STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (WATER & SEWERAGE DIVISION),
Respondent-Public Employer,

Case No. C00 B-18

-and-

SENIOR ACCOUNTANTS, ANALYSTS AND APPRAISERS ASSOCIATION (SAAA),
Charging Party-Labor Organization.
_____/

APPEARANCES:

City of Detroit Law Department, by June C. Boyd, Esq., for the Public Employer

O'Connor & Associates, P.C., by Doyle O'Connor, for the Charging Party

DECISION AND ORDER

On July 25, 2001 , Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

- and – Case No. C00 B-18

SENIOR ACCOUNTANTS, ANALYSTS AND APPRAISERS ASSOCIATION (SAAA),
Charging Party- Labor Organization

_____/

APPEARANCES:

June C. Boyd, City of Detroit Law Department, for the Public Employer

Doyle O'Connor, O'Connor & Associates, P.C., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Detroit, Michigan, on May 25, and October 5, 2000, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on February 4, 2000, by the Senior Accountants, Analysts and Appraisers Association, alleging that the City of Detroit had violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before December 26, 2000, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that the Employer has violated Section 10(1)(e) of PERA by the following conduct:

> The City of Detroit and its Water and Sewerage Department has violated outstanding orders and decisions of the MERC; specifically C70 G-118

(1971) and subsequent arbitration decisions on the 35-hour work week since that time, by unilaterally imposing on some members of the bargaining unit an additional 5 hours per week of unpaid time in direct violation of MERC's prior order.

The particular employees the charge refers to are drafting technicians at the wastewater treatment plant in the City's Water and Sewerage Department. At hearing, SAAA amended its charge to include nutritionists in the Health Department.

Background:

The dispute over the 35-hour work week dates back to l971 when SAAA and eight other labor organizations filed an unfair labor practice challenging the City's action in unilaterally increasing the work week for certain employees from 35 to 40 hours. *City of Detroit*, 1971 MERC Lab Op 211. As discussed in that case, pursuant to a 1956 City ordinance, department heads could seek approval from the City Council for their employees to work 35 hours while still being paid for 40 hours. The benefit would only be granted if the department head could assure the Council that no additional work force would be required to carry on the duties of the department. Overtime would only be paid when employees worked over 40 hours.

Pursuant to the ordinance, various departments, and in some cases only certain classifications in the departments or certain employees working in downtown locations as distinguished from field operations, began working a 35-hour week. The particular employees or department working the 35-hour week fluctuated somewhat depending on the work load of a particular department. After certain City employees had enjoyed this benefit for a considerable time, in July of 1970 the Mayor issued a directive that all employees should be put on a 40-hour work week, and the City unilaterally implemented the increase in working hours. In *City of Detroit, supra,* the Commission affirmed the findings of the ALJ who found that the working hours which had been established by the practice of the parties for up to fourteen years constituted a mandatory subject of bargaining rather than a management prerogative as claimed by the City. By reverting back to the 40-hour work week for certain employees without notification and bargaining with the authorized representatives of its employees, the Commission found that the City violated PERA.

Since that time the 35-hour work week has been a continuing controversy between the City of Detroit and its many unions and has been the subject of several other Commission and arbitration decisions.1 As reflected in these decisions, there is diversity as to which City employees work the 35-hour week and which unions have contractual language incorporating the work schedule.

Facts:

---

1 See, for example, *City of Detroit (Building & Safety),* 1977 MERC Lab Op 555; *City of Detroit (Water & Sewerage),* 1983 MERC Lab Op 602; *City of Detroit(Wastewater Treatment Plant),* 1993 MERC Lab Op 716; *City of Detroit,* 1994 MERC Lab Op 400; See also the following arbitration decisions: *City of Detroit(Water Dept) and Detroit Association of Engineers (*Daniel, AAA Case No.54-39-1173-78, 9/17/79); *City of Detroit and Association of Municipal Engineers* (Roumell, Case No. 94-163, 4/5/96).

The SAAA represents a variety of professional/technical classifications in approximately 28 City departments. Ronald Gracia has been president of SAAA since 1981. The Municipal Engineering Draftsmen Association (MEDA) formerly represented the classifications of drafting technician I, II, and III. Drafting technicians work in several City departments including the Department of Public Works (DPW), the Department of Transportation (DOT), Community and Economic Development and Planning, and Water and Sewerage. MEDA merged into SAAA sometime after MEDA's 1992-95 collective bargaining agreement with the City expired. On November 7, 1997, the City entered into a Memorandum of Understanding with the SAAA regarding drafting technicians I, II, and III, which provided that, with two exceptions not relevant to this dispute:

> The above referenced classifications, formerly represented by the Municipal Engineering Draftsmen Association but now accreted to the Senior Accountants, Analysts, and Appraisers Association, shall have all of the terms and conditions of the 1995-98 Collective Bargaining Agreement apply . . .

