STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF WESTLAND,
Public Employer-Respondent,

Case No. C11 J-181

-and-

AFSCME COUNCIL 25, LOCAL 1602,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Steven H. Schwartz & Associates, PLC, by Steven H. Schwartz, for Respondent

Miller Cohen, PLC, by Keith D. Flynn, for Charging Party

DECISION AND ORDER

On September 14, 2012, Administrative Law Judge Julia C. Stern issued her 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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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF WESTLAND,
Public Employer-Respondent,

Case No. C11 J-181
Docket No. 11-000842

-and-

AFSCME COUNCIL 25, LOCAL 1602,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Steven H. Schwartz, for Respondent

Miller Cohen P.L.C., by Keith D. Flynn, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On October 20, 2011, AFSCME Council 25, Local 1602, filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the City of Westland pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of regular full-time nonsupervisory employees of Respondent, excluding fire fighters, police officers, supervisors, confidential employees, and certain executive positions. The charge, as originally filed, asserted that in July 2011, Respondent eliminated four unit positions and reassigned their work to members of the Westland Fire Fighter's Association and Westland Supervisory Association. The charge alleged that Respondent unlawfully refused to bargain with Charging Party over the transfer/reassignment of work that had been exclusively performed by Charging Party's unit.

On May 11, 2012, the charge was amended to allege that Respondent violated §10(1)(e) of PERA by refusing to bargain over the July 2011 transfer of work performed by five eliminated unit positions. According to the charge, some of the work was transferred to other bargaining

units and some to employees of a private contractor. The charge, as amended, also alleges that Respondent unlawfully refused to bargain over the impact of the transfer on employees. Charging Party alleges, in addition, that the transfers constituted a repudiation of numerous provisions of the parties' collective bargaining agreement, including provisions in the contract recognizing the positions transferred as part of the bargaining unit and provisions protecting Charging Party from erosion of its unit below 80 employees. According to the charge, the transfers "constituted an attempt by the employer to redefine the certified bargaining unit and withdraw recognition." Finally, the amended charge alleges that the transfers violated §§10(1)(a) and (c) of PERA because they constituted acts of retaliation against bargaining unit employees for Charging Party's refusal to support Respondent's mayor in the last election, an action spurred by the mayor's stance at the bargaining table.

Motion for Summary Dismissal:

On December 6, 2011, Respondent made a request, in the form of a letter, that I dismiss the charge based on an arbitrator's award issued on October 11, 2011. This request was followed, on February 6, 2012, by a motion for summary disposition. Charging Party filed a response to this motion on May 2. On May 11, 2012, Charging Party filed the amended charge, and on May 21 it filed a corrected copy of the amended charge.

On June 26, 2012, Respondent filed an amended motion for summary dismissal addressing the allegations in the amended charge. Respondent attached to its amended motion affidavits from Cindy King, Respondent's personnel director, and John Adams, its assistant fire chief/fire marshal. It also attached documents, including a copy of the parties' collective bargaining agreement and the arbitrator's award mentioned above. Charging Party filed a response to this motion on July 31, 2012. Attached to this motion were documents and an affidavit from Charging Party President John McNally.

On August 16, 2012, Charging Party supplemented its response with an affidavit executed by Lawrence Roman, a former president of Charging Party. On August 23, Respondent objected to the inclusion of this affidavit in the record on the grounds that it was beyond the deadline for filing the response to its motion and was "merely a conclusive reiteration of other affidavits already submitted by the Union." In reply, Charging Party explained that Roman, who is retired from employment with Respondent, offered his testimony only after Charging Party had filed its response. Charging Party's request to supplement its response with Roman's affidavit is granted.

Based on the relevant facts as alleged by Charging Party, and other relevant facts not in dispute, and on the arguments made by the parties in their pleadings, I make the following conclusions of law and recommend that the Commission issue the following order.

