STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT, ,
Public Employer - Respondent,

Case No. C10 G-179

- and -

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

APPEARANCES:

Cassandra D. Harmon-Higgins, Staff Attorney for the Charging Party

DECISION AND ORDER

On September 23, 2011, Administrative Law Judge Doyle O'Connor issued a Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

-and- Case No. C10 G-179

AFSCME COUNCIL 25 and LOCAL 542,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Cassandra Harmon Higgins, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based on the entire record, including a post-hearing brief by the Charging Party.

The Unfair Labor Practice Charge:

On July 16, 2010, a Charge was filed in this matter against the City of Detroit (Employer or City) by AFSCME Council 25 and its affiliated Local Union 542 (the Union or AFSCME). The Charge asserted that on or around January 18, 2010, the City unilaterally instituted changes in working conditions which had an impact on grounds maintenance employees represented by AFSCME Local 542. It was alleged that the City changed the work locations of approximately 22 employees irrespective of seniority and in repudiation of express contractual language requiring such relocations be conducted by seniority.[1]

This matter was tried on November 24, 2010. The trial was held pursuant to a notice of hearing sent to the City of Detroit labor relations division by certified mail and signed for on July 23, 2010, by Lorna Jackson. Additionally, the original Charge was accompanied by a July 15, 2010, proof of service on both the City's labor relations division and on its grounds maintenance division. On November 10, 2010, the City's labor relations office was copied in

[1] An original allegation that the City failed to respond to requests by the Union to bargain over the impact of the changes was withdrawn.

on a subpoena request by AFSCME, which again provided the City with the case name and number and the November 24th hearing date. No answer was filed and no one filed an appearance on behalf of the City. No one appeared for the City on the scheduled day of hearing and the trial proceeded in the City's absence, as provided for in Rule 72(1) of the Administrative Procedures Act, MCL 24.272(1).[2] The City labor relations division did timely seek, and was granted, an extension of time in which to file a post-hearing brief; however, no brief was filed on behalf of the City. The City did not seek to reopen the record.

Findings of Fact:

The parties to this case have a long collective bargaining relationship, with conditions of employment determined by a master collective bargaining agreement which covered this and multiple other AFSCME bargaining units of City of Detroit employees, and which, by its terms, is long expired, as well as by a supplemental agreement, also long expired by its terms, covering only the Detroit Recreation Department and Local 542.[3] The supplemental agreement, at Article 3, defines six separate work locations for grounds maintenance employees. In January of 2010, the City closed the "South District" and all or most of the "North District". The City transferred all eleven employees from the South District to the East District and ten employees were transferred from the North District to the West District, all without regard to the relative seniority of the employees. The Union does not dispute the Employer's authority to close such a district, nor does the Union dispute the Employer's authority to reassign or transfer the effected workforce. The Union does dispute the transfers being mandated without regard to seniority. [4] The Union additionally established the transfer of two employees in May or June of 2010 into a work location in the north district, again without regard to seniority and without notice to the Union.

Article 18(G) of the master agreement expressly allows employees to generally select shifts and work locations within their departments and within classifications, based on their respective seniority. That article also provides, in relevant part:

> In the event part of an operation within a department is discontinued, employees affected will be allowed to select, in accordance with their seniority, available shifts and locations within the department in their classification.

[2] That hearing was the second one before me in a two week span where the City either failed to appear or failed to appear on time.

[3] The Union asserts that the contract remains in effect pursuant to its Article 52, which provides for a day to day extension subject to unilateral termination by either party, and that the supplemental agreement likewise survives its stated expiration date. The purported 2005-2008 collective bargaining agreement presented as an exhibit in this case is an unsigned document clearly marked as a draft agreement. However, in the absence of a defense by the City, I am obliged to presume, for purposes of this case only, that the contract and the supplement remain in effect.

[4] The Union additionally at hearing asserted that the merger in work locations adversely effected the assignment of stewards, and the preferential assignment of overtime to stewards, as each location previously had a steward and an alternate steward. It was alleged that as a result of the merger of locations, there were now two stewards and two alternates assigned to the merged locations. The failure to reduce the number of stewards when the number of work locations was reduced was an internal Union matter. The issue was not pursued in the post-hearing brief or request for relief.

Article 18(H) of the master agreement expressly requires that where the Employer exercises its right to involuntarily transfer employees, such transfers will first be offered by seniority and then, if necessary, forced on employees by inverse seniority, with that section providing:

> In situations where it is necessary to transfer one or more employees from their present job location or shift to another location or shift in the department, such transfers will first be offered to employees in the order of their seniority. When there are not enough volunteers, the transfer shall be made according to inverse seniority.

The testimony established that many grounds workers consider particular locations more favorable and that, in the past, grounds workers typically utilized their respective seniority to bid on locations closest to their homes.

The Union filed and pursued a grievance over the involuntary transfers.[5] The Union additionally asserts that such wholesale transfers of the entire relevant workforce without regard to seniority is such a clear violation of the contractual language as to constitute a repudiation of the contractual obligations, and, therefore, an unfair labor practice.

