STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C09 L-241

-and-

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

APPEARANCES:

Andrew Jarvis, City of Detroit Law Department, for Respondent

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

DECISION AND ORDER

On March 11, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order finding that Respondent, City of Detroit, did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, MCL 423.210, and recommending that the Commission dismiss the charge filed by AFSCME Council 25 and Local 542. The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

Exceptions to the ALJ's Decision and Recommended Order were originally due on April 4, 2011. On March 29, 2011, Charging Party filed a request for an extension of time in which to file its exceptions. Pursuant to Rule 176(8) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176(8), we issued an order on April 1, 2011, giving Charging Party until May 4, 2011, to file exceptions. Respondent did not file a timely request for an extension of time in which to file its exceptions.

On May 2, 2011, Charging Party filed a second request for an extension of time to file its exceptions. Charging Party requested an extension until May 11, 2011, but failed to state a reason for needing the additional time. On May 4, 2011, the Commission issued an order granting Charging Party an extension until May 6, 2011.

Respondent filed its exceptions to the ALJ's Decision and Recommended Order on May 4, 2011. Bureau of Employment Relations staff informed Respondent that its exceptions were

untimely as Respondent had not requested an extension of time to file its exceptions. Respondent was also advised that its exceptions would not be considered by the Commission unless Respondent sought, and the Commission granted, a retroactive extension of time to file exceptions.

On Friday, May 6, 2011, Charging Party submitted a request for a third extension of time, until 5:00 p.m. on Monday, May 9, 2011. In this request, Charging Party asserted that it needed copies of some of the exhibits in this case to prepare its exceptions, and claimed that its copies had been misplaced by a former employee. Charging Party's extension request was accompanied by a request, under the Freedom of Information Act (FOIA), MCL 15.231 - 15.246, for copies of the exhibits. On the afternoon of May 6, 2011, the Commission provided Charging Party with the documents requested under FOIA, and extended Charging Party's time to file exceptions until noon on May 9. Charging Party filed exceptions with the Commission on the morning of May 9, 2011.

On May 11, 2011, Respondent filed a Motion Requesting Acceptance of Its Exceptions to the Recommended Order of the Administrative Law Judge, as well as a brief in support. On June 3, 2011, Respondent filed motions to quash the Commission's orders granting the second and third extensions of time to Charging Party. Charging Party filed its responses to Respondent's motions to quash on June 13, 2011.

Respondent's Motion Seeking Consideration of Its Exceptions

In its Motion Requesting Acceptance of Its Exceptions to the Recommended Order of the Administrative Law Judge, Respondent argues that the language of the second paragraph of our April 1, 2011 order extends the time period for filing exceptions for all parties, not just Charging Party. Respondent is mistaken in its reading of the extension order. The extension order specifies the party to whom the extension is granted. Respondent's argument that the extension applies to all parties is based on its reading of only the second paragraph of the order while disregarding the first paragraph.

In its brief in support of its motion requesting that its exceptions be considered, Respondent relies on *Brewer v Schulz*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2011 (Docket No. 294220), as support for its contention that if an order is inconsistent with the pertinent rules, the language of the order controls. In *Brewer*, the Court rejected the plaintiff's argument that the Court's prior order granted plaintiff the full relief allowable under the applicable court rule, explaining that its prior order limited the scope of the relief awarded to something less than what the rule would have allowed. Respondent's reliance on *Brewer* is inapposite to the matter before us. Here Respondent seeks to persuade us that our April 1, 2011 order granted it an extension of time beyond that which we could lawfully grant under the applicable rule. Had our order done as Respondent asserts the order would be void. See e.g., *Mfr Nat'l Bank of Detroit v Director Dep't of Natural Resources*, 420 Mich 128, 146 (1984).

Our order must be read in conjunction with the rule governing the granting of extensions of time. See *Norman v Norman*, 201 Mich App 182, 184 (1993). Rule 176(8) provides that we

may only grant an extension of time "to the moving party upon the filing of the request." Thus, it is clear that the April 1, 2011 order granted an extension of time only to Charging Party to allow it until May 4, 2011 to file exceptions. Accordingly, we deny Respondent's motion and decline to consider its untimely exceptions.

Respondent's Motions to Quash

Both motions to quash argue the same point. Respondent asserts that Charging Party's second and third extension requests did not show good cause as required under Rule 176(8) for extensions subsequent to the first one. Therefore, Respondent requests that both the second and third extension orders be quashed and that Charging Party's exceptions be stricken from the record.

