STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C08 I-197

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 542,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Andrew Jarvis, Esq., City of Detroit Law Department, for the Public Employer

Cassandra D. Harmon-Higgins, Esq., Staff Counsel, AFSCME Council 25, for the Labor Organization

DECISION AND ORDER

On November 23, 2009, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

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: _____

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

In the Matter of:

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AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 542,
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APPEARANCES:

Andrew Jarvis, Esq., City of Detroit Law Department, for Respondent

Cassandra D. Harmon-Higgins, Esq., Staff Counsel, AFSCME Council 25, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on May 11, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules (SOAHR) for the Michigan Employment Relations Commission (MERC or the Commission.) Based upon the entire record, including a post-hearing brief filed by Charging Party on June 25, 2009, I make the following findings of fact, conclusions of law, and recommended order.[1]

The Unfair Labor Practice Charge:

AFSCME Council 25 and its affiliated Local 542 filed this charge against the City of Detroit on September 24, 2008. Local 542 represents about seven hundred nonsupervisory employees in several of Respondent's departments, including employees who perform landscaping and grounds maintenance duties in Respondent's parks. Charging Party alleges that Respondent unilaterally altered its practice or policy of allowing park maintenance employees to remove their reflective safety vests while at lunch or on break.[2] Charging Party asserts that this action constituted an unlawful mid-term modification of the parties' existing collective

[1] Respondent's brief was filed four days late, and Respondent's counsel did not ask for an extension of time until after the due date for filing had passed. I agree with Charging Party that Respondent's brief should not be considered part of the record in this case.

[2] Charging Party alleges that the change was made in April 2008, although it did not learn of it until July 2008.

bargaining agreement. Charging Party also alleges that Respondent violated PERA by failing to provide timely, accurate information about the new policy in response to requests made by Charging Party in July and August 2008.

Findings of Fact:

The Collective Bargaining Agreement

Respondent and Council 25 are parties to a master collective bargaining agreement covering all nonsupervisory employees of Respondent represented by Council 25's member locals, including Local 542. The most recent master nonsupervisory agreement took effect on July 1, 2005 and remained in effect during the events covered by this charge. Article 11(J) of the agreement was entitled "Guidelines for Administration of a Corrective Discipline Program." Subsection 5 of that article read as follows:

> 5. Any published department standards or rules governing employee conduct or expected work performance should be fairly and consistently applied.
>
> **Note:** Within twenty (20) calendar days following the effective date of this Agreement, representatives of Council 25 shall be provided with copies of the standard work rules. Within ninety (90) calendar days after receipt of such copies, Council 25 shall have the opportunity to review and discuss with management these standards and rules currently in effect in the various City departments. [Emphasis added]

Article 13 of the master agreement established joint union-management safety committees for each department and a joint central committee on health and safety consisting of two Council 25 staff representatives and two City representatives. The joint central committee's duties include reviewing and analyzing federal, state or local health and safety regulations, reviewing problems concerning health and safety, and making recommendations regarding any protective equipment, devices or clothing, physical examination or other test deemed necessary.

The master agreement also included a maintenance of conditions clause which required Respondent to maintain in effect during the term of the contract "wages, hours, conditions of employment and current proper practices which are beneficial to employees."

The Dispute over Safety Vests

Local 542 represents several classifications of park maintenance employees, including subforemen and seasonal employees hired for the summer months. Park maintenance employees mow grass, edge, weed, empty trash cans, pick up trash, and clean play lots in Respondent's parks. The duties of park maintenance employees sometimes require them to work near roads, either inside or abutting a park. Park maintenance employees have a half hour lunch period and two paid fifteen minute breaks. Lunch and break periods occur at set times. Therefore, all the employees on a work crew are generally on break and at lunch at the same time. Due to time

constraints, employees usually take their breaks and lunch in the park where they are working, although they may visit a restaurant, if one is close by.

Park maintenance employees were employees of Respondent's recreation department until 2006, when they were moved to the forestry and grounds maintenance division of the newly created general services department. In 2008, the parks maintenance employees were subject to various written work rules and disciplinary policies originally promulgated by the recreation department. They were also subject to the policies set out in a document entitled "Forestry and Ground Maintenance Operations Manual." This manual was created by the general services department in the spring of 2007 and revised in March 2008. The 2008 version of the operations manual includes a drawing of the personal protective equipment (PPE) issued to park maintenance employees. This drawing includes reflective vests, as well as safety glasses, protective gloves, safety shoes and various other items. Several sections of the manual dealing with individual tasks also mention vests. For example, the section on mowing with a riding mower includes vests in the list of required PPE, while the section on mowing with a walk-behind mower does not. The manual says nothing about whether vests, or any PPE, are to be worn during lunch or breaks. Insofar as the record discloses, there is no reference to safety vests in any other written City policy or rule applicable to park maintenance employees.

