STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EIGHTH JUDICIAL DISTRICT COURT
(KALAMAZOO COUNTY),
Public Employer-Respondent,

Case No. C03 C-067

-and-

FRATERNAL ORDER OF POLICE
LABOR COUNCIL,
Labor Organization-Charging Party.
_____/

APPEARANCES:

The McCarthy Law Group, P.L.C., by Kevin M. McCarthy, Esq., for the Respondent

Michael F. Ward, Esq., for the Charging Party

DECISION AND ORDER

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 heard at Lansing, Michigan on December 10, 2003, and February 13, 2004, before Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. On August 23, 2004, the ALJ issued a Decision and Recommended Order finding that Respondent violated Section 10(c) of PERA by unilaterally changing employee work hours on January 2, 2003. The ALJ recommended that Respondent be ordered to cease and desist from unilaterally altering work hours of employees represented by the Fraternal Order of Police Labor Council (FOP), that Respondent bargain over the work hours of employees represented by the FOP, and that pending satisfaction of its bargaining obligation, Respondent rescind the work hours and schedule changes, including suspension of flextime, implemented on January 2, 2003.

The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA, the Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of its exceptions, and Charging Party filed a timely brief in support of the ALJ's Decision and Recommended Order.

Respondent's exceptions allege that Charging Party's bargaining rights as to hours of work were waived by an expired collective bargaining agreement between Respondent and a labor organization representing bargaining unit employees prior to Charging Party's certification as bargaining representative. Respondent further alleges that it had no duty to bargain its exercise of contractual rights during the hiatus between collective bargaining agreements, that it gave timely notice of its intent to exercise those rights, and that Charging Party had no right to demand

bargaining with regard to a decision that Respondent made before Charging Party was certified as representative in bargaining for the affected employees. In light of the entire record, we find no merit in Respondent's exceptions.

The Unfair Labor Practice Charge and History of the Proceedings:

Charging Party was certified as the bargaining representative for a unit of full-time and regular part-time nonsupervisory employees of Respondent on November 6, 2002. The charge as originally filed included the allegation that Respondent violated its duty to bargain in good faith under Section 10(1)(e) of the Act by unilaterally changing terms and conditions of employment, including changing the work hours for employees effective January 2, 2003. During the hearing before the ALJ, it became apparent that in addition to alleging that Respondent had unlawfully altered the hours of work of bargaining unit employees, Charging Party also intended to argue that Respondent had unlawfully eliminated the employees' flextime options. Over Respondent's objection, Charging Party was permitted to amend its charge, and the hearing was adjourned to allow Respondent time to respond to the new allegation.

Facts:

The facts have been accurately and adequately stated by the ALJ and will only be summarized here as necessary. The present Eighth Judicial District Court was created by the merger, on January 1, 1999, of three district courts – District Court 9-1, District Court 9-2, and District Court 8. At that time, the United Auto Workers Union (UAW) represented the employees of District Court 9-1. Employees of District Court 9-2 and District Court 8 were not represented by labor organizations. Employees of the new court continued to perform the same duties at the same locations as before the merger. The former District Court 8 became known as the north division of the Court, District 9-1 became the central division, and District 9-2 became the south division.

After the merger, Respondent and the UAW entered into a collective bargaining agreement for the period from March 2001 through September 30, 2002. This agreement covered a bargaining unit of employees in the central division of the Eighth District Court, formerly District Court 9-1. Article IV of this agreement contained the following language:

> Section 2. The normal work day will consist of eight (8) hours per day and a one-half (30 minutes) or one (1) hour unpaid lunch period.
>
> Section 3. Both the work day and the work week may be modified by the Court as the Court deems necessary. Flexible schedules may be worked out between the employee and supervisor as long as Court operations are not disrupted.
>
> Section 5. The hours for beginning and ending work, rest period and lunch hours may vary depending on the situation facing the Employers. [Sic] The decision to vary the hours of work is the responsibility of management; nothing contained here should be construed as a guarantee of eight (8) hours of work per day or forty (40) hours of work or pay per week.

