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

In the Matter of:

OAKLAND COUNTY,
Public Employer-Respondent,

Case No. C12 J-209
-and- Docket No. 12-001762-MERC

OAKLAND COUNTY EMPLOYEES UNION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Butzel Long, P.C., by Malcolm D. Brown, for Respondent

Soma & Soma, by Edward J. Soma, for Charging Party

## DECISION AND ORDER

On February 11, 2014, Administrative Law Judge Julia C. Stern issued a 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

___/s/_____
Edward D. Callaghan, Commission Chair

___/s/_____
Robert S. LaBrant, Commission Member

____/s/_____
Natalie P. Yaw, Commission Member

Dated: April 18, 2014

**STATE OF MICHIGAN**
**MICHIGAN ADMINISTRATIVE HEARING SYSTEM**
**EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

OAKLAND COUNTY,
Public Employer-Respondent,

Case No. C12 J-209
Docket No. 12-001762-MERC

-and-

OAKLAND COUNTY EMPLOYEES UNION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Butzel Long, P.C., by Malcom Brown, for Respondent

Soma & Soma, by Edward Soma, for Charging Party

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

On October 29, 2012, the Oakland County Employees Union filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against Oakland County alleging that Respondent violated §§10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern from the Michigan Administrative Hearing System.

The Unfair Labor Practice Charge and Motion for Summary Disposition:

Charging Party represents a bargaining unit of Respondent's employees which includes nonsupervisory field employees employed by Respondent's Water Resources Commissioner's Office (WRC). The WRC is responsible for water, waste water, and sewage management and operations in Oakland County. Charging Party's bargaining unit includes employees in 19 operational units within the WRC, including the sewer maintenance unit. In October 2012, Respondent began designating one off-duty sewer maintenance employee as a second, or alternate, on-call employee. During the 24-hour period that he or she is designated as the alternate on-call, the sewer maintenance employee must be available to respond to emergency calls. However, he or she is not compensated unless actually called in to work. The charge alleges that Respondent's unilateral implementation of an unpaid alternate on-call in the sewer maintenance unit violated its duty to bargain in good faith.

On January 28, 2013, Respondent filed a motion for summary disposition asserting that the charge fails to state a claim under PERA because: (1) the subject of the alleged unilateral change is covered by the parties' collective bargaining agreement, and the parties' dispute is merely a good faith dispute over the interpretation of that agreement; and (2) the parties did, in fact, bargain over the action which is the subject of the charge. The motion also asserts that the charge was untimely under §16(a) of PERA because the alleged unilateral change was first implemented in 2003 or 2004. Charging Party filed a response in opposition to the motion on March 11, 2013 in which it asserts: (1) that the unilateral change constituted a mid-term modification to the collective bargaining agreement; (2) Respondent did not negotiate in good faith, and, in any case, violated its duty to bargain by modifying the contract during its term without Charging Party's agreement; and (3) the charge was filed less than 30 days after Respondent announced the change. Respondent then requested oral argument, which was held on July 17, 2013.

Based on facts set forth in the charge and Charging Party's response in opposition to the motion, and on facts set forth in affidavits and documents attached to Respondent's motion and not disputed by Charging Party, I make the following conclusions of law and recommend that the Commission issue the following order.

Facts:

Each operational unit within the WRC maintains a separate call-out list of field employees. If an emergency arises within the unit, or in the case of a more general emergency, off-duty employees are called in to respond to the emergency. Except as discussed below, however, off-duty field employees are not required to make themselves available to respond to emergency calls.

Some operational units in the WRC, including the water maintenance unit, the pump maintenance unit, and the sewer maintenance unit, receive emergency calls on a regular basis. Each of these units has long designated one off-duty employee, on a rotating basis, to respond to emergencies occurring during non-working hours. In 1986, the parties entered into the following letter of agreement (LOA). The LOA, which has been incorporated into all the parties' subsequent collective bargaining agreements, does not contain an expiration date:

> The parties agree that represented employees of the Oakland County Sewer, Water and Solid Waste Division who are designated as "On-Call" during certain non-working hours shall be compensated by receiving 1 and ½ hours pay at the overtime rate for each day they have the "On-Call" designation. Employees "On-Call" on holidays shall be compensated by receiving 2 hours pay at the overtime rate for each holiday designated.

> "On-Call" is defined as being available to respond to an emergency during non-working hours. The employee will carry a beeper and is expected to be within a reasonable distance of his home, his County provided vehicle, tools, and two-way radio.
>
> Should the employee be called to respond to an emergency, the employee would be compensated for the "call-in" as set forth in the collective bargaining agreement.

