STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

MERC Case No. C15 F-087

-and-

AFSCME COUNCIL 25, LOCALS 2799 & 1023,
Labor Organization-Charging Party.
_____/

APPEARANCES:

The Allen Law Group, P.C., by Floyd E. Allen, Shaun P. Ayer and George K. Pitchford, for Respondent

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

DECISION AND ORDER

On October 25, 2017, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] 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: December 26, 2017

[1] MAHS Hearing Docket No. 15-041818

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C15 F-087
-and- Docket No. 15-041818-MERC

AFSCME COUNCIL 25, LOCALS 2799 & 1023,
Labor Organization-Charging Party.
_____/

APPEARANCES:

The Allen Law Group, P.C., by Floyd E. Allen, Shaun P. Ayer and George Pitchford, for Respondent

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

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On June 23, 2015, AFSCME Council 25, Local 2799 and Local 1023, collectively the Charging Party, filed the present unfair labor practice charge against the City of Detroit. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge, Travis Calderwood of the Michigan Administrative Hearing System acting on behalf of the Michigan Employment Relations Commission (Commission). Based upon the entire record, including the transcript of hearings, exhibits, and post-hearing briefs and other pleadings, filed on or before December 19, 2016, I make the following findings of fact, conclusions of law and recommended order.

Unfair Labor Practice Charge and Procedural History:

Charging Party's initial allegations claimed that the City repudiated the parties' contract during its reorganization of its finance functions into the Office of Chief Financial Officer (OCFO). Alternatively, Charging Party alleged that, if repudiation was not found, the City nonetheless unilaterally changed the working conditions of its members. In either event, Charging Party claims that during the reorganization the City bargained directly with its members. Charging Party claims that the City's actions violated Section 10(1)(a), (b), (e) and Section 15 of PERA.

On January 15, 2016, Respondent filed a motion for summary disposition. On February 9, 2016, Respondent filed its first amended motion for summary disposition. Charging Party filed its response in opposition to Respondent's first amended motion on February 19, 2016. On February 23, 2016, Respondent requested leave to file a reply brief to Charging Party's response to the first amended motion. That same day I received Charging Party's opposition to Respondent's request.

A telephone pre-hearing conference was held on February 25, 2016, at which time several deficiencies were identified with respect to Respondent's first amended motion for summary disposition. It was agreed that Respondent would file a second amended motion for summary disposition as opposed to a reply brief; Charging Party would be afforded sufficient time to file a response to said motion. On March 4, 2016, Respondent filed its second amended motion for summary disposition; Charging Party filed its response on March 18, 2016. Neither party requested oral argument.

On September 21, 2016, I issued an Interim Order denying Respondent's motion(s) seeking dismissal of the charge, for the reasons set forth therein and incorporated by reference herein.

Two days of hearing were held before the undersigned on October 26, and October 27, 2016. At the conclusion of the hearing I directed the parties that post-hearing briefs were to be filed thirty (30) days from the mailing date of the hearings' transcripts. Transcripts were mailed to the parties and the undersigned on November 4, 2016. Accompanying the transcripts was a cover letter from the Court Reporter indicating that post-hearing briefs were to be filed on or before December 5, 2016.

Respondent's post hearing brief was filed with my office on December 2, 2016. Charging Party's post-hearing brief was not filed until December 12, 2016. Included with the filing was a request to amend the identification of the Charging Party, under Commission Rule 423.153, R 423.153, to include all of the affiliated AFSCME Council 25's "Detroit Locals" instead of just Locals 1023 and 2799. Charging Party, prior to the December 5, 2016, deadline, did not request an extension of the filing date. After discussions with the parties, Charging Party filed its post-hearing brief and Respondent was permitted to file a post-hearing reply brief. Both Charging Party's post-hearing brief and Respondent's reply brief are accepted as part of the record.

Charging Party's Request to Amend its Pleadings:

As indicated above, Charging Party's post-hearing brief included the request, brought under Commission Rule 153, R 423.153, to amend the identification of Charging Party to encompass AFSCME Council 25 and its affiliated Detroit Locals as opposed to just Local 2799 and Local 1023. Charging Party provides the basis for its request as follows:

> When the charge was first filed, Michigan AFSCME Council 25 was unaware of which City of Detroit Locals would be impacted by the reorganization. The Charge, thus, listed two locals. It has since been learned that other locals have been impacted by the reorganization as well. Thus, AFSCME hereby seeks to clarify that the Charging Party is appropriately labeled: "AFSCME Council 25 and its affiliated Detroit Locals", as opposed to naming two specific locals individually.

> This change will be of no consequence to the merits of the charge, since the Union contract is signed between the City of Detroit and Michigan AFSCME Council 25, not with any specific union local.

