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

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C07 D-063

-and-

DETROIT WAYNE JOINT BUILDING AUTHORITY,
Respondent,

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCALS 1220 AND 2394,
Labor Organization-Charging Party.
_____/

APPEARANCES:

City of Detroit Law Department, by Valerie Colbert-Osamuede, for Respondent City of Detroit

Clark Hill P.L.C., by Thomas P. Brady and Anne-Marie Vercruysse Welch, for Respondent Detroit Wayne Joint Building Authority

Miller Cohen P.L.C., by Richard G. Mack, Jr., for Charging Party

## DECISION AND ORDER

On March 13, 2009, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter recommending that we dismiss the charge filed by Charging Party, AFSCME Council 25 and its affiliated Locals 1220 and 2394 (Union), against Respondent City of Detroit (City) and Respondent Detroit Wayne Joint Building Authority (Authority). The ALJ concluded that Charging Party failed to establish that either Respondent violated the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The ALJ found that Charging Party did not establish that the Authority operates the Coleman A. Young Municipal Center (CAYMC) as the agent of the City. She also found that the Authority is not a party to the master collective bargaining agreements between the City and the Union as an agent of the City and is not bound by the terms of those agreements. The ALJ also concluded that the Authority is not a joint employer with the City of nonsupervisory or supervisory custodial employees working at the CAYMC and, therefore, that

it had no duty to bargain with Charging Party under Section 10(1)(e) of PERA or to provide Charging Party with requested information. Finally, the ALJ found that the facts did not support the allegation that the Authority encouraged prospective bidders to sign collective bargaining agreements with another labor organization.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. After requesting and receiving extensions of time to file exceptions, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on June 24, 2009. Respondent Detroit Wayne Joint Building Authority, requested and received an extension of time to file a response to Charging Party's exceptions, and filed its response on August 6, 2009. Respondent City of Detroit neither filed exceptions nor responded to Charging Party's exceptions.

Charging Party excepts to various rulings and findings of the ALJ, including: her conclusion that the Authority is not an agent of the City; her conclusion that the Authority is not a joint employer with the City of the supervisory and nonsupervisory custodial employees represented by Charging Party; her ruling excluding an arbitrator's opinion from the record; and the ALJ's crediting of certain testimony.

We have reviewed Charging Party's exceptions and the response by the Authority and conclude that the exceptions are without merit.

Findings of Fact:

Unless otherwise noted, we adopt the ALJ's findings of fact and only repeat them to the extent necessary. In 1948, the Authority was incorporated by the City of Detroit and Wayne County (the County). As with any incorporated entity, the Authority is an independent body separate from its incorporators, equipped with the many incidental powers needed to carry out its purpose. It is governed by three commissioners selected by the City and the County. The Authority owns and operates the CAYMC, the majority of which it leases to the City and County for offices and court facilities. The City and County pay rent in proportion to the amount of the building each occupies; the Authority also leases to private tenants, but the City and County are the main source of revenue for the Authority.

The Authority prepares a yearly budget and bills the City and County according to the Authority's projected costs. Under its articles of incorporation, the Authority has the power to raise rents in order to meet its projected costs. However, the Authority has reduced its budget when the City and County responded that they would not pay the amount requested by the Authority. As a result, the Authority determines what expenditures it will reduce in order to comply with budget constraints.

In 1954, the Detroit City Council passed a resolution that stated the City, County, and Authority determined that the best way to provide personnel for the operation of the CAYMC was via a contractual agreement between the Authority and the City. Under the agreement, the City's Department of Public Works (DPW) was to provide the needed personnel for the CAYMC's maintenance and custodial services and the Authority was to reimburse the DPW for

the cost of those services. The Authority's general manager was to provide general direction to the superintendent of building maintenance; the superintendent was then responsible for the direct supervision of the employees performing the services. The resolution provided that the superintendent and all personnel supervised by him would be City employees and would continue to be entitled to the benefits commensurate with that status. At that time, the Authority's general manager was also a City employee. In 1967, a substitute resolution was passed which transferred, to the Authority, the responsibility to purchase materials and equipment for the CAYMC, but maintained the contracting of City employees to perform the needed operational services for the CAYMC. This resolution has never been modified; however, several services previously performed by City employees have been contracted out to private entities. For example, the City no longer provides watchmen, and security has been contracted to a private company.

The Authority has never been listed as a party to any of the master agreements reached between Charging Party and the City. Charging Party has entered into supplemental agreements negotiated with the Authority's general manager and City labor relations representatives specifically covering the custodial workers at the CAYMC; the most recent expiring in 2005. The previous supplemental agreements stated that they were between Local 1220 and the "Detroit Wayne-Joint Building Authority" or "Detroit Wayne-Joint Building Authority, of the City of Detroit" and were executed by the Authority's general manager, who at that time, was a City employee. There is nothing in the record to indicate that the Authority's commissioners ratified these supplemental agreements.

Before 2005, the Authority's general manager was a City employee. In 2005, one of the Authority's commissioners, Gregory McDuffee, temporarily took over the position when the general manager left. McDuffee, who had never previously been a City employee, subsequently accepted the position on a long-term basis and signed a contract directly with the Authority. This contract states that the general manager is to "direct staff oversight and scheduling with the assistance of the assistant general manager, who as a City of Detroit employee, has authority over the building staff." The assistant general manager is the highest ranking City employee at the CAYMC and formally supervises all City staff at that location.

The Authority budgets for a certain number of contracted employees; if the Authority chooses to fill a position that has become vacant, it asks the assistant general manager to requisition another employee from the DPW. The DPW maintains a list of employees who are qualified for such openings and fills positions at the CAYMC from that list. No one from the Authority interviews DPW employees before they start work at the CAYMC.

Currently, only City employees issue discipline to the custodial staff, and all discipline is issued on DPW forms. Local 1220's president testified that before 2005, the general manager would sometimes issue discipline. As previously mentioned, before 2005 the general manager was also a City employee; the current general manager testified that he has no role in the discipline of City employees. In one instance, the Authority, believing an employee to have been absent without leave, sought to have him reassigned to another location and removed from the list of employees for whom it was charged by the City. The City refused to reassign the employee and he returned to work at CAYMC. Months later the Authority banned the employee

after receiving notice that he had threatened other employees. It was only after the City was notified by the Authority that he had been banned as a security risk that the employee was reassigned to another work location by the City.

Custodial work assignments are specifically assigned by the assistant general manager. If the general manager receives a request for additional services, he forwards the request to the assistant general manager. The Authority has no written rules that the custodial staff must follow; however, it does have policies that all individuals, including visitors, must adhere to.

In 2007, the Authority issued a request for proposals for custodial services; there is no evidence in the record that the City had any participation in this decision. After this, Charging Party requested a special conference with the general manager. When the general manager refused to meet with Charging Party, Charging Party met with the assistant general manager. The assistant general manager informed Charging Party that the Authority felt it could purchase the custodial services less expensively elsewhere. The Authority received several bids and selected a private company whose bid was about half the current cost of custodial services.

Discussion and Conclusions of Law:

Witness Credibility

The Union takes exception to the ALJ's findings crediting the testimony of the Authority's general manager with respect to his authority over the assistant general manager and the custodial employees. Charging Party contends that the ALJ erred in not crediting the testimony of Local 1220 and 2394's presidents who testified that the assistant general manager told them that he could not make decisions without the general manager's approval and that a DPW labor relations representative said that the general manager was involved in decision making regarding the custodial staff. Neither the assistant general manager, nor the labor relations representative testified at the hearing. On exceptions, Charging Party contends that the ALJ erred in failing to credit the testimony of the two local presidents based on her finding that their testimony was hearsay. Charging Party contends that their testimony was not hearsay, but instead was admissible as party admissions. Even if we were to accept this contention, it does not override the ALJ's ability to assess witness credibility. The ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. This Commission will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary. See *Redford Union Sch Dist*, 23 MPER 32 (2010); *City of Lansing (Bd of Water & Light)*, 20 MPER 33 (2007); *Bellaire Pub Sch*, 19 MPER 17 (2006). Moreover, the testimony regarding statements by the assistant general manager and a DPW labor relations representative is entitled to little weight when compared to the specific testimonial and documentary evidence showing that the general manager did not hire, discipline, discharge, control, or set the wages of the custodial employees. Accordingly, we find no basis to reverse the ALJ's credibility findings.

