STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB COUNTY (JUVENILE JUSTICE CENTER)
Public Employer - Respondent,

-and-

Case Nos. C07 F-119, C07 F-121, C07 F-123, C07 F-124, C07 F-125 & C07 F-131

UAW LOCAL 889,
Labor Organization - Charging Party.
_____/

APPEARANCES:

John A. Schapka, Assistant Corporation Counsel, Macomb County, for Respondent

Christina Peltier, for Charging Party

DECISION AND ORDER

On April 26, 2013, 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

_____
Nino E. Green, Commission Member

_____
Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MACOMB COUNTY (JUVENILE JUSTICE CENTER)
Public Employer-Respondent,

Case Nos. C07 F-119, C07 F-121, C07 F-123,
C07 F-124, C07 F-125 & C07 F-131

-and-

UAW LOCAL 889,
Labor Organization-Charging Party.
_____/

APPEARANCES:

John A. Schapka, Assistant Corporation Counsel, Macomb County, for Respondent

Christina Peltier, for UAW Local 889

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

The above charges, except for the charge in Case No. C07 F-131 which was filed on June 11, 2007, were all filed on June 6, 2007 with the Michigan Employment Relations Commission (the Commission) by UAW Local 889 against Macomb County. The charges allege that Respondent violated its duty to bargain in good faith, and §§10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(10) by unilaterally changing working conditions, refusing to bargain over these changes and/or their impact, and refusing to provide Local 889 with requested information relevant to pending grievances. The charges were filed on Local 889's behalf by Christina Peltier, then the unit chairperson for Local 889's bargaining unit of Respondent's employees at its Juvenile Justice Center (JJC). Local 889, through Peltier, also filed a charge, Case No. C07 F-122, alleging that Respondent had discriminated against Peltier because of her union activities in violation of §§10(1)(a) and (c) of PERA by issuing her a reprimand in March 2007. Pursuant to Section 16 of PERA, all these charges were consolidated and assigned for hearing to Administrative Law Judge Julia C. Stern, now assigned to the Michigan Administrative Hearing System.

No hearings had been held on these charges when in January 2008, after an election conducted by the Commission, Local 889 was replaced as the bargaining representative for the JJC unit by the Police Officers Association of Michigan (POAM). Peltier ceased to be a union officer and, in March 2008, she was discharged by Respondent. The POAM was served with a copy of the charges and notice of a pre-hearing conference that was held on March 15, 2008, but

did not attend the conference or otherwise indicate interest in the proceeding. On April 4, 2008, Local 889 President Thomas Wright submitted a letter authorizing Peltier to proceed with the pending charges on Local 889's behalf.

In June 2008, Peltier amended the charge in Case No. C07 F-122 to include additional allegations of unlawful interference and discrimination, including that she had been terminated for activities protected by PERA. I granted Peltier's request to replace Local 889 as the charging party in Case No. C07 F-122. I also severed that charge from the bargaining charges so that it could be heard first, and scheduled separate hearings for that charge and the charges alleging violations of the duty to bargain. On December 8, 2008, without objection from Charging Party, I adjourned the hearing on the bargaining charges without date so the hearing in Case No. C07 F-122 could be completed.

Peltier represented herself in Case No. C07 F-122. The fourteenth and final day of hearing in that case took place in September 2010. Before the hearings were completed, the POAM proceeded to arbitration on grievances filed by it over a fifteen day suspension issued to Peltier in January 2008 and over her discharge. The suspension and discharge were upheld by the arbitrator. On June 25, 2010, Peltier filed a charge, Case No CU10 F-023 against the POAM alleging that it breached its duty of fair representation in the handling of the arbitration. In December 2011, I issued a decision and recommended order recommending that the charge be dismissed in its entirety. Peltier filed exceptions to my decision with the Commission, and the exceptions remain pending. The charge filed against the POAM, also assigned to me, is being held in abeyance pending a decision by the Commission on Peltier's exceptions.

The bargaining charges were still adjourned without date on October 12, 2012, when Peltier requested that they be rescheduled for hearing. At a pre-trial conference held on November 30, 2012, Respondent indicated its intention to file a motion for summary disposition on the grounds that the charges were moot. Respondent's motion, filed on February 4, 2013, was accompanied by documents and an affidavit signed by the JJC's assistant director, Mark Emerick. In addition to asserting that the charges are moot, Respondent argues that Charging Party lacks standing to pursue the charge because it is no longer the bargaining agent. On April 8, 2013, Peltier, on Charging Party's behalf, filed a response in opposition to the motion.