Facts:

The Collective Bargaining Agreement

The parties' current collective bargaining agreement was effective on January 1, 2009

and expires on December 31, 2012. Article 10 of this agreement, entitled "Management Responsibilities" reads as follows:

> A. Control and Management
>
> It is recognized that the Government and Management of the City, the control and management of its properties and maintenance of municipal functions and operations are reserved to the City and that all lawful prerogatives of the City shall reign and be solely the City's right and responsibility. Such rights and responsibilities belonging solely to the City are hereby recognized, prominent among which, but no means wholly inclusive are:
>
> 1. All rights involving public policy.
>
> 2. The right to decide the number and locations of facilities, departments, etc.
>
> 3. *Work to be performed within the unit.*
>
> 4. Maintenance and repair.
>
> 5. Supervision and the amount thereof.
>
> 6. Machinery, tools and equipment.
>
> 7. Schedules of work together with the selection, procurement, designing, engineering and control of equipment and materials.
>
> B. Selection and Direction of the Working Forces
>
> It is further recognized that the responsibility of Management of the City, selection and direction or the working forces, including the right to hire, suspend or discharge, *assign*, promote or transfer, to determine the hours of work, to *relieve employees from duty because of lack of work* are solely the responsibilities of the City. *If the bargaining unit falls below 80 employees, the City and Union shall meet to discuss staffing levels. The City agrees that it shall exercise these rights in conformity with the terms of the Agreement as they pertain herein, and shall not exercise these rights in conflict with the terms of the Agreement*. [Emphasis added]
>
> Article 34, entitled "Subcontracting" reads, in pertinent part, as follows:
>
> A. Prior to subcontracting any work in excess of $750 which has been normally and/or regularly performed by members of Local 1602, the City will inform the Union President in writing. Any subcontracting to a contractor totaling more than $5,000 in a fiscal year will require the representatives to meet with the local

bargaining committee to discuss the work to be performed, the cost and the time to accomplish that work. However, the City's right to subcontract shall remain as described in Article 10.

B. The purpose of the above paragraph will be to assure that the intent of subcontracting will not be a deliberate attempt to erode the Bargaining Unit.

Article 13(F) of the agreement states:

Supervision will not perform bargaining unit work which will infringe on an employee's hours of work or result in the displacement of an employee. However, supervision may assist in emergency situations.

The collective bargaining agreement also contains a recognition clause, Article 1, describing the unit as set out above; a provision, Article 8(B), stating that Respondent may supplement its work force with up to 20 non-union workers at any time the number of bargaining unit members is 118 or greater; Article 9, which requires Respondent to offer vacant positions to qualified laid off employees; and Appendix A, which sets out the pay rates for each classification covered by the contract. Article 7(C) sets out the procedure to be followed when there is a reduction in force in any department or classification, including the order of layoff and the rights of laid off employees to bump.

The Transfer/Subcontracting of Bargaining Unit Work
And the Elimination of Unit Positions

Respondent's mayor is William Wilde. In 2007, Charging Party endorsed his opponent because it considered the other candidate to be pro-union and believed that his election would lead to improved wages and working conditions for its unit. Members of Charging Party volunteered to work on the opponent's campaign and Charging Party also contributed money. Other unions representing Respondent's employees, including the union representing fire fighters, endorsed Wilde. In 2009, Wilde ran unopposed.

After 2009, Respondent, like other Michigan municipalities, struggled with declining revenues. Sometime between October 2009 and February 2010, after being advised that it would have an operating deficit in its current fiscal year, Respondent decided not to fill ten vacant positions; it is not clear from the record whether some of all of these positions were in Charging Party's bargaining unit. In February 2010, it laid off ten employees in Charging Party's unit and negotiated the deferral of raises negotiated with its police and fire fighters. Despite these actions, it continued to have an operating deficit in its next fiscal year. Sometime in late 2010 or early 2011, Respondent negotiated an early retirement incentive with all of the unions representing its employees. Twenty-five members of Charging Party's unit accepted the incentive, as did fourteen members of the police department and twelve members of the fire department. Even after the early retirements, Respondent continued to eliminate positions through attrition as well as through the actions which are the subject of this charge. Charging Party's bargaining unit was disproportionately affected by the cuts. Between February 2010 and May 2012, the number of positions in Charging Party's unit dropped from 121 to 63.

In early 2010, Charging Party's unit included four job classifications in Respondent's Building Department: code enforcement officer, building inspector, plan examiner, and chief building inspector. At that time, the unit positions in the Building Department consisted of one code enforcement officer and four building inspectors. The building inspectors all held licenses issued by the State of Michigan. The Building Department was responsible for enforcement of Respondent's building code, which included construction plan review, building inspection, and zoning compliance inspection. This work has to be performed by licensed building inspectors. The Building Department was also responsible for handling other types of residential and commercial inspections that did not require a license. These included rental and home sale inspections, liquor license inspections, and animal and kennel license inspections. The department was also responsible for inspecting residential and commercial property for violations of City ordinances and for handling City ordinance complaints. The code enforcement officer was not a licensed building inspector and was paid approximately $2.00 less per hour than the building inspectors. The code enforcement officer was primarily responsible for ordinance enforcement, although he might be assisted in this function on occasion by one or more of the building inspectors.