Refusal to Reopen the Record to Admit Additional Evidence

In its exceptions, Charging Party argues that the ALJ improperly refused to reopen the record to admit a past arbitration award, the AFSCME Local 2920 bargaining agreement, and sections from the City of Detroit budget. Pursuant to Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166, a party must show all of the following in order to reopen a record and admit new evidence: the additional evidence could not with reasonable diligence have been discovered and produced at the original hearing; the additional evidence itself and not merely its materiality is newly discovered; the additional evidence, if adduced and credited, would require a different result.

The arbitration award Charging Party sought to have admitted is not pertinent to the case at hand. We agree with the ALJ that the facts and issues involved in the arbitration proceeding are so dissimilar that this arbitration award, if adduced and credited, would not have led to a different outcome in this case.

Further, we find no error in the ALJ's refusal to reopen the record to admit into evidence the AFSCME Local 2920 collective bargaining agreement. Charging Party had already offered into evidence a different collective bargaining agreement, which contained the identical clause that Charging Party sought to have the ALJ consider; therefore, admission of a second collective bargaining agreement containing the same information as one already in the record could not support a change in the outcome of this matter.

We also agree with the ALJ's refusal to reopen the record to admit sections from the City of Detroit's budget. No showing has been made that this document was newly discovered after the hearing. In fact, Charging Party made mention of this document during the hearing. The fact that the ledger had expenditures to the Authority only confirmed the general manager's testimony that wages for the custodial workers are paid by the City and that the Authority pays the City for the services it has contracted to receive. This evidence could not lead to a different outcome in this case.

The Authority is not an Agent of the City in Labor Relations Matters

We agree with the ALJ, for the reasons stated in her decision, that Charging Party has not proven that the Authority is an agent of the City, as the operator of the CAYMC, nor has Charging Party offered evidence establishing that the Authority is bound by the terms of the master agreement as an agent of the City.

An agent has the authority to enter into a business relationship with a third party and to enter into contractual relationships on behalf of the principal. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/MEA*, 458 Mich 540, 557 (1998). Further, an agent is bound to follow instructions provided by the principal, in matters that have been entrusted to the agent. *Id*. at 558. The Authority is an independent corporation that is not obligated to follow instructions from the City. Any power that the City asserts over the Authority arises from the lessor-lessee relationship that exists between the two entities.

We also agree with the ALJ that there is no merit to Charging Party's argument that the Authority is an agent under the principles of apparent authority. Apparent authority exists when a third party reasonably believes that an agency relationship exists, however that belief must be traceable to the alleged principal. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 528 (1995). All relevant labor decisions were made by City employees and not the Authority. The Union contends that by using the name "Detroit Wayne-Joint Building Authority" on supplemental bargaining agreements, the City conferred authority on the Authority. However, the use of the Authority's name on the contracts simply reflects the acknowledgment, by the City, of the work location of the employees over whom the agreements would apply. There is no evidence that by designating the contract as applying to workers who provided services for "Detroit Wayne-Joint Building Authority" that the City was granting the Authority the ability to act on the City's behalf with respect to labor relations matters.

The Authority and the City are not Joint Employers of the Employees Represented by Charging Party

Further, we find no error in the ALJ's conclusion that the Authority is not a joint employer of the City's custodial employees at the CAYMC. Two entities are joint employers when they both have the authority to set the terms and conditions of employment for the same group of employees. See, *Southern California Gas Co*, 302 NLRB 456 (1991); *NLRB v Browning-Ferris Industries of Pennsylvania, Inc*, 691 F2d 1117, 1123 (CA3, 1982). To find that an entity is a joint employer, there must be evidence that the entity "meaningfully affects matters relating to the employment relationship." *TLI, Inc*, 271 NLRB 798. Under PERA an entity is a joint employer when it has the characteristics of an employer, including: 1) the right to select and hire the employee; 2) payment of the employees' wages; 3) the power to discharge; and 4) power and control over the employees' conduct. *St Clair Co Intermediate Sch Dist v St Clair Co Ed Ass'n*, 245 Mich App 498, 515-516 (2001). Charging Party urges us to follow the language of the NLRB in *Southern California Gas Co*, which states, at 461:

> In determining whether a joint employer relationship exists, the issue to be resolved is whether the employer exercises, or has the right to exercise, sufficient control over the labor relations policies of the contractor or over the wages, hours, and working conditions of the contractor's employees from which it may be reasonably inferred that the employer is in fact an employer of the contractor's employees.

Review of the facts in this case persuades us that the ALJ is correct in concluding that the Authority is not a joint employer with the City whether or not we apply the above quoted language of *Southern California Gas Co*. In this instance it is the City, without input from the Authority, that makes the decision to hire specific individuals into the DPW and assign them to positions within the CAYMC. The Authority does not bargain over the wages of the custodial workers or have any input as to the compensation they will receive. The collective bargaining agreements setting the terms and conditions of employment for the custodial workers and supervisors who perform services at CAYMC are negotiated with Charging Party by City employees. The Authority pays the City for a service that it has contracted with the City to receive; it does not pay individual employees. The Authority cannot discharge or discipline

employees provided by the City to perform services for the Authority; any discipline is determined by City employees. The only time a specific custodial worker was removed from the CAYMC at the request of the Authority, involved an employee whom the City had initially refused to remove. It was only after the Authority took the action of banning the employee from its premises because it was alleged that he had threatened another employee, that the City reassigned him to a different position within the City. This incident provides persuasive evidence that the Authority's control over the custodial workers is limited to those actions necessary to ensure its own operations are not disrupted. Accordingly, we agree with the ALJ that the Authority does not exhibit the characteristics of an employer in its dealings with the custodial workers and there is no joint employer relationship between the Authority and the City.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. We therefore affirm the ALJ's Decision in this case.

## ORDER

The charges in this matter are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated:_____

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

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C07 D-063

-and-

DETROIT WAYNE JOINT BUILDING AUTHORITY,
Respondent,

-and-

AFCSME COUNCIL 25 AND ITS AFFILIATED LOCALS 1220 AND 2394,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Valerie Colbert-Osamuede, Esq., City of Detroit Law Department, for Respondent City of Detroit

Clark Hill P.L.C., by Thomas P. Brady, Esq. and Anne-Marie Vercruysse Welch, Esq., for Respondent Detroit Wayne Joint Building Authority

Miller Cohen P.L.C., by Richard G. Mack, Jr., Esq., 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, this case was heard at Detroit Michigan on September 26, 2007 and March 20 and 26, 2008, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the Charging Party and the Detroit Wayne Joint Building Authority (the Authority) on or before June 3, 2008, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge:

AFSCME Council 25 and its affiliated Locals 1220 and 2394 filed this charge against the City of Detroit (the City) and the Authority on April 5, 2007 alleging that Respondents violated Sections 10(1)(a), (b), and (e) of PERA. The charge was amended on April 13, 2007.

The Authority, a public entity created in 1948 by the City and Wayne County (the County), owns and operates the Coleman A. Young Municipal Center (CAYMC), an office building housing the Third Judicial Circuit Court, the Wayne County Probate Court, the offices of the Wayne County Clerk, and the principal offices of the City of Detroit. Before the building opened in 1954, the Authority, the County and the City agreed that certain services at the building would be provided by employees of the City's department of public works (DPW). Since that time, building attendants employed by the City and represented by Local 1220 and supervisory custodians employed by the City and represented by Local 2394 have provided custodial services at the building. Employees represented by these locals are covered by master collective bargaining agreements between the City and Charging Party for nonsupervisory and supervisory employees respectively. Both the supervisory and nonsupervisory master agreements currently provide, at Article 19, that the City's right to contract or subcontract shall not be used to undermine the union and that "no employees shall be laid off, demoted, or caused to suffer a reduction in overtime as a direct and immediate result of work performed by an outside contractor."

In January 2007, the Authority sent out requests for proposals (RFPs) for a contract to provide the custodial services City employees currently provide at the CAYMC. There is no contention that the City authorized, directed, or even encouraged the Authority to take this step. However, there is also no dispute that if the Authority contracts with another entity, City employees working at the CAYMC will lose their jobs there and some will be laid off because they lack sufficient seniority to bump into other City positions covered by the master agreements.