During the period covered by the contract, Respondent met with representatives of the circuit and probate courts in Kalamazoo County to discuss how court operations could be made

more uniform. Employee committees, including members of the UAW's bargaining unit, were included in these meetings. On September 21, 2001, the judges of the three courts voted on a set of recommendations presented to them by the committees. A recommendation to change the hours of the courts to make them uniform was among those that were adopted. Effective January 2, 2003, all three courts would be open from 8:00 a.m. to 5:00 p.m., including during lunchtimes.

On June 11, 2002, Charging Party filed a petition seeking to become the representative in bargaining for the employees of Respondent's central division who were represented by the UAW. On September 30, 2002, while the petition was pending, the collective bargaining agreement between Respondent and the UAW expired. By agreement of the parties, an election was conducted on October 22, 2002, in a single bargaining unit consisting of employees of all three divisions of the Eighth District Court, and on November 6, 2002, Charging Party was certified as the bargaining agent for the new unit.

On November 24, 2002, Respondent notified employees that effective January 2, 2003, work hours in all three divisions of the Court would be 8:00 a.m. to 5:00 p.m., with a one (1) hour unpaid lunch hour. The notice also advised that all flextime would be suspended for the first six months of 2003. By letter dated November 26, 2002, Charging Party demanded to bargain over the "changes in hours of work and other conditions of employment." Respondent replied by letter dated December 4, 2002, claiming that both the agreement between Respondent and the UAW and Respondent's personnel policies recognized that Respondent had discretion to approve or disapprove flextime, and that there was no change in terms or conditions of employment because Respondent was merely exercising its management rights. The changes were implemented by Respondent on January 2, 2003, before the parties began negotiations for their first collective bargaining agreement.

Discussion and Conclusions of Law:

Respondent cites the National Labor Relations Board (NLRB) decision in *Shell Oil Co*, 149 NLRB 283 (1964) in support of its position. There the employer's contractually permitted and frequently invoked practice of subcontracting occasional maintenance work was of such long standing duration that it constituted a part of the *status quo* to be maintained during the hiatus following the expiration of the parties' collective bargaining agreement. Here, however, we have a new employer made up of three merged components, only one of which has a history of bargaining, and a newly elected bargaining representative that was not a party to the agreement upon which the Respondent relies. Whether or not Article IV of Respondent's collective bargaining agreement with the UAW is considered a waiver or part of the *status quo*, we find that it does not bind the FOP. We agree with the statement of the NLRB's administrative law judge in *Eugene Ovine, Inc*, 328 NLRB 294 (1999):

> The acquiescence of the employees' former bargaining representative in the employer's unilateral action in the past is not binding upon the newly certified union. The Charging Party Union is not a successor to Local 393. There is no continuity in the organization, officers, or representatives between the two unions. This is not a case involving an affiliation or merger of unions. On the contrary, the employees freely chose to replace Local 393 with the Charging Party. As noted by the judge in *Porta-King Bldg Systems,* 310 NLRB 539 (1993) aff'd 14 F3d 1258 (CA 8, 1994), this is a new unit with a new certification. What the other union did at another time

> when it represented these employees cannot be binding on this new unit and the labor organization the employees have chosen to represent them. 328 NLRB at 296.

The Respondent no longer has a bargaining relationship with the UAW, the bargaining unit has changed, and Respondent must now bargain with a different labor organization. As Charging Party points out in its post-hearing brief, more than 50% of the employees in the newly certified bargaining unit were not covered by the expired collective bargaining agreement between Respondent and the UAW. Under these circumstances, we find that the Respondent's unilateral change of its employees' work hours violated its bargaining obligation with the FOP.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EIGHTH JUDICIAL DISTRICT COURT (KALAMAZOO COUNTY),
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FRATERNAL ORDER OF POLICE
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APPEARANCES:

The McCarthy Law Group, PLC, by Kevin M. McCarthy, Esq., for the Respondent

Michael F. Ward, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER

OF

ADMINISTRATIVE LAW JUDGE

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 heard at Lansing, Michigan on December 10, 2003, and February 13, 2004, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before April 21, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and History of the Proceedings:

The Fraternal Order of Police Labor Council filed this charge against the Eighth District Court on March 26, 2003. Charging Party was certified as the bargaining representative for a unit of full-time and regular part-time nonsupervisory employees of the Respondent on November 6, 2002. The charge as originally filed included the allegation that Respondent violated its duty to bargain in good faith under Section 10(1)(c) of the Act by unilaterally changing terms and conditions of employment, including changing the work hours for employees effective January 2, 2003.