In July 2010, one of the building inspectors, Rick Gowan, bid on and was awarded the vacant position of deputy director in Respondent's Community Development Department. Respondent is the recipient of a federal grant that funds housing rehabilitation in designated areas of the City, and the Community Development Department administers that grant. The deputy director supervises community development specialists and a clerical employee in the Community Development Department, and the position is part of a supervisory bargaining unit represented by the Westland Supervisory Association. Gowan's position in the Building Department was not filled after he left.

Sometime in July 2010, Respondent transferred responsibility for ordinance enforcement on commercial property to fire inspectors/fire marshals in the fire prevention division of its Fire Department. The employees who took over the work were certified fire fighters, but their normal assignment involved enforcement of the fire code. They did not answer emergency calls on a regular basis. At the time of this transfer, the Fire Department had never before had a role in enforcing ordinances other than the fire code, and commercial ordinance enforcement had been performed exclusively by employees in the Building Department represented by Charging Party.

Article 5 of the parties' agreement allows the filing of a grievance based on a violation of "past practice, law or the collective bargaining agreement." On July 29, 2010, Charging Party filed a grievance alleging that the transfer of the commercial ordinance enforcement work violated Article 13(F) of the contract, "purpose and intent" language in Article 1, and past practice. In its response to the grievance, Respondent asserted that under Article 10 it had the sole right to determine the work to be performed within the bargaining unit, and that Article 13(F) did not apply since the Fire Department employees who had been assigned the work did not supervise Charging Party's members. On August 10, Charging Party indicated its intent to arbitrate the grievance. On March 1, 2011, Theodore St. Antoine was selected by the parties as the arbitrator.

One of employees who accepted Respondent's early retirement incentive offer in early 2011 was Joseph Daugherty, the code enforcement officer. Daugherty's scheduled retirement date was July 31, 2011.

In late April 2011, Charging Party President John McNally, at that time a building inspector in the Building Department, found a flier attached to a vacant home that stated that the Fire Department would soon be responsible for residential ordinance enforcement. About a week later, the director of the Building Department confirmed that this was or would soon be the case. On April 25, 2011, Charging Party filed a grievance over the transfer of this work. The grievance alleged violations of the same contract provisions and past practice as the grievance it had previously filed over the transfer of commercial ordinance enforcement duties. The parties agreed to consolidate the two grievances and to permit St. Antoine to rule on both. An arbitration hearing was scheduled for July 26, 2011.

Sometime during the spring or early summer of 2011, McNally learned, from attending budget study sessions conducted by Respondent's City Council, that Respondent planned to eliminate the Building Department, to transfer the inspection of properties by building inspectors in the areas of the City covered by the federal grant to the Community Development Department, and to contract with a private company to perform other building inspections.

On or about June 13, 2011, Respondent sent Charging Party a 10-day notice, as required by the contract, that Respondent planned to lay off members of its unit. At Charging Party's request, the parties held a meeting on either that day or the next. Respondent confirmed that building inspection services were being subcontracted to a private contractor and that the Fire Department would be taking over residential ordinance enforcement. Respondent told Charging Party that it was eliminating four positions in its unit – the three building inspectors, the ordinance officer, and one full-time equipment operator in the Parks and Recreation Department. The three building inspectors, including McNally, and the equipment operator would be laid off and would be entitled to exercise their bumping rights under the contract. During this meeting, Charging Party asked for details about the cost-effectiveness of, and financial reasons for, the transfers/subcontracting of Building Department work. Respondent told Charging Party that it would not negotiate and that the transfers of work would take place as planned.

In her affidavit, Personnel Director King explained that the purpose of the restructuring was to maintain essential services to the greatest extent possible. King stated that since the beginning of the recession in 2008, building within the City, and Respondent's need for building inspectors, has significantly declined. Respondent discovered a number of private companies willing to provide building inspection services on a pay-per-service fee schedule, which met Respondent's needs. According to King, Respondent decided that the interests of its citizens were best served by eliminating Building Department positions and retaining more public safety positions. In his affidavit, Assistant Fire Chief Adams asserted that the code enforcement work was sufficiently similar to the work that the fire prevention division employees were already performing that the only additional training they needed to perform the new work was time to read the various residential and commercial codes. In addition, according to Adams, reassignment of the ordinance work to fire inspectors cut down on the number of inspections that had to be performed, since the fire inspectors could inspect for violations of other ordinances

while checking for fire code violations. It is not clear whether Respondent offered these explanations to Charging Party at their meeting in June 2011.