Since Charging Party was granted an extension until noon on May 9, 2011, the order granting Charging Party's second extension of time, to May 6, is moot. Therefore, Respondent's motion to quash that order is dismissed. However, we agree with Respondent that Charging Party did not assert good cause in its request for the third extension of time. An extension subsequent to the first one may only be granted upon a showing of good cause. Our order granting Charging Party the extension to noon on May 9, 2011, was imprudently granted and is hereby quashed. Thus, Charging Party's exceptions are untimely and we will not consider them.

Inasmuch as neither party has filed timely exceptions to the ALJ's Decision and Recommended Order said Order is adopted by the Commission.

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[1]

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

Dated: _____

[1] Commissioner Christine A. Derdarian did not participate in the decision in this matter.

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APPEARANCES:

Andrew Jarvis, City of Detroit Law Department, for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr. and Austin W. Garrett, for Charging Party

DECISION AND ORDER ON RECONSIDERATION

On July 13, 2011, the Commission issued a Decision and Order in this matter adopting the Administrative Law Judge's (ALJ's) Decision and Recommended Order as its final order after finding that neither party filed timely exceptions. Upon reconsideration of that decision, we find it appropriate to review the merits of this matter.

Procedural issues:

Exceptions to the ALJ's Decision and Recommended Order were originally due on April 4, 2011. Charging Party, AFSCME Council 25 and Local 542 (Union), requested and was granted three extensions of time and filed its exceptions on May 9, 2011. Respondent, City of Detroit (City or Employer), did not request an extension of time, but instead filed its exceptions on May 4, 2011, mistakenly believing that the first extension granted to the Union applied to both parties. The City filed a motion seeking our acceptance of its untimely exceptions, and later, filed motions to quash our orders granting the second and third extensions of time to the Union. In our July 13, 2011 Decision and Order, we denied the City's motion seeking acceptance of its untimely exceptions, but concluded that our order approving the Union's third extension was imprudently granted and quashed the order extending time. Consequently, in the absence of timely exceptions from either party, we issued a decision and order adopting the

ALJ's Decision and Recommended Order. On August 2, 2011, the Union filed a motion for reconsideration of our Decision and Order. The City did not file a response to the motion.

In its motion for reconsideration, the Union argues that the City's motion to quash the third extension order, and our decision granting the motion were improper. The Union also asserts that the third extension request was known to the City as early as May 6, 2011; however, its objections and motion to quash were not filed until June 3, 2011, nearly a month later. The Union contends (1) that the motion to quash was untimely and (2) motions to quash are not permitted under PERA or the Commission's General Rules.

We note that our General Rules do not expressly provide, nor preclude, the filing of motions to quash. As such, no specific time period exists for the filing of such motions. Rule 176(8) provides that a request for an extension must be filed "before expiration of the required time for filing [the pleading for which the extension is sought]." However, parties often wait until shortly before the exceptions deadline to request an extension. Commission practice is to promptly act on extension requests and, when possible, prior to the filing deadline for which the extension is sought. In this instance, the Union's request for the third extension was filed and served on the Employer on May 6, the Friday before the Monday, May 9 deadline for filing exceptions pursuant to the second extension. In keeping with our practice, we reviewed and granted the third extension prior to the expiration of the filing deadline. Since the Union requested the third extension so close to the exceptions due date, there was little time for the City to file objections before we needed to act on the request. Where we have issued an order based solely on our review of a party's request and the opposing party has had little opportunity to respond, we may consider objections filed within a reasonable time after the issuance of our order. Since the City's motions to quash were filed within a reasonable time of our issuance of the third extension order, we considered the City's objections.

After very careful review of the arguments raised in the Union's reconsideration motion, as well as the unusual circumstances in this instance, we find it prudent to grant the Union's motion for reconsideration and vacate our July 13, 2011 Decision and Order. In the interest of fairness to both parties and based on the aforementioned reasons, we have also determined that the exceptions of both the Union and the City will be accepted and processed as timely. We do so cautiously in light of the unique procedural history of this case and consistent with our statutory obligation to resolve labor-management disputes.

