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

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent

Case No. C07 B-030

-and-

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

APPEARANCES:

City of Detroit Law Department, by Andrew J. Jarvis, for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr. and Keith D. Flynn, for Charging Party

## DECISION AND ORDER

On December 16, 2010, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent, City of Detroit (Employer), violated §10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, when it refused to negotiate a supplemental bargaining agreement covering all members of the current bargaining unit represented by Charging Party, AFSCME Council 25, Local 542 (Union). In addition, the ALJ found that Charging Party's amended charge, alleging that the Employer unilaterally implemented a second shift and an overtime distribution system for newly created work crews, was not timely filed and, therefore, was barred by the statute of limitations. Further, the ALJ denied Respondent's motion for reconsideration of his order striking Respondent's post-hearing brief from the record. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with §16 of PERA. After requesting and receiving extensions of time, both Respondent and Charging Party filed exceptions to the ALJ's Decision and Recommended Order on March 11, 2011.

In its exceptions, Respondent alleges that the ALJ erred by issuing an order to show cause why its post-hearing brief should not be stricken. Respondent argues that the ALJ's order was improperly based on a letter from Charging Party that did not qualify as a motion under Commission rules. Respondent contends that since neither Charging Party nor the ALJ made a motion to strike Respondent's post-hearing brief, the show cause order should not have been issued. Respondent further excepts to the ALJ's finding that it acted "contemptuously" when it

filed a motion to strike Charging Party's letter from the record instead of filing a response to the ALJ's show cause order.

Also, Charging Party excepts to the ALJ's finding that its amended charge was barred by the statute of limitations. Charging Party argues that we should allow the conduct alleged in the amended charge to relate back to the original charge and that the ALJ's failure to do so is contrary to precedent.

We have reviewed the record thoroughly and carefully, and have considered the exceptions filed by Charging Party and Respondent. We find no merit in either party's exceptions and agree with the findings and conclusions of the ALJ.

Factual Summary:

We adopt the ALJ's findings of fact and summarize them below.

Charging Party represents a bargaining unit of nonsupervisory employees in various City of Detroit departments, including the Recreation Department. Before 2006, two to three hundred of the employees in that bargaining unit worked in the Recreation Department. In the summer of 2006, Respondent reorganized much of its workforce and moved functions and employees from many of its departments into its newly created General Services Department (GSD). Respondent transferred most of the Recreation Department employees in the AFSCME Local 542 bargaining unit into the GSD, along with employees from numerous other units.

Typically, after Respondent and AFSCME Council 25 have settled the master collective bargaining agreement covering the City employees in the various AFSCME locals, Respondent and Local 542 have negotiated a supplemental agreement. The parties' most recent supplemental agreement expired in 2001, although, the parties generally continued to follow its terms. In 2006, Respondent declared an impasse in negotiations for a new master agreement with Council 25. Respondent then proceeded to impose changes in the terms and conditions of employment for AFSCME bargaining units and incorporated those terms in a document that states that it covers the period of July 1, 2005, through June 30, 2008.

Charging Party sent a letter dated October 5, 2006, to Respondent requesting to begin bargaining for a new supplemental agreement. In response to Respondent's request, Charging Party provided proposed dates to Respondent in a letter dated October 29, 2006. Subsequently, a City labor relations manager informed Charging Party that there would not be negotiations on a new supplemental agreement because Local 542 members had been included in the new GSD. Charging Party sent two additional bargaining demands to Respondent dated November 28, 2006, and January 23, 2007. However, the Employer's response was merely to offer to enter into a supplemental agreement that would cover only the few positions remaining in the Recreation Department. Respondent never agreed to negotiate a supplemental agreement covering the other bargaining unit positions.

On November 6, 2006, Respondent posted notices inviting employees to volunteer to work on a new second shift as park maintenance helpers/workers in the forestry and grounds

maintenance division of the GSD. Charging Party demanded to bargain over the creation of any new shifts at a conference between the parties held after the posting. Charging Party repeated the bargaining demand in letters dated November 28, 2006, and January 23, 2007. Respondent implemented the second shift without responding to Charging Party's bargaining demands.

On February 22, 2007, Charging Party filed the unfair labor practice charge in this matter alleging that Respondent violated its duty to bargain in good faith under §§10(1)(e) and 15(1) of PERA when it failed or refused to negotiate a collective bargaining agreement between the City's Recreation Department and Local 542, which would be supplemental to the City of Detroit master agreement with AFSCME.