Sometime before August 1, 2011, the Building Department was eliminated, and employees of a private contractor began doing building inspections. Existing employees in the fire prevention division of the Fire Department became responsible for all ordinance enforcement, both residential and commercial, as well as enforcement of the fire codes; no new positions were added to that division. The code enforcement officer retired. The director of the Building Department, not a member of any bargaining unit, was laid off. Two of the three building inspectors, including McNally, exercised their right under Charging Party's contract to bump into other unit positions, but suffered a pay cut as a result. The individuals whom they bumped also suffered pay cuts when they bumped into lower paid positions, although no one in Charging Party's unit was laid off as result of this bumping.

The third building inspector, Raymond Parker, applied for and was awarded a vacant position as a community development specialist in the Community Development Department. In his new position, Parker is responsible for building inspections within the area covered by the housing rehabilitation grant, a duty not previously performed by community development specialists. He also performs duties performed by other community development specialists, including the preparation of rehabilitation plans, oversight of work performed by contractors doing rehabilitation work, and the inspection and oversight of buildings and grounds on properties within the scope of the grant. The position of community development specialist had been included in the bargaining unit represented by the Westland Supervisory Association, and Parker, therefore, became part of that bargaining unit when he assumed his new position.

As noted above, on April 29, 2011, Charging Party filed a grievance over the transfer of the residential ordinance enforcement work to the Fire Department. Charging Party did not file a grievance over the subcontracting of the building inspection duties or Parker's performance of building inspection work in his new position.

On October 10, 2011, St. Antoine issued an award denying the two grievances filed over the transfer of work to the Fire Department. The arbitrator noted that Article 10 expressly provided that the employer's rights include "work to be performed within the unit," and gave it the right to the "selection and direction of the working forces including the right to … assign… employees." He noted that this section also stated that the employer was not to "exercise these rights in conflict with the terms of the agreement," but concluded that Charging Party had not cited any contract provision that would restrict the employer's right to remove work from the bargaining unit. He also noted that the contract contained no "work preservation" clause or other similar limitation on the exercise of management's right to determine and assign work. The arbitrator concluded that the parties' agreement authorized the employer to assign the work as it did. He rejected Charging Party's past practice argument on the basis that while the work may have been exclusively performed by members of Charging Party's unit in the past, under the contract Respondent retained the basic right to reassign the work.

According to Charging Party, Respondent has announced plans to eliminate other positions in Charging Party's bargaining unit this year by subcontracting golf course

maintenance, the work performed by its Assessing Department, and work performed by its Department of Parks and Recreation. It has also announced plans to transfer a bargaining unit position in its Personnel Department to the supervisory unit.

Discussion and Conclusions of Law:

Waiver of Bargaining Rights, "Covered by the Contract," and Repudiation

In *Port Huron EA v Port Huron Area Sch Dist*, 452 Mich 309 (1996), the Supreme Court explained the difference between whether a subject is "covered by" a collective bargaining agreement and whether the right to bargain about a mandatory subject has been waived by the agreement as follows:

> A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter, but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.

As the Court explained, when parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules for themselves on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like. When a subject is "covered by" the contract, the details and enforceability of the agreement are generally left to arbitration. Accordingly, the Commission generally finds no breach of the duty to bargain when it concludes that the matter which is the subject of the charge is covered by an existing collective bargaining agreement. The exception is when the employer has "repudiated" the contract. Repudiation exists when no bona fide dispute over interpretation of the contract is involved, and the contract breach is substantial and has a significant impact on the bargaining unit. *Detroit Regional Convention Center*, 25 MPER 8 (2011)*; Plymouth-Canton Cmty Schs*, 1984 MERC Lab Op 894, 897. The Commission will find repudiation only when the action of a party amounts to a rewriting of the contract or a complete disregard for the contract as written. *Goodrich Area Sch*, 22 MPER 103 (2009); *City of Detroit (Dept of Transp)*, 19 MPER 34 (2006). The Commission will not find repudiation on the basis of an insubstantial or isolated breach. *Michigan State Univ*, 1997 MERC Lab Op 615, 618, 11 MPER 29012 (1997).