Based on facts set forth in the charges and in Peltier's pleadings and other facts not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges, Respondent's Motion, and Charging Party's Response:

Case No. C07 F-119

The charge in Case No. C07 F-119 alleges that on or about January 1, 2007, Respondent unilaterally altered existing terms and conditions of employment as established by past practice by implementing a policy allowing employees at the JJC to be involuntarily transferred to another shift without regard to seniority. While the contract between Local 889 and Respondent was silent on the issue, Charging Party alleged that the parties' practice for more than fifteen

years had been that shift transfers would be made based on requests made by employees. If no one requested a transfer and an involuntary transfer was necessary to fill a vacancy, seniority was considered the "key factor" in determining who would be transferred. Among the employees affected by the new policy was an employee with a diagnosed sleep disorder who was involuntarily transferred from the afternoon shift to the day shift. This employee was later discharged for excessive tardiness. Peltier filed a grievance over the employee's transfer and, on or about January 24, 2007, requested copies of employee shift transfer requests made about this time. She did not receive the information she requested.

As noted above, Respondent asserts that Charging Party lacks standing to pursue any of these bargaining charges. It argues that Charging Party is not a party in interest because it does not represent current employees and has no right to bargain on their behalf. Respondent also asserts that the charge in Case No. C07 F-119 is moot because Respondent and the POAM subsequently negotiated and reached agreement on the issue of involuntary transfers. Respondent attached to its motion Article 17 of its most recent collective bargaining agreement with the POAM, covering the period January 1, 2012 through December 31, 2013. Article 17 of that agreement specifically provides that if no interest is expressed by any employee in a shift opening, the opening shall be filled at the JJC director's discretion from among employees in the bottom 75% of the seniority list. Respondent points out that any order requiring it to reinstate the status quo prior to January 2007 would conflict with this contract provision. It also argues that because the employee with the sleep disorder has not been employed by Respondent for many years, an adjudication of the bargaining issue for the purpose of vindicating his rights would not be appropriate or meaningful.

Charging Party asserts that it does have standing to pursue charges filed while it was still the bargaining representative, even if the change in representative means that the remedy could not include a bargaining order. In fact, it asserts that it has an obligation to pursue these charges, citing *Quinn v Police Officers Labor Council,* 456 Mich 478 (1998), in which the Michigan Supreme Court held that a union that filed grievances prior to being replaced as bargaining representative has a duty to process these grievances to their completion. Charging Party also disagrees with the Respondent that the charge is moot, pointing out the employee with the sleep disorder was discharged for tardiness after being involuntarily transferred to a different shift. It also asserts that other unidentified employees may have been affected by the alleged change in the policy.

C07 F-121

The charge in Case No. C07 F-121 alleges that on February 1, 2007, Respondent violated its duty to bargain by unilaterally creating a new temporary bargaining unit position/assignment, Recreation Coordinator. Local 889, through Peltier, requested to bargain over the creation of the new position when it was announced in January 2007. It also demanded to bargain over the impact on employees, which was that assigning youth specialists these new duties and removing them from their regular duties increased involuntary overtime in the rest of the unit.

Respondent maintains that the charge is moot because the position/assignment of Recreation Coordinator has not existed since 2008. According to Emerick's affidavit, the

planning and coordination of recreational activities for youths in their care has always been part of the job responsibilities of youth specialists at the JJC. In early 2007, the JJC decided to assign all responsibility for coordinating recreation activities to two youth specialists. However, this distribution of tasks lasted less than one year, and the JJC has no plans to reinstate it in the future. Therefore, Respondent argues, there is now nothing to bargain over. Charging Party, however, argues that the charge is not moot because the broader issue as to whether an employer may create a new position and make appointments to those positions without bargaining remains unresolved, citing *City of Flint*, 22 MPER 107 (2009). According to Charging Party, since Respondent argued in 2007 that it had no duty to bargain over this issue, the charge is not moot because the action constituting the unfair labor practice is capable of being repeated.

C07 F-123

The charge in Case No. C07 F-123 alleges that on February 2, 2007, Respondent unilaterally changed working conditions by announcing changes to its written attendance policy in an email to members of the bargaining unit. Charging Party, through Peltier, objected to the changes. It also asserted that Local 889 had no obligation to bargain over a new attendance policy until its contract expired later that year. The charge asserts that Respondent violated its duty to bargain in good faith by inviting all union representatives to a meeting to discuss the new policy and unilaterally implementing changes to the policy on August 27, 2007.