The Employer's reply brief objects to Charging Party's request to add additional parties on the grounds that the request is both untimely and prejudicial.

Commission Rule 153(1), R 423.153(1), provides that charging party may seek to amend its charge "before, during, or after the conclusion of the hearing." Section (4) of that rule provides the basis upon which such amendments are permitted and states:

> The commission or administrative law judge designated by the commission may permit or deny the request to amend upon such terms as are **just and consistent with due process.** [Emphasis Added].

Furthermore, Section 16 of PERA requires that charges be filed within six months of the alleged unfair labor practice. MCL 423.216(a). The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

At the onset, any consideration of allowing Charging Party's request must begin with the realization that it is being made more than a year after the original charge was filed or the events that gave rise to this dispute are alleged to have occurred. For this reason alone I would deny Charging Party's request.[2] Additionally, although Charging Party makes the conclusory statement that its proposed change in charging parties would "be of no consequence to the merits of charge" because Council 25 is the signatory of the contract, forcing the City to face potential liability as to violations of PERA against entities other than, and in addition, to those previously identified by Council 25, i.e., Local 2799 and Local 1023, would not be just and/or consistent with due process. Accordingly, Charging Party's request to include all of its affiliated Detroit Locals is hereby **DENIED**.

Historical Background:

The following facts are public knowledge and widely reported in the media and further detailed at http://www.michigan.gov/treasury, the website of the Michigan Department of Treasury.

In April of 2012, following a long period of financial instability and declining revenue, the City entered into a consent agreement, entitled the Financial Stability Agreement (FSA), with the State pursuant to Public Act 4 of 2011 (PA 4).[3]

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[2] It is well-settled that an amendment which adds a new party creates a new cause of action and, in such case, there is no relation back to the original filing for statute of limitation purposes. *City of Pontiac (Pontiac Housing Commission)*, 22 MPER 46 (2009).

[3] Public Act 4 of 2011, enacted by the Legislature and effective March 16, 2011, had the stated purpose of placing financial checks and balances on public employers in a state of financial stress or emergency. Under PA 4, once a state of emergency has been declared in a local governmental unit, the State Treasurer is authorized to enter into a consent agreement with the local governmental unit for a period necessary to achieve the goals and objectives of that

In November of 2012, 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 (PA 72). Both Acts allowed for the appointment of an emergency financial manager in a municipality where the Governor has determined a local government financial emergency.

In December of 2012, the state legislature enacted and the Governor signed into law Public Act 436 of 2012 (PA 436). PA 436, also known as the Local Financial Stability and Choice Act, was set to take effect on March 28, 2013.[4] Like its predecessor PA 4, PA 436 authorizes the State Treasurer to enter into a consent agreement with a local government in a state of financial stress or emergency for a period necessary to achieve the goals and objectives of that agreement. Section 8(11) of PA 436, MCL 141.1548(11), suspends an employer's duty to bargain as set forth in Section 15(1) of PERA for the duration of the consent agreement.

In early March of 2013, Governor Snyder confirmed the existence of a financial emergency in the City. Kevin Orr was appointed Emergency Manager (EM) on March 13, 2013, pursuant to PA 72. On March 28, 2013, PA 436 took effect. The Governor then reconfirmed Orr' s status as emergency manager under PA 436.[5] Under Section 9(2) of PA 436, the appointment of an emergency manager placed Respondent "in receivership" within the meaning of the statute.

In July of 2013, the City filed for protection under the United States Bankruptcy Code. On July 25, 2013, Federal Bankruptcy Judge Steven W. Rhodes issued an Order which essentially stayed any judicial or administrative proceeding against the City.

In December of 2014 the City was discharged from the bankruptcy. On December 14, 2014, Governor Snyder declared Respondent's financial emergency to have terminated.

Findings of Fact:

On or around June 27, 2014, the City and Charging Party entered into a collective bargaining agreement effective through December 31, 2018. The contract's recognition clause, Article 2, states in subsection (b) the following:

> The classifications covered by this Agreement are subject to changes in title, duties, responsibilities and qualifications, **consistent with the law and terms of**

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agreement. Section 14a of PA 4, provided that after a period of 30 days following the execution of a consent agreement or unless directed otherwise by the State Treasurer, the local governmental unit's obligation to bargain under Section 15(1) of PERA is suspended.

[4] Section 4(6) of PA 436 provided, in pertinent part:

> All proceedings and actions taken by the governor, the state treasurer, the superintendent of public instruction, the local emergency financial assistance loan board, or a review team under former 2011 PA 4, former 1988 PA 101, or former 1990 PA 72 before the effective date of this act are ratified and are enforceable as if the proceedings and actions were taken under this act, and a consent agreement entered into under former 2011 PA 4, former 1988 PA 101, or former 1990 PA 72 that was in effect immediately prior to the effective date of this act is ratified and is binding and enforceable under this act.