On the other hand, the parties may not have bargained a "set of rules" but the union may nevertheless have waived its right to bargain over a particular matter by language in the contract or through a past practice of permitting unilateral action. When a union waives its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, a waiver must be "clear and unmistakable." *Lansing Fire Fighters Union, Local 421 v City of Lansing*, 133 Mich App 56 (1984); *Southfield Police Officers Ass'n v City of Southfield*, 162 Mich App 729, 736 (1987). In determining whether a union has waived its rights to bargain, the Commission is not bound by an arbitrator's decision that the employer's action did not violate the contract. *Cedar Springs Pub Schs*, 1985 MERC Lab Op 1101, aff'd *Kent Co Ed Assoc v Cedar Springs Pub Schs*, 157 Mich App 59 (1987).

Respondent argues that it satisfied any duty it had to bargain over the actions which are the subject of this charge by negotiating provisions in the contract which gave it the unilateral right to reassign and subcontract work. It argues that it satisfied any duty it had to bargain over the impact of its actions by negotiating provisions governing layoffs and bumping rights.

The language which Respondent claims gave it the right to reassign work performed by Charging Party's bargaining unit to employees represented by the Westland Fire Fighter's Association and Westland Supervisory Association is contained in Article 10, the management's rights provision. Article 10(A)(3) specifically lists the right to determine "work to be performed within the unit" as a right reserved to Respondent, and Article 10(B) states that it is solely Respondent's responsibility to "assign … [and] relieve employees from duty because of lack of work." According to Respondent, these rights are limited only by requirement that the exercise of this right not conflict with any other term of the collective bargaining agreement.

Respondent's argument here is waiver, i.e., it argues that Charging Party has given up its right to bargain and ceded to Respondent full discretion to reassign bargaining unit work to employees in other units. The Commission has held that management right's language which gives the employer the right to "assign work" does not constitute a clear and unmistakable waiver of the union's right to bargain over the reassignment of its work *outside* the bargaining unit. See *Center Line School District*, 1982 MERC Lab Op 756; *City of Ishpeming*, 1985 MERC Lab Op 687. However, in this case the management's rights clause also explicitly gives Respondent the right to determine the "work to be performed *within* the unit." The corollary, of course, is that Respondent also has the right to determine what work will not be performed within the unit. I find that Article 10(A)(3) clearly indicates the parties' intent to allow Respondent to remove a function, such as code enforcement or building inspection, from Charging Party's unit and assign that function to employees in another unit. The presence of this explicit language distinguishes this case from the *Interurban Transit Partnership v Amalgamated Transit Union*, 2006 WL 27271, cited by the Charging Party.[1]

Charging Party argues that Respondent has no right under Article 10 to reassign unit work outside the unit when, as was the case here, the number of employees in its unit is less than eighty. However, Article 10 does not say this. Charging Party also argues that Respondent's exercise of its rights in this case conflicted with a list of other contract provisions. Among these are Article 13(F), which restricts supervisors from performing bargaining unit work, and Article 8(B), which gives Respondent the right to "supplement its workforce with non-union workers," but only when the bargaining unit consists of at least 118 employees. Both the fire prevention division employees who assumed responsibility for code enforcement and the Community Development Department positions who took over the building inspection work that was not subcontracted were classified as supervisors, and Charging Party's bargaining unit no longer has

[1] Charging Party asserts that the code enforcement officer position was transferred out of its unit "intact," without a change in job duties, and therefore should be restored to Charging Party's unit. An employer cannot lawfully take an existing position and, without changing its job duties, transfer it to another unit or declare it to be an unrepresented position. See, e.g., *City of Grand Rapids*, 19 MPER 69 (2006). In this case, however, the code enforcement officer position no longer exists; its duties have been combined with enforcement of the fire code and assigned to the fire inspectors responsible for the latter.

118 employees. However, after Respondent transferred all responsibility for code enforcement to the Fire Department, these duties were no longer "bargaining unit work." Moreover, Respondent neither "supplemented" its workforce in this case by adding positions nor assigned the work to "non-union" workers. I find no conflict between Respondent's exercise of its rights under Article 10(A)(3) and Articles 13(F), 8(B), 1, or 9, or the wage schedule for unit jobs contained in the appendix to the contract. I conclude, therefore, that Article 10(A)(3) clearly and unmistakably waived any right Charging Party had to bargain over the reassignment of the code enforcement and building inspection work that had been performed by its members to employees in other bargaining units. I recommend, therefore, that the Commission grant Respondent's motion and dismiss Charging Party's allegation that Respondent unlawfully refused to bargain over the reassignment of this work.

