined the amount of the premium increases. The 2004-2009 collective bargaining agreement represented a departure from previous contracts in that it sets out in detail the benefits to which employees and retirees are entitled when electing each of the plans available to them. However, as it has since 1996, COPS Trust determines the amount of the monthly premium it charges to provide these benefits to unit members and retirees electing the COPS Trust Plan. Under the terms of 2004-2009 agreement, Respondent is responsible for eighty percent of this premium and employees are responsible for the other twenty percent.

On July 15, 2006, Respondent implemented certain changes in the health care benefits it provided to retired members of Charging Party's unit, including increases in their premium co-payments. On July 12, 2006, various plaintiffs, including COPS Trust and Charging Party, filed suit in circuit court to enjoin these changes. The suit, *Alan Weiler et al v City of Detroit,* Wayne County Circuit Court Case No. 06-619737 CK, alleged that the changes violated Respondent's

contractual obligation to provide retirees with benefits under the terms of past collective bargaining agreements. The complaint was later amended to allege a violation of the parties' current collective bargaining agreement as well.

On April 26, 2007, Respondent filed a counterclaim in the *Weiler* action against COPS Trust only. The counterclaim was served on the counsel for COPS Trust, who is also the counsel for Charging Party in the underlying suit, on May 7, 2007. The counterclaim had two counts, both of which related to premium reserve funds maintained by COPS Trust and its insurance companies. The counterclaim alleged that COPS Trust received approximately $7 million in reserve funds from Bankers Life Insurance Company, the insurance company from which COPS Trust purchased insurance prior to 2003. The first count of the counterclaim sought an accounting from COPS Trust of these monies. The second sought a return of the monies in this fund, plus interest, on the theory of unjust enrichment. As summarized by the circuit court, Respondent asserted that although $7 million remained in the reserve fund after all claims for which Bankers Life remained liable had been paid, COPS Trust and its new insurance company, US Health, subsequently established a new reserve fund much larger than custom and practice required. The counterclaim alleged that COPS Trust intentionally inflated the premiums it charged Respondent in order to create this reserve fund which COPS Trust could allegedly retain for itself.

On May 12, 2008, the circuit court issued an opinion denying motions filed by both Respondent and COPS Trust seeking summary disposition on count two of the counterclaim. 2008. The circuit court concluded that Respondent had properly stated a claim for unjust enrichment as the majority of the reserve fund had come from Respondent's premiums and there was no express contract between Respondent and COPS Trust covering the reserve or the premiums out of which the reserve was funded. It concluded, however, that genuine issues of material fact existed with respect to that claim, i.e. whether COPS Trust had been enriched as a result of wrongful behavior. At the time the motion and response were filed, a trial had not been conducted on Respondent's counterclaim.

Positions of the Parties:

In its motion, Respondent asserts that the charge is untimely under Section 16(a) of PERA because the alleged unfair labor practice, the filing of the counterclaim, occurred in April 2007 while the charge was not filed until February 15, 2008. In its response, Charging Party does not deny having knowledge of the counterclaim in May 2007, but asserts that Respondent's pursuit of the counterclaim constituted a continuing violation, citing *Spring Lake Pub Schs*, 1988 MERC Lab Op 362 and *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125.

Respondent also asserts in its motion that the charge fails to state a claim on which relief could be granted under Section 10(1) (e) of PERA. In response, Charging Party maintains that Respondent's demand for the return of monies paid in premiums constitutes an attempt to modify the parties' current and past collective bargaining agreements, because, according to Charging Party, Respondent has relinquished all claims to and control over these monies under the terms of these agreements. Charging Party also argues that the counterclaim attempts to change terms and conditions of employment by depleting the COPS Trust reserve fund, thereby threatening its

ability to continue providing benefits and possibly eliminating the COPS Trust plan as an available option for Charging Party's members.

Finally, Respondent asserts that Charging Party has failed to state a claim for unlawful interference under Section 10(1) (a) of PERA. As noted above, the charge, as filed, did not actually assert such a claim. In its response to the motion, Charging Party asserts that its charge properly states a claim for unlawful interference because Respondent's counterclaim was intended to retaliate against Charging Party for exercising its statutory rights under PERA.