Park maintenance employees in the Local 542 bargaining unit mow the grass and clean the City's parks. Before the GSD was created in 2006, park maintenance employees regularly worked weekdays from 6:00 a.m. to 2:30 p.m. and were assigned to work in one of five districts of the City. Individual employees generally worked exclusively in the district to which they were assigned. When overtime work was available, it was performed by members of Charging Party's bargaining unit on weekends and between 2:30 p.m. and 6:30 p.m. on weekdays. In the spring of 2007, Respondent created "roving crews" generally made up of the lowest seniority park maintenance employees. The roving crews worked across the districts, during the hours normally reserved for overtime. After that point, employees who were permanently assigned to specific districts, and not on the roving crews, were denied overtime work. The parties' 1998-2001 supplemental agreement provides in Article 6, §1(A) for the equal distribution of overtime work for bargaining unit members within each of the five City districts.

On August 27, 2007, the ALJ conducted a prehearing conference call with the parties. At that time, Respondent explained that it had reorganized the services and functions of several City departments and had included employees from those departments who performed the same or similar job functions in the GSD. Further, Respondent asserted that the bargaining unit represented by Local 542 was no longer an appropriate unit and that it would be filing a unit clarification petition for the City covering the GSD employees who were then included in multiple AFSCME locals. On December 7, 2007, Respondent filed a petition for unit clarification seeking the realignment of approximately seven hundred employees in more than twenty bargaining units, represented by eight different unions. Although the petition sought to include the bargaining unit represented by AFSCME Local 542, the unit proposed by the petition was considerably broader than that discussed in the August 27, 2007 conference call. Therefore, the ALJ declined to consolidate the unit clarification case with this matter. Subsequently, the unit clarification petition was adjudicated by the Commission in Case No. UC07 L-033.[1]

On January 29, 2008, Charging Party filed an amended charge alleging, among other things, that Respondent violated §§10(1)(a), (c) and (e), and 15(1) by implementing new terms

[1] In its Decision and Order in *City of Detroit*, 23 MPER 102 (2010), issued contemporaneously with the ALJ's Decision and Recommended Order in this matter, the Commission dismissed the Employer's unit clarification petition, finding the petition defective as it failed to meet minimum pleading requirements under Commission Rule 143. The Court of Appeals dismissed, as untimely, the Employer's appeal of the Commission's Decision in an order issued February 23, 2011, (docket number 302085). On May 23, 2011, the Court denied the Employer's delayed application for leave to appeal (docket number 302927).

and conditions of employment, including a night shift and an overtime distribution system for newly created work crews.

The initial hearing in this matter was held on May 28, 2008, following the parties' off the record discussion with the ALJ regarding Charging Party's amended charge. Subsequently, the ALJ held that Charging Party's original charge, which did not include allegations arising out of the night shift and roving crews' effects on overtime, could not be amended to include those issues because those claims were barred by the statute of limitations.

An evidentiary hearing was held in this matter on April 21, 2009, and post-hearing briefs were due by July 20, 2009. Charging Party filed its post-hearing brief on July 20, 2009. Respondent faxed its post-hearing brief to the ALJ, but did not send a proof of service, and it did not submit the original and additional hard copies as required by Rule 181 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.181. In a letter to the ALJ, dated December 7, 2009, Charging Party asserted that it had never received a copy of Respondent's post-hearing brief and requested that Respondent's brief be stricken from the record if it had not been timely filed.

On December 28, 2009, the ALJ issued an Order to Show Cause, requiring Respondent to show why its post-hearing brief should not be stricken from the record. The ALJ's order gave Respondent until January 8, 2010, to provide proof that it had properly and timely served a copy of its post-hearing brief on Charging Party and to address its failure to comply with Rule 181. On January 7, 2010, Respondent filed a motion to strike Charging Party's December 7, 2009 letter from the record, and to quash the ALJ's Order to Show Cause. In its motion, Respondent argued that Charging Party's letter did not comply with Commission Rule 163 regarding motions to strike. However, Respondent's motion did not address whether it had served a copy of its post-hearing brief on Charging Party or filed the documents required by Rule 181. On January 8, 2010, Respondent filed a motion to stay the due date of the response to the ALJ's Order to Show Cause pending the outcome of its motion to strike. On February 12, 2010, the ALJ issued an order that: denied Respondent's motion to stay the due date of the show cause order; denied Respondent's motion to quash the show cause order; found Respondent's failure to respond to the show cause order to be contemptuous; and struck Respondent's post-hearing brief from the record. On March 5, 2010, Respondent filed a motion for reconsideration of the ALJ's order striking its post-hearing brief. In denying the motion in his Decision and Recommended Order, the ALJ noted that Respondent had still failed to address the question of whether it had ever served a copy of its post-hearing brief on Charging Party and still had not explained its apparent failure to comply with Rule 181.