[5] Section 31 of the PA 436 provides that an EM appointed under PA 72 would continue to act in that capacity for the local government under the new law.

this Agreement. Such changes to a classification will not result in a change in current bargaining unit status or representation, except when two or more classifications are combined or consolidated, in which case the parties and any other applicable union will negotiate with respect to bargaining unit status or representation. If agreement is not reached, this dispute will be submitted to the Michigan Employment Relations Commission for resolution. The positions may also be added to or eliminated, consistent with the law and terms of this Agreement, with new positions performing similar work being placed within the same bargaining unit. The City may not re-classify or re-title positions for the purpose of discriminating against the Union, or for the purpose of removing bargaining unit work from being covered by this Agreement. [Emphasis Added.]

Article 3 of the Contract, the management's rights clause, states in the relevant part:

C. The City will have the right and obligation to determine and establish the policies goals and scope of its operations. Consistent with its operational needs, the City may reasonably determine and implement: work schedules/shifts, vacation schedules, flex time, the goals and methods and processes by which such work is performed, the qualifications of employees assigned to do the work, and the below-listed rights and obligations provided they do not conflict with the terms of this Agreement. **Except as specifically limited by the terms of this Agreement or applicable law, these rights and obligations include, but are not limited to**:

1. Implement changes in the structure of department operations, including establishment or consolidation of service areas and work locations within the department;

2. Cease or outsource functions or operations, consistent with this Agreement;

3. Initiate new functions or operations;

4. Provide appropriate training, education, performance evaluation and job assignments for employees;

5. Establish reasonable qualifications and methods for hire, transfer, assignment and promotion in employment;

6. Revise, create, combine, and/or eliminate classifications, duties, and/or positions, subject to the terms of this Agreement. The City will notify the applicable Union President and participate in a meeting to discuss implementation of any retitled, new or eliminated classification, duty or position, at least ten (10) working days prior to implementation. The applicable Union President may provide input during the meeting with respect to any proposed changes;

7. Initiate promotions and disciplinary actions;

8. Determine personnel hiring and reductions;

9. Discipline and discharge employees for just cause;

10. Recruit, assign, transfer employees to positions within the employee's department;

11. Establish reasonable rules and policies, consistent with the operational needs of the City; adopt and enforce work rules and policies applicable to this unit and/or all employees, including but not limited to, the Universal Work Rules attached;

12. Determine the requirements related to an employee's job functions including, but not limited to, equipment, tools, clothing, and uniforms;

13. Enforce state and local licensing and other requirements; the City will pay for a bargaining unit employees' attainment or renewal of required licenses, bonding, training, registration, or certification to the extent such payments are incorporated in the applicable department's budget as of the effective date of this Agreement; nothing in this Agreement obligates the City to include such payments in a department's budget;

14. Lay off employees for lack of work or lack of funds;

15. Determine methods, means and employees necessary for departmental operations; and

16. Control the departmental budget.

[Emphasis Added.]

Article 14, the contract's layoff and recall provision, provides in the relevant part:

A. NOTICE TO THE UNION: Where practical, the City will provide notice to the Union at least fourteen (14) days prior to the issuance of any layoffs.

* * *

C. UNIT-WIDE DISPLACEMENT: Permanent seniority employees who are being removed from a given class will have the following optional displacement rights in their bargaining unit:

1. To displace the least seniority employee in a lower class in the same occupational series; provided the employee can perform the duties of the new position as determined by the applicable department.

2. To displace the least seniority employee in some other classification which the senior employee previously held; provided the employee can perform the duties of the new position as determined by the applicable department.

In addition, employees who are unable to displace lesser seniority employees in their bargaining unit may be transferred or demoted to other available vacant positions in the bargaining unit for which they are adjudged to be qualified.

Those employees who are unable to displace lesser seniority employees or are not status-changed to other available vacancies in the bargaining unit will be laid off by issuance of a layoff notice from their department.

Employees who have an opportunity to displace a lesser seniority employee in the next lower class in their occupational series, will have those recall, reemployment and restoration rights …

Article 8 of the contract provides the parties' agreed upon grievance procedure which culminates with binding arbitration.