Respondent also asserts that Article 34 –and by reference Article 10 – gave it the right to unilaterally make the decision to subcontract building inspection work to the private contractor. Respondent's argument is that subcontracting is "covered by" the contract, i.e., the parties have already bargained over the circumstances under which Respondent may subcontract and have incorporated their agreement into the contract. The Commission has repeatedly held that an employer satisfies its obligation under PERA to bargain over a decision to subcontract by agreeing to a contract provision specifying the circumstances under which subcontracting may occur. *Village of Romeo*, 2000 MERC Lab Op 296, 301; *Central Mich Univ*, 1995 MERC Lab Op 113;*Village of Constantine*, 1991 MERC Lab Op 467 (no exceptions). While an employer's repudiation of a subcontracting clause may violate its duty to bargain, there is no repudiation, and no unfair labor practice, if the parties have a bona fide dispute over whether the clause permits the employer to subcontract the work under the circumstances of the case. *Village of Romeo,* at 298. In this case, a bona fide dispute between the parties clearly existed over whether Respondent was entitled under Article 34 and Article 10 to subcontract the building inspection work. This dispute encompassed, but was not limited to, the meaning of the phrase "deliberate attempt to erode the Bargaining Unit" in Article 34. I conclude that since subcontracting is a matter "covered by" the parties' contract, and the facts here do not indicate that Respondent repudiated the contract, Respondent's unilateral subcontracting of the building inspection work did not violate its duty to bargain. I recommend, therefore, that the Commission grant Respondent's motion and dismiss this allegation.

I also conclude that Respondent satisfied its duty to bargain over the impact on employees of its decisions to subcontract and reassign bargaining unit work by agreeing to Article 7(C) governing employee rights when unit positions are eliminated. I recommend, therefore, that the Commission grant Respondent's motion and dismiss the allegation that Respondent unlawfully refused to bargain over the impact of these decisions.

Finally, Charging Party alleges that Respondent's decision to ignore the numerous contract provisions that allegedly prohibited it from removing work from its unit constituted a repudiation of the parties' collective bargaining agreement. Charging Party points out that its bargaining unit is now "a shell of its former self" due to Respondent's actions over the last several years, including the subcontracting and transfers which are the subject of this case. It argues that if its charge is dismissed, Respondent will continue to ignore contract provisions such as Article 1, Article 8(B), Article 13(F) and Article 34(B), and "continue to chop entire

departments out of the recognition clause" by transferring and subcontracting work. However, as indicated in my discussion of the waiver issue above, I do not agree that any of the cited contract provisions prohibit Respondent from transferring functions previously performed by members of Charging Party's unit to positions in other bargaining units. I also find that the parties have a bona fide dispute over the interpretation of the subcontracting provision of their agreement, and that Respondent did not repudiate that provision or the contract. I recommend, therefore, that the Commission grant Respondent's motion and dismiss this allegation.

Unlawful Retaliation

Charging Party alleges that the reassignment and subcontracting of bargaining unit work in this case violated §§10(1)(a) and (c) of PERA because they constituted retaliation against bargaining unit employees for engaging in concerted protected activity under §9 of the Act. The alleged protected activity consisted of Charging Party's support of Mayor Wilde's opponent in his last contested election in 2007, including campaigning for the opponent and contributing money to his campaign.

Respondent asserts that the employees' support for Wilde's opponent in this election was not activity protected by §9, citing *Genesee Co Sheriff's Dept*, 18 MPER 4 (2005) and *Firestone Steel Products Co*, 244 NLRB 826 (1979). It also argues that even if this were considered protected activity, Charging Party has failed to allege facts sufficient for a *prima facie* case of unlawful discrimination.

The charge in *Genesee Co* involved numerous allegations of unlawful retaliation against sheriff's deputies for engaging in a variety of protected activities. One of these allegations was that the sheriff unlawfully reprimanded one deputy for taking bereavement leave because he had campaigned for the sheriff's opponents during the primary election. The ALJ found that this was not protected activity, but also concluded that even if it were, the charging parties had not met their burden of demonstrating that the campaigning was a cause of the reprimand. The Commission adopted this finding, and many of the other findings of the ALJ, without specifically discussing it.