Discussion and Conclusions of Law:

Inasmuch as Respondent has not excepted to the ALJ's finding that it violated §10(1)(e) of PERA when it failed or refused to negotiate a supplemental agreement covering the bargaining unit represented by Charging Party, we need not address this issue. We merely point out that, upon reviewing the record, we agree with the ALJ's conclusions.

In its exceptions, Respondent alleges that the ALJ erred by issuing an order requiring Respondent to show cause why its post-hearing brief should not be stricken from the record. Respondent contends that the ALJ's order was based on a letter from Charging Party that did not comply with the requirements for a motion under Commission Rule 161. Respondent contends that the Commission's Rules do not permit an ALJ to issue an order to show cause based on a letter. Respondent argues that in addressing motions to strike, Rule 163 does not permit an ALJ to issue an order to show cause. Further, Respondent asserts that the ALJ erred in finding that its response to the ALJ's order to show cause was contemptuous. We disagree with each of Respondent's exceptions for the following reasons.

Commission Rule 182 sets forth the requirements for service of documents and other pleadings. Under Rule 182(5), the administrative law judge is authorized to decline to consider any document or pleading not served in accordance with Commission rules. Rule 181 and the Commission's fax filing policy[2] provide that briefs of ten pages or less may be submitted to an administrative law judge by fax and will be deemed timely upon receipt, if the original and the required additional copies of the document and a proof of service are filed within five business days. Here, it appears that the defects in service and filing were brought to the ALJ's attention by Charging Party's letter. The ALJ had the discretion to strike Respondent's post hearing brief based merely on the filing defects that he noted. However, Charging Party's assertion that Respondent had failed to serve its post-hearing brief on the Union raised a more serious issue. Accordingly, acting within the broad authority granted under Commission Rule 172, the ALJ issued a show cause order giving Respondent the opportunity to offer evidence of its efforts, if any, to serve its post-hearing brief on Charging Party and to otherwise explain its failure to comply with Rules 181 and 182.

The ALJ's order simply required Respondent to submit proof that it had properly and timely served a copy of its post-hearing brief on Charging Party and to address its failure to comply with Rule 181. Rather than doing either of those things or explaining its failure to do so, Respondent sought to strike Charging Party's letter from the record and to have the ALJ quash his own order, claiming that the order was "procured with a patently defective application." Even in its motion for reconsideration of the ALJ's order striking its post-hearing brief, Respondent failed to explain its reason for its noncompliance with Rules 181 and 182. It was not until the submission of its brief in support of its exceptions to the ALJ's Decision and Recommended Order that Respondent attempted to give some explanation for its failure to serve its post-hearing brief on Charging Party. Respondent claims that it did not receive Charging Party's post-hearing brief and admits that it withheld service of its own brief until it received confirmation that Charging Party's brief had been filed. Respondent's explanation is not only untimely, but indicates Respondent's determination to follow the ALJ's orders and the Commission's rules only when it finds them convenient. Accordingly, we agree with the ALJ that Respondent's reply to the order to show cause is contemptuous.

In its exceptions, Charging Party argues that the ALJ erred by dismissing the Union's amended charge because it was filed more than six months after the conduct complained of and does not relate back to the original charge for statute of limitations purposes. Charging Party contends that the ALJ's decision on this issue is not supported by Commission precedent.

[2] http://michigan.gov/documents/fax_filing_141148_7.pdf

Under Section 16(a) of PERA, a charge must be filed with the Commission within six months of the date the claim accrued. Further, this Commission has long held that the statute of limitations contained in Section 16(a) is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health***,** 17 MPER 45 (2004); *Walkerville Rural Communities Sch*, 1994 MERC Lab Op 582. The six-month period begins to run when the charging party knows or should have known of the alleged violation. See *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983), affg 1981 MERC Lab Op 836; *AFSCME Local 1583*, 18 MPER 42 (2005). When a charge alleges a unilateral change in terms and conditions of employment, the statute of limitations runs from the date the employer announces the decision. *Interurban Transit Partnership*, 20 MPER 107 (2007); *Lapeer Co & Lapeer Co Treas*, 19 MPER 45 (2006); *City of Detroit (Dep't of Water and Sewerage)*, 1990 MERC Lab Op 400, 404-405; *Tuscola Intermediate Sch Dist*, 1985 MERC Lab Op 123, 125.