Article 15 of the contract, entitled Transfers and Promotions, states:

The City will have the right to transfer and/or promote employees within any department or to any new department in its reasonable discretion that will take into account an employee's seniority, training, education, expertise, performance, attendance, and discipline history, as well as any possible disruption that may result from an inter-departmental transfer. Such transfer and/or promotion will be on a six (6) month probationary period, during which time the City may reasonably determine that the transferred employee is unable to perform the duties and functions of the new position and may reasonably exercise its right to transfer that person back to their old position or to another position. Transfers and promotions will be effected without loss of seniority.

On September 25, 2014, Orr, by authority of PA 436, issued Emergency Manager (EM) Order 41, that directed the City, and more specifically its CFO, to centralize the City's financial operations. To that point, EM Order 41 provided:

3. The CFO is directed to establish a centralized financial management organization structure, to be called the Office of the Chief Financial Officer ("Office of the CFO"). The Office of the CFO will provide management oversight, control, and direction to the existing Budget Department, Finance Department and all their subordinate components, and all finance, budget, and grant related components of the City departments, divisions, and agencies.

The Office of the CFO shall oversee, control, direct and coordinate the City's activities relating to budgets, financial plans, financial management, grants management, financial reporting, financial analysis, and compliance with the budget and financial plan of the City.

* * *

10. Notwithstanding any City or human resources rule, regulation, policy, agreement, ordinance, or practice to the contrary, including but not limited to the City's Civil Service Rules, the CFO shall have the authority to do the following in consultation with the Human Resource Department:

    a. Determine the placement of all finance, budget, and grants related positions, including the selection and removal of incumbents, within the Office of the CFO and other City departments, division and agencies;

    b. Create or modify job titles, roles, responsibilities and positions in support of the City's finance and budgeting functions, within the Office of the CFO and other City departments, divisions and agencies; and

    c. Make recruitment, hiring, retention, promotion, demotion, reassignment and any other related personnel decisions affecting the City's finance and budgeting functions.

    In all events, the CFO shall comply with the terms of applicable collective bargaining agreements and provide required notices to impacted employees and labor unions, if applicable.

* * *

15. **Nothing in this order shall be interpreted as contrary to applicable law.**

[Emphasis Added.]

On January 7, 2015, Respondent met with employees that it had identified as potentially being affected by the creation of the OCFO; Charging Party was not invited to or informed of the meeting prior to it taking place. At that meeting, Respondent's CFO, John Hill, presented a Power Point presentation entitled "Office of the Chief Financial Officer Restructuring." Hill testified that Respondent had attempted to identify, and invite, any individual employed with the City that may be affected by the restructuring, i.e., any employee that worked in a finance function of some sort or another. Part of that presentation focused on how the OFCO would create new positions and job descriptions and included a slide entitled "Pathway to Employment" which provided a flowchart on how current employees could retain their employment in the new department; current employees could apply for new OCFO positions regardless of whether the positions were similar to or different than their current positions, or apply for non-OCFO vacant positions elsewhere in the City. That same slide also indicated that employees could or should

"explore [their] contractual rights" and "utilize transition services." As part of this presentation the City stated that currently there were approximately 390 full-time finance function employee positions employed Citywide. Charging Party did not identify what number of those positions were its unit members or what percentage of its overall unit membership those positions comprised. Hill testified at the hearing that it was his and the City's belief that they undertook the reorganization in compliance with the parties' contract.

Either at the January 7, 2015, meeting or sometime thereabout, Respondent created and provided a document to its unions and employees that served as Frequently Asked Questions (FAQ) for the creation of the OCFO. That FAQ states in the relevant part the following:

> **Why is the Office of Chief Financial Officer being created?**
>
> The City of Detroit's Bankruptcy Plan of Adjustment ("POA") approved by Judge Rhodes requires the restructure of Citywide finance operations. The POA further requires strict oversight of the City's finances by a Financial Review Commission and lays out plans for significant restructuring and reinvestment initiatives Citywide. The Michigan State Legislature and the Governor signed into law Public Act ("PA") 181 of 2014, requiring, among other items: (1) the appointment of a Chief Financial Officer to supervise all financial and budget operations of any municipality in the State with a population of over 600,000; and (2) the creation of a Financial Review Commission ("FRC") within the Michigan Department of Treasury to oversee Qualifying municipalities. The Mayor of the City of Detroit has appointed and sent to the City Council for confirmation the appointment of John W. Hill as the Chief Financial Officer for the City of Detroit. In addition, the Michigan Department of Treasury has created a Financial Review Commission for the City of Detroit.
>
> The City of Detroit Emergency Manager ("EM") issued multiple EM Orders to ensure the financial well-being of the operations of the City of Detroit government. EM Order Number 41 requires the Chief Financial Officer to: (1) create a centralized financial management operation called the Office of the Chief Financial Officer ("OCFO"); (2) consolidate finance related functions; and (3) oversee, control and direct all existing finance personnel within all City departments, divisions and agencies.
>
> The City of Detroit's existing finance operations are broken, misaligned and deficient. The City is unable to issue the CAFR timely, prepare reliable financial reports, or manage operations. In addition, the City is unable to manage cash or perform detailed financial analysis without outside assistance.
>
> The Chief Financial Officer is mandated and compelled to implement the POA and EM Order, as well as follow Michigan State Law to restructure the financial operations of the City of Detroit.
>
> * * *
>
> **How will these positions be filled?**

All Class II, III and IV positions will be filled through a competitive selection process. All current employees will have to apply for those positions they think they are qualified to perform once the positions are advertised.

