STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (WATER AND SEWERAGE DEPT),
Public Employer-Respondent,

MERC Case No. C14 A-013
Hearing Docket No. 14-002291

-and-

SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
Labor Organization-Charging Party.
____/

APPEARANCES:

Steven H. Schwartz and Catherine Ann Heitchue Reed, for Respondent

Saulius Simoliunas, President, Sanitary Chemists and Technicians Association, for Charging Party

DECISION AND ORDER

On August 24, 2016, 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 either 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: October 19, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT (WATER AND SEWERAGE DEPT),
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SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
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APPEARANCES:

Steven H. Schwartz and Catherine Heitchue Reed, for Respondent

Saulius Simoliunas, President, Sanitary Chemists and Technicians Association, for Charging Party

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

On January 31, 2014, the Sanitary Chemists and Technicians Association (SCATA or Charging Party) filed an unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the City of Detroit (Water and Sewerage Department), pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216.[1] Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

As detailed below, on September 23, 2015, Respondent filed a motion for summary dismissal of the charge. Charging Party filed a response on October 5, 2015. On February 18, 2016, Respondent filed a supplemental motion. Charging Party filed a response to the supplemental motion on February 22, 2016.

I find that there are no material issues of fact requiring an evidentiary hearing in this case. Based on undisputed facts set out in the charge, pleadings and, as discussed below, in the record

[1] The Detroit Water and Sewerage Department is a department of the City of Detroit and not a separate legal entity. However, in this decision the City and the Water and Sewerage Department are referred to collectively as the Respondent, while the Water and Sewerage Department is referred to individually as the DWSD.

of a previous case, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Until the actions which are the subject of this charge, Charging Party represented a bargaining unit of employees of the DWSD in the following classifications: Water Systems Laboratory Technician Trainee, Water Systems Laboratory Technician, Senior Water Systems Laboratory Technician, Junior Chemist, Assistant Water Systems Chemist, Water Systems Chemist, Junior Microbiologist, Microbiologist, Assistant Wastewater Process Controller, Wastewater Process Controller, and Analytical Chemist.

The charge, as filed on January 31, 2014, read as follows:

> Detroit Water and Sewerage Department, while in negotiations for a new labor contract with Sanitary Chemists and Technicians Association, transferred SCATA titles to another union, Senior Water Systems Chemist Association. SCATA gave to DWSD two proposals for a new contract and had to receive [a] DWSD proposal [sic]. However, DWSD unilaterally transferred SCATA titles to another union. This is a gross ULP.

Charging Party attached to the charge a copy of a document dated January 28, 2014, entitled "DWSD Proposal – Senior Water Systems Chemist Association." The document began, "The Detroit Water and Sewerage Department has assigned the new job classifications of Chemist and Special Projects Technician to the Senior Water Systems Chemist Association."

There is no dispute that sometime before January 2014, Respondent created a new job title, Chemist, and decided that the new Chemist title would be represented by the Senior Water Systems Chemist Association (SWSCA), a labor organization that at that time represented positions that supervised members of Charging Party's unit. As outlined below, Charging Parties' members were told that they had to apply for new positions. There is also no dispute that in the fall of 2015, certain employees formerly represented by Charging Party were reclassified as Chemists, at which point the SWSCA became their bargaining agent. A few of Charging Party's members applied for and were selected to fill another new position, Plant Technician. The Plant Technician title was to be represented by yet another labor organization. By the end of 2015, the job titles formerly represented by Charging Party had all been abolished, and all the employees who had held those titles had either been reclassified and placed into other bargaining units or had been laid off. At that point, Respondent no longer recognized Charging Party as the bargaining agent for any of its employees. As I understand the charge and pleadings, Charging Party alleges that Respondent violated its duty to bargain in good faith by transferring its members and their work to the SWSCA and then refusing to recognize Charging Party as their bargaining agent.