Commission Rule 153 governs the amendment of charges and states as follows:

> (1) The charging party may file an amended charge before, during, or after the conclusion of the hearing. All amendments made before or after hearing shall be in writing and shall, except for good cause shown, be prepared on a form furnished by the commission. An original and 4 copies of the amended charge shall be filed with the commission and a copy served on each party. Amendments made at hearing shall be made in writing to the administrative law judge or stated orally on the record.
>
> (2) Where an amendment is made in writing, each respondent may file with the commission a signed original and 4 copies of an objection to the amended charge within 10 days after receipt thereof, and at the same time shall serve a copy of the objection on each party.
>
> (3) If objection to the amended charge is not filed or stated orally on the record, then the commission or administrative law judge designated by the commission may permit the amendment upon such terms as are just and consistent with due process.

Charging Party points to the administrative law judge's decision in *Washtenaw Co Rd Comm*, 20 MPER 69 (2007), for a statement of the test used in permitting amendments. There, the ALJ stated:

> Rule 153(3) gives an administrative law judge both the discretion to disallow an amendment even when the respondent does not object and the authority to permit amendment over respondents objection if the judge determines that to do so would not violate respondent's right to due process. When a charging party seeks to amend its charge before or at the hearing, the key question is whether the allegations in the original charge and in the amendment are so related that justice requires that the decision maker consider them together. If they are so related, charging party must be permitted to amend its charge. . . . If the allegations are not so related, there is no reason to allow amendment unless hearing the

allegations together would not result in delay and would be more convenient for the parties, the judge and the witnesses.

Charging Party contends that neither Rule 153 nor the test outlined in *Washtenaw Co Rd Comm* suggest that PERA's six-month statute of limitations affects the Commission's jurisdiction over the amendment of a charge. However, the date of the filing of the amended charge was not an issue in the *Washtenaw Co Rd Comm* case. In that case, the amendment was filed within the six-month limitations period, and the ALJ denied the motion to amend for reasons unrelated to the timeliness of the amendment. While Rule 153 may not expressly address the issue of timeliness, it limits administrative law judges to granting amendments "upon such terms as are just and consistent with due process." PERA §16(a) and Rule 153 must be read together. It would neither be just nor consistent with due process to permit an amendment that does not relate back to the original charge and involves an incident that occurred more than six months prior to the filing of the amendment. Commission Rule 153 does not and cannot create an exception to the six-month statute of limitations contained in §16(a) of PERA. An amended charge that does not relate back to the original charge must be filed within six months of the date the claim accrued. See *City of Pontiac*, 22 MPER 46 (2009).

As the ALJ found, the issues raised in the original charge differ significantly from those raised in the amended charge. Charging Party's original charge alleges that Respondent engaged in unfair labor practices under §§10(1)(e) and 15(1) by refusing to negotiate a new supplemental agreement. The amended charge alleges that, in addition to refusing to bargain, Respondent made unilateral changes to mandatory bargaining subjects such as the implementation of an overtime distribution system for newly created work crews and the implementation of a night shift. The amended charge also claims that Respondent's actions violated§§10(1)(a) and (c) in addition to §§10(1)(e) and 15(1). The matters raised in the amended charge constitute a separate charge arising out of separate conduct—Respondent's refusal to bargain over a supplemental agreement is not the same as its actions in unilaterally creating a night shift and implementing roving work crews. Charging Party's amendment alleging a unilateral change in terms and conditions of employment does not relate back to the charge that Respondent refused to bargain over a supplemental agreement.

As the ALJ determined, Charging Party was aware of the Employer's implementation of the night shift as early as November 2006, before it filed its original charge, and well over six months before Charging Party filed its amended charge. Charging Party knew of the implementation of the roving crews at least as early as May of 2007, but waited more than six months, until January 29, 2008, to file an amended charge regarding this issue. Accordingly, we agree with the ALJ's finding that the amended charge must be dismissed as untimely, as it does not arise out of the same conduct or transaction as the original charge, and therefore does not relate back for statute of limitation purposes.

Upon reviewing the record thoroughly and carefully, we affirm the ALJ's Decision and Recommended Order. We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

## ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

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

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer,

Case No. C07 B-030

-and-

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 25, LOCAL 542,
Charging Party-Labor Organization.
_____/

APPEARANCES:

City of Detroit Law Department, by Andrew R. Jarvis, for Respondent

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

## DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On February 22, 2007, American Federation of State, County and Municipal Employees (AFSCME), Council 25, Local 542, filed an unfair labor practice charge against the City of Detroit. The charge alleges that the City, which has a master collective bargaining agreement covering multiple AFSCME local unions, violated its duty to bargain in good faith by failing or refusing to negotiate a supplemental collective bargaining agreement with AFSCME Local 542. On January 29, 2008, the Union amended the charge to include allegations that the City violated PERA by unilaterally changing terms and conditions of employment for Charging Party's members, including implementation of an "overtime distribution system for newly created work crews and a night shift."