Herbert Simmons is the safety officer for various Respondent departments, including the general service department. Simmons' job includes making sure that Respondent complies with all governmental safety regulations in the areas under his supervision. According to Simmons, the State of Michigan mandates that employers do hazard/risk assessments for individual jobs. If an employer recognizes any hazards, the employer has the responsibility to provide appropriate PPE. It is part of Simmons' job to instruct supervisors on how to do hazard/risk assessments. He, along with departmental management, then determines how to best protect workers from the hazards identified, including what PPE they will be issued.

Parks maintenance employees have long been given various items of PPE, including safety glasses and gloves. Respondent first decided to add safety vests to the park maintenance employees' PPE around the time the general services department was created. The safety vests issued to park maintenance employees are made of mesh in a bright yellow green color with stripes of reflective tape. The vests close in the front with Velcro and have the general services department logo printed on the back. The purpose of the vest is to ensure that the employees are visible to traffic and to other employees operating machinery. The vest also makes the employees easily identifiable to supervisors and members of the public visiting the parks. At the hearing, Simmons admitted that there was no state or federal regulations that specifically required that employees performing the duties of a park maintenance worker be provided with a reflective vest. However, he explained that a risk assessment had been done for their job, that traffic had been identified as a hazard for them, and that he and managers in the employees' department had determined that a reflective vest would protect the employees from this hazard.

Although the decision that park maintenance employees would wear vests was made in 2006 or before, at least some employees did not actually receive vests until sometime later. One park maintenance worker testified that she got a vest in 2007, while another said that he was not issued a vest until the spring of 2008. Insofar as the record discloses, parks maintenance

employees were not given any specific instructions for the vest other than that they were to wear it. Employees understood that they were supposed to keep their vests on while they were working, even if their work location was far away from traffic. However, two of the three park maintenance employees who testified said that they routinely took their vests off when on break or at lunch because they were hot or because the vests were dirty. There was no indication in the record that any employee was told that this was unacceptable before late June 2008.

In late June or early July 2008, a supervisor visiting a park saw a crew of park maintenance employees standing by their vehicle. She asked the subforeman what they were doing, and he explained that they had postponed their break to finish a job. The supervisor told them that they were not authorized to change the time of their break. Some of the employees were not wearing safety vests, and the supervisor asked them why. The subforeman explained that they had taken their vests off for their break. The supervisor told the subforeman that employees were supposed to keep their vests on during their breaks, and the subforeman replied that they never wore them on break or at lunch. Before the supervisor left, she told the subforeman that the crew would be "written up."

After the supervisor had left, the subforeman called Simmons and asked if park maintenance employees were required to keep their vests on during breaks. Simmons said that he did not know. Simmons then called Phillip Bartell, superintendent for the grounds maintenance department, and asked him this question. Bartell told him that if employees were "on the clock," meaning that they were being paid, they had to wear their PPE. The following day, Simmons called the subforeman back and told him that employees needed to keep the vests on at all times.

Sometime later, the subforeman and two members of his crew were called into the supervisor's office to discuss the incident in the park. The subforeman testified that they were told that they were being given verbal warnings for not wearing their vests on break. However, a Charging Party steward who was also present testified that the supervisor said that the warnings were for not wearing their vests after break time was over. The verbal warnings were never put into the employees' files. No other park maintenance employee was warned or disciplined for not wearing a vest on lunch or break.

After the meeting with the supervisor, the steward called Local 542 president Melvin Brabson to report the above incident. Brabson was not aware that there was a policy requiring park maintenance employees to wear safety vests. Brabson emailed Bartell about what Brabson thought was discipline that had been issued to employees for not wearing their vests on break. Brabson noted in his email that vests had not been mentioned during the parties' last special conference about uniforms. He asked when wearing the vest had become a condition of employment and when a vest policy had been presented to the union. He also asked for a copy of the policy, which classifications were required to wear the vest, and what the costs were to employees if their vests were damaged.

On July 8, 2008, Simmons responded to Brabson's email. Simmons told Brabson that the safety vest was part of the standard PPE equipment issued to park maintenance employees. He also said that he and Bartell agreed that since parks maintenance workers primarily took their breaks in and around the work area and road hazards were a constant, employees needed to wear

their vests at all times. Simmons added, however, that they did not need to wear them when they were in Respondent's service yard or inside a vehicle.