In its original charge, Charging Party did not cite the sections of PERA that Respondent was alleged to have violated. However, it is apparent from its subsequent pleadings that Charging Party asserts that Respondent "transferred SCATA titles" to the SWSCA because

Charging Party, unlike the SWSCA, had refused to agree to terms proposed by Respondent for a new collective bargaining agreement. That is, according to Charging Party, Respondent eliminated all Charging Party's job titles and transferred its members and their work to SWSCA in retaliation for Charging Party's members' exercise of their rights under Section 9 of PERA. Therefore, in addition to alleging that Respondent's actions violated Section 10(1)(e) of PERA, Charging Party also alleges that they violated Section 10(1)(c) of the Act.

In its response to Respondent's first motion for summary disposition, Charging Party also alleged that Respondent violated its duty to bargain by unilaterally deciding to assign water sample testing work previously performed exclusively by chemists in Charging Party's unit to employees in the Plant Technician classification.[2]

Procedural History and Motions for Summary Disposition:

When this charge was filed in January 2014, there was a pending proceeding in the U.S. Bankruptcy Court involving the City of Detroit. On February 14, 2014, I notified the parties that that because of the proceeding, and a stay issued by the Bankruptcy Court, no hearings were being scheduled on unfair labor practice charges filed against the City that were assigned to me. A complaint and notice of hearing without date was issued.

In August 2015, after the bankruptcy had concluded, attempts were made to reactivate the charges that had been placed on hold during the bankruptcy proceeding. On August 23, 2015, I sent the parties a letter stating that if they had any objection to placing the case back on the active docket, they were to notify me by September 23, 2015. On September 23, Respondent filed an objection to reactivation of the cases and motion for summary disposition. In the motion, Respondent stated that it did not dispute that it had eliminated classifications in Charging Party's bargaining unit and transferred work previously performed by those classifications to other unions. However, Respondent's motion asserted that it had made these changes pursuant to a court order issued by Federal District Judge Sean F. Cox on November 4, 2011, as well as under the authority of and at the order of Kevyn Orr, then the emergency manager for the City of Detroit. Respondent argued that because Judge Cox's order also enjoined the Commission from exercising jurisdiction over complaints regarding actions taken by Respondent to comply with the order, the Commission should dismiss the charge for lack of jurisdiction.

On October 5, 2015, Charging Party filed a response to the motion. In its response, Charging Party asserted that the DWSD had reclassified chemists in its bargaining unit as "technicians." It also asserted that Respondent, over Charging Party's objection, had assigned chemist work to "untrained technicians." According to the October 5, 2015, pleading, when Charging Party complained about the reclassifications and reassignment of work, "the DWSD changed the technician titles back to chemist titles, but did not give the jobs back to chemists."

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[2] Charging Party also made this allegation in a second charge, Case No. C15 K-144/ Docket No. 15-058913-MERC, filed on November 4, 2015. Respondent's arguments for why it had the right to transfer the testing work to Plant Technicians are included in the motion it filed for summary dismissal of Case No. C15 K-144 on April 29, 2016. However, I conclude that this allegation is properly part of the instant charge and should be addressed in this decision.

Charging Party asserted that the transfer of SCATA duties to untrained technicians resulted in dubious analytical results and "not only destroyed SCATA but also destroys meaningful water/wastewater treatment." It concluded, "Surely Judge Cox did not mean by his order the very negation of [the] Clean Water Act, which is to clean wastewater before discharge to receiving waters."

On October 28, 2015, Respondent notified me that there were active settlement discussions being conducted through the Federal Bankruptcy Court, and asked me to hold this charge in abeyance. On November 2, 2015, Charging Party responded that there were no settlement negotiations between Charging Party and the City or DWSD, and asked me to rule on the motion. Despite Charging Party's objection, I held the charge in abeyance pending the outcome of what I was informed was federal court mediation involving the bargaining unit placement of DWSD employees.

On December 14 and December 15, 2015, after the federal court mediation had concluded, Judge Cox issued additional orders addressing Respondent's pending disputes with its labor organizations. These orders are discussed below. On December 30, 2015, I sent the parties in this case a letter stating that, as I interpreted it, Judge Cox's December 15, 2015, order directed the Commission to decide, as a threshold issue, whether the actions alleged to constitute the unfair labor practices in this case were "ordered or specifically permitted to be taken" by Judge Cox's November 4, 2011, order. I offered Respondent the opportunity, if it wished, to file a supplement to its motion for summary disposition.

