STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MONTCALM COUNTY,
Public Employer-Respondent,

MERC Case No. C18 C-020

-and-

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 3067.03,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Varnum LLP, by Luis E. Avila, for Respondent

Kenneth J. Bailey, Director of Arbitration & Legal, for Charging Party

DECISION AND ORDER

On December 21, 2018, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by either of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Issued: February 28, 2019

[1] MAHS Hearing Docket No. 18-005257

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MONTCALM COUNTY,
Respondent-Public Employer,

Case No. C18 C-020
-and- Docket No. 18-005257-MERC

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 3067.03,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Varnum LLP, by Luis E. Avila, for the Public Employer

Kenneth J. Bailey, Director of Arbitration & Legal, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the American Federation of State, County & Municipal Employees (AFSCME), Local 3067.03 against Montcalm County on March 16, 2018. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission). The charge asserts that the Montcalm County Clerk violated PERA by dealing directly with bargaining unit members regarding how to implement a reduction in the department's budget. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed on August 1, 2018, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

Charging Party represents a bargaining unit consisting of approximately 31 employees of Montcalm County, including employees of the County Clerk's Office. The County Clerk's Office is split into two separate divisions: the Vital Records and Elections Division and the Circuit Court Clerk's Division. Kristin Millard was elected Montcalm County Clerk in 1997 and is still serving in that capacity. Millard and her chief deputy, Nan Hagerman, work out of the Vital Records office in the Administration Building. Neither Millard nor Hagerman are members of the bargaining unit represented by AFSCME Local 3067.03. At the time of the events giving rise to this dispute, there were four members of

Charging Party's bargaining unit employed within the County Clerk's Office. Administrative aide Jaye Christensen and deputy clerks Candace Thomas and Amy Johnson were assigned to the Circuit Court Clerk's Division and worked in the court complex, while Rhonda Carlson worked as a clerk in the Vital Records Office. Christensen and Carlson were both elected Local Union officers; Christensen was a steward-treasurer and Carlson was a steward-secretary.

The most recent collective bargaining agreement between Charging Party and the County covers the period January 1, 2015, through December 31, 2017. The contract contains a management rights clause which provides, in pertinent part:

> Except as in this Agreement otherwise specifically and expressly provided, the Employers [Montcalm County and the Montcalm County Clerk, Register of Deeds, Prosecuting Attorney, Sheriff, Treasurer, and Drain Commissioner] retain the sole and exclusive right to manage and operate the County of Montcalm in all of its operations and activities. Among the rights of management, included only by way of illustration and not by way of limitation, is the right to . . . establish classifications of work and the number of personnel required; to determine the nature and number of personnel required; . . . to manage its affairs efficiently and economically; to determine the quantity and quality of service to be rendered; . . . to determine the size of the work force and increase or decrease its size; to determine the number of hours to be worked; to establish work schedules, and in all respects to carry out the ordinary and customary functions of management.
>
> The Employers shall also have the right to hire, promote, assign, transfer, suspend, discipline, discharge, layoff and recall personnel; . . . to determine work loads [sic]; to establish and change work schedules . . . . The exercise of any management right shall not be inconsistent with any of the express terms of this Agreement.

The agreement contains language specifically addressing hours of work for bargaining unit members. Section 12.1 states:

> The normal work day for regular full-time employees shall be eight (8) hours, excluding a sixty (60) minute non-paid lunch period. The normal work week for regular full-time employees shall be five (5) work days, Monday through Friday, and shall usually be forty (40) hours in duration. The recitation of the normal work day and work week shall not serve as a guarantee of work. The normal starting and quitting times for the court house clerical staff who work the day shift shall remain as was in effect at the effective date of this Agreement unless otherwise changed by mutual agreement, provided however that the Employers reserve the right to establish other work shifts and may stagger starting times to accommodate services.

The budget for the various departments within the County, including the Clerk's Office, is determined by the County Board of Commissioners. In May of each year, the County Controller provides each department head and elected official with a manual

containing recommended cuts. The department heads and elected officials review that manual and make recommendations. Those recommendations are then submitted to the County's Finance and Personnel Committee which, in turn, reviews the materials and makes its own recommendations to the Board of Commissioners. The Board of Commissioners then votes on the budget for each department. Once the budget for the Clerk's Office is final, it is up to Millard to decide how to implement that budget within her department, including whether to increase revenues and/or reduce expenses. If she decides to increase revenues by raising fees, for example by increasing the cost charged for certified copies, she must go back to the Finance and Personnel Committee and obtain its approval. Millard testified that when the Clerk's Office has faced budget reductions in prior years, she has routinely sought the input of her staff with respect to how to respond to those budgetary constraints.