Before the hearing on December 10, 2003, the parties reached a settlement of all allegations of the charge except for Charging Party's claim that Respondent unlawfully altered work hours. During the hearing, it became apparent that in addition to alleging that Respondent had unlawfully extended the employees' workday as set out in the original charge, Charging Party also intended to argue that Respondent had unlawfully eliminated the employees' flextime options. Over Respondent's objection, I permitted Charging Party to amend its charge. The hearing was adjourned to February 13, 2004 to allow Respondent time to respond to the new allegation.

Facts:

The present Eighth Judicial District Court was created by the merger, on January 1, 1999, of three district courts – District Court 9-1, District Court 9-2, and District Court 8. At the time of the merger, the United Auto Workers Union (UAW) had represented the employees of District Court 9-1 for at least 15 years. Employees of District Court 9-2 and District Court 8 were not represented by labor organizations. Employees of the new court continued to perform the same duties at the same locations as before the merger. The former District Court 8 became known as the north division of the Court, District 9-1 became the central division, and District 9-2 became the south division.

Before the merger, the normal work hours of employees of District Court 9-1 (the employees represented by the UAW) were from 8:00 am to 4:30 pm, with a one-half (1/2) hour unpaid lunch hour. However, with the exception of the bench clerks, District Court 9-1 employees, with their supervisor's approval, could work any regular schedule as long as they were at work until at least 4:00 pm. Employees of District Court 9-1 were allowed to skip lunch hours and/or breaks to have a workday of less than eight and one-half (1/2) hours. Employees of District Court 8 had the choice of working from 8:00 am to 4:30 pm or from 7:30 am to 4:00 pm, with a one-half (1/2) hour unpaid lunch. Employees of District Court 9-2 worked from 8:00 am to 4:30 pm, with a one-half (1/2) hour unpaid lunch. District Court 9-2 employees did not have a flextime option. After the merger, employees at each location continued to have the same work hours and flextime options as before the merger.

Respondent continued to recognize the UAW as the representative of employees in the Court's central Division after the merger. Respondent and the UAW entered into a contract covering the term March 2001 through September 30, 2002. Article IV of this agreement contained the following language:

> Section 2. The normal work day will consist of eight (8) hours per day and a one-half (30 minutes) or one (1) hour unpaid lunch period.
>
> Section 3. Both the work day and the work week may be modified by the Court as the Court deems necessary. Flexible schedules may be worked out between the employee and supervisor as long as Court operations are not disrupted.

> Section 5. The hours for beginning and ending work, rest period and lunch hours may vary depending on the situation facing the Employers. [Sic] The decision to vary the hours of work is the responsibility of management; nothing contained here should be construed as a guarantee of eight (8) hours of work per day or forty (40) hours of work or pay per week.

Sometime before September 2001, Respondent began meeting with representatives of the circuit and probate courts also located in Kalamazoo County to discuss how the operations of the courts could be made more uniform. Employees, including members of the UAW's bargaining unit, sat on committees that were part of this project, although there is no indication that the UAW itself participated. On September 21, 2001, the judges of the three courts voted on a set of recommendations presented to them by the committees. Most of the recommendations, such as a recommendation to adopt uniform fees, did not affect court employees. Among the recommendations the judges adopted, however, was a proposal to change the hours of the courts to make them uniform. The judges decided that, effective January 1, 2003, all three courts would be open from 8:00 am to 5:00 pm, including during lunchtimes. After the judges' vote, a document was prepared showing the actions the judges had taken on each recommendation. This document may have been placed in some employee lunchrooms. However, Respondent did not otherwise notify employees of its intent to change the hours of the Court or the employees' work hours.

On June 11, 2002, Charging Party filed a representation petition seeking to become the collective bargaining agent for employees of Respondent's central division, i.e., the employees who at that time were represented by the UAW. The parties agreed to an election in a single unit consisting of employees of all three divisions. On September 30, 2002, while the petition was pending, the collective bargaining agreement between Respondent and the UAW expired. The election was held on October 22, 2002. On November 6, 2002, Charging Party was certified as the bargaining agent for the new unit.