In addition to receiving the on-call pay referenced in the 1986 LOA, the on-call was permitted to take a County vehicle home with him or her. If the on-call employee needed assistance with a repair, or if another emergency occurred while the on-call was already responding to a call, the dispatcher called another off-duty employee using the unit's call-out list. However, employees, other than the designated on-call, were not required to accept the assignment. In the event that the on-call required assistance and no other employee was available or accepted the assignment, a supervisor was called in to perform the repair.

This was the situation in all the WRC's operational units until sometime in the spring of 2003, when the water maintenance unit instituted a second, or alternate, on-call system. Like the so-called "primary" on-call, the alternate on-call was required to be available to respond to all emergency calls over a 24-hour period and could not refuse a call-out. The alternate on-call was not called unless the primary on-call needed assistance or a second emergency occurred while the primary on-call was responding to an emergency. Although the alternate on-call in the water maintenance unit, like the primary on-call, was allowed to take a County vehicle home, the alternate on-call did not receive any pay for the time he or she was on call unless actually called in to work.

Charging Party did not file a grievance or unfair labor practice charge over Respondent's institution of an unpaid alternate on-call in the water maintenance unit. In 2004, the job description for field employees in the water maintenance unit was revised to reflect that they could be required to be "assigned On-Call and/or On-Call alternate."

In August 2004, the pump maintenance unit in the WRC also began designating one employee as the alternate on-call for every 24-hour period. Like the alternate on-call in the water maintenance unit, the alternate on-call was required to be available to respond to emergency calls and was required to accept assignments when the primary on-call needed help or was busy. Like the alternate on-call in the water maintenance unit, the alternate on-call in the pump maintenance unit did not receive on-call pay, but was allowed to take a County vehicle home. Charging Party did not file a grievance or unfair labor practice charge over Respondent's institution of an unpaid alternate on-call in the pump maintenance unit.

On September 30, 2005, the parties' collective bargaining agreement expired. During negotiations for a successor agreement, Charging Party made a proposal to increase the on-call rate as set forth in the 1986 LOA. However, there was no discussion during negotiations regarding application of the LOA to the alternate on-calls in the water and pump maintenance units. In September 2006, while the negotiations for the new contract were still taking place,

Charging Party filed a class action grievance seeking compensation for the alternate on-calls at the rates set forth in the LOA. Charging Party, however, did not pursue the grievance and, pursuant to language in the grievance procedure, it was considered dropped. In January 2007, the parties reached agreement on a new collective bargaining agreement with an expiration date of September 30, 2012. The new agreement did not include any changes to the LOA or mention of alternate on-calls. The agreement was ratified and became binding in March 2007.

Effective July 1, 2011, the pump maintenance unit established another alternate on-call designation, this time specifically for grinder pump breakdowns. The employee designated as the grinder pump alternate on-call was required to respond to grinder pump emergencies if the primary on-call needed assistance with a grinder pump breakdown or if there was a grinder pump breakdown while the primary on-call was responding to another call. The other alternate on-call was the backup response for other types of pump emergencies. Both alternates were required to be available to respond to calls, but did not receive on-call pay.

In late July 2011, a pump maintenance unit employee filed a grievance asserting that he was entitled to receive on-call pay under the 1986 LOA when he was designated as the grinder pump alternate. The grievance was arbitrated and denied by the arbitrator in a written opinion issued on August 3, 2012. The arbitrator acknowledged that because the category of on-call alternate did not exist in 1986, the parties could not have intended at that time that the pay requirement apply – or presumably, not apply – to alternate on-calls. However, he found that the 1986 LOA was arguably ambiguous because its second paragraph acknowledged Respondent's right to *designate* on-call employees, while the third paragraph defined on-call employees as employees *available* to respond to an emergency during non-working hours. He concluded that because the 1986 LOA was ambiguous, the parties' practice regarding the application of the language was pertinent. He noted that the past practice had been not to compensate alternate on-call employees, even though they were required to carry a phone or beeper, be in reasonable distance of home, and be able to respond timely to an emergency. He also concluded that under the language of the contractual grievance procedure, he was precluded by Charging Party's decision not to proceed with the 2006 grievance from granting the 2011 grievance.

In August 2012, the parties began negotiations for a new collective bargaining agreement. On October 4, 2012, while negotiations were still in progress, the sewer maintenance unit issued a memorandum to unit employees, with a copy to Charging Party, announcing the implementation of an alternate on-call in the sewer maintenance unit. During a meeting between sewer maintenance employees and Respondent's representatives on or about that same date, Charging Party President Steve Schell demanded that the sewer maintenance alternate on-call receive on-call pay. Schell was told that Respondent had prevailed in the arbitration over the grinder pump alternate and intended to use the same system in the sewer maintenance unit.