On or about July 28, 2017, Bob Clingenpeel, the County Controller, sent a memo to all department heads and elected officials listing the budget cuts which the Finance and Personnel Committee would be recommending to the full Board for the 2018 budget. Clingenpeel requested that each department head identify what steps they would take to satisfy the proposed reductions. According to a document attached to the memo, the Finance and Personnel Committee was recommending a $50,000 reduction in the budget for the County Clerk's office. At the hearing in this matter, Millard described the proposed budget reduction as potentially "devastating" to the department.

In early August of 2017, Millard met with her staff and asked them to come up with ideas to deal with the looming budget cuts, including options to generate additional revenue or reduce expenditures. Jaye Christensen testified that the discussion occurred during an informal meeting which transpired during one of Millard's daily visits to the court complex and that Millard engaged the staff in similar discussions throughout the month of August. Millard testified that the discussion occurred at a regularly scheduled staff meeting held on August 4, 2017. Regardless, it is undisputed that on August 9, 2017, Christensen sent an email to Millard which stated, "Not sure if you have a plan yet or have made a decision, but I would gladly give up 8 hours a week to be able to keep people. That's about $7,500 a year." Millard responded by email that same date, telling Christensen "That's awesome. Thank you Jaye." A few minutes later, Christensen wrote back, "You're welcome. I just hope we can come up with enough." At hearing, Christensen was asked why she decided to make the offer to Millard:

> Q (by counsel for the Employer): What is your recollection of any meeting that took place before this e-mail that would have prompted you to send this e-mail?
>
> A (by Christensen): Well, what prompted me to send the e-mail, I think, was in talking to the Chief Deputy Clerk, Nan Hagerman, who had said she had offered to give up eight hours of pay to keep her girl up there, and I said – so that's what prompted me to say, you know, I would be willing to do this if it would help keep people. So there had to have been some meeting.

At 9:04 a.m. on August 10, 2017, Clingenpeel sent an email to Millard and other department heads regarding the budget situation. In the message, Clingenpeel indicated that the County's expenses outweighed its revenues and opined that "a simple band-aid fix is not

the answer. All of us are accountable for fixing this problem." The message urged department heads to come up with viable solutions for increasing revenue or cutting expenses and concluded with the statement, "If you are not part of the solution you are part of the problem." Approximately one hour later, Millard forwarded Clingenpeel's email to the Clerk's Office staff, along with a message indicating that she would be submitting her own budget recommendations to the Finance and Personnel Committee in the form of a memo the following day. Millard wrote that that the memo "will say that we have nothing to cut in the amount of $50,000. Period." Later that same day, at approximately 3:31 p.m., Amy Johnson sent the following message to Millard on behalf of the deputy clerks:

> These are the suggestions we came up with to add to your memo to the board tomorrow.
>
> County Wide Furlough Days-we feel this would effect [sic] all departments equally. Instead of just a few departments choosing to make this sacrifice. "All of us are accountable for fixing this problem."
>
> All County Offices close at Noon on Friday. Again to effect [sic] all offices equally. This would give all county employee's [sic] 72 hours per pay period. "If you are not part of the solution you are part of the problem."
>
> If we are all in this together then EVERY department needs to be affected the same way!
>
> Eliminating any more staff for the clerk's office leaves us vulnerable and unable to complete our duties. As of now when one employee is left in the Vital Records Office of the Clerk, she must use the restroom with the door open and let customers now [sic] from the back that she will be with them in a moment. The court office which is left with 2 employees on some days must lock the office door to use the restroom while the other employee is in the courtroom. This is nether safe nor effective!!
>
> Due to the reduction in staff at the Clerk Court Office there are times when we just cannot complete our Statutory Duty of having a Clerk present for all courtroom hearings as needed.
>
> Hope this helps with putting your memo together.

Millard responded with an email thanking her staff for the suggestions and asking whether anyone had anything else to add.