On February 18, 2016, Respondent filed a supplement to its motion for summary disposition. Respondent asserted that its actions were in "direct compliance with Judge Cox's November 4, 2011 order," and again argued that the charges in this case were challenges to actions that were ordered or specifically permitted by Judge Cox's November 4, 2011, order. Therefore, according to Respondent, the Commission should find that the charges were permanently enjoined by Judge's Cox's December 15, 2015, order.

On February 22, 2016, Charging Parties filed a response in opposition to the supplemental motion. This response, which supplemented the facts set out in the charge, also asserted that Respondent's motive for assigning the new classification Chemist to be represented by the SWSCA was that the SWSCA and Respondent had reached a collective bargaining agreement, whereas Charging Party and Respondent had not. Charging Party also argued that the transfer of sample testing work previously performed by its bargaining unit to Plant Technicians without chemical training was injuring the environment.

As noted in footnote 2 above, on April 29, 2016, Respondent filed a motion for summary disposition in a second charge filed by Charging Party, Case No. C15 K-144/ Docket No. 15-058913-MERC. In its April 29, 2016, motion, Respondent addressed Charging Party's argument that it violated its duty to bargain by transferring work performed by its members to the new Plant Technician classification. Respondent asserted that this action, like the other actions of which Charging Party complains, was taken to comply with Judge Cox's November 4, 2011, order. It also argued that it had a managerial right to transfer the work, citing *Ishpeming Supervisory Employees' Chapter of Local 128, Michigan Council 25, American Federation of*

State, County and Municipal Employees (AFSCME), AFL-CIO v City of Ishpeming, 155 Mich App 501 (1986) and *City of Detroit (Water & Sewerage),* 1990 MERC Lab Op 34, 40-42. Respondent also pointed out that on or about April 10, 2012, the City of Detroit entered into a consent agreement with the State of Michigan. Under the Local Government and School District Fiscal Accountability Act, 2011 PA 4, which was then in effect, entering into this consent agreement had the effect of suspending the City's duty to bargain.[3] On or about March 14, 2013, Kevyn Orr was appointed emergency manager for the City, which also suspended the City's duty to bargain. Respondent asserts that it had no duty to bargain over the transfer of work because the transfer took place while its duty to bargain was suspended.

Respondent also argued in its April 29, 2016, motion that Charging Party's 10(1)(c) allegations should be dismissed because Charging Party had provided no evidence that the actions to which it objected were motivated by anti-union animus.

Facts:

Certain background facts not in dispute, and pertinent to the instant case, are set out in *City of Detroit (Detroit Water & Sewerage Dept),* 29 MPER 62 (2016). This was a decision by the Commission on a unit clarification petition filed by AFSCME after the DWSD, as part of a general DWSD reorganization that was sparked by Judge Cox's November 4, 2011 order, abolished classifications represented by AFSCME, transferred the employees and their work to newly-created titles, Plant Technician and Office Support Specialist, and assigned these titles to be represented by the International Union of Operating Engineers. During the lengthy hearing on that petition, Respondent explained what led to the reorganization and how it was carried out. According to the record developed at that hearing, beginning in early 2012, the DWSD put in motion a process to reorganize and retrain its workforce that included consolidating existing classifications to reduce their number, as Cox had ordered. With the assistance of an outside consultant and the input of employee teams, recommendations were made with respect to which classifications should be consolidated with which other classifications.