Charging Party alleges that the Authority's attempt to contract with another entity for custodial services constitutes an unlawful repudiation of Article 19 of both master agreements and thus violates the City's and/or the Authority's duty to bargain in good faith under Section 10(1) (e) of PERA. While the Authority contends that it is not a party to the master agreements, Charging Party argues that it is bound by them because it is an agent of, or joint employer with, the City. In Charging Party's post-hearing brief, it also argues that the Authority has a contract with the City to provide it with custodial services and Charging Party should be able to compel the Authority to continue to comply with that contract because Charging Party is a third-party beneficiary of the contract. After it filed the unfair labor charge, Charging Party obtained an injunction under Section 16(h) of PERA preventing the Authority from entering into a contract for custodial services pending a decision on the merits of the charge.

The charge also alleges that the Authority and City violated PERA by refusing to provide Charging Party, in a timely fashion, with information it requested about the proposed contracts. In addition, it alleges that the Authority violated Sections 10(1) (a) and (b) of PERA by

encouraging prospective bidders on the custodial services contract to sign contracts with another labor organization, the Service Employees International Union (SEIU).

II. Charging Party's Request to Reopen the Record:

During the hearing, Charging Party asserted that there were certain documents which it had tried but failed to obtain before the hearing. It sought permission to submit these documents after the close of the hearing if it could obtain them. These were, first, a copy of the most recent master agreement between Charging Party and the City covering supervisory employees and, second, documents from an employee's personnel file that Charging Party had subpoenaed from the City but that the City had allegedly failed to provide. I informed Charging Party that it could move to reopen the record if it later obtained the documents. Late in the hearing, Charging Party also sought to admit excerpts from the City's 2006-2007 budget. In response to the Authority's objection that the excerpts were incomplete, Charging Party promised to submit a more complete document after the hearing closed.

On May 22, 2008, Charging Party moved to reopen the record to admit the following documents: (1) excerpts from the City's charter; (2) documents from the employee personnel file referred to above; (2) an arbitration award by arbitrator George Roumell issued on May 15, 2008; (3) the 2001-2005 supervisory master agreement between the City and Charging Party; (4) extracts from the City's 2006-2007 fiscal year budget showing the "Detroit Wayne Joint Building Authority" as both revenue and expense line items within the DPW portion of the budget.

Rule 166(1) of the Commission's General Rules, 2002 AACS, R 423.166, states:

> A party to a proceeding may move for reopening of the record following the close of a hearing conducted under Part 7 of these rules. A motion for reopening of the record will be granted only upon a showing of all of the following:
>
> a. The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
>
> b. The additional evidence itself, and not merely its materiality, is newly discovered.
>
> c. The additional evidence, if adduced and credited, would require a different result.

The Authority filed objections to the admission of all but the charter excerpts. It asserts that the additional evidence Charging Party seeks to have admitted is not relevant, and that even if it is relevant it should not be admitted under Rule 166 because it would not change the result.

The documents from the personnel file consist of an oral reprimand issued to the employee for attendance violations and several City forms listing the employee's department as either "DPW" or "DWJBA." The oral reprimand is signed by Norris Louie, assistant general

manager at the CAYMC. The record already includes similar documents for other employees at the CAYMC. There was testimony during the hearing about the Authority's role in allegedly causing a disciplinary action to be issued to this employee for making a threat in the workplace. However, the documents offered by Charging Party do not contain any reference to this discipline. I conclude that these documents should not be admitted as they do not pertain to any issue in dispute and, therefore, would not change the result.

The Authority objects to the admission of the 2001-2005 supervisory master agreement on the basis that it was not the agreement in effect in 2007. Charging Party admits that there was a subsequent agreement, but asserts that this agreement was never put into final form. Charging Party does not explain in its motion or response to the Authority's objections why it seeks to have this document admitted. At the hearing, Charging Party's witness testified without contradiction that the current supervisory master agreement includes a provision, also at Article 19, identical to Article 19 in the nonsupervisory agreement. I conclude that the 2001-2005 supervisory agreement should not be admitted under Rule 166 as it does not pertain to any issue in dispute and would not change the result.

The Authority argues that the excerpts from the City's budget are also not relevant to any issue in dispute. Charging Party asserts that the excerpts are relevant because they show that the Authority is included as an expenditure in the City's budget. There was unrebutted testimony from the Authority's general manager that that the City pays the wages and benefits of certain employees working at the CAYMC, including Charging Party's members, and is reimbursed by the Authority for these sums. The budget excerpts merely reinforce the general manager's testimony. I conclude that the budget excerpts are not relevant to any issue in dispute and should not be admitted because they would not change the result.

In the arbitration award which Charging Party seeks to have admitted, arbitrator George Roumell held that the City breached Article 19 of the nonsupervisory master agreement when it entered into a contract with a private organization, Detroit Belle Isle Grand Prix, Inc. (DBI), that temporarily turned over to this organization a portion of the City's Belle Isle Park and allowed the DBI to subcontract park maintenance work normally performed by AFSCME members to subcontractors approved by the City. The arbitrator found that the subcontracting caused unit members to lose overtime. Although the City argued that it had merely issued a permit to the DBI that allowed it to maintain an area of the park, the arbitrator concluded that the City, either directly or through DBI as its agent, had contracted out bargaining unit work. Charging Party asserts that the arbitration award is "precedential" in this case.

In determining whether PERA has been violated, the Commission is not bound by an arbitrator's decision interpreting a collective bargaining agreement. *Kent Co Ed Ass'n v Cedar Springs Pub Schs*, 157 Mich App 59, 63-64 (1987). However, since the parties have agreed to be bound by the arbitrator's interpretation, the Commission normally gives weight to this interpretation. There are, however, significant differences between these two cases both in the facts and in the issues presented. In the Belle Isle arbitration, the City owned and controlled the park where the subcontracted work was performed. It was also the sole employer of the unit employees who normally performed the work. The City argued that it was not responsible for the DBI's subcontracting because it had merely granted the DBI a permit to hold an event on Belle

Isle, a contention that the arbitrator found to be without merit. There was no claim that the DBI had ever been an employer of the employees who lost overtime or that DBI itself owed any obligation to the Charging Party under the collective bargaining agreements. Here, however, the Authority, not the City, owns and controls the CAYMC. Charging Party argues, as was not necessary in the Belle Isle case, that the Authority, as a joint employer or City agent, is bound by the terms of collective bargaining agreements to which it is not explicitly a party. I conclude that the record should not be reopened to admit the arbitration award in the Belle Isle case because the issues decided by the arbitrator were too different for the arbitrator's findings to be given deciding weight here.

Only the charter amendments are admitted as exhibits.

III. Reopening of the Record Under Rule 172(g)

Throughout the hearing and in their post-hearing briefs, both parties treated the Authority's ownership of the CAYMC as an undisputed fact. However, certain documents in the record brought this into question. On January 15, 2009, I issued an order reopening the record, in accord with my authority under Rule 172(g) of the Commission's General Rules, for the purpose of admitting evidence to clarify the record on this point. In response to my order, the Authority submitted an affidavit from the Authority general manager, Gregory McDuffee, explaining the discrepancies in the record. Attached to the affidavit were several public documents, including a quit claim deed recorded on August 8, 1951, from the City to the Authority for the property on which the CAYMC was built. This affidavit and the documents attached are admitted into the record.

IV. Findings of Fact:

The Authority's Incorporation and Funding

The Authority was incorporated on July 12, 1948 by the City of Detroit and County of Wayne under the authority of the Building Authorities Act, MCL 123.951 *et seq.* This statute authorizes the creation of independent public corporations for the purpose of acquiring, building, owning, operating and maintaining buildings and their appurtenances for the joint use of a county and city. According to its articles of incorporation, the Authority was formed to "acquire, furnish, equip, own, improve, enlarge, operate and/or maintain a building … for lease to, and the joint use and eventual ownership of the said incorporating units." Under its articles of incorporation, and consistent with its enabling statute, the Authority is a body corporate independent from the City and County. It has the power to sue and be sued and all the incidental powers necessary to carry out the purposes of its incorporation.

The Authority is governed by a three person commission. The commissioners serve six year terms. One commissioner is chosen by the City, one by the County, and the third by agreement of both, or by the governor of the State of Michigan if the two parties cannot agree. A commissioner may be removed for cause by action of the majority of the legislative bodies of both the City and the County. Per the articles of incorporation, the commission elects one of its members chairman, one secretary and one treasurer.