After receiving this email, Brabson sent Respondent a letter requesting a special conference. In preparation for the special conference, Brabson again requested a copy of the safety vest policy. Sometime between July 8 and August 6, 2008, Simmons sent Brabson a copy of guidelines published by the Michigan Department of Transportation (MDOT) for PPE equipment. The guidelines stated that MDOT required employees to wear fluorescent vests with reflective stripes when regulating traffic; performing, inspecting or observing work within the road right of way; or performing or inspecting work that would cause the employee to be exposed to vehicle traffic or construction equipment. Brabson called Simmons and told him that he "did not see a vest policy in this document." Simmons then sent Brabson excerpts from construction industry safety standards promulgated by the Michigan Occupational Safety and Health Administration (MIOSHA). The construction industry safety standards stated that flagpersons directing traffic should wear a reflectorized garment. Brabson also received a copy of the operations manual, although it was not clear from the record when he received this document.

The parties held a special conference on August 6, 2008. Brabson testified that nothing happened at the conference except that Respondent refused to bargain over the vest policy. However, in a written summary of the conference provided to Brabson on August 7, Lee Stephenson, manager of the forestry and grounds maintenance division, told Brabson that the department had a long-standing requirement that park maintenance employees wear PPE in the work field. Stephenson said that Respondent had not changed its policy, it had only increased enforcement. Stephenson told Brabson that Respondent agreed that employees would not have to wear the vests while on lunch. However, he said that they would still be required to wear the vests "while in the work field and while on break." Stephenson also told Brabson that all park maintenance series employees through foreman were required to wear the vests, and that Respondent furnished park maintenance employees with replacement vests.

On August 19, Brabson sent Stephenson a letter stating that Charging Party had still not received a copy of the safety vest policy. He also repeated his demand to bargain over the policy. He did not receive a response to his demand. The unfair labor practice charge was filed on September 24, 2008.

On the date of the unfair labor practice hearing on May 11, 2009, Respondent stated on the record that park maintenance employees would no longer be required to keep their vests on during either lunch or breaks. However, the parties were unable to agree on whether Respondent had a duty to bargain with Charging Party over changes in the requirements for PPE. Respondent did not move to dismiss the charge as moot, and the parties proceeded with the hearing.

Discussion and Conclusions of Law:

It is well established that safety rules and safe work practices are conditions of employment and, as such, are mandatory subjects of bargaining under both PERA and the National Labor Relations Act, (NLRA), 29 USC 150 et seq. *City of Detroit*, 1993 MERC Lab Op

529, citing *NLRB v Gulf Power Co*, 384 F2d 822, 824-825, (CA 5, 1967), enfg *Gulf Power Co*., 156 NLRB 622 (1966), and the concurring opinion of Justice Stewart in *Fibreboard Paper Products Corp v NLRB*, 379 US 203, 222 (1964). In *Gulf Power Co*, the National Labor Relations Board (NLRB) explicitly rejected the argument made by the employer, and by Respondent in this case, that safety rules are a matter of management prerogative because an employer has a legal obligation to provide a safe workplace. In *AK Steel Corp*, 324 NLRB 173 (1997), the NLRB held that an employer violated its duty to bargain by unilaterally discontinuing its practice of allowing employees the option of wearing a particular type of safety shoe and instead requiring its use. When the union demanded to bargain over the change, the employer agreed to discuss the matter, but asserted that it was not a negotiable item since PPE was a managerial prerogative. The NLRB adopted the finding of its administrative law judge, at 181, that required safety equipment, as well as work rules related to safety, are "germane to the working environment," are not matters within the core of entrepreneurial control, and, therefore, are mandatory subjects of bargaining. The administrative law judge emphasized that it was not the NLRB's role to assess whether the proposed change would make the workplace safer or better, and that the only issue was whether the change was an issue of legitimate concern to the union such that it should be entitled to bargain about it. In accord with the reasoning expressed in that case, I find that the PPE for particular jobs and when a particular item of PPE must be worn are mandatory subjects of bargaining under PERA.

Although this issue was not raised directly, I also note that the NLRB has held that an employer is required to bargain over the matter of appropriate wearing apparel in the workplace, including whether unit employees must wear uniforms. The NLRB has held that the decision to require a uniform, and not merely its effect on employees, is a mandatory subject of bargaining. *In re Public Service Co. of New Mexico* 337 NLRB 193(2001) citing *St Luke's Hospital*, 314 NLRB 434 fn. 1, 440 (1994) and *United Technologies Corp.*, 286 NLRB 693, 694 fn.1 (1987).