In the course of the reorganization, the DWSD made the decision to abolish all existing DWSD classifications, which at that time numbered 257, and consolidate them into fifty-seven new classifications. The new classifications included Plant Technician, Office Support Specialist, and Chemist. Respondent also created a new title, Special Projects Technician, which was designed for existing employees who were not transferred to any of other new titles. New job descriptions were prepared for the new classifications. Sometime between December 2013 and February 2014, the DWSD decided – without input from the labor organizations directly

[3] In November 2012, 2011 PA 4 was repealed by referendum of the voters. The repeal had the effect of reviving a predecessor statute, the Local Government Fiscal Responsibility Act, 1990 PA 72. Both statutes allowed for the appointment of emergency financial managers. 1990 PA 72 did not suspend a local municipality's duty to bargain during its financial emergency. However, a third statute providing for the appointment of an emergency manager, the Local Financial Stability and Choice Act, 2012 PA 436, MCL 141.1543 et seq., was adopted by the Legislature near the end of 2012 and took effect on March 28, 2013. Under 2012 PA 436, when a municipality is placed "in receivership," i.e., an emergency manager is appointed, its duty to bargain is suspended for five years or until the receivership is terminated, whichever is sooner.

impacted – what new classifications would be represented by which of the unions currently representing its employees.

Sometime in early 2014, Respondent told the unions currently representing DWSD employees which new classifications, if any, they would be representing. The SWSCA was informed that it would be representing the new Chemist classification. DWSD employees were also informed that they needed to apply for a new position. At that time, the DWSD provided its employees with a list of the new classifications along with the existing classifications to be "mapped," i.e., consolidated into, each new classification. According to this list, at that time the DWSD planned to map the following classifications to the new Chemist classification: Water Systems Chemist, Senior Water Systems Chemist, Senior Water Systems Laboratory Technician, Microbiologist, Analytical Chemist, Principal Analytical Chemist, Senior Analytical Chemist, Head Water Plant Operator (some duties/employees), Sewerage Plant Laboratory Supervisor (some duties/employees), and Supervisor of Filtration (some duties/employees). According to this list, some of the work performed by the Junior Water Systems Chemist classification would be mapped to the new Chemist classification and the rest to the new classification Water Technician. As a comparison of this list with the list of classifications in Charging Party's unit shows, most of the titles to be mapped to the Chemist classification were from Charging Party's unit. Other titles mapped to the Chemist classification were represented by the SWCSA or were unrepresented.

Charging Party asserts, and Respondent does not dispute, that sometime shortly after the instant charge was filed on January 31, 2014, the DWSD informed Charging Party that its members and their work were to be transferred not to the new Chemist title, but to the new Plant Technician title. The Plant Technician title was to consist of employees who operate machinery in the Wastewater Treatment Plant. Unlike the positions represented by Charging Party, the Plant Technician position would not require any chemical education. Charging Party complained to the Great Lakes Water Authority, an entity discussed below, that the chemists it represented should not be in the same classification with untrained operators. It also complained that allowing operators without chemical training to perform sample testing would affect the quality of the analysis. Charging Party made these same complaints to DWSD Director Sue McCormick. According to Charging Party, the DWSD then "gave the titles back to chemists." Although not entirely clear from the pleadings, it appears that sometime before the fall of 2015, the DWSD returned to its original plan to "map" the chemist titles formerly represented by Charging Party to the new Chemist title. However, the DWSD decided to assign Plant Technicians to perform the sample testing work in the Wastewater Treatment Plant that had previously been performed exclusively by Charging Party's members. Respondent does not dispute that it decided to have at least some of this work performed by Plant Technicians rather than Chemists, and that it subsequently trained and assigned Plant Technicians to do the work. However, nothing in the charge or pleadings indicates when the decision to assign Plant Technicians to perform the sample testing work was made, when the decision was communicated to Charging Party, or when Plant Technicians first began performing the work.

After employees submitted their applications for the new titles, Respondent's Human Resources staff, based on skill assessments completed by the employees and their supervisors, decided who would fill the new positions. Not all employees who applied were given new

positions, and some employees who were not assigned a new classification were laid off or retired.

In late September 2015, a number of Charging Party's members received notice that they were to be laid off effective October 14, 2015. These layoffs, and Respondent's refusal to arbitrate a grievance over the selection of the employees to be laid off, is the subject of a second charge filed by Charging Party on November 4, 2015, Case No. C15 K-144/Docket No.15-058913-MERC. After these layoffs and the reclassification of Charging Party's remaining members as Chemists, Respondent ceased to recognize Charging Party as the bargaining representative for any of its employees.