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the State Office of Administrative Hearings & Rules, acting on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing brief filed by Charging Party on July 20, 2009, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

AFSCME Local 542 represents nonsupervisory employees of various departments of the City of Detroit, including the Recreation Department. The charge, as originally filed in this matter, alleges that Respondent and Local 542 were parties to a supplemental agreement to the master AFSCME contract covering City employees. According to the charge, the Local 542 supplemental agreement expired in 2001, but remains in effect on day-to-day basis by mutual agreement of the parties. The charge asserts that the City repeatedly ignored the Union's requests to bargain a new supplemental contract.

A prehearing conference call was held on August 27, 2007 for the purpose of clarifying the issues in dispute. During the conference, the City asserted that it had recently reorganized and combined services and functions from a number of different departments, including the Recreation Department, into the new General Services Department (GSD). According to the City, the GSD is comprised of employees formerly assigned to a number of different departments who now all perform the same or similar job functions. The City asserted that as a result of the reorganization, the bargaining unit represented by Local 542 is no longer an appropriate unit for purposes of collective bargaining and that it intended to file a Petition for Unit Clarification covering employees of the GSD who are currently within multiple AFSCME locals. I indicated to the parties that upon the filing of such a petition and the service thereof upon all affected AFSCME locals, the unit clarification petition would be consolidated with the instant charge.

On December 3, 2007, the City filed a petition seeking the realignment of some 700 GSD positions in 26 different labor organizations. After careful review of the petition, I issued an order on December 17, 2007 denying consolidation of the unit clarification and unfair labor practice proceedings. I concluded that the petition for unit clarification, which covered multiple bargaining units, including units not represented by AFSCME or its affiliated locals, was not the type of action described by the City during the prehearing conference call. Accordingly, an evidentiary hearing was scheduled in Case No. C07 B-030 limited to the issue of whether the City unlawfully refused to negotiate a supplemental collective bargaining agreement with AFSCME Local 542.[3] On January 29, 2008, the Union amended the unfair labor practice charge to include an allegation that the City had unlawfully implemented new terms and conditions of employment, including "an overtime distribution system for newly created work crews" and a night shift.

[3] The unit clarification matter, MERC Case No. UC07 L-033 was assigned to ALJ Doyle O'Connor. The ALJ directed the City to provide specific information regarding the GSD positions in dispute and an explicit description of the realignment sought by the petition. The City filed a perfunctory one page reply to the ALJ's order on July 2, 2009. The ALJ held that the response was not adequate and directed the City to provide specific answers to a numbered list of questions. When the City did not respond to that order, AFSCME, on or about December 8, 2009, moved for dismissal of the petition. In an order which is being issued contemporaneously with this decision, the Commission dismissed Case No. UC07 L-033, finding that the petition for unit clarification has been abandoned by the City.

A hearing on the Union's charge in Case No. C07 B-030 was held on April 21, 2009. Post-hearing briefs were due in a Commission office on or before July 20, 2009. The Union filed an original and copy of its brief on that date, along with a proof of service indicating that the brief had been served on the City's attorney, Andrew Jarvis, by first-class mail. That same day, the City attempted to file its post-hearing brief by fax. No proof of service was attached to the brief, nor were an original and additional hard copies subsequently filed as required by Rule 181, R423.181, of the General Rules and Regulations of the Employment Relations Commission.

By letter dated December 7, 2009, the Union asserted that it had never received a copy of the City's post-hearing brief. The City did not respond to that letter. On December 28, 2009, I issued an order directed the City to show cause why its post-hearing brief should not be stricken from the record on the ground that an original hard copy of the brief had not been filed. As part of its response, the City was ordered to provide proof that it had properly and timely served a copy of its post-hearing brief on the Union, and to address its apparent failure to comply with Commission Rule 181. The City's response was due on January 8, 2010.

The City did not file a response to the order to show cause. Rather, on January 7, 2010, the City filed, by fax, a motion to strike Charging Party's December 7, 2009 letter from the record and to quash my order of December 28, 2009. The City asserted that the order to show cause should not have been issued because the Union's December 7th letter did not constitute a proper motion under Commission Rules 161 and 184. The City did not address the question of whether it served the Union with a copy of its post-hearing brief, nor did the City offer an explanation for its failure to comply with Rule 181. Four days later, the City filed a motion to stay the due date for its response to the order to show cause pending the outcome of its motion to strike/quash. The Union filed its response to the City's motion strike/quash on January 19, 2010.