On August 11, 2017, Millard sent a memo to the Finance and Personnel Committee with the subject "Clerk's Office Budget – Proposed Budget Reduction." In the memo, Millard references the $94,000 cut from her budget the prior year which had resulted in the elimination of a full-time assistant, as well the reduction of a full-time employee to part-time. Millard asserted that the department was operating with a "skeleton crew" and had been left in the position of being unable to fulfill its statutory duties. As an alternative to the $50,000 budget reduction for 2018, Millard recommended that County-wide furlough days be

imposed on employees in all departments and that County offices close at noon on Fridays. Millard forwarded copies of the memo to her staff. On August 14, 2017, Christensen sent an email to Millard congratulating her on the document. "I thought your memo was perfect," she wrote. "Hope it gets us good results."

The Finance and Personnel Committee was scheduled to meet on the budget recommendations on September 11, 2017. In advance of that meeting, Millard sent another memo to the committee dated September 8, 2017. In this memo, Millard once again complained that her department was operating at an "undesirable level" and she explained why the consolidation of the Vital Records and Elections Division and the Circuit Court Clerk's Division was not a practical solution. Millard wrote, "[T]he only possible reduction I can possibly offer at this time would be to eliminate the part-time Administrative Aide position in the Vital Records Office." She also suggested that the County consider imposing a 37.5 hour work week for all employees or, in the alternative, lessening the impact on the Clerk's Office by cutting $25,000 from its budget instead of the $50,000 which had been previously proposed.

Millard attended the September 11, 2017, meeting of the Finance and Personnel Committee, as did Hagerman, Johnson and Candace Thomas. The staff of the Clerk's Office presented information to the committee in an attempt to explain how the department would be impacted if additional positions were eliminated. A motion was made to accept Millard's proposal to change the amount cut from the department's budget to $25,000, but it failed. Ultimately, the Commission voted to approve the $50,000 reduction in the budget for the Clerk's Office. Following the meeting, Clingenpeel sent a memo to all department heads and elected officials notifying them that they must inform him by September 20, 2017, as to how their respective departments intended to meet the budget reductions approved by the Finance and Personnel Committee.

Millard met with her staff on September 15, 2017, and informed her employees that, despite their best efforts, the County was going forward with the $50,000 reduction in the department's budget. As she had done previously, Millard solicited proposals, suggestions and options from her staff regarding how to deal with the budget cuts. According to Millard, Christensen once again volunteered to give up eight hours of work per week provided that the rest of the staff would do the same. Millard responded that even a reduction in eight hours by every employee in the department would be insufficient to make up for the deficit. At hearing, Millard testified, "At this point, it was our – I think we had exhausted all of our other efforts at that point. We had gone through every single item, every single revenue that we had." Millard made no commitments to her staff at that meeting regarding how she would go about implementing the reduced budget for the Clerk's Office.

On September 19, 2017, Millard sent a memo to Clingenpeel and the Board of Commissioners with the subject "Clerk's Office Budget – Proposed Reductions." Millard testified that even though the Finance and Personnel Committee had made its decision, she intended to plead the case for the department. The memo, which incorporated prior staff suggestions, presented two options for revenue increases and expense reductions for the department's 2018 budget. Both options called for a $5 increase in certified copy fees and the transfer of $10,000 from the "CPL fund" to be used for wages. Under Option #1, which was based upon the $50,000 budget reduction proposed by the Finance and Personnel

Committee, Christensen and Carlson would have their hours reduced to 22 and 16 hours per week, respectively, with a .5 hour per day reduction for all other employees. Option #2, which Millard recommended that the Board adopt, called for a reduction in the department's budget in the amount of $25,000, with a reduction of five hours per pay period for Christensen and Thomas and three hours per pay period for Johnson and Carlson. Pursuant to this second option, the remaining employees in the department would still have their hours reduced by .5 per day.