On or about November 11, 2015, Charging Party President Saulius Simoliunas heard, from Charging Party's attorney, that Respondent's attorney had admitted that Respondent was "trying to abolish" Charging Party. According to a letter that Charging Party attached its pleadings, however, Charging Party's attorney later told Simoliunas that he merely meant to share with Simoliunas what Respondent's attorney had told him, which was that Charging Party would soon cease to exist as a result of layoffs and reclassifications to other bargaining units.

A new regional water authority, the Great Lakes Water Authority (GLWA) came into existence on January 1, 2016. Many of the functions performed by the DWSD were transferred to the GLWA, and the GLWA became the employer of former DWSD employees performing these functions. Pursuant to its agreement with the DWSD, the GLWA also assumed the DWSD's obligation to bargain with the unions representing the classifications now employed by the GLWA. As indicated in the record in *City of Detroit (Detroit Water & Sewerage Dept),* the GLWA assumed responsibility for the Wastewater Treatment Plant and the water treatment plants formerly operated by the DWSD.

Judge Cox's November 4, 2011 and December 2015 Orders:

In 1977, the Federal Environmental Protection Agency sued the City of Detroit and its Water and Sewerage Department for violations of the Clean Water Act, 33 USC 1251 et seq, related to discharge of treated water into the Detroit River from the City's wastewater treatment operations. The suit remained pending for decades because the City and the DWSD repeatedly agreed to remedial plans to which they were not able to adhere. After the retirement of Federal District Judge John Feikens, to which the case had been assigned, the case was reassigned to Federal District Judge Sean Cox. In explaining its repeated failures at compliance to Cox, the City cited various City charter provisions and ordinances, and existing collective bargaining provisions and/or past practices, which it asserted were preventing it from making fundamental changes in identified problems areas and leading to its inability to meet the federal standards. At Cox's direction, a "Root Cause Committee" was formed and charged with identifying the causes of the City's repeated compliance failures and with identifying solutions.

On November 2, 2011, the committee presented Cox with a "Plan of Action." On November 4, 2011, Judge Cox issued an order adopting the Plan of Action. However, as stated in that order, Judge Cox concluded that the Plan of Action did not adequately address issues with the City's collective bargaining agreements and union work rules. Judge Cox concluded, based

on the committee's report, that certain collective bargaining provisions and work rules were impeding the DWSD from achieving and maintaining short-term and long-term compliance. He noted that the committee was unable to agree on a proposed solution to remedy these impediments, and therefore decided to order his own remedy. The Root Cause committee had identified the following options: (1) terminating all collective bargaining agreements; (2) suspending the duty to bargain; (3) establishing a regional authority as a new employer for Department employees; (4) outsourcing plant operations so corporate representations or warranties of compliance could be enforced; or (5) ordering that negotiations take place to address the various identified problems.

Judge Cox rejected all these options. He concluded that "the least intrusive means" of effectively remedying the impediments to compliance was to (1) keep all current CBAs that cover DWSD employees in force, but strike and enjoin those current CBA provisions or work rules that threatened short-term compliance; (2) order that, in the future, the DWSD was to negotiate and sign its own CBAs that covered only DWSD employees, and (3) prohibit future DWSD CBAs from containing the provisions that threatened long-term compliance. In thirteen numbered paragraphs, later referred to as his "Labor Orders," Cox set out what the DWSD was to do, and what types of collective bargaining provisions and past practices were to be struck, enjoined, and prohibited from being included in future collective bargaining agreements. For purposes of this proceeding, the relevant paragraphs of the "Labor Orders" are paragraphs eight and thirteen, which read as follows:

> 8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.
>
> 13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the union from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

At the time Cox issued his November 4, 2011 order, the DWSD had twenty separate bargaining units. Many of these units also contained employees employed in other City departments.

After Judge Cox issued his November 4, 2011, order, several unions, including AFSCME but not including the Charging Party, filed motions to intervene in the federal court action. The City of Detroit and the DWSD also filed a series of motions with Judge Cox requesting clarification of his November 4, 2011 order. Respondent did not ask Judge Cox to clarify the scope of its authority under paragraph 8.