The Issues on Exception:

We note that both parties except to the ALJ's Decision and Recommended Order issued on March 11, 2011. The ALJ found that the City did not violate the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217 by implementing a process that used roving work crews in its building cleaning operation. The ALJ specifically concluded that the City had satisfied its duty to bargain over the change in working conditions when it entered into an oral agreement with the Union on the new process that was later memorialized in a letter sent to the Union. The ALJ also determined that the Union failed to submit a timely bargaining demand to the City and found no evidence that the Union had actively sought to bargain over the issue in dispute. Finally, the ALJ found that the City did not

interfere with Charging Party's ability to make union stewards accessible to members assigned to the new work crews.

In its exceptions, the Union alleges that the ALJ erred by finding that (1) it had a duty to demand bargaining over an alleged unilateral change in a mandatory subject of bargaining to implement roving work crews; (2) the City had met its bargaining obligation regarding the mid-term change in working conditions, (3) the Union made no legitimate bargaining demand regarding the change and (4) the switch to roving work crews did not intentionally disrupt the Union's internal steward structure. Finally, the Union argues in its supporting brief (but not in its exceptions) that the change to roving work crews deprives bargaining unit members of overtime opportunities.

In its exceptions, the City objects to Footnote 1 of the ALJ's decision indicating that the parties' post hearing briefs were filed untimely. The City asserts that this finding is not supported by the record and requests that it be stricken. After careful review of the exceptions and other pleadings from each party, we find the Union's exceptions to be without merit and the City's exception to be moot.

Factual Summary:

We adopt the factual findings as set forth in the ALJ's Decision and Recommended Order and repeat them only as necessary. In the fall of 2009, the City sought to reduce the budget of its Building Services department wherein services were performed by Charging Party's members as well as outside vendors. To avoid further layoffs of bargaining unit members, the City proposed restructuring the overall operation to a general services department that would use roving work crews that traveled between sites, rather than being assigned to static work locations. The proposed change would also eliminate the City's need to use outside vendors by shifting most, if not all, of the work functions to Charging Party's members exclusively. The City also projected that the overtime budget allocated to the Union's members would triple under this proposal.

On Oct 6, 2009, the City held a special conference at which management and the Union's representatives were present. Following the City's presentation on the new roving crew proposal, the Union demanded to bargain. The Union caucused and then requested that the City augment its proposal to include a second shift to accommodate those members with supplemental employment. The City agreed. Hearing no further requests or demands from the Union, the parties then discussed and established a date for Charging Party's members to bid on the new assignments and shifts under the new roving crew operation. The next day on October 7, the City sent the Union a letter confirming the details of their verbal agreement reached during the special conference. The letter provided an overview of the components of the new system including the intent to reassign bargaining unit members to roving work crews and eliminate several outside vendor contracts. It further acknowledged the Union's concern regarding adequate steward coverage in light of the change to roving crews. The City also expressed in the letter its willingness to comply with the overtime allocations under the parties' existing agreements, and its belief that the terms outlined therein did not violate any of those agreements. The Union did not respond to the City's letter. Assuming the parties had a bona fide agreement, the City eliminated its contracts with the outside cleaning vendors so that the work could be

reassigned to bargaining unit employees as part of the new operation.

On October 12, the parties met as planned for Charging Party's members to bid on assignments under the change to roving work crews. Union stewards were allowed first choice based on the super-seniority provisions under the collective bargaining agreements, followed by the remaining employees based on their respective seniority status. After some minimal objections and discussion, the parties agreed to allocate overtime based on seniority within the roving crews rather than based on their prior stationary work location seniority. Midway in the bidding process, one affiliate local raised an objection and demanded bargaining but never identified any specific issues in its demand.

On October 14, the City received a letter from the Union's affiliate local demanding to bargain but again failing to identify any specific issues in dispute, other than to request that the roving crews stop. At this point, the City had already terminated its outside maintenance contracts and bargaining unit members had made their selections under the new roving work crew system. No additional attempts were made by the Union or its affiliates to seek bargaining with the City on the change to roving crews. On December 9, the Union filed the instant charge alleging, in sum, that the City unilaterally changed a mandatory subject of bargaining by switching its members to roving work crews and altering the shifts of its union stewards.

Discussion and Conclusions of Law:

The predominant issue underlying Charging Party's exceptions relates to its contention that the City failed to bargain over a mid-term change in a mandatory subject of bargaining by altering the work assignments of its building attendants from static building locations to roving work crews. As the ALJ indicates, we examine the "totality of the circumstances" in refusal to bargain cases to determine whether the parties have "openly" and "actively" engaged in the bargaining process with intent to obtain an agreement. *Grand Rapids Pub Museum*, 17 MPER 58, 170 (2004). Also, where an employer knows that a bargaining demand has been made, there must be a statement or action by the employer that would reasonably indicate a refusal to honor that request. *Macomb County*, 1998 MERC Lab Op 344 (no exceptions); *Michigan State University*, 1993 MERC Lab Op 52 at 63 citing *Clarkwood Corp*., 233 NLRB 1172 (1977).