In *Eastex, Inc v NLRB*, 437 US 556 (1978), the Supreme Court held that the phrase "mutual aid and protection," as it appears in §7 of the National Labor Relations Act (NLRA), 29 USC §150 et seq, encompasses actions that can be viewed as political. The Court noted in that case, at n 20, that there might be types of conduct or speech that were so purely political, or so remotely connected to the concerns of employees as employees, as to be beyond the protection of the clause, but that this determination should be made on a case-by-case basis. In *Firestone*, the National Labor Relations Board (NLRB) held that the distribution of political tracts supporting the election of candidates for various statewide offices did not relate to employee concerns or problems, and, therefore, was not activity for "mutual aid or protection."

However, I would not hold, on the strength of *Genesee Co Sheriff's Dept*, that public employees are not engaged in activity for "mutual aid and protection" under §9 of PERA when they concertedly seek to influence the outcome of an election for a member of their employer's governing body or other elected official with authority to make decisions directly impacting their

terms and conditions of employment. However, I conclude that even if the employees' support for Wilde's opponent constituted protected activity, the facts as asserted by Charging Party are not sufficient to survive a motion for summary disposition. These facts are as follows. (1) In 2007, Wilde's last contested election, Charging Party actively campaigned for Wilde's opponent, while other unions representing Respondent's employees supported Wilde. (2) Beginning in 2009, with the start of the recession, Respondent began eliminating positions. Charging Party's unit was disproportionately affected. (3) In February 2010, Respondent laid off ten employees in Charging Party's unit, but no employees in its other bargaining units. (4) In July 2011, Respondent transferred and subcontracted the work which is the subject of this charge. Employees in other bargaining units were again not affected. (5) Respondent subsequently announced plans to subcontract or transfer other work performed by Charging Party's bargaining unit.

In order to establish a prima facie case of discrimination under Section 10(1)(c) PERA, Charging Party must establish, in addition to an adverse employment action: (1) that the employee(s) engaged in union or other protected concerted activity; (2) that the employer had knowledge of that activity; (3) union animus or hostility towards the employees' protected activity; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory actions. *City of St Clair Shores,* 17 MPER 76 (2004). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *City of Grand Rapids (Fire Dept),* 1998 MERC Lab Op 703, citing *MERC v Detroit Symphony Orchestra,* 393 Mich 116, 126 (1974). In other words, Charging Party must present sufficient evidence to support an inference that the employees' protected activities were the cause, at least in part, of the adverse actions of which it complains in the charge. Once a prima facie is established, the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct, but the ultimate burden of showing unlawful motive remains with the Charging Party. *MESPA v Evart Public Schools*, 125 Mich App 71, 74 (1982); *City of Grand Rapids (Fire Dep't)* at 706; *Residential Systems Co,* 1991 MERC Lab Op 394, 405.

Charging Party has not asserted that Wilde expressed his hostility toward Charging Party in words. Rather, to support its claim that its support of Wilde's political opponent was a motivating cause of Respondent's decision to subcontract the building inspector work and transfer the other duties of the Building Department, Charging Party cites the fact that, since about 2009, Charging Party's unit has borne the brunt of Respondent's elimination of positions. However, this fact, by itself, is not sufficient to support an inference of unlawful motive. See, e.g., *Branch Co,* 1989 MERC Lab Op 642, in which the Commission, in a decision issued without exceptions, held that the fact that the employer laid off more employees in its Sheriff's Department than in any other department was not sufficient to demonstrate that the layoffs in that department were caused by the filing of a petition under 1969 PA Act 312 on behalf of these employees. Charging Party also argues that the proximity of the adverse action to the protected activity demonstrates that there was a connection between the two. However, the alleged protected activity took place in 2007, four years before the actions which are the subject of this charge, and there is no suggestion that Wilde attempted to retaliate against Charging Party's unit in any way until Respondent began eliminating jobs late 2009 or early 2010. I conclude that

Charging Party, in response to Respondent's motion to dismiss for failure to state a claim, failed to asserted facts which, if proved, would constitute a prima facie case of unlawful discrimination or to shift to Respondent the burden of producing evidence that it would have taken the same action even in the absence of the protected activity. That is, I find that what Charging Party has offered here is nothing more than "suspicion or surmise." I recommend, therefore, that the Commission grant Respondent's motion, and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____