The parties did not discuss work hours at the time the Memorandum of Understanding was entered into. The SAAA 1995-98 contract, also signed on November 7, 1997, provided at Article 2, Management Rights and Responsibilities, Section D, that:

> The City has the right to establish reasonable practices, policies or rules, provided the same do not conflict with the express terms of this Agreement and are applied equally to all employees in the bargaining unit.

The contract also provided at Article 21 that: "Wages, hours and conditions of employment legally in effect at the execution of this Agreement, except as improved herein, shall be maintained during the term of this Agreement." The contract contains a grievance procedure culminating in binding arbitration.

SAAA members have historically worked a 35-hour week, with a paid lunch hour. This work schedule is not delineated in its contract with the City. The matter was not raised in negotiations for the 1995-98 contract, except for an offer by the City to grant one group of SAAA employees an 18% wage increase in exchange for working a 40-hour week. This proposal was rejected by the Union.

In May of 1999 the Union discovered that DPW was requiring that drafting technicians in its Traffic Engineering and Street Maintenance division who had been moved to a new location work a 40-hour work week. These drafting technicians had previously worked a 35-hour work week. The attorney for SAAA wrote a letter to City representatives, advising that such action was contrary to the contract and to the earlier Commission decision in *City of Detroit and SAAA,* 1971 MERC Lab Op 211. After the Union initiated litigation in Wayne County Circuit Court, in July of 1999 the City entered into a settlement agreement returning these drafting technicians to a 35-hour week and compensating them for five hours per week for each 40-hour week worked.

The drafting technicians at issue in this case work at the wastewater treatment plant, a division of the Water and Sewerage Department. SAAA represents other employees at the wastewater plant including purchasing agents, programmer analysts and governmental analysts; these employees normally work a 35-hour week with a one-hour paid lunch, absent an overtime schedule. Gracia testified that he did not know what hours the drafting technicians at the wastewater plant had previously been scheduled to work. Plant maintenance foreman Stanley Komar testified that when he started work with the department approximately 23 years ago, he worked at a downtown office location. At that time he was a junior draftsman (now drafting technician I) and worked a 35-hour work week. When he was transferred to the wastewater treatment plant in 1977, Komar began working a 40-hour work week and continued on that schedule until he left the position in the mid l980's. Alan Lewis, the City's chief labor relations specialist in the economic division of Labor Relations, testified that he began working for Labor Relations in 1986 and the MEDA contract was one of the first he was assigned. According to Lewis, the drafting technicians at the wastewater treatment plant were on a 40-hour work week prior to the time they were accreted to SAAA and to his knowledge they were still on a 40-hour work week. In a previous Commission case, *City of Detroit (Wastewater Treatment Plant),* 1993 MERC Lab Op 716, 720, the ALJ's factual findings reflect that while some of the drafting technicians represented by MEDA had a paid lunch hour (35-hour week), those at the wastewater treatment plant worked a 40-hour week.

In September of 1999, Gracia posted a notice to all SAAA members directing that any member required to work a 40-hour work week immediately contact his office. The Union subsequently learned that nutritionists in the Health Department and drafting technicians in the Water and Sewerage Department were working a 40-hour week. The SAAA attorney again wrote to the City on January 25, 2000, reminding them that they had not yet met their obligations under the previous settlement agreement, and also protesting the City's action in requiring the nutritionists and the drafting technicians in the Water and Sewerage Department to work a 40-hour work week as a violation of the contract and the prior Commission order. The City did not respond to this letter and the Union subsequently filed this unfair labor practice on February 4, 2000.

On April 13, 2000, Gracia wrote to Water and Sewerage Director Stephen Gordon and Deputy Director Kathleen Leavey regarding the 40-hour work week and the pending unfair labor practice charge. Gracia stated in part:

> This bargaining unit represents nearly 600 employees Citywide in 28 departments and basic policies, rules and procedures including standard working hours must be applied equally across the bargaining unit. This Association, unlike some others, has never agreed to any condition or circumstance to allow for bargaining unit members, regardless of department, to work a disparate set of workweek hours, to the detriment of the employee so affected. That would be obviously unfair and prejudicial and would give rise to the SAAA being sued by its affected members for agreeing to such condition.

The next day, April 14, the parties met for negotiations for the 1998-2001 contract. The City proposed language covering the work schedule as follows:

> Employees currently scheduled to work regularly less than forty (40) hours but not less than thirty-five (35) in a service week shall be paid on the basis of forty (40) hours with such compensation to be full pay for work up to and including forty (40) hours exclusive of the meal period. Such employees shall be continued on such schedule.
>
> Where employees are on a different work schedule and/or new positions are accreted to the bargaining unit, the Association and the City shall meet in an effort to achieve agreement on the work schedule of affected employees.

Variations of this language, detailing the work week for specific employees, had also been proposed by the City earlier in negotiations and rejected by the Union. The City eventually dropped its proposals regarding the work week. The parties reached tentative agreement on the 1998-2001 collective bargaining agreement in April and the Union ratified the contract on May 16, 2000.