The application process will require each individual to apply by submitting a resume and by completing a Work Accomplishment Record. The application and applicant evaluation process will include the following steps:

Step 1 - Each application will be reviewed to determine if the minimum qualification requirements are met. This will include the required years of experience, any educational requirements as well as certifications.

Step 2 - The applicant completed Work Accomplishment Record will be reviewed and evaluated by a panel of trained and certified reviewers. The Work Accomplishment Record is critical to the application process and each applicant is asked to spend the appropriate amount of time to complete this record. Based on this review the best-qualified applicants will be scheduled for a Structured Interview.

Step 3 - The candidates that reach this step will be required to participate in a structured interview by a panel of subject matter experts. The structured interview will be used to determine those applicants that should be recommended for a final interview.

Step 4 - In some circumstances certifications may be required and/or written, online, work samples, and/or other tests may be required to demonstrate possession of a knowledge, skill and/or ability.

Step 5 - Candidates participate in a final interview with the supervisor or manager of the organization where the applicant will be assigned or with an interview panel made up of members of the Office of the Chief Financial Officer.

* * *

What will happen to me if I do not get selected for one of these positions?

First and foremost -Apply, apply, apply:

Option 1: Apply to all positions that match your experience, education and skill.

Option 2: Apply for all positions that are similar to your experience, education and skill.

Take advantage of other opportunities if not selected:

Option 3: Seek vacant positions in other departments that match your experience, education and skill.

Option 4: Based on your seniority rights if a position is not found, exercise your bumping right to another position in other departments.

Option 5: Take advantage of City offered Transition Services

On January 8, 2015, Respondent met with the authorized bargaining representatives, including Charging Party, of those employees and units that would potentially be affected by the restructuring. Hill testified that he presented the same material from the prior day's meeting and attempted to answer all of the questions that he could.

On January 12, 2015, AFSCME Council 25 Staff Representative Catherine Phillips sent a letter to Michael A. Hall, the City's Labor Relations Director, which stated in the relevant part:

> Michigan AFSCME Council 25 is demanding to bargain over the implementation of the referenced matter and the impact this reorganization will have upon our members.
>
> We are unclear which departments will be directly affected by the reorganization. Therefore, we request that all AFSCME Presidents be released to attend the negotiations. [6]

Hall responded by letter dated January 14, 2015, indicating that he would like to meet with Phillips during the week of January 26, 2015. That letter went on to indicate that further information would be provided to "AFSCME as well as other City union representatives" at a meeting scheduled for January 16, 2015.

The City met with Charging Party and other unions on January 16, 2015. The record is devoid of what occurred at the meeting.

On January 27, 2015, Hall and other members of the City's labor relations department met with Phillips and another AFSCME Staff Representative and various local Presidents. Phillips's unrefuted testimony was that no bargaining took place during that meeting and that the City was unable to answer questions regarding the reorganization, including, but not limited to, which employees and/or departments would be affected. The City did commit to getting back with the Union regarding its questions.

Sometime in March 2015, the City once again met with Charging Party and other City unions to provide an update regarding the reorganization. During that meeting Phillips reminded the City of its outstanding demand to bargain. According to Phillips, Hill responded by stating the "City doesn't have to bargain" and that they "have the right to make changes as they see fit."

In May of 2015, the City once again met with Charging Party. According to Phillips, Hall was the only City representative in attendance. At this meeting Phillips provided the City with a written proposal that included its request that Charging Party's members affected by the reorganization be "grandfathered" into the new classifications and that existing AFSCME represented employees not currently employed in "finance" positions not be subject to a credit check or city tax requirement when applying for the new positions. It is clear from testimony at the hearing that while the City never responded in writing to the proposal it did, at some point, communicate that it would eliminate at least the City tax requirement from the new job descriptions.

[6] Phillips testified that in a second letter, not introduced into evidence that she made the demand that the City "cease and desist" with the reorganization "until we could have an opportunity to sit down and bargain over the impact that this reorganization" would have on the membership.