On November 24, 2002, Respondent Court Administrator Cheryl Stewart sent a memo to employees notifying them that effective January 2, 2003, work hours for all employees in all three divisions of the Court would be 8:00 am to 5:00 pm, with a one (1) hour unpaid lunch hour. Stewart stated in the memo that she was suspending all flextime for the first six months of 2003. The memo explained that the purpose of the change was to make Respondent's hours of operation the same as those of the circuit and probate courts. Stewart informed employees that Respondent's telephones were to be answered between 8:00 am and 5:00 pm, and that the Court Clerk's and Probation Department offices were to remain open during lunch hours and until 5:00 pm.

By letter dated November 26, 2002, Charging Party demanded to bargain over the "changes in hours of work and other conditions of employment" announced in Stewart's November 24 memo. Stewart replied by letter dated December 4, 2002. Stewart's letter noted that both the agreement between Respondent and the UAW and Respondent's personnel policies recognized that Respondent had the discretion to approve or disapprove flextime, and that Respondent had always had this right. Stewart asserted that there was no change in terms or conditions of employment because Respondent was merely exercising its management rights.

On January 2, 2003, employees' hours were changed in accord with Stewart's November 24 memo. The parties began negotiations for their first collective bargaining agreement in March 2003. Charging Party presented a proposal on hours and flextime that Respondent rejected. At the time of the hearing in this case, the parties had not yet reached a contract.

Discussion and Conclusions of Law:

The duty to bargain over employee "hours" as set forth in PERA encompasses both the number of hours worked and the particular hours and days of the week employees are required to work. *Reading Comm Schools,* 1989 MERC Lab Op 1069; *Detroit Bd of Ed.*, 1986 MERC Lab Op 121. In *Wolverine Public Schools*, 1983 MERC Lab Op 1127, the Commission held that the Employer violated PERA when it lengthened the workday by the addition of an additional half-hour of unpaid lunch.

Respondent first argues that it had no duty to bargain over the change in hours because it made this decision on September 21, 2001, before Charging Party was certified. An employer's obligation to bargain commences on the date of the union's election as the exclusive bargaining representative. *Central States Community Services,* 1995 MERC Lab Op 552, citing *Mike O'Connor Chevrolet-Buick GMC Co,* 209 NLRB 701 (1974), *enforcement denied on other grounds* 512 F2d 684 (CA 8, 1975). See also *Adrian Public Schools,* 1994 MERC Lab Op 298, in which the Commission held that an employer had no duty to bargain over a subcontracting decision made after the union filed its representation petition but before the date of its election as bargaining representative.

I find that Respondent decided on September 21, 2001 to change its hours of operation effective January 2, 2003. This was substantially before Charging Party's election as bargaining representative on October 22, 2002. However, the fact that Respondent decided in September 2001 to change its hours of operation does not mean that it also decided to change its employees' hours of work at that time. The distinction between the Court's hours of operations and the employees' hours of work is significant. The hours that a public employer remains open to provide services to the public is, at least arguably, a matter of managerial prerogative. See *Local 1277, Metropolitan Council No 23, American Federation of State, Co, and Municipal Employers, AFL-CIO v City of Center Line,* 414 Mich. 642 (1982). However, as noted above, the particular hours and days of the week that employees are required to work is a mandatory subject of bargaining. There is no conflict between an employer's obligation to bargain over hours and its right to determine what services it will provide to the taxpayers. The employer's obligation is simply to give the union the opportunity to make proposals, such as the hiring of part-time employees, or the reassignment of duties among existing employees, that would allow for the accommodation of employee scheduling needs and desires, and to bargain over these proposals in good faith. I find no indication in the record that Respondent made a specific decision to change its employees' hours of work, including eliminating the flextime options available to some employees, before Charging Party became their bargaining representative.