The Board met on September 25, 2017, and formally adopted the $50,000 budget reduction for the Clerk's Office as recommended by the Finance and Personnel Committee. Millard met with her staff on Wednesday, September 27, 2017, to inform them of the action taken by the board. At hearing, Millard and Christensen offered conflicting accounts of what occurred at this meeting. Millard testified that she did not solicit any additional suggestions from her staff because "it was too late for ideas at that point." Millard claims that, by then, she had already made her decision regarding how to implement the budget cuts. In contrast, Christensen recalled that during the meeting in late September, she commented that it would be fair if everyone took the same cut and that Millard responded by asking her, "Jaye, what are you willing to give up." Christensen testified that she offered to reduce her work schedule by one day per week. According to Christensen, Millard then looked at Thomas and queried, "You can't give up much more than that, can you" to which Thomas responded "no." Christensen proposed that everyone give up a day per pay period. At some point, Johnson volunteered to take a pink slip because she was the least senior of any employee in the department.

Mary Openlander is the AFSCME staff representative assigned to Montcalm County. In that capacity, she is responsible for handling negotiations and supporting the local Union officers with grievances and other contract enforcement matters. Openlander testified that she received a phone call from Rhonda Carlson on September 27, 2017, regarding a staff meeting at which Millard had asked employees what they were doing to help the County Clerk's office with the budget. At 4:24 p.m. that same day, Christensen sent an email to Openlander which stated, "Kris told us today that Bob is NOT going to tell her who to cut. She will make the decisions for herself and if it results in a grievance then so be it and it will cost the County money. We are supposed to know tomorrow. Can Bob block her cuts?"

Over the course of the next several days, Christensen and Carlson communicated back and forth by email regarding the budget situation. The email chain began on September 28, 2017, with the following message:

> Am I in trouble for telling Mary about our meeting yesterday[?]
>
> No, you are not. Mary just texted me and asked if it was true that I offered to take a cut in hours. I told her yes it is true but what else could I say in front of everyone. I was totally put on the spot. I have told Kris that a cut for everyone was fair and that is when she asked what I was willing to give up.
>
> All Mary told me is that Kris is violating the labor law by negotiating directly with a Union member who has representation. She cannot do this and I cannot either. I didn't know that. I told Mary I was willing to take a cut to be

> fair and shoulder part of the burden. I didn't want to be the only one who wouldn't do it. But, it bit me in the ass anyway because right after Mary emailed Kris and told her she couldn't do it, Candis [sic] and Amy stopped speaking to me.
>
> What do you think of the latest proposal from Kris? I think it stinks. She is keeping Amy even after Amy said she wanted the pink slip. Plus, Mary called me later, Kris is also demoting me from Admin back to Office Assistant. Mary said she can't do that because it is arbitrary and capricious. I also added that it is retaliatory.
>
> * * *
>
> Let me know your thoughts. Have you talked to Nan about this latest proposal of hers?

On the morning of September 29, 2017, Carlson sent a message to Christensen which stated, in part, "I talked to Mary after the office closed and she told me the verbal proposals she has given Bob. [That is] what I figured she would do to me. I think the meeting Wednesday was a planned set up to see if I would offer to give up my job. I just listened." That same day, Millard presented a letter to Christensen indicating that due to the $50,000 budget cut adopted by the Board, her full-time administrative aide position was being reduced to part-time status of 36 hours per week, effective October 6, 2017. The letter was copied to the AFSCME Chapter Chairperson. On that same date, Millard notified Thomas that she was being relegated to part-time and informed Carlson that she was being laid off from her position as deputy clerk in the Vital Records Division.

Discussion and Conclusions of Law:

Charging Party asserts that the County Clerk engaged in direct dealing when she requested that members of her staff propose changes in terms and conditions of employment to respond to the $50,000 budget reduction. Respondent argues that the direct dealing allegation must be dismissed as untimely because the Union knew or should have known that the County Clerk was soliciting ideas from employees on how to implement the budget cuts more than six months before the charge was filed on March 16, 2018. According to the County, the statute of limitations began running no later than August 4, 2017, when Millard first met with her staff and solicited ideas regarding the proposed budget reduction.

Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of the charge upon the respondent. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community 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).