The land on which the building which is now the CAYMC sits was deeded to the Authority by the City in 1951. As provided in its enabling statute, the Authority issued bonds to fund the construction of the building. In 1952, the Authority, City and County entered into a lease agreement pursuant to which the Authority leased space in the building to be built to the City and County for a period "extending beyond the last maturity date of the bonds, not to exceed a period of forty years." The lease also stated that the Authority, "at the expense of the County and City, shall operate, maintain and keep in repair the building and site." It stated that at the beginning of each budget year, the Authority was to prepare and adopt a budget setting forth its operation and maintenance expenses, and that County and City were to pay their proportionate shares of these expenses as "essential operating expenses." Under the terms of the lease, the County and City paid rent to the Authority sufficient to service and retire the bonds and cover the operating expenses of the building.

The original articles of incorporation stated that the Authority would have a fifty-year life. However, in 1988, the Authority's articles were amended to make its existence permanent. At that time, the Authority, County and City also amended their lease agreement to extend until 2028. In January 2007, there were no outstanding revenue bonds but the Authority still held title to the building. Under the extended lease agreement, the County and the City paid rent sufficient to cover the operating expenses of the building in proportion to the amount of space they occupied. Although the Authority received some rent from private tenants in the building, almost all the costs of operating the building were paid by the City and County. For the fiscal year 2006-2007, the City paid 67.4 percent of the CAYMC's operating expenses and the County paid 32.6 percent.

The Authority's articles of incorporation and the lease agreement give the Authority the right to determine its annual operating expenses and to bill the City and the County. The Authority prepares a budget each year based on its costs from the previous year and projected cost increases. After the Authority adopts its budget, it forwards a copy to both the City and the County to inform them how much rent they will be required to pay as of the beginning of the new fiscal year. The Authority has the power under its articles and the lease to raise rents to meet its expenses. However, on several occasions the Authority has reduced its budget when the City and/or County said that it was not prepared to pay the amounts the Authority wanted them to pay. In the budget year 2004-2005, the Authority reduced its operating budget because of the City's budget problems. It did so, in part, by reducing the number of custodial positions at the CAYMC. As a result, the City laid off some of Charging Party's members. After the Authority sent its proposed budget for 2005-2006 to the City and County, both entities informed it that they would not pay what it had budgeted. Both, in fact, passed budgets of their own that allocated less money for the Authority than the Authority was seeking. In response, the Authority implemented reductions in spending, including eliminating spending for capital improvements, that brought its budget to within the limits imposed by the City and County. According to the documents in the record, although the City and/or County forced the Authority to cut its budget, the Authority itself decided where the cuts would be made.

Agreements between the Authority and City for Services

Before the building now called the CAYMC opened, the City, County, and Authority agreed that the City would provide employees to operate and maintain the building. On December 22, 1954, the Detroit City Council passed a resolution stating that the Authority, the City and the County had mutually agreed that the best method of providing personnel for the operation and maintenance of the building would be through a contractual agreement with the City. Although the City and Authority never entered into a separate written contract, the resolution authorized the City's department of public works (DPW) to provide the needed personnel, material and equipment for the operation and maintenance of the building, including "providing operating and service personnel necessary to meet the standards of operation and custody as established by the Authority." The DPW was to be responsible, in accordance with the City charter, City civil service rules, and regulations of the DPW, for the employment and control of personnel assigned to perform work for the Authority. It was also to process payrolls; provide the Authority with detailed cost statements; provide both working and supervisory personnel for certain specified services; and determine the need for and purchase materials and equipment. The Authority was to reimburse the DPW for the cost of services rendered by the DPW and be responsible, through its general manager, for the general direction of the superintendent of building maintenance under whose direct supervision services would be performed. The resolution also provided that the superintendent of building maintenance and all personnel needed for the performance of these services would be classified civil service employees of the City of Detroit on the DPW payroll and would retain all City benefits, including civil service status, retirement, and other City fringe benefits.

The DPW began providing employees as provided in the resolution when the building, then called the City-County building, opened. In May 1967, the Respondents passed a substitute resolution that transferred to the Authority the responsibility for purchasing materials and equipment for the building. The 1967 resolution, which was adopted by both the Authority's governing body and the City Council, read in its entirety as follows:

> Whereas the Board of Commissioners of the Detroit Wayne Joint Building Authority has decided that the most practical and desirable method of providing personnel for the operation and maintenance of the City-County building would be to continue to use City employees, either available or to be recruited, which employees will appear on the City's payrolls, be members of the City's Retirement System, and entitled to all municipal fringe benefits, all of such services and costs to be reimbursed to the City by the Authority, and
>
> Whereas This Common Council does concur in the decision in the matter made by the Detroit Wayne Joint Building Authority,
>
> Now, Therefore, Be It
>
> Resolved, that the Department of Public Works continue to furnish the needed and acceptable personnel, as determined by the General Manager for the Building

Authority, for the operation and maintenance of the City-County Building as follows:

1. Provide the operating and service personnel necessary to maintain the standards of operation and custody, as established by the Authority, in the following areas:

a. Operating heating and air conditioning equipment

b. Cleaning

c. Elevator starter service

d. Watchman services

e. Building maintenance and repair services and such other services as may be required by the Authority from time to time.

2. Provide additional building maintenance and repair services and security personnel as requested by the Building Authority from time to time.

3. Employees assigned to the City-County Building will be required to work under rules and regulations established by the Authority in addition to City of Detroit or Civil Service rules and the provisions of any union contract signed by the City of Detroit.

4. Process payrolls and other personnel records of all maintenance, service and custodial personnel assigned to the City-County Building to perform the work requested by the Building Authority.

5. Provide detailed cost statements incident to services provided the Building Authority as requested by the Building Authority.

The Detroit Wayne Joint Building Authority will reimburse the Department of Public Works for the cost of the services rendered by the Department to the Authority.

The Authority, through its General Manager, will have general supervision of all supervisory personnel under whose direct supervision the above services will be performed.

All personnel needed for the performance of these services will be classified Civil Service employees of the City of the Department of Public Works payroll and will retain all City benefits, including Civil Service status, retirement, and other City fringe benefits of whatever nature.

The 1967 resolution has never been modified. However, over the years some of the services covered by the resolution have been contracted out to other entities. The City no longer provides watchmen. At one time, the Authority had an agreement with the County to provide security, but since early in this decade it has contracted with a private company for this service. The Authority also contracts with private companies to provide some electrical, carpentry, plumbing, HVAC, and elevator maintenance services. In addition, in November 2005, the Authority hired Hines Porcher, a property management firm. At the time of the hearing, a Hines Porcher employee was handling day-to-day accounting work for the Authority and temporarily assisting the assistant general manager's secretary with work orders. Another Hines Porcher employee was working full time at the CAYMC as an engineering consultant.

The City invoices the Authority monthly for the wages and fringe benefits of City employees working at the CAYMC. The invoices include cost information broken down by position. The Authority checks this invoice for accuracy. On occasion, the Authority finds errors which it brings to the City's attention. For example, in February 2007, Authority general manager McDuffee wrote to the DPW to point out that two former CAYMC employees who had been reassigned to work at another City location were still listed on the Authority's monthly invoice. If these errors are not immediately corrected, and they are usually not, the Authority pays the monthly invoice but adjusts its final payment for the fiscal year to reflect the overbilling.

In April 2006, McDuffee wrote a letter to the City's director of labor relations, Barbara Wise-Johnson, stating that it was "time to clarify the arrangements [between the Authority and the City of Detroit regarding staffing] and establish a formal agreement." The letter proposed that the City agree to certain terms, including that "staff persons assigned to the Authority are exclusively employed by the City of Detroit and have no employee/employer relationship to the Authority," that "All DPW employees have been and continue to be supervised exclusively by first-line supervisors and/or foremen of the DPW," and that "The Authority reserves the right to terminate these arrangements for staff services by providing the DPW with a thirty-day (30) notice of termination." Wise-Johnson referred McDuffee to the director of the DPW. They met several times to discuss the Authority's proposal, and the Authority presented the City with a proposed draft agreement which was referred to the City's legal department. As of the date of hearing in this case, the City had neither signed this agreement nor refused to sign it.