On October 29, 2012, Charging Party filed the instant unfair labor practice. On November 1, 2012, the parties reached a tentative agreement on a new collective bargaining agreement expiring in November 2015. The tentative agreement, which was ratified by both parties, did not include any changes to the 1986 LOA or any specific mention of alternate on-calls.

Discussion and Conclusions of Law:

As noted above, Respondent asserts that the charge should be dismissed as untimely because the alleged unilateral change was first implemented in 2003 or 2004. Under §16(a) of PERA, an unfair labor practice charge that is filed more than six months after the commission of the alleged unfair labor practice is untimely. In the instant case, the alleged unfair labor practice was the announcement by the WRC's sewer maintenance unit, on October 4, 2012, that an alternate on-call system would be implemented in that unit. Respondent and Charging Party disagree over whether this, in fact, constituted a change in an existing term or condition of employment for the bargaining unit. However, the charge was clearly filed within six months of the act constituting the alleged unfair labor practice. I find that the charge was not untimely under §16(a) and dismissal on these grounds would not be appropriate.

Charging Party alleges that Respondent's implementation of an unpaid alternate on-call system in the sewer maintenance unit constituted an unlawful mid-term modification of the LOA. It points out that the LOA makes no distinction between a "primary" and "alternate" on-call, and asserts that the LOA on its face unambiguously requires Respondent to pay on-call pay to any off-duty unit employee required by Respondent to be available to respond to an emergency as defined in the LOA. As noted above, Respondent argues that the parties' dispute over whether the LOA requires on-call pay for the alternate is merely a contract dispute.

The Michigan Supreme Court, in *Port Huron EA v Port Huron Area Sch Dist*, 452 Mich 309, 317-318 (1996), addressed the interaction between arbitration and the Commission's role in enforcing the duty to bargain under PERA. The Supreme Court noted that an employer can fulfill its statutory duty to bargain by bargaining about a subject and memorializing resolution of that subject in the collective bargaining agreement. It stated that when parties negotiate for a provision in the collective bargaining agreement that fixes the parties' rights, they foreclose further mandatory bargaining because the matter is "covered by" the agreement. In *Port Huron*, at 321, the Court held that in reviewing an agreement for any PERA violation, the Commission's initial responsibility is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

Thereafter, in *St Clair Intermediate School Dist v Intermediate Educ Association/Michigan Educ Ass'n,* 458 Mich 540, 563-568 (1998), the Supreme Court affirmed that under PERA, as under the National Labor Relations Act, (NLRA), 29 USC §150, a mid-term modification of a collective bargaining agreement by either party without negotiation and agreement by the other party constitutes a violation of a party's duty to bargain in good faith and an unfair labor practice. In doing so, the Court, at 567, cited *Port Huron* for the principle that when a matter is "covered by" a collective bargaining agreement, the parties have created a set of enforceable rules for themselves.

On June 12, 2013, between the date the motion for summary disposition was filed and the date of oral argument on July 17, the Supreme Court issued its decision in *Macomb County v AFSCME Council 25,* 494 Mich 65 (2013). Like *Port Huron, Macomb County* addressed the

interaction between arbitration and the Commission's role in enforcing the obligation to bargain under PERA. During oral argument in the instant case, Respondent drew my attention to several statements made by the *Macomb* Court in support of Respondent's argument that Charging Party has failed to state a claim because the issue of on-call pay is "covered by" a collective bargaining agreement. These were, first, the *Macomb* decision's reiteration, at 70, of the statement made in *Port Huron* that if a term or condition in dispute is covered by the collective bargaining agreement, the details and enforceability of the provision are left to arbitration. Second, Respondent pointed out that the *Macomb* Court "reaffirmed," at 81, that when the parties have agreed to a separate grievance or arbitration process, the Commission's review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim. Finally, Respondent quoted the *Macomb* Court's statement, at 81, as follows:

> Because arbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations, doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute. The arbitrator, not the MERC, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment.