Discussion and Conclusions of Law:

It is axiomatic that, where employees have selected an exclusive representative, there is a duty to bargain over proposed changes to wages, hours and other terms and conditions of employment, such that unilateral action by either party may be unlawful under PERA.[6] Under Section 15 of PERA, there is a duty to bargain over wages, hours and conditions of employment and neither party may take unilateral action on a mandatory subject of bargaining to alter an existing term or condition of employment absent a good faith impasse in negotiations.[7] A party can fulfill its obligation under the Act by bargaining about a subject and memorializing the resolution of that subject in the contract. Under such circumstances, the matter is "covered by" the agreement.[8] Once a public employer and union have fulfilled the duty to bargain, the parties have a right to rely on the contract as the statement of their obligations on any topic covered by that agreement.[9]

An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated.[10] Repudiation exists when 1) the contract breach is

---

[5] At hearing, the Union asserted that the grievance was approved for arbitration. Inexplicably, post-hearing the Union asserted that all City of Detroit AFSCME grievances reaching the final step of the grievance procedure since July 1, 2008 have been placed on hold and that none would be arbitrated prior to 2012.

[6] *DPOA v Detroit*, 391 Mich 44 (1974).

[7] *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996); Central *Michigan Univ Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277, (1978); *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage*, 134 Mich App 466, 472 (1984); *Plymouth Fire Fighters Ass'n, Local 1811, IAFF, AFL-CIO v City of Plymouth, 156* Mich App 220, 222-223 (1986).

[8] *Port Huron, supra* at 318; *St. Clair Intermediate Sch Dist*, 2000 MERC Lab Op 55, 61-62.

[9] *Port Huron*, *supra* at 327.

[10] See e.g. *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985) (employer

substantial, and has a significant impact on the bargaining unit and 2) no bona fide dispute over interpretation of the contract is involved.[11] The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written.[12]

Pursuant to the plain language of the collective bargaining agreement, while the Employer had the unfettered right to consolidate work locations and to eliminate existing districts, it had expressly agreed to a quite ordinary method of accommodating the seniority based selection of new work locations by the effected employees. The contractual commitment was straightforward: in the circumstance of such a consolidation, transfers were to be done first by volunteers and then involuntarily by inverse seniority. This mechanism allowed the more senior employees to select their workplace based on proximity to home or perhaps some other desirable characteristic. Less senior employees were to be left with whatever their seniority allowed, or the Employer mandated. Such systems are routine, but not universal, in the public sector.

Instead of complying with the contractually agreed upon seniority based method of accomplishing the substantial relocation of the workforce in January 2010, the Employer simply ignored its obligations. The employees were all transferred without any effort at compliance with the plain language of the contract. Those employees were thereby deprived of a significant contractual entitlement which had a direct impact on their assignment to more, or less, desirable work locations. The transfers necessarily had a significant impact on the bargaining unit where essentially one-half of all relevant employees had their seniority rights ignored in the relocation of work. The Employer's actions constitute a repudiation of the Employer's contractual obligations as well as a unilateral change in conditions of employment and, therefore, of its statutory duty to bargain in good faith. The disputed transfer of two employees in May or June of 2010, standing alone, would not have constituted a repudiation and would have been treated as a mere contract violation, subject to resolution through the grievance procedure.

For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The City Detroit, its officers, agents, and representatives shall:

1. Cease and desist from

    a. Repudiating the terms of its agreements with AFSCME;

---

found to have repudiated the contract by refusing to pay negotiated wage increases because it lacked funds); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901 (the Commission rejected the employer's attempt to justify its decision to alter the contractual wage rate based on economic necessity and a management rights clause that made no reference to wages).

[11] *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897.

[12] *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

b. Unilaterally changing conditions of employment without fulfilling the statutory bargaining obligation;
c. Engaging in the wholesale involuntary transfer of employees without regard to the contractually mandated reliance on relative seniority.

2. Take the following affirmative action necessary to effectuate the purposes of the Act

    a. After consultation with the Union, conduct a bid process to allow those employees involuntarily transferred from the North and South Districts to bid on their preference as to working in the East or West Districts based on their respective seniority;
    b. If any employees remain working at the North or South District, those employees are to remain assigned to those locations, absent a demand by the Union that those positions be included in the bid process;
    c. Pursuant to the bid process, the City shall transfer effected employees to the work location determined by their respective seniority.[13]

3. Post the attached notice to employees in a conspicuous place at each effected City of Detroit work locations where grounds maintenance workers are assigned for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 23, 2011

[13] No other individualized relief, such as compensation for any improper transfers, or recalculation of overtime equalization or the like, is ordered.

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the CITY OF DETROIT, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Repudiate the terms of its agreements with AFSCME;
b. Unilaterally change conditions of employment without fulfilling the statutory bargaining obligation;
c. Engage in the wholesale involuntary transfer of employees without regard to the contractually mandated reliance on relative seniority.

WE WILL

a. After consultation with the Union, conduct a bid process to allow those employees involuntarily transferred from the North and South Districts to bid on their preference as to working in the East or West Districts based on their respective seniority;
b. If any employees remain working at the North or South Districts, those employees will remain assigned to those locations, absent a demand by the Union that those positions be included in the bid process;
c. Pursuant to the bid process, we will transfer effected employees to the work location determined by their respective seniority.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CITY OF DETROIT

By:_____

Title:_____

Date: _____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.