The Authority's Role in Collective Bargaining and Contract Administration

The Authority has never been listed as a party to the master agreements between Charging Party and the City. The current master agreements, like their predecessors, were executed without the Authority's commissioners conducting a ratification vote on the contracts, and none of the commissioners signed the master agreements. The nonsupervisory master agreement includes a list of City departments and divisions covered by that contract. In that contract the "Detroit Wayne Joint Building Authority" is listed as a division of the DPW along with other divisions of that department. The assistant general manager at the CAYMC was, like he had been for prior contracts, a member of the City's bargaining team during negotiations for the last nonsupervisory master agreement. He attended some negotiation sessions but did not present proposals on the Authority's behalf. The assistant general manager's role in these

negotiations was similar to that played by representatives of other City departments who were also members of the bargaining team.

As discussed below, until McDuffee became general manager in late 2005, the Authority's general manger was a City employee. Before McDuffee, the general manager heard grievances at the third step of the grievance procedure, the department head level, under the nonsupervisory master agreement. The general manager also met with Charging Party in special conference as provided in the master agreement. However, after McDuffee became general manager the assistant general manager at the CAYMC took over these responsibilities.

Many of the local unions representing employees under the master agreements negotiate separate supplemental agreements covering working conditions particular to the department in which their employees work. Before McDuffee became general manager, Local 1220 negotiated supplemental agreements with a bargaining team consisting of the Authority's general manager and City labor relations representatives, and the Authority's general manager executed the agreement. The last three supplemental agreements, the most recent of which expired in 2005, all state that they are agreements between Local 1220 and the "Detroit Wayne-Joint Building Authority" or the "Detroit Wayne-Joint Building Authority, of the City of Detroit." Elmira Willis-Stuckey, Local 1220's president, testified that she assumed that the general manager discussed the supplemental agreements with the Authority's commissioners because the general manager generally discussed all important matters with them. However, she admitted that she had never been present at a commission meeting where a supplemental agreement was discussed. Willis-Stuckey also admitted that she did not know whether the Authority's commissioners ratified these supplemental agreements before they were executed. Although no one who was on the commission at the time the last supplemental agreement was executed was a witness at the hearing, McDuffee testified that he could find no evidence of a ratification vote in the minutes of commission meetings from that period.

Shortly after McDuffee became general manager, Willis-Stuckey asked to begin negotiations for a new supplemental agreement to replace the one that had expired. McDuffee refused to talk to Willis-Stuckey on the grounds that meeting with the unions was the responsibility of the City, not the Authority. Accordingly, in about January 2006, Willis-Stuckey asked assistant general manager Norris Louie to schedule a bargaining session. However, Louie told her that he would have to check with McDuffee. Willis-Stuckey testified that she had several similar conversations with Louie between January 2006 and August 2008, and that Louie never agreed to schedule a meeting. Louie did not testify in this matter. McDuffee testified that he did not speak to Louie about the negotiation of a supplemental agreement. He also testified that he considered this to be Louie's responsibility as the City's representative and not an obligation of the Authority.

Roles of the General Manager and Assistant General Manager

Until 2005, the Authority's general manager was a City employee. Like other City employees working at the CAYMC, the general managers were paid by the City on City salary scales, received City fringe benefits, were eligible for City retirement benefits, and had rights under the City's civil service system. The job description for the position of Authority general

manager stated, among other things, that the general manager was to "act as administrative officer to the Building Authority;" "be responsible under the Building Authority for all maintenance, operation and building services;" and "receive and pass upon any requests for special services or questions regarding the adequacy of maintenance, service or custody of the building."

As noted above, the general manager acted as the Authority's administrative officer. It is not clear from the record what influence the commissioners had over the general manager's terms of employment. However, the record indicates that the general manager before McDuffee, Renee Strong-Terry, was effectively selected by the commissioners. Strong-Terry worked in the City's housing department before she came to the CAYMC. Elmira Willis-Stuckey, Local 1220's president, testified that Strong-Terry told her that she submitted her resume to the commissioners and was interviewed by them, and that they voted to approve her appointment. McDuffee, who was a commissioner when Strong-Terry was hired, denied that the commissioners interviewed her. However, he testified that one of the commissioners who knew Strong-Terry, Patricia Cole, suggested that she be transferred to the position and that the DPW accepted this recommendation.

McDuffee began serving as a commissioner of the Authority in 2002 and had never been employed by the City. When Strong-Terry left in 2005, McDuffee took over as temporary general manager. In September 2005, McDuffee entered into a long-term employment contract directly with the Authority. McDuffee's contract contains a statement of job duties. The contract states, among other things, that he is to "direct staff oversight and scheduling with the assistance of the assistant general manager who, as a City of Detroit employee, has authority over the building staff."

The assistant general manager is currently the highest-ranking City employee at the CAYMC and formally supervises all City employees working there. At the time of the hearing, this position was filled by Norris Louie. When the assistant general manager position became vacant after McDuffee became general manager, McDuffee and the Authority's commissioners recommended to the City that Louie be promoted to this position from building services foreman at the CAYMC. The City accepted this recommendation, and also the Authority's recommendation that Louie be paid at the top of the salary scale for his position.

The only direct testimony regarding the relationship between Louie and the Authority came from McDuffee, who testified that he was not Louie's supervisor and that he had no authority to discipline him. He also testified that Louie did not take direction from him. It is clear from the record that McDuffee and Louie regularly communicate regarding building issues, including the cleanliness of the building. In addition, according to the minutes of commission meetings entered into this record, Louie regularly attends these meetings. He also makes regular reports to the commissioners on staffing levels and certain personnel issues, including discipline issued, expected retirements, and absenteeism levels. According to McDuffee, these reports help the Authority make sure that the City is invoicing it correctly, alert the commission when a position may become vacant because the City does not respond quickly to requests to fill vacancies, and help Louie explain his problems in meeting the Authority's cleaning expectations.

Both Willis-Stuckey and Charging Party Local 2394 president Yolanda King testified, that Louie has repeatedly told them that he does not have authority to make decisions without McDuffee's approval. As noted above, since McDuffee became general manager, the assistant general manager has taken over the general manager's responsibility for handling grievances. Although McDuffee denied having any authority over or role in processing grievances, Willis-Stuckey testified that on one occasion she and Louie agreed to reduce a discharge to a five day suspension, but Louie told her that he had to receive approval from McDuffee before finally agreeing to the change. King testified that at her first grievance meeting with Louie in May 2006, she asked him, "Who makes decisions for this department?" and Louie replied that it was McDuffee. According to King, Louie also told her that he could not make a decision about shift schedules or anything else without checking with McDuffee. King also testified that when she complained to a labor relations representative for the DPW about Louie's refusal to meet with her in a special conference, the labor relations representative told her that "McDuffee and Louie ran things the way they wanted," and that the labor relations representative was just a liaison to explain the contract. On another occasion, according to King, she complained to the same labor relations representative about the City's failure to recall a laid off bargaining unit member to fill a vacant unit position. The labor relations consultant told King, "McDuffee and Louie decide who will be brought back to work."

Neither Louie nor the labor relations representative testified at the hearing. As noted above, the only direct testimony about the relationship between Louie and the Authority came from McDuffee, who denied that the Authority had the power to control Louie's conduct. Apparently, no written document exists that addresses this issue. Although the testimony of Willis-Stuckey and King was admitted into the record, it presents the classic problem of hearsay. That is, even if their testimony is credited, it is impossible to determine whether Louie or the labor relations representative truthfully represented the relationship between Louie and the Authority or Louie and the DPW. For example, it is possible that Louie merely used McDuffee as an excuse not to meet or enter into agreements with the union presidents or to shield himself from their criticism. For that reason, the testimony of Willis-Stuckey and King deserves less weight than McDuffee's direct testimony that the Authority does not control Louie's conduct. Therefore, I credit McDuffee's testimony.

Hiring, Discipline and the Direction of Work at the CAYMC

The Authority's budget details how many positions there are to be in each job classification working at the CAYMC. When a vacancy occurs in a building attendant position, for example, the commissioners decide whether it should be filled. If the commissioners want the position filled, they ask the City's assistant general manager to requisition employees from the DPW. The DPW maintains a list of individuals qualified to work in that position, and fills the requisition by sending individuals from that list. No one from the Authority interviews building attendants before they are assigned to work at the CAYMC.