On December 14, 2015, Cox issued a "Stipulated Order Regarding Labor Matters" signed by the City, DWSD and AFSCME. The order included a list of thirteen "2015 Labor Mandates," including the following:

Paragraph 8. DWSD retains the ability to reduce employee classifications in order to increase workforce flexibility, based on operational needs.

Paragraph 13.

(a) *Except as provided in this Order, labor claims filed or later filed that challenge actions of DWSD which were ordered or specifically permitted by the Labor Orders are permanently enjoined unless dismissed with prejudice by the parties.*

(b) Upon execution of this Order, the injunction previously issued is modified to return jurisdiction to Wayne County Circuit Court, MERC and grievance arbitrators for those claims challenging DWSD actions which were neither ordered nor specifically permitted by Labor Orders. These labor claims may proceed whether filed before or after this Order's date.

(c) *There are also certain pending claims where the parties disagree as to whether or not DWSD's actions, which were challenged with such claims, were ordered or specifically permitted to be taken by the Labor Orders. For such claims, the tribunal where the matter is pending will decide whether DWSD's actions were ordered by Labor Orders.* This shall occur also for claims yet to be filed. [Emphasis added]

The December 14, 2015, order then went on to list particular "labor claims," including Commission charges by case number, that were enjoined or dismissed or for which the tribunal where the matter was pending was to decide whether the DWSD's action were ordered by the Labor Orders. The instant charge was not listed as a "labor claim" in this order.

On December 15, 2015, Judge Cox issued a second order. This order made the thirteen "Labor Mandates" in the stipulated order of the previous day applicable prospectively to the City/DWSD and any labor unions that were not party to the December 14, 2015 stipulated order. The December 15, 2015, order included language identical to paragraph 13 in the December 14, 2015 order. The December 15, 2015 order stated that the Labor Mandates and rulings contained in that order replaced the Court's November 4, 2011 order and "are the entire sum and substance of all labor or union employment rulings which will govern DWSD henceforth, as orders from this Court."

Discussion and Conclusions of Law:

As discussed above, Charging Party alleges that Respondent violated its duty to bargain by eliminating the classifications in its bargaining unit and transferring the employees and their work to a new classification represented by another labor organization, the SWSCA. It also alleges that Respondent violated its duty to bargain by unilaterally transferring sample testing work exclusively performed by members of its bargaining unit to the Plant Technician classification. Respondent asserts that all of these actions were undertaken pursuant to paragraph 8 of Judge Cox's November 4, 2011 order. I conclude that both of these allegations clearly fall

into the category of "pending claims where the parties disagree as to whether or not DWSD's actions, which were challenged with such claims, were ordered or specifically permitted to be taken by the Labor Orders." As I informed the parties in my December 30, 2015, letter, I interpret Judge Cox's December 15, 2015 order as a directive to the Commission to decide, as a threshold issue, whether the actions taken by Respondent which are the subject of this charge were "ordered or specifically permitted to be taken" by his November 4, 2011, Labor Orders.

Under PERA, the redefinition or constitution of a bargaining unit is a permissive, not a mandatory, subject of bargaining. However, as the Court held in *Detroit Fire Fighters Ass'n, Local 344, IAFF v City of Detroit*, 96 Mich App 543, 546 (1980), an employer cannot alter an existing bargaining unit or remove a position from an existing unit unilaterally. The reclassification and remove of positions from a bargaining unit without a substantial change in their job duties does not involve the employer's managerial authority to assign work, and, therefore, is not within the scope of a public employer's management prerogative. Rather, it is a question of unit placement that, absent agreement by the parties, should be decided by the Commission in exercise of its authority under Section 13 of PERA to decide the unit appropriate for collective bargaining. *Michigan State Univ,* at 123; *City of Ann Arbor,* 16 MPER 17 (2003) (no exceptions). Also see *Michigan Educational Support Personnel Ass'n v Southfield Public Schools,* 148 Mich App 714, 716 (1985). The proper course of action for an employer, if it seeks to remove a position from its existing unit and the union does not agree, is to file a petition for unit clarification with the Commission. *Michigan State Univ,* at 124-125.