As stipulated to by the parties, at least one City representative and at least one representative from Charging Party met several more times where the subject of the OCFO reorganization/creation was discussed. The dates of those meetings were: July 22, 2015; October 1, 2015; December 15, 2015; March 16, 2016; April 11, 2016; and June 13, 2016. All told the parties stipulated to and/or the record established that beginning with the January 8, 2015, meeting, the parties met formally on nine separate occasions for purposes related to the reorganization; the last meeting occurring on June 13, 2016.

Except as specifically set forth within this decision, the parties provided very little information as to what occurred and/or was discussed at the majority of these meetings.

In September 2015, the City distributed a questionnaire, entitled "City of Detroit Position Questionnaire" (Questionnaire) to employees that were expected to become part of OCFO. The Questionnaire asked the employees to provide information on the type of work each performed as well as information regarding their individual skill sets. Phillips testified that she contacted Hall and demanded that he "cease and desist" distributing the questionnaire and that "he would get a demand to bargain over the questionnaire." Phillips never claimed that such a bargaining demand was ever made.

The City and AFSCME met once again on April 11, 2016, for the intended purpose of discussing severance pay for those employees who would not continue their employment. On April 19, 2016, the City presented Charging Party with a proposed severance plan for employees who would receive separation notices as a result of the reorganization; Charging Party did not accept the proposal nor did it propose a counter offer.

Sometime in 2015, the City began to post the new classifications with the OCFO; the positions were posted as "open competitive" which allowed for any person, both currently employed by the City and the general public to apply for consideration. Posting the positions as "open competitive" differed from the parties' pact practice where upon the posting of a new position the City would allow current City employees within that department to be considered first, then City employees as a whole and then last the general public. Existing employees were required to apply for the new positions and had to fill out an "Accomplishment Record" as part of the process.

As a result of the City's reorganization, countless numbers of City's employees who held finance positions were consolidated into the OCFO while an untold number of employees who previously held those positions were not placed within the OCFO, with the great majority of those individuals having found positions somewhere else within other City departments. Charging Party did identify three former unit members that were laid off after they were unable to secure employment either within the OCFO or elsewhere in the City.

Discussion and Conclusions of Law:

Charging Party's theory of its case is best characterized by using its own statement of such as taken verbatim from its post hearing filing.[7] Therein Charging Party stated:

[7] Despite Charging Party's repeated written claims that the City's actions with regard to the creation of the OCFO and its reorganization of its workforce into that office violated Section 10(1)(a), (b), (e) and Section 15 of PERA, nowhere does it articulate any argument as it relates to Section 10(1)(a) or (b). Furthermore, Section 15 does not provide a basis for an unfair labor practice, as a violation thereof is prosecuted under Section 10(1)(e). Accordingly,

> With these charges, Michigan AFSCME Council 25 and its affiliated locals (AFSCME) challenge the method of a reorganization conducted by the City of Detroit within its financial operations. The manner in which it did so repudiated the AFSCME collective bargaining agreement. Alternatively, if this Commission finds that the Union contract language does not support a charge of repudiation, AFSCME contends that the City of Detroit unilaterally implemented mandatory subjects of bargaining in the manner in which it reorganized. Finally, AFSCME contends that the City directly bargained with AFSCME-represented employees in the course of the reorganization.

Respondent argues initially that EM Order 41 justified its actions. However, while that directive did prompt the creation of the OCFO, at the time it was issued by Orr the City was under no statutory duty to bargain with its labor organizations. Moreover, the actual reorganization and actions complained of by Charging Party occurred long after the City's duty to bargain under PERA had been restored in December of 2014.[8] Equally damaging to Respondent's argument regarding EM 41 is that the actual language of the order requires that the reorganization be carried out in accordance with the parties' labor contract and applicable law – in this case PERA. As such, I reject Respondent's argument that either EM 41 and/or the City's consent agreement excused it from any statutory duty bargain over the effects of its reorganization that began and/or occurred after such times as the City's financial emergency was terminated in December of 2014.

Repudiation

It is well-established that repudiation exists only when: (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over contract interpretation is involved. *Wayne County Airport Authority*, 29 MPER 14 (2015). Repudiation warranting Commission involvement can be found only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. See *Gibraltar Sch Dist*, 16 MPER 36 (2003). A good faith dispute over contract interpretation exists where the provisions of the collective bargaining agreement cover the matter in dispute and where those provisions may reasonably be relied on for the actions taken by the parties. See, *City of Pontiac*, 26 MPER 30 (2012); *City of Royal Oak*, 23 MPER 107 (2010). In such situations, and where the contract at issue includes a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich. 309, 317-321 (1996).