In *Macomb,* the Supreme Court overturned the Commission's holding that an employer's unilateral change in the mortality table used to calculate optional joint and survivor pension benefits constituted an unfair labor practice because of the parties' tacit agreement to use a different table over a succession of collective bargaining agreements, despite the existence of a dispute over whether use of this mortality table conflicted with language in the retirement ordinance incorporated into the collective bargaining agreements. The Supreme Court concluded that the language in the ordinance unambiguously conflicted with the past practice. Accordingly, it held that the Commission's finding that the parties' "tacit" agreement to use the mortality table amended the language of the ordinance/contract was not consistent with the Court's holding in *Port Huron,* at 312, that when there is an unambiguous provision in a collective bargaining agreement, a charging party must show that the parties had a "meeting of the minds" on an agreement to modify the contract language.

The charging parties in *Macomb* did not allege that change in the mortality table constituted an unlawful mid-term modification to their contracts. Nor was there any discussion by the *Macomb* Court of the *St Clair Intermediate Sch Dist* case or whether the Commission has the authority to find an unfair labor practice based on an employer's mid-term modification of a provision in a collective bargaining agreement without the agreement of the union. Given the absence of any discussion by the *Macomb* Court of this issue, I will not infer, from the excerpts from the decision quoted above, that the Supreme Court meant to preclude the Commission, under appropriate circumstances, from finding that an employer has committed an unfair labor practice by modifying (or repudiating) a term of its collective bargaining agreement, even though the subject of the modification or repudiation is clearly "covered by" the agreement and the agreement contains a provision for binding arbitration.

In the instant case, however, the contract language which Charging Party alleges was unlawfully modified has already been interpreted by an arbitrator as not requiring Respondent to

pay on-call pay to employees designated as alternate on-calls. Thus, Charging Party is asking the Commission to substitute its own interpretation of the LOA for that of an arbitrator. This, I conclude, would clearly constitute improper interference with the well-established principle that when the parties have agreed to binding arbitration, bona fide disputes over the interpretation of contract language are to be decided by an arbitrator and not the Commission. For that reason, I conclude that Charging Party's allegation that Respondent's October 2012 implementation of an unpaid alternate on-call system in the sewer maintenance unit constituted a mid-term modification of the LOA should be dismissed.

I will also, briefly, discuss the other arguments raised by the Charging Party in this case. Charging Party asserts that Respondent's designation of employees as alternate on-calls, which includes the requirement that they be within reasonable distance of home, is a mandatory subject of bargaining because it substantially restricts their off duty time. I agree that the designation of employees as alternate on-calls, and whether and what they will be paid, are mandatory subjects of bargaining. If I understand Respondent's position correctly, Respondent does not disagree. The issue in this case, however, is not whether Respondent would have to consider a proposal to pay on-call pay to alternate on-calls if Charging Party made that proposal at the bargaining table, or whether Charging Party could bargain to impasse over that proposal. Rather, the issue is whether Respondent had a duty to bargain with Charging Party before implementing an unpaid alternate on-call system in the sewer maintenance unit in October 2012. If the unpaid alternate on-call system was "covered by" the LOA, then Respondent had no duty to bargain in October, because it had already satisfied its obligation to bargain over the issue by entering into the LOA and was entitled to rely on the arbitrator's interpretation of that agreement.

However, even if pay for alternate on-calls was not "covered by" the LOA, the undisputed facts establish that the past practice, when Respondent implemented the unpaid alternate on-call system in the sewer maintenance unit, was that Respondent would not pay alternate on-calls when it decided a unit within the WRC needed them. In 2003 and 2004, Respondent established unpaid alternate on-call systems in both its water and pump maintenance units. Charging Party did not pursue a grievance over either of these actions or address the issue in contract negotiations for the 2005-2012 collective bargaining agreement. It was not until Respondent began a third system – the designation of an unpaid grinder pump on-call in the pump maintenance unit – in 2011 that Charging Party filed a grievance which it took to arbitration. In 2012, after that grievance was denied, it entered into yet another collective bargaining agreement that included no specific provision for on-call pay for alternates. Charging Party has not shown, or attempted to show, that there was any relevant difference between the alternate on-call system in the sewer maintenance unit and the systems previously established by Respondent in other units of the WRC. I conclude, therefore, that implementation of the system in the sewer maintenance unit in October 2012 was not a unilateral change in terms and conditions of employment for the bargaining unit. Rather, it was merely a continuation of the status quo which, as stated above, was that Respondent could implement alternate on-call systems when it believed it needed them, but would not pay on-call pay to the alternates. In these circumstances, Charging Party, if it wished to require the Employer to pay the alternates, was obligated to bring a proposal to this effect to the table in contract negotiations. Based on the conclusions of law set forth above, I recommend that Respondent's motion for summary dismissal of the charge be granted and that the Commission issue the following order.

## RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 11, 2014