A custodial supervisor represented by Local 2394 testified that she was interviewed by the general manager before she was promoted from another City position to her current position at the CAYMC. However, this occurred more than five years ago, before McDuffee became general manager. McDuffee does not interview supervisory custodians sent from the DPW to the

CAYMC. The commissioners and McDuffee, however, have effectively recommended the promotion of individuals, in addition to Louie, to vacant nonunion supervisory positions at the CAYMC. In November 2006, the authority voted to promote Rochelle Jackson, the most senior engineering employee, to a vacant building services foreman position. Although the DPW took some time to process the promotion, it accepted the Authority's recommendation. At the time of the hearing the Authority had also recommended the promotion of another building engineer, but the DPW had not yet acted on their recommendation.

McDuffee testified that the Authority has repeatedly requested that the City fill all budgeted custodial positions, but that the City has not done so. Willis-Stuckey partially confirmed this. According to Willis-Stuckey, in April 2007, she attended a commission meeting at which Louie told the commissioners that there were not enough custodians to clean the building properly. The commissioners voted to send requisitions to DPW for supervisory and nonsupervisory custodians, consistent with the numbers that were in the budget. Willis-Stuckey testified that Louie also told her after the meeting that although the commissioner had asked for three supervisors, he was submitting only one supervisory requisition, for a nonunion position, because McDuffee told him to do this. McDuffee, however, denied this. McDuffee testified that Louie told him that requisitions had been submitted for all three supervisory positions although at the time of the hearing the DPW had not filled them.

Discipline of custodial employees at the CAYMC is issued on DPW forms. The assistant general manager issues disciplinary actions or signs off on all written disciplinary actions issued by the custodial supervisors. Willis-Stuckey testified that prior to 2005, the general manager also sometimes issued discipline, but McDuffee does not do this. Willis-Stuckey testified that she was told by Louie on more than one occasion that he disciplined an employee because McDuffee told him to do so. However, McDuffee testified that he does not have a role in disciplining employees and has never told Louie to discipline anyone. For reasons discussed in the section above, I credit McDuffee's testimony that he does not control Louie's disciplinary decisions.

Charging Party introduced a copy of a memo from McDuffee to the DPW sent on February 8, 2007 stating that the Authority would not accept a maintenance employee back at the CAYMC when he returned from leave based on the Authority's history with that employee. The memo stated that in the Authority's opinion the employee should have been discharged for being absent without leave, and requested that he be immediately reassigned to another location and eliminated as a payroll charge against the Authority. The DPW's human resources manager met with Louie to discuss this memo. On February 20, he sent McDuffee a memo stating that the DPW was prepared to discharge the maintenance employee for being absent without leave when it learned that he had called in sick. The memo told McDuffee that it was "imperative that the DWJBA staff and HR closely monitor" the employee's attendance and work performance to ensure that appropriate disciplinary action was issued in a timely and progressive manner. However, the human resources manager refused to reassign the employee to another location. The employee returned to work at the CAYMC until, about four months later, other employees reported that he had threatened them. It was not until after the Authority notified the City that it was banning the employee from the CAYMC for security reasons that the City reassigned him.

The regular tasks performed by the custodians and the frequency with which these tasks are performed have been the same for many years. The current list of tasks and frequencies was developed after 2005 by an employee of Hines Porcher based on his knowledge of practices at similar office buildings. However, an essentially identical list existed for many years and was taped to various locations in the CAYMC for reference by the custodians.

In addition to their regularly scheduled tasks, the custodians sometimes perform additional cleaning. Since July 2007, the CAYMC has had a system for generating work orders for custodians and maintenance employees electronically. Under this system, certain designated tenant representatives are authorized to input work orders into the system. Louie's secretary then prints these work orders out and distributes them to a custodial supervisor who assigns the work. This replaced a system where tenants either called or emailed Louie or McDuffee to ask that additional cleaning be done in their area. McDuffee does not give direct assignments to either custodians or custodial supervisors. McDuffee also testified that if he receives a complaint from a tenant, he passes this along to Louie.

Although the 1967 resolution states that CAYMC employees will be subject to rules established by the DPW and rules established by the Authority, the Authority currently has no written rules for CAYMC employees. The Authority does have policies that all individuals within the building, including visitors, are required to follow.

The Authority Issues RFPs for Custodial Services

In the spring of 2005, the Authority issued an RFP for custodial services. Charging Party filed an action in circuit court seeking an injunction against the Authority, and the RFP was withdrawn as part of the settlement of that case.

In the summer and fall of 2006, McDuffee received repeated complaints from CAYMC tenants about the cleanliness of the building, particularly areas that were supposed to be cleaned by the afternoon shift. McDuffee discussed these complaints with Louie, who instructed the supervisors to do more inspections, particularly of the rest rooms.

In about January 2007, the Authority again issued an RFP for custodial services. The Authority sent copies of the RFP to the DPW and to Charging Party. There is no evidence on this record that City representatives suggested, encouraged, or participated in any way in the issuance of the RFP.

After the RFP was issued, Charging Party requested a special conference. Willis-Stuckey met with Louie because McDuffee would not meet with her. Louie told her that McDuffee and Hines Porcher had concluded that the Authority could save money by hiring private contractors because the contractors could do the job with fewer employees. On or about February 20, 2007, Willis-Stuckey was given a copy of a report written by a Hines Porcher representative which compared the CAYMC's costs in several categories, including cleaning, to the average for Class A office buildings in Detroit's central business district and to published national averages for office buildings over 50 years old. According to the report, the CAYMC's costs were above average in several categories, especially utilities and cleaning.

The Authority received eight to ten bids in response to its RFP, and selected a private company whose bid was about half what the Authority pays to the City annually for custodial services. Before the contract could be executed, however, Charging Party filed the instant charge and the Authority was enjoined from signing a contract with this company.

The Authority Allegedly Encourages Prospective Bidders to Sign Contracts with the SEIU

The 2007 RFP required the bidder to be a union contractor, but not to have a contract with any specific union. The Hines Porcher report stated, "The high variance [in cleaning costs as compared to the two benchmarks] is due to the high labor costs required to fill positions under the DPW staffing structure." The report continued, "A third party contractual cleaning firm, using employees of the Service Employees International Union (SEIU), would save approximately $1,180,000 per year." McDuffee testified that the report mentioned the SEIU because most cleaning firms providing services to Class A office buildings in downtown Detroit had contracts with this labor organization.

Both King and Willis-Stuckey attended a meeting of the Authority's commissioners in February 2007 at which the Hines Porcher report was discussed. King testified that a Hines Porcher representative said at that meeting that if the Authority "went with the SEIU, it would eliminate all the issues about union, the union positions." The representative then passed out a chart that purported to compare the costs of "DPW Staff" to "SEIU Vendor" for various cleaning costs and services, based on rates and fees in the current SEIU Local 3 collective bargaining agreement. This is the collective agreement to which many private cleaning firms in the Detroit area are parties. The chart assumed eight fewer positions would be needed with a private cleaning firm due to lower absenteeism among its employees.

Charging Party's Requests for Information

On March 16, 2007, Charging Party's attorney wrote to the Authority warning it that Charging Party's contract prohibited outsourcing if this resulted in layoffs or a reduction in work hours. In this same letter, Charging Party requested the following information from the Authority under PERA:

> 1. All documents and communications sent to entities/persons regarding the issue of hiring an outside company (ies)/person(s) [sic] to perform janitorial services in the CAYMC, from June 2006 through the present. This includes requests for proposals, request for quotes and other items;
>
> 2. All documents and communications received from person(s)/entity (ies) regarding the issue of hiring an outside company (ies)/person(s)[sic] to perform janitorial service in the CAYMC, from June 2006 through the present. This includes but is not limited to bid responses or requests for more information.
>
> 3. All documents, internal e-mails and other correspondence among the agents, employees, officials or representatives of the DWJBA or the City of Detroit,

> regarding the issue of hiring an outside company(ies)/person(s) to perform janitorial services in the CAYMC, from June 2006 through the present;
>
> 4. All documents reflecting the costs of performing janitorial services in the CAYMC (wages, fringe benefits, equipment, supplies) which are under consideration for outsourcing, for the years 2006-20007. AFSCME was given a graph which purports to represent a cost comparison of outsourcing versus the current costs of having the work performed in-house. We request, also, all supporting information for the breakdown.

On March 20, Charging Party wrote to the Authority requesting a special conference under the master agreements. On March 21, McDuffee responded to both the request for a special conference and request for information as follows:

> The employees in question are employees of the Public Works Department of the City of Detroit. The Detroit-Wayne Joint Building Authority has no authority to hire, fire, promote or layoff these employees. You should therefore direct your demands and requests to the City's Labor Relations Department.

