STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C03 D-092

-and-

ASSOCIATION OF MUNICIPAL ENGINEERS,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Bruce Campbell, Esq., for Respondent

Vinod Sharma, President, Association of Municipal Engineers, for Charging Party

DECISION AND ORDER

On August 21, 2007, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Remand finding that Respondent, City of Detroit (Employer), did not violate its duty to bargain under Section 15 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.215. Finding that Respondent's conduct did not constitute a repudiation of its obligation to arbitrate grievances under the parties' contractual grievance procedure, the ALJ recommended dismissal of the charge. He concluded that the Charging Party, Association of Municipal Engineers (Union), had acceded to Respondent's requests for additional time and that the parties had engaged in a good faith and largely successful attempt to settle a majority of the claims short of arbitration. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On September 6, 2007, the Union filed exceptions to the ALJ's Decision and Recommended Order. Respondent did not file a response to the exceptions.

In its exceptions, the Union argues that the ALJ erred in concluding that it and not the Respondent had delayed resolution of the case. The Union asserts that, instead of proceeding to arbitration, it was Respondent's "systematic strategy" to ask for more time during a period of more than five years. The Union complains that although it has asked for arbitration, Respondent "continues to do nothing" and may ask for more time "ad infinitum." It asserts that Respondent's failure to correct the underpayments constitutes

repudiation of the parties' collective bargaining agreement. The Union asserts that during the MERC hearings, Respondent agreed in writing on three occasions to resolve the issues, but never did so. Finally, it complains that Respondent never posted the unfair labor practice notice in Case No C05 I-219, another case involving the same parties.

We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the ALJ's Findings of Fact as set forth in both his first Decision and Recommended Order and his Decision and Recommended Order on Remand and repeat them only as necessary here.

Charging Party serves as the bargaining representative for fifty to sixty employees of the City of Detroit, thirteen of whom are involved in the pay dispute. In April 2003, the Union filed an unfair labor practice charge against the Employer, alleging that Respondent breached the collective bargaining agreement by underpaying members of its bargaining unit. In November 2003, at Oral Argument in this matter, Charging Party moved to amend its charge to include an allegation that Respondent intentionally circumvented the grievance procedure by refusing to participate in arbitration over the back pay claims. On December 16, 2004, the ALJ issued an order recommending that the Commission summarily dismiss the charge as untimely under Section 16(a) of PERA. On review of Charging Party's exceptions, we issued an Order remanding the case back to the ALJ for an evidentiary hearing to determine whether the City violated its duty to bargain by refusing to proceed to arbitration. During the evidentiary hearing, the ALJ was to determine whether the City's conduct constituted repudiation of its contractual obligation to arbitrate grievances, thereby constituting a continuing violation and rendering the amended charge timely. On August 21, 2007, the ALJ issued his recommended order, again finding that the unfair labor practice charge should be dismissed.

The parties' 1998-2001 collective bargaining agreement in effect at the time of the dispute contains a five-step grievance procedure that concludes in final and binding arbitration. The grievance procedure requires that prior to commencing arbitration, a party must submit written notice of intent to arbitrate to the other party. If no arbitrator can be agreed upon by the parties, the dispute is submitted to the Federal Mediation and Conciliation Services to select an arbitrator within seven days of submission of the notice of intent. Of the two grievances filed by the Union that proceeded to arbitration between 2002 and 2004, the Union invoked the procedure by filing written notice to Respondent requesting arbitration per the terms of the agreement.

In this case, the Union filed a grievance in November 2001, alleging that the City violated the collective bargaining agreement by underpaying bargaining unit members. The grievance advanced to step four of the grievance procedure, but no agreement was reached. Charging Party suggested to the Employer that the grievance be advanced to

arbitration. However, neither testimony nor evidence in the record indicates that Charging Party ever formally submitted a written request for arbitration in accordance with the contract. The parties then attempted to resolve the dispute at a pre-arbitration meeting. The City continuously requested more time to address the payment issues, and the Union obliged. By December 2006, the City had resolved 10 of the 12 back pay claims and had made significant efforts to resolve an additional claim. Respondent further expressed its willingness to pursue any claims remaining to arbitration.

Discussion and Conclusions of Law:

According to Section 15 of PERA, a public employer must meet and confer in good faith with the representatives of its employees over terms and conditions of employment, and if requested, shall execute a written document incorporating any agreement reached. This Commission has determined that an employer violates its duty to bargain by refusing to accept and process grievances under a contractual grievance procedure simply because it believes the grievance lacks merit. See, *Washtenaw Co Road Comm*, 20 MPER 69 (2007), and the numerous cases cited therein. While the Commission will not exercise jurisdiction over every contract dispute, we will find an unfair labor practice when the alleged breach of the collective bargaining agreement rises to the level of contract repudiation. *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-01. Repudiation warranting Commission involvement can be found only when there has been a substantial abandonment of the collective bargaining agreement or the relationship. *Argentine Twp*, 2000 MERC Lab Op 176, 179; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960. Moreover, the Commission does not involve itself in procedural matters relating to grievance processing, absent conduct closing the door to the entire grievance procedure. *Id.*