We agree with the ALJ that there is no indication that the City engaged in conduct designed to thwart its bargaining obligation under PERA. Instead, the record indicates that the City advised and met with Union representatives regarding its proposal to avoid further layoffs of bargaining unit members. The Union reviewed details of the City's proposal that included increasing bargaining unit work and overtime opportunities for Charging Party's members by instituting roving crews and eliminating city contacts with outside vendors performing similar work. The Union then demanded and obtained a significant change to the City's initial proposal. Finally, the parties mutually established and participated in a meeting at which Charging Party's members bid on new assignments resulting from the altered work structure. Based on these facts, we find that the City satisfied its duty to bargain on the change in work assignments of Charging Party's affected members during the special meeting and reduced the parties' agreement to writing in a letter sent to the Union the next day. We reject Charging Party's

contention that the City breached its bargaining obligation by implementing the roving work crew proposal.

The Union asserts that it had no duty to demand bargaining on the change to roving shifts, or alternatively, the letter to the City on October 14 from its affiliate local constituted a legitimate bargaining demand. As the ALJ notes, a bargaining demand requires no particular form; however, it must be conveyed so that the intended party reasonably understands that a bargaining request has been made. *Michigan State University*, 1993 MERC Lab Op 52 at 63, citing *Clarkwood Corp*, 233 NLRB 1172 (1977). As such, an employer's duty to bargain is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City*, 135 Mich App 553, lv den 421 Mich 857 (1995). Simply indicating that an issue should be negotiated or protesting an action, does not constitute a demand to bargain. *Dearborn Pub Sch*, 19 MPER 73 (2006). Further, after learning of a union's demand, an employer must make a statement or action that reasonably indicates its refusal to honor the request. *Macomb County*, 1998 MERC Lab Op 344 (no exceptions).

The Union argues that its local affiliate objected to the change to roving crews and demanded to bargain on the concept. We disagree and concur with the ALJ that the Union's attempted "demand" made during the bid meeting and in a subsequent letter was too vague to constitute a sufficient demand. The "demand" did not specify any issues or concerns in dispute. There was no follow-up by the Union until days later, when again, the communication was void of any particulars. By this time, the City had already terminated its contracts with outside vendors having relied on the agreement reached by the parties during the special conference. As such, the verbal demand and follow-up letter by the local affiliate did not create an obligation on the City to engage in bargaining on the change to roving crews.

The Union also argues that by establishing roving crews, the City repudiated the supplemental agreements of many of its local affiliates. We disagree. As previously discussed, during the special conference, the City sought and obtained verbal approval of its proposal which included a modification made at the Union's demand. A majority of the Union's locals participated in the special meeting and all were present at the subsequent meeting to bid on assignments under the new plan. The record also indicates that the Union failed to refute the City's contention that the terms under the roving crew plan did not violate the parties' supplemental agreements. Based on these facts, we will not find repudiation.

We also reject the Union's claim that the implementation of roving crews denies members their right to union representation. As the ALJ suggests, the change did not preclude the Union from adopting alternative methods for assigning or selecting union stewards. Further, the Union's stewards had first opportunity to bid on the new roving crew assignments. We find that the City did not engage in any conduct that would reasonably interfere with the Union's right to represent its unit members.

The Union argues that the move to roving crews changed the method of awarding overtime. We disagree and note that the City's confirming letter to the Union indicated that it would adhere to the overtime process based on the existing agreements. The Union failed to respond and later acquiesced to a different arrangement on October 12.

The City takes exception to a footnote in which the ALJ stated the City's post-hearing brief was not properly filed. Assuming we agree with the City's contention, the ALJ accepted and considered the brief in his recommendation. As such, any effort by this Commission to revise the ALJ's footnote would have no practical or legal effect on the existing controversy between the parties. *People v Richmond,* 486 Mich. 29, 782 N.W.2d 187 (2010).

Finally, we have reviewed the remaining arguments contained in the parties' exceptions and other pleadings and find that they would not change the outcome here.

ORDER

The Motion for Reconsideration is granted. Our Decision and Order issued on July 13, 2011 is set aside. It is further 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

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____