Respondent asserts that the charge is moot because, through the POAM's acquiescence, the attendance policy implemented in August 2007 has become an existing term and condition of employment. According to Emerick's affidavit, the attendance policy implemented in August 2007 has been in effect and applied continuously since that time. According to Emerick, while Respondent has negotiated several collective bargaining agreements with the POAM, the POAM has not objected to the attendance policy or sought to make it an issue in contract negotiations. Respondent asserts that an order to Respondent to restore the status quo as it existed prior to the implementation of the attendance policy in 2007 and/or bargain with the POAM over this issue would violate the tacit agreement between Respondent and the current bargaining agent. Charging Party notes that Respondent has not provided any direct evidence that the POAM agrees with the current policy. It also argues that, like the creation of a new position, the issue presented by the charge is not moot because the action constituting the unfair labor practice – the unilateral implementation of a new attendance policy – is capable of being repeated.

C07 F-124

The charge in Case No. C07 F-124 alleges that in April or May 2007, Respondent unilaterally changed working conditions by creating another new temporary bargaining unit position/assignment, ACA Support Staff. On May 23, 2007, Peltier, on behalf of Local 889, demanded to bargain over the creation of the new position, and subsequently attempted, without success, to discuss with Respondent the impact of the new position/assignment on the unit. Local 889 objected to the new assignment for the same reason it objected to the creation of the Recreation Coordinator position/assignment, i.e., it allegedly increased involuntary overtime in the rest of the unit.

Respondent asserts that the charge is moot because, like the Recreation Coordinator position/assignment, the ACA Support Staff position/assignment no longer exists. According to Emerick's affidavit, in early 2007, Respondent decided to seek accreditation for the JJC from the American Correctional Association (ACA). Before becoming accredited, the JJC had to demonstrate compliance with over 700 hundred ACA policies. To provide administrators with assistance from knowledgeable frontline staff, the JJC assigned the second most senior youth specialist to work full-time on this project on a temporary basis. The project proved too expensive, and it, and the ACA Support Staff assignment, ended in less than a year. The JJC has not made efforts to become accredited since that time, and has no plans to do so. As with the charge in Case No. C07 F-121, Respondent asserts that there is now nothing to bargain about. Charging Party argues that the charge should proceed to hearing for the same reasons as the charge in Case No. C07 F-121, because the act constituting the unfair labor practice is capable of being repeated and the broader issue of Respondent's right to unilaterally create new unit positions is unresolved.

C07 F-125

The charge in Case No. C07 F-125 alleges that on or about May 15, 2007, Respondent unilaterally changed an established past practice by requiring youth specialists to attend mandatory training outside of their normal working hours. In May 2007, Respondent began requiring youth specialists to attend training sessions on their scheduled days off, paying them overtime for the time. When Charging Party objected, Respondent contended that it was not obligated to bargain over this action because the collective bargaining agreement gave it the right to mandate overtime. Charging Party alleges that requiring employees to attend training on overtime violated both past practice and an explicit agreement reached with Local 889 in 2004 that all required training for youth specialists would be conducted during their normal working hours.

Respondent asserts that the charge in C07 F-125 is moot because the monthly mandatory shift meetings which were the subject of this charge were discontinued sometime in 2010. It also argues that since the POAM had an opportunity to make these meetings a subject of bargaining in contract negotiations, but did not do so, the POAM tacitly acquiesced to the continuation of the practice. Charging Party asserts that the charge is not moot because whether Charging Party waived its right to bargain over the scheduling of the meetings, like the other issues discussed above, remains unresolved.

C07 F-131

The charge in Case No. C07 F-131 alleges that Respondent failed to provide Local 889 with information relevant to pending grievances that it requested in letters dated on or about March 22, April 6, April 11, and May 27, 2007. According to Charging Party's pleadings, the first two requests which were for "information regarding an investigation involving R. Redlowsk." The April 11 request was for information relevant to a grievance filed over tuberculosis testing policies. The pleadings also assert that Respondent failed and refused to supply information regarding the Recreational Coordinator and ACA positions, although they do not give the dates that this information was requested. In its pleadings, Charging Party also

alleges that Respondent failed to provide information requested on August 16 and October 24, 2007 pertaining to a reprimand issued to Peltier and her personnel file.

Respondent attached to its motion for summary documents indicating that it asked for more clarification of an information request made by Charging Party on April 11, 2007, but did not receive a response, and that it provided Charging Party with information Charging Party requested on May 27, 2007 pertaining to a disciplinary action issued to one of its members. Although unable to state that it replied to all of the requests made by Charging Party during this period, Respondent asserts that these matters became moot with the conclusion of the referenced grievances. Charging Party argues that despite the fact that it is no longer the bargaining representative and that a remedy may no longer be appropriate, the Commission has an obligation to see that justice is served. It argues that the Commission should make a finding that Respondent violated its duty to provide the information and issue a cease and desist order and whatever other remedy it should find appropriate.