As Simmons testified, Respondent's departments routinely issue new items of PPE to employees after conducting hazard/risk assessments of their jobs, but without providing Charging Party with specific notice of the new equipment. Charging Party did not receive a notice that safety vests had been added to the park maintenance employees' PPE. When Charging Party president Brabson learned of this in the summer of 2008, he did not object to the requirement that employees wear the vests while working, but did object to Respondent's apparent change in policy regarding the wearing of the vests during lunch and on break. In fact, the evidence indicates that until the issue was raised by a supervisor in late June or early July 2008, Respondent had no written policy or uniform practice regarding the wearing of vests during those periods. When confronted with the question of whether employees had to wear their vests while on break, Superintendent Bartell's response was that the vests needed to be worn at all times if employees were being paid. However, by August 7, Respondent had decided that employees did not have to wear the vests while at lunch, while in a vehicle, or when working in a service area outside a park. The only issue remaining in dispute, therefore, was whether employees were required to keep their vests on during their fifteen minute breaks. As discussed above, I find that prior to July 1, 2008, Respondent had no uniform policy on this issue. However, after Stephenson's August 7, 2008 letter, it clearly did. By the time Respondent decided to rescind the rule, on the day of the unfair labor practice hearing, the rule had been in effect for over eight months.

As indicated above, some park maintenance employees want to take their vests off during breaks because the vests are hot and often dirty. Respondent told Charging Party that park maintenance employees had to keep their vests on during breaks because of the hazards presented by traffic in the park. Although whether vests must be worn during breaks may seem like a minor matter, I conclude that this work rule was a matter of legitimate concern to Charging Party, that Respondent had a duty to bargain over it, and that Respondent violated PERA when it failed to respond to Charging Party's bargaining demand.

I find no merit, however, in Charging Party's argument that Respondent's actions constituted a mid-term modification of the collective bargaining agreement. None of the contract provisions cited by Charging Party, including Article 13, clearly prohibit Respondent from requiring employees to wear specific items of PPE or determining the circumstances under which they are to wear them. The Commission does not find a mid-term modification of contract when there is a bona fide dispute over whether the contract has been violated. *West Branch-Rose City Area Schs*, 1987 MERC Lab Op 955; *Meadowbrook Medical Care Facility*, 1994 MERC Lab Op 148 (no exceptions).

Charging Party also alleges that Respondent violated its duty to provide information by failing to provide a copy of its safety vest policy. According to Charging Party, although Respondent provided "random documents … the documentation provided was neither accurate nor timely." The record indicates that Charging Party made several requests for a copy of Respondent's safety vest policy as well as other information in the summer of 2008. I find that at the time these requests were made Respondent had an unwritten policy that park maintenance employees had to wear safety vests, but no written policy covering when they had to be worn. On August 7, 2008, Stephenson announced, in his written summary of the parties' special conference, that employees would be required to wear the vest "while in the work field and while on break" but not at lunch. There is no dispute that Brabson received this document. The other information Brabson requested was provided at this special conference and/or in Stephenson's summary letter. I find that Respondent did not fail or refuse to provide Charging Party with the information that it requested in this case.

In sum, I find that Respondent actions did not constitute a mid-term modification of the parties' collective bargaining agreement and that Respondent did not fail or refuse to provide Charging Party with the information it requested about its safety vest policy. However, I conclude that after August 7, 2008, Respondent unlawfully refused to bargain with Charging Party over a rule requiring park maintenance employees to keep their safety vests on during breaks. Although Respondent rescinded this rule on the day of the unfair labor practice hearing, it did not move to dismiss the charge as moot, and the parties agreed to proceed with the hearing to resolve the underlying issue of whether Respondent had a duty to bargain over PPE requirements. Where statutory issues are of sufficient importance and where the unfair labor practice is likely to reoccur, the Commission does not dismiss a charge as moot even if the employer voluntarily corrects its course of conduct. *Wayne State Univ*, 1991 MERC Lab Op 496; *Ingham Co*, 1988 MERC Lab Op 170, 172. Cf *City of Bay City*, 22 MPER 60 (2009). Since Respondent has rescinded the rule over which Charging Party sought to bargain, and no employee was disciplined for violating the rule, the remedy is limited to a cease and desist order

and notice posting. In accord with these conclusions of law and my findings of fact set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Detroit, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain over mandatory subjects of bargaining, including the personal protective equipment required for particular jobs and when and under what circumstances personal protective equipment must be worn.

2. Post the attached notice to employees in conspicuous places in the workplace, including all places where notices to park maintenance employees represented by AFSCME Local 542 are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: November 23, 2009

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **THE CITY OF DETROIT** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain over mandatory subjects of bargaining, including the personal protective equipment required for particular jobs and when and under what circumstances personal protective equipment must be worn.

As a public employer under PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment or other conditions of employment.

CITY OF DETROIT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. C08 I-197.