On February 12, 2010, I issued an order denying the City's motion to stay and striking its post-hearing brief from the record. The order states, in pertinent part:

> Respondent's counsel has yet to substantively address the Order To Show Cause or the alleged defect in service. The failure of Respondent's counsel to promptly answer the simple, straightforward questions put to him in the order, and his failure to cure the apparent defect in service, is suggestive of a singularly cavalier approach to litigation before the Commission, and is, regardless, contemptuous.
>
> The City's assertion that it has no obligation to respond to the Order to Show Cause is, at best, frivolous. Pursuant to Rule 163, the Commission "or administrative law judge designated by the commission may, **on its own motion** or on a motion by any party, order stricken from the pleadings redundant, immaterial, impertinent, scandalous, or indecent matter or **may strike all or part of a pleading not drawn in conformity**

**with these rules**." (Emphasis supplied). Since it is within my authority to strike a pleading even in the absence of the filing of a motion to strike by the opposing party, the December 28, 2009, Order to Show Cause was properly and lawfully issued.

On March 5, 2010, the City filed a motion for reconsideration of my order striking its post-hearing brief. In the motion, the City denied generally that attorney Jarvis had acted contemptuously, but otherwise raised no new issues of law or fact. Most importantly, the City once again failed to comply with the clear directives set forth in the original order to show cause. Specifically, the motion does not indicate whether the City ever served a copy of its post-hearing brief on Charging Party or explain the City's apparent failure to comply with Rule 181. Accordingly, the City's motion for reconsideration is hereby denied.

Findings of Fact:

I. Supplemental Bargaining Agreement

AFSCME Local 542 has historically negotiated separate collective bargaining agreements with Respondent to supplement the master agreement covering all City of Detroit employees represented by Michigan AFSCME Council 25. The most recent supplemental agreement between the City and Local 542 expired in 2001. However, the parties have continued to abide by the terms of that agreement.

The past practice of the parties has been to negotiate new supplemental agreements once the master AFSCME contract has been settled. In 2006, the City declared an impasse in negotiations with Council 25 on a new master agreement and unilaterally imposed terms and conditions of employment on all AFSCME bargaining units. Those terms and conditions of employment were incorporated in a document entitled "Master Agreement" which purportedly covered the term July 1, 2005 – June 30, 2008.

After the imposition by the City, Melvin Brabson, president of AFSCME Local 542, sent a letter to the City requesting that bargaining commence on a new supplemental agreement for the years 2005-2008. The letter, which is dated October 5, 2006, was addressed to Barbara Wise-Johnson, director of the City's Labor Relations Division, GSD director Charles Beckham, and Loren Jackson, director of Respondent's Recreation Department. On October 24, 2006, Niles Sexton, a labor relations manager with the City, contacted Brabson and asked him to provide bargaining dates and a list of the members of Charging Party's negotiation team. Brabson provided that information to the City by letter dated October 29, 2006.

Local 542 did not hear back from Sexton regarding bargaining dates. Rather, sometime in the middle of November of 2006, Sexton told Brabson that he had been instructed by Wise-Johnson not to enter into negotiations on a new supplemental agreement for Charging Party due to the inclusion of Local 542 members in the new

General Services Department. Brabson repeated the Union's demand to bargain a successor supplemental agreement by letters to Respondent dated November 28, 2006 and January 23, 2007. Thereafter, during a special conference between the parties, the City offered to bargain a supplemental agreement with Local 542 which would cover only those five or six unit positions remaining in the Recreation Department. At no point did the City ever agree to commence bargaining with the Union for a supplemental agreement governing the entire bargaining unit.

II. Summer Season Roving Crews

Prior to 2006, Charging Party represented around five hundred employees of the City of Detroit, two to three hundred of which were working in positions within Respondent's Recreation Department. Those positions included park maintenance worker/helper, building attendant, property guard, tree artisan, as well as several clerical positions. In the summer of 2006, Respondent consolidated the functions of many of its departments into the GSD and transferred employees from various bargaining units, including Local 542, into the new department. As a result of the reorganization, almost all of the Recreation Department positions represented by Charging Party are now part of the GSD.

Park maintenance employees represented by Local 542 are responsible for cutting grass and cleaning parks throughout the City. Prior to the creation of the GSD, park maintenance employees were assigned to work crews in one of five districts: East, West, North, South and Belle Isle. Other than the occasional instances in which the park maintenance employees were dispersed to a single location in preparation for special City events, the park maintenance employees worked exclusively within the district to which they were assigned.[4] The regular work schedule for the park maintenance crews was weekdays from 6:00 a.m. to 2:30 p.m. Overtime work, if available, was performed by Charging Party's members between the hours of 2:30 p.m. to 6:30 p.m. and on weekends.