Discussion and Conclusions of Law:

Pursuant to Section 16(a) of PERA, a charge that is filed more than six months after the commission of the unfair labor practice is untimely. The limitation contained in Section 16(a) of PERA is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004); *Police Officers Labor Council, Local 355*, 2002 MERC Lab Op 145; *Walkerville Rural Communities Schs*, 1994 MERC Lab Op 582; *Detroit Federation of Teachers*, Local 231, 1986 MERC Lab Op 477. The six month period begins to run when the charging party knows, or should have known, of the alleged violation. *American Federation of State, County and Municipal Employees, Local 1583*, 18 MPER 42 (2005); *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836.

In *City of Adrian*, 1970 MERC Lab Op 579, 581, the Commission adopted the holding of the US Supreme Court in *Local Lodge No 1424 v NLRB (Bryan Mfg)* 362 Mich 411 (1960), rejecting "the doctrine of continuing violation if the inception of the violation occurred more than six months prior to the filing of the charge." However, as the Commission held in *Reese Pub Schs*, 1989 MERC Lab Op 476, 481, when a party has a continuing duty to bargain over a mandatory subject, but refuses repeated demands to bargain, the statute of limitations under Section 16(a) begins to run anew whenever the other party makes a demand to bargain over the subject and is refused. Thus, in *Spring Lake Pub Schs*, each refusal by the Employer to bargain with the Union and enter into an agreement over the content of a teacher evaluation form constituted a separate unfair labor practice. In *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125, a Commission administrative law judge, citing *Spring Lake*, held that the Union's renewal of its demand that the Employer include a nonmandatory subject in their collective bargaining agreement constituted a "continuing," i.e. separate, violation of PERA. The Commission has consistently held, however, that when the charge involves an unlawful unilateral change in terms and conditions of employment, the statute of limitations begins to run from the date the Employer announces the change. *Lapeer Co*, 19 MPER 45 (2006). *Livonia Pub Schs*, 1983 MERC Lab Op 992; *Deckerville Cmty Schs*, 1985 MERC Lab Op 1131; *City of Detroit (Dept of Public Works)*, 2000 MERC Lab Op 149 (no exceptions); *Saginaw Twp*, 1994 MERC Lab Op 952 (no exceptions).

In the instant case, Charging Party alleged that Respondent's filing of the counterclaim in the *Weiler* suit violated its duty to bargain in good faith because it was an attempt to unilaterally change terms and conditions of employment and/or modify an existing collective bargaining agreement during its term. Obviously, the alleged unilateral change could not take place unless and until the counterclaim was successful. However, the conduct alleged to constitute the unfair

labor practice was the filing of the claim. I conclude that the charge is both as to the Section 10(1) (e) and 10(1) (a) allegations untimely because it was filed more than six months after Charging Party learned of the alleged unlawful conduct.

I note, however, that had the charge not been untimely, however, I would grant summary disposition under Commission Rule 165(2) (f), R 423.165 (2) (f) on the merits of the refusal-to-bargain charge. Once agreement is reached on a mandatory subject of bargaining, the terms of the written bargaining agreement are preserved and neither the employer nor the union may unilaterally modify the agreement without the consent of the other party; a unilateral modification of the contract is an unfair labor practice. *St Clair Intermediate School Dist v Intermediate Educ Association/Michigan Educ Ass'n*, 458 Mich 540, 566-567 (1998). However, Respondent does not deny that it had a contractual obligation to provide Charging Party's members with certain health care benefits and to pay the cost (less the employees' contributions) of providing them. Nor does Respondent seek in its counterclaim to repudiate or modify this obligation. Rather, the essence of the counterclaim appears to be that COPS Trust, which is not a party to the collective bargaining agreements, charged Respondent too much for this service. In my view, the counterclaim cannot be construed as an attempt to change either existing terms and conditions of employment for Charging Party's members or the obligations of the contracts.

In accord with the conclusions of law set out above, I find that the charge in this case was untimely filed under Section 16(a) of PERA, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____