Insofar as the record discloses, Charging Party did not send any information request to the City. The information requested in the March 16, 2007 letter was subpoenaed by Charging Party for the hearing in this unfair labor practice case and was provided to the Charging Party by the Authority in September 2007.

V. Discussion and Conclusions of Law:

The Authority denies that it employs the custodial employees working at the CAYMC, that is the City's agent, or that it has any obligation under PERA to bargain with the Charging Party. According to the Authority, its decision to replace City employees with employees of a private contractor raises no issue cognizable under PERA, and it had no obligation under PERA to provide information to Charging Party. The Authority denies that it encouraged prospective bidders for the custodial contract to sign collective bargaining agreements with the SEIU.

The City did not file an answer to this charge. Although it appeared at the hearing, it did not present evidence or file a brief and relied on the Authority's arguments for its defense.

The Authority as Agent of the City

Charging Party claims that the Authority, by attempting to contract with an outside party for custodial services, has unlawfully repudiated the master agreements to which it is a party by virtue of its agency relationship with the City. An agent, under PERA as under the common law of agency, is "one who acts for or represents another by his authority." *St Clair Intermediate School District v Intermediate Education Association,* 458 Mich 540, 559 (1988). The principal's right to control the conduct of the agent with respect to the matters entrusted to him is fundamental to the existence of an agency relationship. *St Clair* at 559, citing *Capitol Lodge No 141, FOP v Meridian Twp,* 90 Mich App 533, 541 (1970).

Charging Party's chief argument in support of its agency claim seems to be that the Authority has always been acknowledged by the parties to be a division or department of the City. This is clearly false. As Charging Party has always been aware, the Authority is a public body created jointly by the County and City pursuant to statute. The Authority has its own powers, as set out in its articles of incorporation, and its own governing body. Although the governing body consists of commissioners appointed by the City and the County, they are appointed for six year terms and cannot be removed during that time except for cause. The Authority is not an arm or division of either the City or the County.

It does appear that the City's DPW, which has provided employees to the CAYMC for over fifty years, has a division which it refers to as the Detroit Wayne Joint Building Authority or DWJBA. References to that division are contained in the nonsupervisory master agreement, as well as assorted personnel documents and arbitration awards entered into the record in this case. The DPW division and the public entity, however, are not the same.

The fact that the Authority is an independent body does not, of course, mean that it cannot act as an agent of the City. For example, in *Smith, Hinchman v River Rouge Bldg Authority,* 374 Mich 514 (1965), after a city building authority was dissolved, a city was held liable for payment to a firm of architects who had contracted with the authority. Since the city had also approved the contract, the building authority was held to be acting as an agent of the city in entering into the agreement. In the instant case, however, while the Authority performs a service for the City and the County by owning and operating the CAYMC, the City has no right under the Authority's articles of incorporation or statute to control the conduct of the Authority. Moreover, according to this record, the control the City exercises in practice over the Authority seems confined to forcing the Authority to adjust the City's rent. As the Authority notes, this control arises, at least in part, from the fact that the City has considerable bargaining power over the Authority as the CAYMC's principal tenant. I conclude that the record does not establish that the Authority operates the CAYMC as the City's agent.

The Authority is also not the City's "contractor," as Charging Party refers to it several times in its brief. The Authority was created by the County and City to build, own and operate an office building for their joint use. The City never had ownership of the building now known as the CAYMC. While the City deeded the land for the building to the Authority more than fifty years ago, it is inaccurate to say, as Charging Party does in its brief, that the City "transferred" the building to the Authority by contract or any other means.

Charging Party argues that "the Authority is bound to the master agreement by ratification, under Michigan law," or under the principle of apparent authority. Under common law principles of agency, ratification occurs when an act done, or professedly done, on a principal's account is subsequently treated by the principal as authorized. *David v Serges*¸373 Mich 442, 444 (1964). Apparent authority is authority that a third party reasonably believes an agent has, based on the third party's dealings with the principal, even though the principal did not confer or intend to confer the authority. Apparent authority arises when acts and appearances lead a third person reasonably to believe that an agency relationship exists. *Meretta v Peach,* 195

Mich App 695, 698-699 (1992). Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. *Meretta,* at 699.

Although Charging Party elsewhere argues that the Authority is the City's agent, its ratification argument is that the Authority, as principal, ratified the City's act of entering into master agreements with Charging Party on its behalf by acknowledging the validity of these contracts and by permitting its general managers to respond to grievances filed under those agreements. I do not agree. During the period that the Authority's general managers responded to grievances, they were City employees. Although they may have been joint employees of both the Authority and the City, they were clearly agents of the City for some purposes. As discussed above, the DPW appears to have a division which it refers to as the DWJBA. There is no indication that the general managers responded to grievances in their capacities as agents of the Authority rather than as heads of that division.[1] The Authority has acknowledged that the City and Charging Party have collective bargaining agreements which govern the terms and conditions of employment of City employees working at the CAYMC, per the terms of the 1967 resolution. However, I find that the Authority did not acknowledge, by any action, that it was a party to these contracts.

Charging Party also argues in its brief that the City conferred apparent authority on the Authority when it referred to the "DWJBA" as a department of the City in the master agreement and in other documents. As discussed above, however, the "DWJBA," the division of the DPW, and the Authority, the public entity, are not one and the same, and Charging Party could not have reasonably concluded otherwise.

Charging Party also cites *St Clair Intermediate School District,* apparently for the proposition that a party to a collective bargaining agreement can be held responsible for actions of its agent that modify the contract during its term. In that case, the Court had to decide whether the Michigan Education Association (MEA) had violated its duty to bargain in good faith by changes made to the health care provisions of its collective bargaining agreement with the school district by the Michigan Educational Support Services Association (MESSA), the third party administrator of the health insurance plan. The Court concluded that the MEA had violated its duty to bargain. However, the Court also concluded in that case that the MEA exercised effective control over its subsidiary. In fact, it concluded that "more than a mere agency relationship" existed between the MEA and MESSA, as MESSA had been created by the MEA, was the exclusive sponsor for MESSA products, the two entities had overlapping boards of directors, and MEA members constituted a majority of the MESSA board that decided to change the health care provisions. As discussed above, the facts do not demonstrate that the City exercises either *de jure* or *de facto* control over the Authority's operation of the CAYMC.

I conclude that Charging Party has not established that the Authority operates the CAYMC as an agent of the City or that the Authority was bound by the terms of the master agreements as the City's agent.

[1] I also find no evidence that the Authority's general managers entered into supplemental agreements with Local 1220 in their capacity as agents of the Authority.

The Authority as Joint Employer

The general characteristics of employers under PERA are: (1) they select and engage the employee, (2) they pay the wages, (3) they have the power of dismissal, and (4) they have power and control over the employee's conduct. *Saginaw Stage Employees Local 35, IATSE v. City of Saginaw*, 150 Mich App. 132, 134-135(1986). The Commission has held that a joint employer situation arises when two or more completely separate entities share or co-determine the powers of an employer. *St Clair Intermediate Sch Dist*, 1999 MERC Lab Op 38, 61-63. [2] In *Michigan Council 25, American Federation of State, County and Mun Employees (AFSCME) v Louisiana Homes, Inc*, 192 Mich App. 187, 190-193(1991), the Court of Appeals affirmed the Commission's finding that the State of Michigan and a private non-profit corporation with which the State had contracted to provide care to developmentally disabled citizens were joint employers of the employees who provided this care and, thus, both had an obligation to bargain with the union.[3]

The National Labor Relations Board (NLRB) also uses the term "joint employer" to refer to an employer that shares the powers of an employer with a separate entity. See *In re Airborne Freight*, 338 NLRB 597, 597 (2002); *NLRB v Browning-Ferris Industry*, 691 F2d 1117, 1124 (CA 3 1982).[4] According to the NLRB, when two separate entities are alleged to be joint employers, the essential element in the analysis is whether the putative joint employer's control over employment matters is direct and immediate. *TLI, Inc*, 271 NLRB 798, 798-799 (1984), enfd mem 772 F2d 894 (CA 3 1985). In assessing whether a joint employer relationship exists, the NLRB does not rely merely on the existence of contractual provisions, but rather looks to the actual practice of the parties. *TLI*, at 798-799; *AM Property Holding Co*, 350 NLRB 998 (2007). The NLRB has held that to establish a joint employer relationship, the evidence must show that one employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer's employees. *Laerco Transportation*, 269 NLRB 324, 325 (1984); *The Continental Group*, 353 NLRB No. 51 (2008). In *Southern California Gas Co*, 302 NLRB 456 (1991), a case cited in the Authority's brief, the NLRB applied this test to find that a company that contracted with a cleaning contractor to clean its premises was not a joint employer with that contractor of the contractor's employees. The Authority argues that it is not a joint employer with the City under this test. I agree.