In the instant case, there is no dispute that Millard attempted to solicit ideas from her staff regarding the budget during a meeting which occurred in early August of 2017. Although Respondent admits that such meetings continued throughout August and into September, it asserts that the relevant date for statute of limitations purposes is when the Union first became aware of the allegedly unlawful conduct and that any later discussions between Millard and her staff cannot be relied upon to revive an otherwise untimely claim. It is true that the Commission has rejected the continuing violation doctrine if the inception of the violation occurred more than six months prior to the filing of the charge. See e.g. *County of Lapeer*, 19 MPER 45 (2006); *Detroit Bd of Ed*, 16 MPER 29 (2003); *City of Flint*, 1996 MERC Lab Op 1. However, that policy has not been applied to all types of unfair labor practices arising under PERA. The Commission has consistently held that when a party has a continuing duty to bargain over a mandatory subject, but refuses repeated demands to negotiate, the statute of limitations under Section 16(a) begins to run anew with each refusal to bargain. *Waverly Community Sch*, 31 MPER 30 (2017) (exceptions withdrawn); *Oakland Co Rd Comm*, 22 MPER 92 (2009) (exceptions withdrawn); *City of Detroit*, 21 MPER 70 (2008) (no exceptions); *Reese Pub Schs*, 1989 MERC Lab Op 476, 481; *Van Buren Twp*, 1982 MERC Lab Op 398.

For example, in *Oakland Co Rd Comm*, *supra*, the ALJ held that each time the employer refused the union's renewed requests for information constituted a new violation of Section 10(1)(e) of the Act for purposes of the statute of limitations. In *Spring Lake Pub Schs*, 1988 MERC Lab Op 362, the Commission found that each refusal by the employer to bargain with the union regarding the content of a teacher evaluation form constituted a separate and "continuing" unfair labor practice for purposes of the statute of limitations. In *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125 (no exceptions), the ALJ, citing *Spring Lake*, held that the Union's renewal of its demand that the Employer include a nonmandatory subject in their collective bargaining agreement constituted a separate violation of PERA.

I find that the allegations giving rise to the instant charge are similar to those at issue in *Spring Lake* and *Jackson Fire Fighters Ass'n*. A charge asserting that a public employer has engaged in direct dealing is, in part, a claim that the employer violated its duty to bargain in good faith under Section 15 of PERA by refusing to negotiate with the exclusive bargaining representative of its employees. Millard's repeated attempts to solicit her staff were akin to the respondents' repeated refusals to bargain in *Spring Lake* and *Jackson Fire Fighters Ass'n*. Thus, to the extent that Millard's communications with employees in the County Clerk's office constituted unlawful direct dealing, the statute of limitations began to run anew each time Millard engaged her staff in such discussions.[2] Accordingly, the next

[2] *City of Adrian*, 1970 MERC Lab Op 579, in which the Commission initially rejected the continuing violation doctrine, involved an allegation that the respondent had hired an employee at the top rate of the wage scale without posting the position as required by the contract and without consultation with the union. However, *Adrian* predated the cases cited above in which the Commission held that a party commits a new unfair labor practice each time it refuses to bargain. Moreover, *Adrian* is distinguishable on its facts. There, the Commission held that the unfair labor practice occurred when the employee was hired at a rate above the contractual starting rate and that the statute of limitations did not renew each time the employee received a paycheck at the higher rate. In the instant case, the record establishes that Millard made several distinct attempts to bypass the Charging Party.

issue to consider is whether the most recent attempt by Millard to solicit ideas from her staff regarding the budget occurred within the statutory period.

At the hearing in this matter, Millard admitted to having sought input from her staff regarding implementation of the budget on multiple occasions in 2017. Millard testified that at the August 4, 2017, meeting, she asked her staff to come up with "every possible idea as far as generating additional revenue and finding other areas that we could possibly cut to try to meet this." According to Millard, similar discussions occurred throughout the month of August and continued at a staff meeting held on September 15, 2017, when she told employees that she needed proposals, suggestions and opinions regarding how to deal with the budget cuts. According to Millard, however, that was the last meeting at which such a solicitation occurred. While it is undisputed that there was another staff meeting on September 27, 2017, Millard asserted that the purpose of that meeting was simply to inform the staff of the board's decision to cut $50,000 from the department's budget. Millard testified that she did not solicit employee input at that meeting because "it was too late for ideas at that point" and that she had already decided how to implement the cuts. In contrast, Christensen testified that at the September 27, 2017, staff meeting, Millard asked her what she was "willing to give up" and that in response to Christensen's offer to forgo one day of work per week, Millard looked at Thomas and said, "you can't give up much more than that, can you?"