A side issue which occurred during the same period that the contract was being negotiated, but took place outside the context of collective bargaining, concerned certain benefits offered the Union by the City in exchange for agreeing to allow a Mayor's alternate to sit on the Pension Board. SAAA president Gracia was also an elected member of the Pension Board. Gracia sent a memo to Roger Cheek, Director of Labor Relations for the City, attaching certain proposals "in exchange for the Mayor's alternate language." One of these proposals read:

> Notwithstanding current language in support of and a history of decisions, by both MERC and arbitrators, regarding the 35-hour workweek; this memorandum herby clarifies such practice by stipulating ALL MEMBERS OF THE SAAA Bargaining Unit, with NO EXCEPTIONS, shall work a 35-hour workweek.

Cheek responded with a draft of a Memorandum of Understanding which contained the following language:

> Bargaining unit members currently scheduled to work regularly less than forty (40) hours, but not less than thirty-five (35) in a service week, shall be continued on such work schedule. Where employees are on a different work schedule and/or new positions are accreted to the bargaining unit, the parties shall meet in an effort to achieve agreement on the work schedule of affected employees. A current particular situation which is to be discussed with a goal toward mutual resolution is the work schedule for employees in Drafting Technician positions in the Water and Sewerage Department.

This proposal was not acceptable to the Union and was not made a part of the 1998-2001 collective bargaining agreement.

Discussion and Conclusions:

The Charging Party maintains that the 35-hour week for SAAA bargaining unit members is mandated by the collective bargaining agreement and the Commission's earlier order in *City of Detroit,* 1971 MERC Lab Op 211. The Charging Party argues that pursuant to the accretion agreement, the drafting technicians were subject to all the terms and conditions of the 1995-98 contract, with two exceptions not relevant to this dispute, and this included the 35- hour work week. The City asserts that the parties are in the wrong forum and that this is a contract matter properly before an arbitrator. The City takes the position that the Charging Party has failed to establish a unilateral change in working conditions, since the drafting technicians at the waste water treatment plant have always worked a 40-hour work week; this pre-existing condition of employment was preserved by the maintenance of conditions clause in the parties' agreement.

In order to establish a violation of PERA, Charging Party must demonstrate that the City has made a change in wages, hours, or working conditions without giving notice to and bargaining with the Union. The difficulty with Charging Party's argument is that it has not established a *change* in working hours of the drafting technicians or nutritionists.2 The City introduced unrebutted evidence that the drafting technicians at the wastewater treatment plant previously worked a 40-hour week. This factor distinguishes their situation from the DPW drafting technicians who had previously worked a 35-hour week and whose schedule was changed by the City to a 40-hour week when their location was changed. This also differentiates this case from the earlier Commission decisions and arbitration awards. These cases concerned employees whose hours were unilaterally changed by the City in violation of either a specific contract provision or past practice and therefore do not apply to the instant case.

In *Howell Ed Sec Assn v Howell Pub Sch,* 130 Mich App 546 (1983), *revg* 1982 MERC Lab Op 943, the Michigan Court of Appeals found that the terms of a previously negotiated contract do not automatically apply to a newly accreted group of employees. Here the parties did negotiate a Memorandum of Understanding applying the terms of the 1995-98 collective bargaining agreement to the accreted employees, but did not specifically bargain over work hours, which also were not delineated in the existing contract. The Memorandum must therefore be read in conjunction with other contract language and the past practices of the parties. Charging Party relies chiefly on the contract clause specifying that "practices, policies, and rules apply equally to all employees in the bargaining unit." The City maintains that the maintenance of conditions clause, which states that "wages, hours and conditions of employment legally in effect at the execution of the agreement. . . shall be maintained," provides for the continuation of the 40-hour work week for the drafting technicians. It is evident from the arguments of the parties that this case involves the interpretation of the 1995-98 contract, the Memorandum of Understanding, and the past practices of the parties. As the ALJ concluded in an earlier case involving the 35-hour work week, I find that this is essentially a good faith contract dispute and does not raise a litigable issue under PERA. *City of Detroit*

2 There was no evidence introduced regarding the previous work schedule of the nutritionists.

(Wastewater Treatment Plant), 1993 MERC Lab Op 716; see also *City of Grand Rapids (Police Dept),* 1986 MERC Lab Op 105, 113-115. The Commission has consistently held that it will not involve itself in matters of contractual interpretation which should be resolved through the grievance procedure. *Central Mich Univ*, 1997 MERC Lab Op 501; *Central Mich Univ* 1995 MERC Lab Op 112; *Cass County (Sheriff),* 1993 MERC Lab Op 455.

Based on the above discussion, I find that Charging Party has not established a violation of Section 10(1)(e) of PERA by the City. It is therefore recommended that the charge be dismissed and that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch
Administrative Law Judge

Dated: _____