Discussion and Conclusions of Law:

Respondent has not cited any cases holding that an unfair labor practice charge alleging a violation of the employer's bargaining duty must be dismissed for lack of standing if the charging party union loses its status as bargaining representative while the charge is pending, and I am not aware of any. However, I conclude that the fact that the Commission is precluded from ordering an employer to bargain with a union that has lost its representative status must be considered in any determination of whether the charge has become moot.

A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Powell v McCormack*, 395 U.S. 486, 496, 89 (1969). *Los Angeles County v Davis,* 440 US 625, 631 (1979). As the Supreme Court said in *Davis,* as a general rule, the voluntary cessation of allegedly illegal conduct does not make a case moot. However, when there is no reasonable expectation that the alleged violation will reoccur, and interim relief or events have completely eradicated the effects of the alleged violation, a case can be said to be moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact or law. As the Commission held in *Detroit Pub Schs,* 24 MPER 58 (2012), an issue is moot if an event has occurred that renders it impossible for a court to grant relief, citing *City of Warren v Detroit,* 261 Mich App 165, 166, n 1, or if a judgment on an issue cannot have a practical legal effect on an existing controversy, citing *People v Richmond,* 486 Mich 29, 34-35 (2010).

Even if an issue is technically moot, however, dismissal of an unfair labor practice charge may not be warranted. As the Commission stated in *Wayne State Univ,* 1991 MERC Lab Op 496; 4 MPER 22082 (1991).

> The defense of mootness is not an uncommon one; frequently, in labor relations, the parties' underlying disputes are resolved before the legal issues can be joined and decided in the legal forum. However, we have held that, where the statutory issues are of sufficient importance, resolution of the specific underlying dispute

between the parties does not require granting a motion to dismiss for mootness, even if the employer voluntarily corrects its course of conduct.

In *Detroit Pub Schs*, the Commission refused to dismiss as moot an allegation that the employer refused to provide a union with relevant information, stating:

> We acknowledge that Charging Party's need for the previously requested information is diminished and is now moot. However, if we were to ignore Charging Party's claim merely because it has little practical value today, we could unwittingly encourage similar misconduct to reoccur. We decline to encourage parties to ignore legitimate information requests where the need for the sought after material would become moot before intervention can be obtained from this commission. Consequently, we concur with the ALJ that a bargaining violation occurred from Respondent's failure to honor Charging Party's information request of January 22, 2009.

See also *City of Flint*, 22 MPER 107 (2009), where the Commission refused to dismiss as moot a charge alleging that the employer unlawfully created several new nonunit positions doing unit work, even though the positions had been abolished by the time the case reached the commission. In that case, the charging parties represented bargaining units of supervisory police officers with the ranks of sergeant, lieutenant and captain. The collective bargaining agreements for these units included detailed procedures for promotion to the next highest rank, including the nonunit position/rank of deputy chief. The charge was filed after the police chief created five new nonunit supervisory positions with salaries between that of a sergeant and captain, assigned them "ranks" not previously used in the department, and personally selected individuals formerly employed as nonsupervisory patrol officers to fill the new positions. The Commission noted that while the new positions no longer existed, the issue of the employer's right to establish supervisory police positions outside the unit and make unilateral appointments to these positions had not been resolved. [1]

In Case Nos. C07 F-119 and C07 F-123, Charging Party alleges that Respondent violated its duty to bargain by unilaterally implementing a new shift transfer policy and new work rules relating to attendance. It is well established that work rules are a mandatory subject of bargaining, and, in the absence of a contractual waiver or an established past practice of permitting the employer to unilaterally establish work rules, an employer has a duty to bargain over changes in work rules that may lead to discipline. *City of Detroit*, 19 MPER 70 (2006); *Amalgamated Transit Union v SEMTA*, 437 Mich 441 (1991). Policies for selecting employees for involuntary shift transfer are also a well-established mandatory subject over which an employer must bargain unless the union has waived its rights. *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006) (elimination of seniority as a consideration when selecting employees for involuntary transfers); *Industrial Lechera de Puerto Rico (Indulac, Inc.)*, 344 NLRB 1075 (2005) (transfer from one shift to another).

[1] In *City of Flint v Police Officers Labor Council*, in an unpublished opinion appearing at 24 MPER 23(2011), the Court of Appeals reversed the Commission's finding that the employer violated its duty to bargain and held that the charges should have been dismissed under the arbitration provisions in the contract. However, it agreed with the Commission that the charges were not moot.