Here, Charging Party asserts that Respondent breached the contractual grievance procedure by refusing to advance the proceedings to arbitration after step four of the grievance process. We do not believe that this alleged breach of contract establishes a PERA violation; instead, we agree with the ALJ that the Union has not met its burden of establishing repudiation. Under clear contract language, the Union could have initiated arbitration at any time by submitting a written request to arbitrate, as it has done before. There is no evidence that the Union ever requested arbitration in accordance with the contract's procedure. While we do not condone what appears to be Respondent's delay and seeming indifference to resolving this matter, it appears that Charging Party acceded to the delays and to Respondent's repeated requests for additional time. We agree with the ALJ that the parties have met their respective obligations to bargain under Section 15 of PERA and that dismissal of the charge is warranted.

ORDER

For the above reasons, we hereby adopt the Administrative Law Judge's Decision and Recommended Order as our final order in this case and dismiss the charge in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Bruce Campbell, Esq., for Respondent

Vinod Sharma, President, Association of Municipal Engineers, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON REMAND

On December 16, 2004, I issued a Decision and Recommended Order recommending dismissal of the above entitled matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. In a Decision and Order issued on November 3, 2005, the Michigan Employment Relations Commission remanded the case to me for an evidentiary hearing. Pursuant to that order, this case was heard before the undersigned at Detroit, Michigan on December 14, 2006. Based upon the entire record, including the transcript of hearing, exhibits and a post-hearing brief filed by Charging Party on or before January 31, 2007, I make the following findings of fact, conclusions of law, and recommended order.[1]

The Charge and Background:

On April 28, 2003, the Association of Municipal Engineers (AME) filed this charge against the City of Detroit. Charging Party represents a bargaining unit of approximately fifty to sixty employees of the City's Water & Sewerage Department. The charge alleges that Respondent violated the parties' collective bargaining agreement by failing to correct underpayments to twelve of its members. On November 20, 2003, the Union moved to amend

[1] Respondent did not file a post-hearing brief in this matter. Charging Party inappropriately submitted with its post-hearing brief exhibits which were not entered into evidence at the hearing. Regardless, these proposed exhibits would not change the analysis or outcome in this matter.

the charge to include an allegation that Respondent had refused to arbitrate a grievance pertaining to the back pay claims. That motion was taken under advisement.

Following oral argument, I issued an order recommending that the Commission dismiss the charge as untimely under Section 16(a) of PERA. I held that the Union was aware that Respondent owed money to its members as early as November 26, 2001, when it filed a grievance over that issue. With respect to Charging Party's assertion that Respondent had unlawfully refused to arbitrate that grievance, I concluded that the Union knew or should have known of the City's alleged noncompliance with its arbitration demand by May of 2002, when the City asked for more time to remedy the issue of underpayments to bargaining unit members. I also held that there were no issues raised which were cognizable under PERA because the facts alleged by the Union would not support a finding that Respondent had engaged in conduct closing the door to the entire grievance process.

On exception, the Commission agreed with my conclusion that the charge was untimely with respect to the alleged underpayment of wages, since the charge was filed almost a year after the Union knew or should have known of the facts pertaining to that allegation. However, the Commission directed me to hold an evidentiary hearing on the issue of whether Respondent violated its bargaining obligation by refusing to submit the grievance over the back pay issue to arbitration and, if so, whether such conduct constitutes a continuing violation thereby rendering the allegations first raised in the amended charge timely.[2]

Facts:

At the time this dispute arose, Charging Party and Respondent were parties to a collective bargaining agreement covering the period 1998 to 2001. That contract contains a five-step grievance procedure culminating in final and binding arbitration. The agreement states that arbitration "shall be invoked by written notice to the other party of the intent to arbitrate." In the event that the parties are unable to agree on the selection of an arbitrator, the contract provides that the parties shall, within seven days of the notice of intent to arbitrate, submit the dispute to the Federal Mediation and Conciliation Service (FMCS) for the selection of an arbitrator. From 2002 to 2004, the parties went to arbitration on two grievances. In both instances, the Union invoked the arbitration process by sending a letter to the City requesting arbitration. Each time, the City responded to the request by sending the Union a list of acceptable arbitrators.

In November of 2001, the AME filed a grievance alleging that the City had violated the parties' collective bargaining agreement by underpaying approximately 10 to 20 members of the bargaining unit. The grievance was advanced to Step 4 of the parties' contractual grievance process, at which it was denied by Respondent. Thereafter, representatives of the Union conveyed to Respondent that Charging Party wished to have the grievance proceed to arbitration. However, there is nothing in the record to suggest that the Union ever submitted a written request to arbitrate as required under the contract. Don McReynolds, president of the AME from

[2] Following the issuance of the Commission's decision, I immediately scheduled an evidentiary hearing for February 9, 2006. However, the hearing was postponed due to the illness of one of Respondent's witnesses. Thereafter, the hearing was adjourned several more times while the parties attempted to finalize a settlement agreement resolving the underlying dispute and because of a severe injury suffered by the undersigned.

approximately 2002 to 2004, testified that he could not recall whether the Union ever sent the City a letter requesting arbitration of the grievance, and no such letter was entered into evidence by Charging Party at the hearing in this matter. Moreover, Dwight Thomas, labor relations specialist for the City, testified credibly that no written arbitration request from the AME exists in Respondent's files.