Respondent also asserts that its contract with the UAW gave it the right to unilaterally modify the hours of work for employees at its central location. Respondent argues that because

of this contract provision, the existing terms and conditions of employment for central division employees on November 24, 2002 included the right of Respondent to unilaterally adjust their hours of work. According to Respondent, after the expiration of this collective bargaining agreement, Respondent was not only entitled, but obligated, to maintain the status quo, citing *Local 1467, IAFF v City of Portage,* 134 Mich App 466, 472 (1984), and *Wayne County Community College,* 2002 MERC Lab Op 26, 30 (holding that "the terms of an expired contract regarding mandatory subjects of bargaining survive the expired contract by operation of law.")

If a collective bargaining agreement "covers" a particular subject, or contains language waiving the union's right to bargain, an employer has no duty to bargain over this subject for the term of the contract, even if the identity of the bargaining representative changes. *City of Romulus,* 1988 MERC Lab Op 504. In *Romulus,* the charging party union became the bargaining representative on April 3. On June 1, before the collective bargaining agreement negotiated by the employer and charging party's predecessor union expired, the employer announced a change in the workweek. The Commission held that the employer had no duty to bargain because the union was bound by language in the existing agreement that waived the union's bargaining rights.

In this case, however, the contract between the UAW and Respondent had expired when Respondent announced, on November 24, 2002, that it intended to change employee hours. In *City of Lansing,* 1989 MERC Lab Op 1055, 1059, and *Capac Comm Schools,* 1984 MERC Lab Op 1195, the Commission held that when the parties have had a past practice of permitting unilateral action by the employer on a particular matter, this practice becomes part of the status quo that must be continued after contract expiration. See *Winn-Dixie Stores, Inc,* 224 NLRB 1418 (1976). The Commission also held, however, that a waiver of bargaining rights based on contract language does not continue after the contract expires.[1] In other words, contract language, by itself, is not a term or condition of employment and does not survive the expiration of the agreement in which it is contained. See also *Wayne State Univ*, 1987 MERC Lab Op 899, 902. Therefore, even if the collective bargaining agreement between Respondent and the UAW "covered" or contained a waiver of the union's right to bargain over changes in work hours and the work schedule, Respondent's contractual right to act unilaterally on this subject did not extend past the expiration of the agreement.

In sum, I find no evidence that Respondent decided to change the work hours of its employees or eliminate their flextime options before it announced these changes on November 24, 2002. I conclude that since these changes were mandatory subjects of bargaining, and since Charging Party was the bargaining representative of Respondent's employees in November 2002, Respondent had an obligation to bargain with Charging Party before implementing the changes. I find that Respondent's obligation to bargain was not affected by provisions in a collective bargaining agreement that expired before Respondent announced the change. I

[1] Respondent cites *City of Harper Woods,* 1987 MERC Lab Op 1004, for the proposition that employer rights set forth in a contractual management rights' clause become part of the status quo and, thus, continue after the contract expires. *City of Harper Woods* was the decision of an administrative law judge adopted by the Commission when no exceptions were filed. To the extent that the waiver found in *Harper Woods* depended on the language in the expired contract, it is inconsistent with the Commission decisions in *City of Lansing and Capac Comm Schools.* This is also true of *Gladwin Comm Schools,* 1989 MERC Lab Op 673, another administrative law judge decision cited by the Respondent.

conclude, therefore, that Respondent violated its duty to bargain in good faith by refusing Charging Party's demand that it bargain over the changes announced on November 24, 2002, and by implementing these changes on January 2, 2003 without satisfying its obligation to bargain. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Eighth Judicial District Court, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally altering the work hours of employees represented by the Fraternal Order of Police Labor Council.

2. Upon demand, bargain with the above labor organization over the work hours and work schedules, including flextime options, of employees in its bargaining unit.

3. Pending satisfaction of its obligation to bargain, rescind the work hour and schedule changes, including the suspension of all flextime, implemented on January 2, 2003.

4. Post the attached notice to employees in conspicuous places on the Respondent's premises, including places where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the Eighth Judicial District Court has been found to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally alter the work hours of employees represented by the Fraternal Order of Police Labor Council.

WE WILL, upon demand, bargain with the above labor organization over the work hours and work schedules, including flextime options, of employees in its bargaining unit.

WE WILL, pending satisfaction of our obligation to bargain in good faith, rescind the work hour and schedule changes, including suspension of all flextime, implemented on January 2, 2003

EIGHTH JUDICIAL DISTRICT COURT

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, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510