STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF MANISTEE,
Public Employer - Respondent,

Case No. C11 C-036

- and -

UNITED STEELWORKERS LOCAL 14758,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Mika Meyers Beckett & Jones PLC, by John H. Gretzinger, for the Respondent

Tonya DeVore, Staff Representative, for the Charging Party

DECISION AND ORDER

On July 27, 2011, Administrative Law Judge David M. Peltz issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

Case No. C11 C-036

CITY OF MANISTEE,
Respondent-Public Employer,

-and-

UNITED STEELWORKERS, LOCAL 14758,
Charging Party-Labor Organization.
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APPEARANCES:

Mika, Meyers, Beckett & Jones, PLC, by John H. Gretzinger, for Respondent

Tonya DeVore, Staff Representative, for Charging Party

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, oral argument was held at Detroit, Michigan on June 13, 2011, before David M. Peltz, Administrative Law Judge of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based upon the entire record, I make the following conclusions of law and recommended order on summary disposition.

This matter arises from an unfair labor practice charge filed by the United Steelworkers, Local 14758 (USW) on March 3, 2011. The charge alleges that the City of Manistee violated its duty to bargain in good faith under PERA by hiring part-time janitors and refusing to recognize them as members of the USW bargaining unit. The Employer asserts that it was authorized by the parties' collective bargaining agreement to hire part-time janitors and exclude them from Charging Party's unit.

A hearing was scheduled for June 13, 2011. On that date, I indicated to the parties that there did not appear to be any dispute of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools,* 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). However, Charging Party was given the opportunity for oral argument in accordance with *Smith v Lansing School District*, 428 Mich 248 (1987).

After considering the arguments made by the parties on the record, I rendered a bench decision recommending dismissal of the charge. The substantive portion of my findings of fact and conclusions of law are set forth below:

> [T]he parties have agreed on certain facts in this case. The first is that up until 1997, there was a full-time janitor employed by the City. In that year, the individual performing that janitor work passed away, and the City subcontracted the work out to a private company. [T]he work was performed by that company for [some period] of time.
>
> [B]eginning in either . . . 2007 or 2010, the Employer began using its own employees again to perform janitorial work. The individuals that were hired [by the City] worked individually less than 1,040 hours per year. . . . There were no employees that were replaced – no current employees replaced by any of these individuals hired to perform janitorial work and no [bargaining unit member] lost work . . . .
>
> The parties are party to a contract which is currently still in effect. The contract covers the period of July 1, 2010 through June 30, 2011. [T]hat agreement contains a recognition clause [which] provides:
>
> > Section 2.0. Collective Bargaining Unit: Pursuant to and in accordance with all applicable provisions of Act 379 of the Public Acts of 1965, as amended, the City does hereby recognize the Union as the exclusive representative for the purpose of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment for the terms of this agreement for all employees of the City, including in the bargaining unit described below.
>
> That unit is then described as "all full-time employees of the City of Manistee employed in the street, water, parks and sewer departments and employed as bridge tenders and janitors but excluding clerical employees, supervisors, temporary employees and all other employees."
>
> Section 9.2 of the contract, which is titled "Part-Time Employees", provides:
>
> > A. Regular part-time employees are defined as any employee regularly scheduled to work more than 1,040 hours per year, whether permanent part time or temporary full time. Said employees are covered by the collective bargaining agreement. Benefits which accumulate on a seniority basis shall be prorated including sick leave, vacation leave and longevity pay. A regular part-time employee shall be eligible to apply for participation in the City's group hospitalization and dental

> insurance program, provided, however, that the City shall not be obligated to contribute more than one half the monthly premium for single coverage. In order to be eligible for such coverage the employee must authorize a payroll deduction such that the City receives the employee's share of the insurance coverage premium in advance of the date that the City must pay for the coverage.
>
> B. Irregular employees are defined as lifeguards, marina attendants, boat launch attendants and all other part-time employees, including co-op students, summer Youth Corp workers, volunteers and all seasonal employees. Irregular employees may not operate equipment which requires a CDL or other special licenses.
>
> C. The City reserves the right to hire, discharge and utilize irregular employees at its sole discretion. Such employees and volunteers are not with the recognition granted to the Union and are not covered by the terms of the agreement. The performance of work by irregular employees and volunteers shall not constitute a violation of this agreement even if it could remove potential overtime opportunities, provided, however, that the Employer agrees not to utilize irregular employees and volunteers so as to cause employees covered by this agreement to lose time from their regular scheduled hours or be laid off. Irregular employees will not be used in lieu of regular employees for call-in time.

[T]he Union has asserted that the Employer's conduct in this matter constitutes a breach of the duty to bargain under PERA. [U]nder Commission law, a party violates PERA if before bargaining it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996). A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. [U]nder such circumstances, the matter is considered "covered by the agreement." *Port Huron, supra* at 318. [See also *St. Clair Intermediate Sch Dist*, 2000 MERC Lab Op 55, 61-62]. As the Michigan Supreme Court stated in the *Port Huron* case at page 327, "Once the Employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic covered by the agreement".

In the instant case, [Charging Party and Respondent are parties to] a contract which, in the "Recognition" clause, indicates that the unit includes all full-time employees of the City and excludes all others.

* * *

Section 9.2 . . . specifically allows part-time employees to be included in the unit as well. But the language specifically provides, "In order for an individual working less than full time to be considered a unit member, that employee individually must be working more than 1,040 hours per year."

[There is] no dispute in this case that the individuals that are referenced in the charge by the Union, none of those are working individually more than that period specified in the agreement. Pursuant to that language, any employee working less than 1,040 hours per year would be considered not a regular part-time employee but an irregular employee. And in Subsection 3, the City specifically reserved the right to hire, discharge and utilize irregular employees at its sole discretion. The only limitation on that [which] would be potentially relevant here, the agreement provides that the Employer "cannot utilize irregular employees and volunteers so as to cause employees covered by this agreement to lose time from their regularly scheduled hours or be laid off." And in this case there is no current employee whose work was affected by the use of these irregular employees.

The Union . . . relies on Section 9.2(B) and [argues] that the janitors in question could not be considered irregular employees under the agreement because they're not specifically identified in the list of employees set forth therein. [However, the list of positions referred to by Charging Party is prefaced by the word "including" which indicates that the list was not intended to be all-inclusive. Had the parties intended to limit the definition of "irregular" employees to only those positions specifically identified in Section 9.2(B), it could have explicitly indicated as such. In fact, the phrase immediately prior to the word "including" expressly defines irregular employees as "all other part-time employees".]

* * *

So in conclusion, I find that under Section 9.12 of the agreement, the Employer had the right to utilize irregular employees and that these particular employees in question or in dispute in this case were, in fact, irregular employees because they have worked individually less than 1,040 hours per year. Obviously if that amount should change . . . , the Employer would then have an obligation on its own to include those employees within the unit and to notify the Union as such so that the Union could take the necessary steps to have dues deducted or what have you under the Agency Shop provision in the contract. But at this point I do not see there being any dispute of fact in this matter. [I thereby conclude that Charging Party has not established a] violation of the duty to bargain under PERA. For that reason I will issue a decision recommending that the Commission dismiss the charge.[1]

[1] The transcript excerpt reproduced herein contains typographical corrections and other minor edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

Based on the findings of fact and conclusions of law set forth above, I issue the following recommended order:

ORDER

The unfair labor practice charge in Case No. C11 C-036 is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: July 27, 2011