Charging Party's repudiation allegation is premised on the idea that Respondent repudiated the parties' collective agreement, not by the act of reorganizing itself, but rather by the method by which Respondent conducted its reorganization. To that point, Charging Party identified several contract provisions in its post-hearing brief it claims were violated by the City during the reorganization: Article 3(C)(6), which requires the City to "notify the applicable Union President and participate in a meeting to discuss implementation of any revised, new or eliminated classification, duty or position, at least ten (10) working days prior to implementation.

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it is the conclusion of the undersigned that any such argument predicated thereupon has been abandoned. I will proceed to analyze the merits of this matter with respect to Section 10(1)(e) only.

[8] Orr issued EM 41 on September 25, 2014, while the City was in bankruptcy and operating in receivership pursuant to the terms of the 2012 consent agreement. In December of 2014, the City was released from bankruptcy and Governor Snyder terminated its financial emergency thereby releasing the City from the consent agreement.

The applicable Union President may provide input during the meeting with respect to any proposed changes."; Article 3(C)(9), which requires discharge of employees for just cause; Article 3(C)(14), which allows the City to layoff employees for "lack of work or lack of funds"; and Article 12(C), which outlines when an employee may lose his or her seniority.

As to the first element of repudiation, Charging Party claims "there is no dispute" that the alleged breach(s) have a significant impact on the bargaining unit. However, Charging Party did not establish on the record how many of the approximate 390 City employees employed in finance functions prior to the reorganization were its members nor what percentage of said positions were impacted, other than to identify three individuals who were laid off.

The preceding notwithstanding, assuming that Charging Party could establish significant impact, it nonetheless failed to establish the absence of a bona fide dispute over contract interpretation and/or that the Employer's actions amounted to a complete disregard for the contact as written. Article 3(C)(14) provides the City with the right to "lay off employees for lack of work or lack of funds." However, nowhere within that Article nor within Article 14, the contract's layoff and recall provisions, is the City's right to lay off tempered by the requirement that it *only* be done for "lack of work or lack of funds" as claimed by Charging Party. Furthermore, Article 3(C)(14) together with the other management rights explicitly bestowed upon the City, which included the right of the City to change the department structure; change functions of the department, including the reduction and/or creation of functions; revise, create combine, and/or eliminate classifications; determine hiring and reductions; transfer employees; and, control the methods, means and employees necessary for department operations, it is clear to the undersigned that there exists contract language which supports the City's actions. Accordingly, it is my finding that the dispute between the party is covered by the contact and that any question as to the meaning or scope of that contact language should be left for an arbitrator to resolve.

Charging Party's failure to establish the prima facie elements of repudiation notwithstanding, it argues, in its post-hearing brief, that Respondent failed to present any evidence at the hearing of an actual dispute as to any specific contract provision. To that point, Charging Party cites to several cases, two of which will be discussed below in turn.

Charging Party cites to *Garden City Public Schools,* 28 MPER 63 (2015) and claims that there, the Commission rejected the district's conclusory claim that a bona fide dispute existed as to whether the contract authorized the employer to substitute one health care plan for another. While, Charging Party's case summary is correct as to the Commission's holding, it ignores the factual basis as developed by the record that guided such; the ALJ found, and the Commission agreed, that "the contract in this case does not, as some collective bargaining agreements do, allow Respondent to provide either a specific health care plan or equivalent coverage." The ALJ went on to find that on the contrary the contract "unambiguously" required the employer to provide charging party with a specific and identified plan. In the instant case, there are managerial rights provisions, that the City can rely upon to support its actions in the reorganization. Additionally, absent from the contract is any clear requirement that layoffs be limited to only a lack of work or funds, contrary to the position taken by Charging Party.

Charging Party next relies upon an unpublished Court of Appeals decision, *36th District Court v Michigan AFSCME Council 25,* Docket No. 285123 (September 29, 2009). There the employer appealed the Commission's decision that its reduction in the work week by way of

layoff days constituted a repudiation because the contract contained an explicit definition of what constituted a work week. There, the Court stated:

> Here, although respondent raised the issue whether the MERC properly affirmed the administrative law judge's conclusion that it repudiated the contract, respondent failed to properly argue the merits of this issue. Specifically, respondent failed to cite to any authority in support of its position that it did not repudiate the contract and, further, failed to explain why it contends that there was no repudiation. It is not sufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to either sustain or reject his position." [Internal Citations Omitted] Because respondent failed to properly argue the merits of its claim, we deem this issue abandoned on appeal.