On March 28, 2002, the parties participated in a pre-arbitration meeting in an attempt to resolve the dispute. Shortly thereafter, in a letter to the Union dated April 9, 2002, the City's chief labor relations specialist, Arnold Bauer, acknowledged that some AME members had not received pay increases on a timely basis. Bauer promised the Union that the City's human resources department would "develop an overtime plan to expedite addressing this issue" and that the department will "continue taking steps to resolve the problems raised in this grievance." At the conclusion of the letter, Bauer wrote "The City appreciates that the Association has been patient in this matter, and asks that the Association be a little bit more patient." At some point following receipt of the letter, Charging Party verbally requested that the matter proceed to arbitration. Once again, the City responded by asking the Union for more time to resolve the dispute.

Following the pre-arbitration meeting, Respondent worked with the Union in an attempt to calculate and pay the wages owed to AME members. McReynolds conceded that the parties had resolved the underlying dispute with respect to a number of the unit members identified in the 2001 grievance, although he was uncertain as to the exact number. Thomas testified credibly that the claims asserted by ten of the twelve AME members named in the instant charge had been resolved, and that it was his understanding that those individuals had been paid in full by the time of hearing. The City also made partial satisfaction to Mahendra Parikh, a unit member whose name was included in the 2001 grievance but who was not identified as a claimant on the unfair labor practice charge. As of February of 2001, Respondent had paid Parikh $9,402.63 of the $11,248.48 to which the Union claims he is entitled under the contract. With respect to Parikh and the other two employees who are allegedly still owed money, Respondent was still trying to resolve the dispute at the time of hearing. Thomas testified that he contacted the supervisor of those employees just prior to the hearing to discuss the back pay issue and that Respondent remains "willing and ready" to arbitrate the matter.

Discussion and Conclusions of Law:

Section 15 of PERA requires a public employer to meet and confer in good faith with the representative of its employees over terms and conditions of employment and, if requested, to execute a written document incorporating any agreement reached. The Commission has held that an employer violates its duty to bargain in good faith by refusing to process a grievance under a contractual grievance procedure simply because it believes the grievance lacks merit. *Washtenaw County Road Commission*, 20 MPER ___ (2007); *City of West Branch*, 1978 MERC Lab Op 352. However, the Commission does not involve itself in disputes over procedural matters relating to grievance processing unless the employer's conduct "closes the door" to the entire grievance procedure or substantially frustrates the process. *Gibraltar Sch Dist*, 16 MPER 36 (2003); *Kalamazoo Pub Schs*, 1977 MERC Lab Op 771, 778, 793.

The Commission, in remanding this case, directed me to make findings regarding whether Respondent made a good faith attempt to resolve the claims asserted by Charging Party on behalf of its members, or whether its repeated promises to investigate the alleged underpayments were "merely designed to delay resolution and were a deliberate attempt to frustrate the grievance process." Having taken evidence on that issue, I conclude that Charging Party has failed to meet its burden of proving that the City's conduct in connection with this matter was such as to constitute a repudiation of its obligation to arbitrate grievances under the parties' contractual grievance procedure.

Following the denial of the back pay grievance at Step 4 of the parties' contractual grievance procedure, the City acknowledged to the Union that some bargaining unit members had not received timely pay increases and asked Charging Party to delay arbitration in order to give its representatives more time to resolve the underlying dispute. The record establishes that Respondent in fact satisfied the claims of a majority of AME members to whom back pay was alleged owed. As of December of 2006, the City had fully paid ten of the twelve individuals identified by the Union in its unfair labor practice charge as potential claimants, and had made substantial efforts to resolve the claim of another bargaining unit member whose name was not listed on the charge. Moreover, Thomas testified credibly the City was still attempting to satisfy the remaining claims and that Respondent is willing to proceed to arbitration on those issues.

If the Union had actually reached the conclusion that the parties' ongoing efforts to settle this dispute were fruitless and that the City was merely engaging in dilatory tactics, it could have initiated the arbitration process at any time by submitting a written request to arbitrate the grievance, just as it had done with respect to the two grievances which were advanced to arbitration during McReynolds' term as AME president, and in accordance with the explicit terms of the parties' collective bargaining agreement. Yet there is no evidence indicating that Charging Party ever made such a request, nor is there any suggestion in the record that the Union ever attempted to submit the dispute to the FMCS for the selection of an arbitrator. Instead, it appears that Charging Party acceded to the City's requests for additional time to resolve the matter and that the parties engaged in a good faith and largely successful attempt to settle the dispute short of arbitration. Based upon these facts, I conclude that the parties fulfilled their obligations under Section 15 of PERA and, therefore, that dismissal of the charge is warranted.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: _____