In the instant case, however, Respondent and the POAM, Local 889's successor, have negotiated several collective bargaining agreements since the alleged unilateral changes occurred in 2007. The POAM, therefore, has had the opportunity to present contract proposals to undo the changes made by Respondent before POAM became the bargaining representative. In fact, Respondent and the POAM have agreed to contract language covering involuntary transfers, while the POAM has not sought to bargain over the attendance policy. Under these circumstances, I find, there is no practical remedy for the alleged violations. Respondent cannot be ordered to bargain with Charging Party, since it no longer represents the bargaining unit. An order by the Commission requiring Respondent to restore the status quo as it existed prior to the 2007 changes and bargain with the POAM over these issues would also be improper, since Respondent has already satisfied its obligation to bargain with that labor organization over these issues. Both the change in the bargaining representative and the passage of time since that change occurred has diminished the significance of an order to cease and desist and a notice to employees that their employer violated the Act. The strongest argument for allowing the charge to go to hearing is that there may be employees who were adversely affected by the changes to the shift transfer and attendance policies. However, the possibility of identifying these employees after five years seems remote. I also find that neither the significance of the issues raised nor the possibility that dismissal of the charges would encourage employers to ignore their bargaining duties justifies the expense and effort that litigation of these issues would require after this much time has elapsed. I conclude, therefore that Respondent's motion should be granted and these charges dismissed as moot.

In Case Nos. C07 F-121 and C07 F-124, Charging Party alleges that Respondent unlawfully refused to bargain over the creation two new bargaining unit positions/assignments and the impact of their creation on the unit. Under PERA, an employer does not have a duty to bargain over alterations of work tasks or changes in day to day work assignments within the unit unless the newly assigned duties substantially change the nature of the job, although the employer is required to bargain, on demand, over the impact of these changes on employees. *City of St. Joseph*, 1996 MERC Lab Op 274, 275; *Suttons Bay Schs*, 1979 MERC Lab Op 302, 207 (no exceptions); *Charlotte Sch Dist*, 1996 MERC Lab Op 193, 201-203 (no exceptions). Cf *Oakland Univ*, 1994 MERC Lab Op 540, 543. For example, in *Grand Rapids Fire Dept*, 1997 MERC Lab Op 69, 78-79 (no exceptions), the Commission held that the employer was not required to give the union advance notice and an opportunity to bargain over the assignment of bargaining unit members to become certified instructors in certain specialty training areas, and that the employer's only obligation was to discuss with the union, after an appropriate request, concerns such as safety and extra compensation for the assignment. In *City of Pontiac (Police Dept)*, 1997 MERC Lab Op 201, (no exceptions), the Commission held that an employer did not have a duty to bargain with the union before creating a "walking beat" assignment within the patrol officers' bargaining unit. The Commission has also held that the creation of a new position within the bargaining unit is not a mandatory subject of bargaining, although the employer must bargain over the wages, hours, and working conditions of the new position after the position is created. *City* of *Hamtramck*, 1985 MERC Lab Op 1123, 1125; *City of Dearborn*,1975 MERC Lab Op 225,233 (no exceptions); *City of River Rouge*, 1976 MERC Lab Op 664, 668 (no exceptions). In this case, Respondent may have had an obligation to bargain with Charging Party on the impact of the creation of the new positions/assignments on the rest of

the bargaining unit. Since the positions/assignments no longer exist, however, an order requiring Respondent to bargain with the POAM over the impact of these assignments would be pointless. As with the charges in Case Nos. C07 F-119 and C07 F-123, I find nothing here that would justify the expense and effort of litigating these charges after so much time has elapsed.

I reach a similar conclusion with respect to the remaining two charges, Case No. C07 F-125 and C07 F-131. The issue in C07 F-125 was whether provisions in the collective bargaining agreement between Respondent and Charging Party in 2007 dealing with mandatory overtime gave Respondent the right to require employees to attend training sessions on their scheduled days off, despite an earlier agreement with Local 889 that it would not do so. These training sessions are no longer being held, and the collective bargaining agreement on which Respondent relied has expired and has been replaced by a series of contracts between Respondent and the employees' new bargaining representative. In Case No. C07 F-131, the grievances for which Charging Party sought information have been dropped or resolved. Neither of these charges raise significant questions of law. I find the possibility that dismissal of the charges under the circumstances of this case would encourage employers to ignore their bargaining obligations to be remote. As with the other charges discussed above, I find nothing that would justify the expense and effort of litigating the alleged violations more than five years after they occurred. I recommend, therefore, that the Commission grant Respondent's motion to dismiss all the charges as moot, and that it issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____