It is clear in the Court's statements that the respondent's failure to offer support for its position related to a failure in its appeal of the Commission's decision and order to the Court. In the underlying Commission decision, *36th District Court*, 21 MPER 19 (2008), both the Commission and ALJ found that no bona fide dispute existed because the employer disregarded the clear definition of "work week" and instead substituted its own definition in place thereof. Once again however, the contract between Charging Party and Respondent in the instance case contains numerous contractual provisions that the City can rely upon to support its actions in the reorganization.

Accordingly, while the Employer could have provided better direct testimony or evidence as to the specific contract provisions it relied upon, above and beyond Hill's testimony that he considered the reorganization to have been done in accordance with the contract, the Charging Party cannot escape the fact that the contract's language and terms contained therein offer explicit and specific support for the City's actions, thereby creating a bona fide dispute.

Bargaining Over the Impact

Alternative to its repudiation allegations, Charging Party asserts that the City violated PERA by refusing to bargain the impact of its decision to reorganize and the accompanying changes in working conditions for unit members, manifesting as the requirement that all finance employees reapply for positions with the OCFO which resulted in transfers and the eventual layoff of three unit members.

Under *Ishpeming Supervisory Employees v City of Ishpeming*, 155 Mich App 501 (1986), it is well established that a public employer does not have a duty to bargain regarding the legitimate departmental re-organization or re-structuring of its operations. There, at 511, the Court stated:

> Once the initial decision [to reorganize] has been made, the union has the ability to protect its members by bargaining regarding the impact of the decision. For instance, if any employees are to lose their jobs because of the reorganization, the union can bargain concerning the specific individuals who are to be laid off.

Such duty to bargain on the part of the employer is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City*, 135 Mich

App 553 (1984). While a demand to bargain is not required to take a particular form in order to be effective, the employer must know that a request is being made. *Michigan State University*, 1993 MERC Lab Op 52, 63. Furthermore, a demand to bargain must articulate with some specificity what impact the requestor wishes to bargain. See *City of Grand Rapids*, 22 MPER 70 (2009).

Charging Party claims that its January 12, 2015, letter constituted a clear unequivocal demand to bargain over the City's implementation of the reorganization and the effect on Charging Party's members. According to testimony by Phillips, this demand was repeated verbally near the end of March 2015.

Aside from Charging Party's initial general and broad demand to bargain over the reorganization and "the impact this reorganization will have upon our members" the record is devoid of any specific bargaining demand other than the one written proposal presented by Charging Party in May of 2015. With respect to that one specific bargaining proposal, while the City rejected the offer as to grandfathering current members, it did accept the part of the proposal regarding background checks. Additionally, with respect to the job questionnaire, while the Charging Party claims the City failed to bargain over the Job questionnaire and/or the "Accomplishment Record" it failed to present any evidence to prove that any actual and sufficient demand was made to do so. While Charging Party has communicated very clearly in its filings what issues it wished to have had the opportunity to bargain over, such does not cure its failure to do the same during the actual reorganization.

Accordingly, it is my finding that Charging Party failed to establish that it made any bargaining demand that articulated with any semblance of specificity what it wished to bargain, and that in the absence of such, the City actions cannot be found to have constituted a refusal to bargain.

Direct Dealing

With respect to Charging Party's argument that the City violated PERA by directly dealing with represented employees, an employer violates the duty to bargain and unlawfully bypasses the union when it confers a benefit upon employees or otherwise changes conditions of employment without going through the employees' exclusive bargaining representative. *Interurban Transit Partnership*, 30 MPER 56 (2017). In these cases, the relevant inquiry is whether the employer's conduct is "likely to erode the union's position as exclusive representative." *City of Detroit (Housing Comm)*, 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987). However, not all communications between an employer and its employees are unlawful. A violation will not be found where the employer communicates with employees for the purpose of providing information relating to planned or actual changes in operations or procedures, the employees are offered nothing and are not requested to make an agreement. *City of Grand Rapids*, 1994 MERC Lab Op 1159; *North Ottawa Comm Hosp*, 1982 MERC Lab Op 555.

Under the facts as presented by the parties in these proceedings I find no basis to conclude that the City's information sessions with employees regarding the reorganization of its finance functions sought to bypass Charging Party or erode the Union's position as the representative of its members. Nor can I conclude that such meetings were anything other than the City communicating to its employees about the planned reorganization and how such would impact them. Charging Party failed to establish that its members were offered something or in

any way asked to make a deal in return for such. Additionally, as I have already concluded that the City was under no obligation to bargain the effects of the reorganization, a charge of direct dealing fails. See *Southfield Public Schools*, 15 MPER 33028 (2002).

I have considered all other arguments as set forth by the parties and conclude that such does not justify a change in my conclusion. Accordingly, for the reasons set forth above I recommend that the Commission issue the following Order:

Recommended Order:

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 25, 2017