---

[2] In *St Clair Prosecutor v AFSCME*, 425 Mich 204, 224 (1986), the Court concluded that where certain powers of an employer are granted by statute to one public entity and others are granted by statute to another, the two entities are "co-employers."

[3] In response to this decision, the legislature added Section 1(e) (i) to PERA. This subsection states that a person employed by a private organization or entity that provides services under a time-limited contract with the state or political subdivision of the state is not an employee of the state or that political subdivision and is not a public employee. The Authority, of course, is not a "private organization or entity."

[4] As noted by the Michigan Supreme Court in *St Clair Prosecuto*r, 224 at fn 2, the NLRB at one time used the term "joint employer" as synonymous with "single employer." See e.g., *Pulitzer Pub Co v NLRB*, 618 F2d 1275, 1279 (1980), cited by the Court in *St Clair* at 224, fn 2. However, the factors used by the NLRB to determine whether several business entities comprise a "single employer" are quite different. *Pulitzer Pub*, at 1279. A joint employer relationship may exist between completely separate companies, such as a contractor and the client for whom it provides custodial services, if the two companies share control over the employees who provide the services. The essence of a single employer finding is common control over the companies themselves.

The City hires custodians and other employees and selects who will be assigned to the CAYMC without input from the Authority's commissioners or McDuffee. I find that the Authority does not meaningfully affect who is hired for these positions. The Authority has effectively recommended to the DPW that it promote several nonunit supervisors, including Louie and engineering supervisor Rochelle Jackson. However, the fact that a putative joint employer requests that a particular individual be appointed supervisor at its facility, and its contractor acquiesces to this request, does not indicate that the two entities are joint employers where the putative joint employer does not exercise effective control over its contractor's supervisors. See *Southern California*, at 461.

The wages of employees at the CAYMC are paid directly by the City, and indirectly by the County and the City through rent paid to the Authority. The Authority does not determine the wages and benefits paid to unionized employees. These are set by collective bargaining agreements to which it is not a party. It also does not determine the wages and benefits paid to nonunionized employees.

Under the 1967 resolution, the City is to supply the Authority with "needed personnel" as determined by the Authority's general manager. Under this resolution, the Authority not only has the right to set cleaning standards, it also has the right to determine how many employees are required to meet these standards. As the record shows, however, the Authority's exercise of this right in practice is constrained by several factors, including City and County pressure to keep their rent low and the Authority's dependence on the City to send it employees to fill vacant positions.

Discipline of custodial employees is done by Louie or his subordinates. Neither the Authority's commissioners nor McDuffee issue discipline, and they do not communicate directly with custodians when dissatisfied with their work. Moreover, although the 1967 resolution gives the Authority the right to demand "acceptable" employees, and the Authority has attempted to exercise this right, the record indicates that the Authority has not always been successful in demanding that the DPW fire or reassign employees that the Authority deems unacceptable. For example, the City did not remove a maintenance employee from the CAYMC when the Authority demanded that it do so in February 2007 and the employee was not reassigned until some months later when the Authority banned him from the building for security reasons.

There are regular cleaning tasks at the CAYMC and a well established routine for how often they need to be done. Louie and his subordinates assign particular tasks to individual custodians and determine who does extra cleaning when necessary. McDuffee and the commissioners do not assign work to the custodians or give them orders. When McDuffee receives a complaint from a CAYMC tenant about custodians, he passes it on to Louie. As the NLRB's administrative law judge noted in *Southern California Gas*, at 461, any employer that receives contracted labor services on its premises will, of necessity, exercise sufficient control over the operations of the contractor to ensure that its operations are not disrupted and that it is receiving the services for which it has contracted. The NLRB held in that case that the fact that representatives of the putative joint employer had ongoing communications with its cleaning contractor's supervisor, or gave routine direction to employees about what tasks to do, did not indicate joint employer status where the significant indicia of employer status, including hiring,

firing, negotiating contracts, and granting leaves of absences were in the hands of the contractor. Under the 1967 resolution, the Authority has the right to set cleaning standards for the CAYMC and to exercise general supervision over the custodial supervisors to ensure that these standards are met. The fact that McDuffee and Louie discuss custodial employee performance, along with other cleaning issues, does not demonstrate that the Authority exercises the control of an employer over CAYMC custodians. The fact that Louie tries to meet McDuffee's demands does not alter the relationship between the City and the Authority.

The CAYMC's assistant general manager directs and assigns work to City employees at the CAYMC, has the authority to discipline them, and is responsible for handling grievances and meeting with the unions. The assistant general manager is a City employee. As I discussed in my findings of fact, the record indicates that assistant general manager Louie has frequently told Charging Party that he lacks effective authority on these matters and must defer to McDuffee. However, for reasons discussed in that section, I have credited McDuffee's testimony that this is not the case. I find that the evidence insufficient to find assistant general manager to be jointly employed by or an agent of the Authority.

For reasons discussed above, I conclude that the Authority is not a joint employer with the City of nonsupervisory or supervisory custodians working at the CAYMC.

Duty to Provide Information

Since the Authority is not an employer of the custodians at the CAYMC, it follows that it has no duty to bargain with Charging Party as their representative under Section 15 of PERA and had no duty under Section 10(1) (e) of PERA to provide Charging Party with the information it requested on March 16, 2007. I also find that the City had no duty to provide the information since Charging Party did not send its March 16, 2007 request to the City.

Charging Party as a Third-Party Beneficiary

Charging Party's third argument, raised for the first time in its brief, is that it has the right to enforce the terms of the agreement between the City and the Authority under which the City provides custodial services to the CAYMC because it is a third-party beneficiary of this agreement. Charging Party relies on an unpublished decision of the Michigan Court of Appeals, *MEA/NEA Local 1 v Mt Clemens Cmty Schs,* 17 MPER 69 (2004), finding that a union had the right to sue to enforce an agreement between a school district and a private company hired to manage and operate several schools in the school district. The agreement provided that the teachers at these schools would continue to be employees of the school district and covered by the collective bargaining agreement between the school district and the union. The private company failed to pay the teachers at one school the wages set out in the collective bargaining agreement. The Court held that the union had a right to enforce the contract between the school district and private company as a third-party beneficiary.

*Mt Clemens* was an action to enforce a noncollective bargaining contract and did not involve PERA. Charging Party's brief does not explain how the Authority violated PERA by allegedly breaching its contract with the City, even if the 1967 resolution constitutes a contract

between the Authority and the City. I find that this allegation does not state a claim upon which relief could be granted under PERA. Moreover, since Charging Party's argument raises issues not litigated in this proceeding, including whether the 1967 City Council resolution constitutes an enforceable contract between the City and the Authority, I find that it would be inconsistent with due process to allow Charging Party to raise this argument for the first time after the close of the hearing.

Encouraging Prospective Bidders to Sign Collective Bargaining Agreements with the SEIU

Charging Party's claim that the Authority encouraged prospective bidders to sign collective bargaining agreements with the SEIU is not supported by the record. Rather, the Authority used the wages and fringe benefits contained in a local SEIU agreement to calculate possible savings from the subcontracting to a union cleaning contractor, since many of the local union cleaning companies were already parties to this agreement. There is no evidence that the Authority encouraged bidders to sign contracts with the SEIU or discouraged contractors with contracts with other unions from bidding.

Summary

In sum, I conclude that Charging Party has not established that the Authority operates the CAYMC as an agent of the City or that the Authority was bound by the terms of the master agreements as the City's agent. I also conclude that the Authority is not a joint employer under PERA of the City's custodial employees at the CAYMC. I conclude that the Authority has no obligation under the Act to bargain with Charging Party and, therefore, that it did not violate Section 10(1) (e) of PERA as alleged in the charge. I find that the allegation that the Authority encouraged prospective bidders on its RFP to sign collective bargaining agreements with another labor organization in violation of PERA is not supported by the facts. I also find no violation of PERA by the City of Detroit on this record.

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

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____