Preparation for the grass-cutting season begins in April of each year, with the actual cutting commencing in May. Union steward Maletus Glover testified that at the start of the 2007 season, Respondent implemented cross-district or "roving crews" of park maintenance employees. These crews cut grass and cleaned parks throughout the City and were not restricted to any one district. An investigation conducted by Glover at the time revealed that the crews worked after 2:30 p.m. and on weekends, hours normally considered overtime. The members of the roving crews were typically the lowest seniority employees in the department. While the roving crews were being utilized by

[4] At hearing, Marcus Holmes, a human resources consultant with the City, testified that if a crew completed its grass-cutting duties early, those employees "could" be assigned to work in a different district for the remainder of the shift. Holmes further averred that grass-cutting crews might be assigned to other districts depending on the source of funding for the work. However, Holmes did not cite any specific instances in which such out-of-district assignments had actually been made, and there was no other evidence in the record to corroborate Holmes' generalized allegations.

Respondent, employees who were permanently assigned to a specific district, including Union stewards, were not allowed to work overtime.

Prior to the start of the 2008 grass-cutting season, the parties participated in a special conference to discuss various topics, including the use of roving crews and its impact on the availability of overtime for bargaining unit members. On or about March 27, 2008, GSD assistant superintendent Paul Mason Jr. sent Brabson a letter in which he alleged that the City would be removing the roving crew and incorporating its duties into "West Districts [sic] responsibilities." Brabson responded to Mason by letter dated April 1, 2008, in which he asserted that the changes proposed by the City failed to adequately address the Union's concerns. Brabson wrote, "The changes that you are implementing are a mandatory subject of bargaining. It changes the wages, hours, terms and condition [sic] of employment. Like I have said in the special conference and I will reconfirm our position again, **we demand to bargain** over these issues." [Emphasis in original.] Brabson testified without contradiction that Respondent continued to utilize roving crews during the 2008 grass-cutting season.

The 1998-2001 supplemental agreement provides for the equal distribution of overtime for bargaining unit members within each individual district. Article 6, Section 1(A) provides, "Whenever overtime is required, the person with the least number of overtime hours, in their classification within their district will be called following the Steward by the supervisor and so on down the list in an attempt to equalize overtime hours."

III. Night Shift

On November 6, 2006, Respondent announced by way of a posting that it was instituting a second shift for park maintenance helpers/workers in the forestry and grounds maintenance division of the GSD. Pursuant to the posting, the evening shift was scheduled to begin at 10:00 p.m. on December 4, 2006. Employees were invited to volunteer for the shift, with vacancies to be filled in order of inverse seniority. After the announcement, the parties participated in a special conference during which the Union demanded to bargain over the creation of any new shifts. The Union repeated its demand to bargain in a series of letters from Brabson to Respondent dated November 28, 2006 and January 23, 2007. The City did not respond to the Union's demands and the night shift was implemented.

Discussion and Conclusions of Law:

Charging Party asserts that the City violated Section 10(1)(e) of PERA by refusing to negotiate a new supplemental agreement covering the bargaining unit represented by AFSCME Local 542. Section 10(1)(e) makes it unlawful for a public employer to refuse to bargain collectively with the representative of its public employees. The record in this matter establishes that in the fall of 2006, Brabson, the president of Local 542, made repeated requests of the City to begin bargaining a new supplemental agreement for Charging Party's members to replace the exiting agreement which covered

the term 1998-2001. In response, labor relations manager Sexton informed the Union that he had been instructed by the City's labor relations director not to bargain any new supplemental agreement for Charging Party due to the inclusion of Local 542 members in the new GSD. Although the City later offered to bargain with Charging Party, it did so only on the condition that any new agreement reached by the parties would be limited in scope and application to the five or six members of Local 542 who remained in the City's recreation department following the reorganization of City services. Such a response, which plainly ignores the two to three hundred unit members now assigned to the GSD, is not a proper and valid reply to the Union's bargaining demand. To the contrary, the City's actions in connection with this matter appear to constitute an unlawful attempt by Respondent to unilaterally change the composition of the bargaining unit.

Pursuant to Section 13 of PERA, the Commission "shall decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining . . . ." The Commission has repeatedly held that bargaining unit placement is neither a mandatory subject of bargaining nor a matter of managerial prerogative, but rather a matter exclusively reserved to the Commission by Section 13 of the Act. See e.g. *City of Warren*, 1994 MERC Lab Op 1019; *Northern Michigan Univ*, 1989 MERC Lab Op 139; *Michigan State Uni*., 1993 MERC Lab Op 345; *Ingham Co & Ingham Co Bd of Comm'rs*, 1993 MERC Lab Op 808. It is well-established that a public employer may not alter bargaining unit placement unilaterally or after bargaining to impasse, but must either acquire the Union's agreement to changes in bargaining unit composition or obtain an order from the Commission by filing an unfair labor practice charge, or if appropriate, a unit clarification petition. *Livonia Pub Schs*, 1996 MERC Lab Op 479; *Michigan State Univ*. 1992 MERC Lab Op 120; *Northern Mich Univ*, 1989 MERC Lab Op 139.