However, the Commission, in exercising its authority to determine the scope of the appropriate unit, normally defers to the parties' past agreements concerning unit placement. As discussed in *City of Detroit (Detroit Water & Sewerage Dept),* 29 MPER 62 (2016), the Commission clarifies units only to resolve disputes over "newly established classifications or existing classifications which have undergone recent, substantial changes in the duties and responsibilities of the employees so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past," citing *Univ of Michigan,* 29 MPER 23 (2015). A position is not "newly established" if it has the same job duties as an abolished position and has merely been given a new title. *City of St Clair Shores,* 1988 MERC Lab Op 485. Moreover, as it reiterated in *City of Detroit (Detroit Water & Sewerage Dept),* the Commission generally considers only changes in job duties that have already been implemented, and does not base its unit placement decisions on an employer's testimony that it plans to change the job's duties in the future. *Branch Co Sheriff,* 1989 MERC Lab Op 768; *Lansing Sch Dist,* 20 MPER 3 (2007). In short, under Commission case law, absent the union's agreement, an employer cannot lawfully move a position from its existing bargaining unit and place it in another, or declare it to be unrepresented, merely because the employer has concluded that the position's work has more in common with that of positions in the second unit or with other unrepresented positions. It also cannot change the unit placement of a position based solely on its expectation that the position's job duties will change sometime in the future.

However, under the terms of Judge Cox's December 15, 2015 order, the Commission is enjoined from finding Respondent to have committed unfair labor practices in taking action ordered or specifically permitted by Judge Cox's November 4, 2011 Labor Orders. As noted above, therefore, whether Respondent was entitled to remove positions from Charging Party's bargaining unit and assign them to a bargaining unit represented by the SWSCA because these

actions were ordered or specifically permitted by Judge Cox's November 4, 2011, order is a threshold question in this case. Judge Cox's November 4, 2011, order did not direct the DWD to eliminate any bargaining unit or any union, and Judge Cox's November 4, 2011, order does not explicitly give the DWSD the authority to alter existing bargaining units. Nor did Judge Cox explicitly tell the DWSD to reduce the number of its classifications by 80%, or eliminate all of its existing classifications and replace them with new ones. I conclude, however, that once the DWSD undertook a reorganization of its entire job classification system, forcing the DWSD to continue to keep employees within their existing bargaining units would have restricted its ability to combine classifications for maximum efficiency. Except in the unlikely case that a union agreed to give up positions, the DWSD would have been prevented from combining classifications from different bargaining units into one new title. In that case, if the DWSD in the future wanted to reassign work across bargaining unit lines, it would have had to bargain with the unions over the reassignment of work, encumbering its ability to respond quickly to operational needs.

The Commission addressed the scope of paragraph 8 of Judge Cox's November 4, 2011 Labor Orders in *City of Detroit (Detroit Water & Sewerage Dept).* It concluded:

> [W]e find that since Cox's order included an injunction on our exercise of jurisdiction, that he intended to give the DWSD the authority to reduce job classifications without necessarily respecting existing bargaining unit configurations, as we would have ordered it to do. We also agree with the DWSD that in ordering the DWSD to reduce the number of its classifications to "increase flexibility," Cox contemplated that the DWSD would assign at least some of its employees to new classifications without substantially changing their job duties.

I agree with Respondent that eliminating the classifications represented by Charging Party and transferring SCATA employees and their work to the newly-created Chemist classification was part of what Judge Cox ordered Respondent to do in paragraph 8 of his November 4, 2011, order, even though these actions disrupted the existing bargaining unit configurations. I conclude, therefore, that the Commission is permanently enjoined by the terms of Judge Cox's December 15, 2015, order from finding that Respondent's unilateral decision to take these actions violated its duty to bargain under PERA.