Although I found both Millard and Christensen to be equally trustworthy witnesses, the documents which were prepared around the time of the staff meeting and which were introduced into the record in this matter seem to support Christensen's account of the incident. In an email to Openlander dated September 27, 2017, Christensen wrote that Millard had, that same day, told employees that Clingenpeel could not tell her who to cut and that she would make the decision for the department, thus contradicting Millard's testimony at hearing that she had already decided how to implement the budget by the time of the last staff meeting. Similarly, the email chain between Christensen and Carlson references a meeting which occurred on September 27, 2017, during which Millard asked an employee what she was "willing to give up." The email chain also mentions a conversation between Carlson and Openlander during which the AFSCME staff representative indicated that Millard's behavior constituted a violation of the law because was "negotiating directly with a Union member who has representation." Notably, Openlander testified credibly that she received a phone call from Carlson on September 27, 2017, regarding that meeting. For these reasons, I credit Christensen's testimony and find that Millard attempted to obtain agreement from members of her staff to changes in terms and conditions of employment at the September 27, 2017, meeting. Accordingly, I conclude that the charge in this matter was timely filed.

The next question is whether the interaction between Millard and her staff constituted direct dealing in violation of Sections 10(1)(a) and (e) of PERA. It is well-established that once a union is designated or selected by a majority of public employees in an appropriate unit, that union is the exclusive representative of these employees for purposes of collective bargaining with respect to wages, hours or other conditions of employment. *Huron Sch Dist*, 1990 MERC Lab Op 628, 634. Under both PERA and the National Labor Relations Act (NLRA), 29 USC 151 et seq., an employer commits an unfair labor practice when it circumvents the designated representative and attempts to negotiate directly with employees

by presenting new information or proposals to employees before or instead of to their bargaining agent. See e.g. *Jackson Co*, 18 MPER 22 (2005); *Pontiac Sch Bd of Ed*, 1994 MERC Lab Op 366, 374; *Medo Photo Supply Corp v NLRB*, 321 US 678 (1944). As the National Labor Relations Board (NLRB) stated in *General Electric Co*, 150 NLRB 192, 195, enf'd 418 F2d 736 (CA 2 1969), "The employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees." The fact that employees approach the employer, and not vice-versa, has no effect on the employer's obligation to avoid direct-dealing. *Medo*, at 687; *Brownstown Twp*, 19 MPER 35 (2006) (no exceptions).

Not all communications between an employer and employees are unlawful. For example, an employer may communicate factual information regarding the status of negotiations or its position at the bargaining table, provided that it does so in a non-coercive manner and without disparaging the bargaining agent. *MEA v North Dearborn Heights Sch Dist*, 169 Mich App 39, 45-46 (1988); *Jackson County*, *supra*. In allegations of direct dealing, the inquiry focuses on whether the employer's conduct is "likely to erode the union's position as exclusive representative." *City of Detroit (Housing Commissio*n), 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987).

I find that the record overwhelmingly establishes that Respondent engaged in direct dealing in violation of Sections 10(1)(a) and (e) of PERA. The evidence shows that Millard communicated directly with union-represented employees for the purpose of changing wages, hours, and terms and conditions of employment and that the exchange was to the exclusion of the Union. In so holding, I reject Respondent's assertion that the charge should be dismissed because Millard did not formally enter into negotiations with employees of the Clerk's Office, but rather was merely seeking their input with regard to budgetary decisions. When management attempts to determine what employees would be willing to "give up" in response to budget cuts, it is seeking economic concessions, regardless of whether the request is made formally to the Union at the bargaining table or directly to employees. In the latter scenario, such a communication has the effect of undercutting the Union's role as exclusive bargaining representative. Direct dealing need not take the form of actual bargaining but, rather, occurs when the employer's conduct in dealing with employees is likely to erode the union's position as exclusive bargaining representative. *Allied-Signal, Inc*, 307 NLRB 752, 753 (1992).