Although the City filed a petition for unit clarification seeking the realignment of employees represented by various labor organizations, including AFSCME Local 542, it did so only after the Union was forced to bring an unfair labor practice charge asserting a refusal to bargain under Section 10(1)(e) of PERA. The filing of the petition did not serve to insulate Respondent from liability under the Act for its prior refusal to negotiate with Charging Party, nor did the pendency of the unit clarification proceeding excuse the City from its continuing obligation to bargain with Charging Party. Absent a Commission order altering the composition of the bargaining unit or an agreement by the Union to the changes sought by Respondent, the City remains obligated to bargain with AFSCME Local 542 over the terms and conditions of employment for all of the positions which have historically been part of Charging Party's unit. The City's prior offer to negotiate a new supplemental collective bargaining agreement covering only those members of Local 542 who continue to work in the recreation department did not in any way satisfy the City's statutory obligation to bargain under the Act. I conclude that the City violated Section 10(1)(e) of PERA by refusing to negotiate a new supplemental collective bargaining agreement covering all of the members of Local 542.

With respect to the City's implementation of a night shift and its utilization of roving crews, I find that the charge must be dismissed as untimely. Pursuant to Section 16(a) of the Act, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). The Commission has steadfastly rejected attempts by charging parties to revive otherwise untimely claims based upon a continuing violation theory. See e.g. *City of Adrian*, 1970 MERC Lab Op 579, 581, adopting the U.S. Supreme Court ruling in *Local Lodge 1424, Machinists v NLRB (Bryan Mfg Co)*, 362 US 411 (1960). See also *County of Lapeer*, 19 MPER 45 (2006); *Detroit Bd of Ed*, 16 MPER 29 (2003); *City of Flint*, 1996 MERC Lab Op 1, 9-11.

In the instant case, the record establishes that Charging Party was aware of the City's intent to implement a new shift as early as the fall of 2006. On November 6, 2006, Respondent announced by way of a posting that it would be instituting an evening shift beginning at 10:00 p.m. on December 4, 2006. The Union demanded to bargain concerning the extra shift at a special conference held shortly after the posting and again in letters to the City dated November 28, 2006 and January 23, 2007. In one of the letters of November 28th, the Union threatened to file an unfair labor practice charge regarding the City's implementation of the night shift. Yet, the Union did not raise the issue with the Commission until January 29, 2008 when it filed its amended charge in this matter. Similarly, Charging Party was aware of the existence of the roving crews more than six months prior to the filing of the amended charge in January of 2008. The record establishes that Respondent began utilizing roving crews to work overtime hours at the beginning of the 2007 grass-cutting season which commenced in April or May of that year and continued to so through the remainder of that season, as well as during the following year. Under such circumstances, I conclude that allegations concerning the implementation of a night shift and roving crews, as well as the impact of those changes on unit members which were not raised until the filing of the January 29, 2008 amended charge, are not timely and that the amended charge must be dismissed on that basis.[5]

For the above reasons, I hereby recommend that the Commission issue the following order.

[5] The amended charge does not arise out of the same conduct or transaction as the original charge. Therefore, there can be no relation back to the original charge for statute of limitations purposes.

RECOMMENDED ORDER

It is hereby ordered that the City of Detroit, its officers, agents and assigns, shall:

(1) Cease and desist from refusing to bargain collectively and in good faith with AFSCME Council 25 Local 542 on a supplemental agreement covering all members of the bargaining unit represented by Local 542 as that unit has historically been defined.

(2) Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with AFSCME Council 25 Local 542 on a supplemental agreement covering all members of the bargaining unit represented by Local 542 as that unit has historically been defined.

(b) Post copies of the attached notice to employees in conspicuous places on the Employer's premises, including all locations where notices to employees are customarily posted and on any website routinely utilized by the City of Detroit for employee access. Copies of this notice shall remain posted for 30 consecutive days.

The amended charge filed by AFSCME Council 25 Local 542 on January 28, 2008 is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____

## 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 an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

**WE WILL** upon request bargain collectively and in good faith with AFSCME Council 25 Local 542 on a supplemental agreement covering all members of the bargaining unit represented by Local 542 as that unit has historically been defined.

**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 a period of 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, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.