As discussed above, Charging Party also alleges that Respondent violated its duty to bargain by unilaterally reassigning sample testing work that was formerly performed exclusively by members of its bargaining unit to employees in the Plant Technician classification. Respondent argued that the reassignment of this work to Plant Technicians fell within its managerial prerogative, and also that it cannot be found to have committed an unfair labor practice because the transfer of work took place while its duty to bargain under PERA was suspended. An employer has the right, as part of a legitimate reorganization, to eliminate a bargaining unit position and distribute the work performed by that position among other positions outside the bargaining unit. *Ishpeming Supervisory Employees' Chapter of Local 128 v City of Ishpeming,* supra. However, as the Commission held in *City of Detroit(Water & Sewerage),* 1990 MERC Lab Op 34,40-42, if work transferred outside the bargaining unit has been performed exclusively by members of the bargaining unit, an employer has a duty to

bargain over the transfer if: (1) the transfer has a significant adverse impact on unit employees, including that employees were laid off or terminated as a result of the transfer; and (2) the transfer dispute must be "amenable to resolution through the collective bargaining process." As explained in the 1990 *City of Detroit (Water & Sewerage)* case, this means that the transfer decision must be based at least in part on labor costs or other general enterprise costs that could be affected by the bargaining process. In this case, the transfer of Charging Party's work to Plant Technicians may have allowed Respondent to employ fewer Chemists, resulting in some of Charging Party's members being laid off because they were not selected to fill an available position. The decision to transfer the work may also have been caused at least in part by the labor costs of employing Chemists to perform this work. However, the facts set out in the charge and pleadings are not sufficient to answer these questions. I am also unable to determine from the facts set out in the charge and pleadings whether the transfer of work to the Plant Technicians took place while Respondent's duty to bargain was suspended or whether it occurred after December 14, 2014, when Governor Snyder declared that the City's financial emergency had ended.

However, I conclude that resolution of these issues is unnecessary because, as Respondent asserts, Judge Cox's November 4, 2011, order encompassed not only the consolidation of chemist titles into one classification, but the transfer of the sample testing work from chemists to non-chemist Plant Technicians. In paragraph 8 of his November 4, 2011 Labor Orders, Cox ordered the Director of the DWSD to review the DWSD's existing classifications and combine them to increase workplace flexibility, i.e., maximize the efficient use of manpower. I find that the transfer of the sample testing work to non-chemists was part of the consolidation of work and positions which Judge Cox ordered. I conclude that because the transfer of the work was ordered by Judge Cox, the Commission is enjoined by Judge Cox's December 15, 2015, order from finding that Respondent violated its duty to bargain by its unilateral decision to transfer this work.

Charging Party also alleges that the elimination of its job titles, and the transfer of work and employees to the new classification represented by the SWSCA, constituted retaliation against it for its members' exercise of their Section 9 rights. I find that this allegation, unlike the other allegations in the charge, is not a "pending claim where the parties disagree as to whether or not DWSD's actions, which were challenged with such claims, were ordered or specifically permitted to be taken by the [Judge Cox's] Labor Orders." Clearly, Judge Cox ordered Respondent to consolidate job classifications for the purpose of increasing workplace flexibility and maximizing efficiency, and not for the purpose of eliminating labor organizations with which Respondent had trouble reaching agreement. However, I find that Charging Party has alleged no facts, or shown any indication that it could produce any such facts at a hearing, that might sustain a claim that Respondent had a retaliatory motive. When unlawful discrimination is alleged, it is the charging party's burden to proof unlawful motive. *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op703, 706; *Residential Systems Co,* 1991 MERC Lab Op 394, 405. Here, there is no dispute that the SWSCA had reached a new collective bargaining agreement with Respondent while Charging Party had not. However, this fact alone is not sufficient to prove that Respondent combined Charging Party's chemist positions and the chemist positions represented by SWSCA into one new Chemist position, or that it assigned the new Chemist position to be represented by the SWSCA, in order to rid itself of a troublesome labor

organization. Despite having been given a full and fair opportunity to do so, Charging Party has alleged no additional facts that might support this conclusion. I conclude, therefore, that Charging Party's allegation that Respondent violated Section 10(1)(c) should be dismissed without hearing.

In accord with the facts and the conclusions of law set out above, I recommend that the Commission grant Respondent's motion for summary disposition 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: August 24, 2016