In so holding, I find no merit to Respondent's argument that the presence of Christensen and Carlson at the September 27, 2017, staff meeting obviates a finding that Millard engaged in direct dealing with employees in violation of PERA. Although Christensen was a treasurer/steward and Carlson was a secretary/steward at the time of the meeting, the record establishes that they were solicited in their capacity as employees of the County Clerk's office and not as officers of the Union. The discussions did not occur at a scheduled bargaining session or at a meeting of a joint labor-management committee; rather, Millard solicited offers from employees at a staff meeting which she initiated. Cf. *City of Grand Rapids*, 1994 MERC Lab Op 1159 (direct dealing not found where discussions occurred during a meeting of a joint committee). The two union officers were present because they were employees, not because of their status as elected union officials. There is nothing in the record to suggest that Christensen or Carlson have ever had any role in the

collective bargaining process or that either individual had authority to negotiate on behalf of Charging Party. To the contrary, Openlander testified without contradiction that as the AFSCME staff representative assigned to Local 3067.3, she is responsible for handling contract negotiations. Cf. *Mason County Eastern Sch Dist*, 1993 MERC Lab Op 5 (no exceptions) (meetings between principal and employee did not constitute direct dealing where evidence established that both individuals had roles in the collective bargaining process). Notably, there is no indication that any discussions ever took place between Respondent and Openlander regarding the 2018 budget before Millard solicited her staff or even after Openlander complained to Millard about those discussions. In fact, the record indicates that Millard never even responded to Openlander's email. For these reasons, the fact that Christensen and Carlson were elected Union officials at the time of the September 27, 2018, staff meeting is not relevant to the question of whether Millard violated Sections 10(1)(a) and (e) of the Act.[3]

Respondent also contends that there can be no finding of direct dealing in this matter because the collective bargaining agreement between the parties gave management the right to reduce the hours of unit members and, therefore, Millard had no obligation to bargain with Charging Party over concessions offered by her staff. In support of this contention, the County relies on the management's rights clause of the contract. While that provision does confer upon Respondent the right generally to determine the number of hours to be worked and to establish work schedules, the clause specifically states that "The exercise of any management right shall not be inconsistent with any of the express terms of this Agreement." Section 12.1 of the agreement contains language which specifically defines the normal work day and work week and which limits the circumstances pursuant to which work shifts may be changed. In any event, even if the contract did give management unfettered authority to reduce the hours for employees of the County Clerk's office, such language would not justify Millard's actions in the instant case. Millard did not specifically ask her employees whether they would be willing to forgo a certain number of hours per week or per pay period. Rather, Millard asked Christensen what she would "be willing to give up." It was Christensen who repeatedly proposed reducing her hours of work. While a reduction in hours was one possible response to the budget issues faced by the department, Millard's open-ended question to her staff potentially implicated changes in wages and other terms and conditions of employment. In other words, it was the solicitation of offers by management, rather than the employees' response to that solicitation, which is the relevant consideration in a direct dealing case. For that reason, I find Respondent's reliance on the contract as a defense to the unfair labor practice charge to be without merit.

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[3] See e.g. *Ingredion, Inc*, 366 NLRB No. 74 (2018) (the fact that two employees were union stewards did not serve as a defense to a finding of direct dealing where neither employee had any role in negotiations); *Leatherback Industries*, 1999 WL 33453700 (1999) (employer found to have engaged in direct dealing where union stewards were present at meeting only because they were employees and the union was never notified of the meeting); *Nat'l Ass'n of Gov Employees*, 327 NLRB 676 (1999) (employer could not lawfully discuss offer with group of employees which included a member of union's bargaining committee where that employee was not engaging with the employer in a representative capacity at the time and the employee had no authority to negotiate on behalf of the union).

I have carefully considered all other arguments set forth by the parties in this matter, including Respondent's claim that Charging Party had a duty to demand bargaining over economic concessions, and conclude that they do not warrant a change in the result. For the reasons set forth above, I conclude that Respondent violated Sections 10(1)(a) and (e) of PERA by circumventing the exclusive bargaining representative and dealing directly with its employees. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

Montcalm County, its officers and agents, are hereby ordered to:

1. Cease and desist from violating its duty to bargain in good faith with AFSCME, Local 3067.03 by circumventing the Union and bargaining directly with employees or engaging in other conduct with the intent of avoiding good faith agreement with the certified bargaining agent.

2. Post the attached notice to employees in conspicuous places on the County's premises, including all places where notices to employees in AFSCME, Local 3067.3 are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 21, 2018

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, MONTCALM COUNTY, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT, has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL cease and desist from violating our duty to bargain in good faith with AFSCME, Local 3067.03 by circumventing the Union and bargaining directly with employees or engaging in other conduct with the intent of avoiding good faith agreement with the certified bargaining agent.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

MONTCALM COUNTY

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.