STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPT. OF TRANSPORTATION),
Public Employer – Respondent,

Case No. C03 F-126

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25 AND ITS LOCAL 312,
Labor Organizations – Charging Parties.

_____/

APPEARANCES:

Bellanca, Beattie & DeLisle, P.C., by James E. Zeman, Esq., for Respondent

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by Renate Klass, Esq., for Charging Parties

DECISION AND ORDER

On December 4, 2004 Administrative Law Judge Julia C. Stern 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

_____
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:

CITY OF DETROIT (DEP'T OF TRANSPORTATION),
Public Employer – Respondent

Case No. C03 F-126

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25 AND ITS LOCAL 312,
Labor Organizations – Charging Parties
_____/

APPEARANCES:

Bellanca, Beattie & DeLisle, P.C., by James E. Zeman, Esq., for Respondent

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by Renate Klass, Esq., for Charging Parties

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 Detroit, Michigan on September 16 and December 19, 2003, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including briefs filed by both parties on March 30, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The American Federation of State, County and Municipal Employees (AFSCME) Council 25, and its Local 312, filed this charge against the City of Detroit on July 9, 2003 alleging that Respondent violated its duty to bargain in good faith under Section 10(1)(c) of PERA. On May 22, 2003, Respondent, the Southeastern Michigan Area Regional Transportation Authority (SMART), and the Detroit-area Regional Transportation Coordinating Council (RTCC), entered into an agreement creating the Detroit Area Regional Transportation Authority

(DARTA). [1] Charging Parties assert that Respondent flagrantly disregarded its obligation under their collective bargaining agreement to give them notice and an opportunity to participate in the negotiations that led to the DARTA agreement. Charging Parties allege that Respondent's conduct amounted to a repudiation of its collective bargaining obligations.

Facts:

The Collective Bargaining Agreement

Local 312 is the collective bargaining representative for certain employees in Respondent's Department of Transportation, including bus mechanics, security guards, and clerical employees. Respondent and AFSCME Council 25 are parties to a collective bargaining agreement, the so-called City of Detroit Master Agreement, covering all employees of Respondent represented by AFSCME. Employees in Local 312's unit are also covered by a supplemental collective bargaining agreement between the Department of Transportation (D-DOT) and Local 312.

The possible merger or consolidation of D-DOT's operations with those of SMART has been a topic of public discussion for a number of years. On July 13, 2000, Local 312 and Respondent signed a supplemental agreement that carried over the following provision, Article 26, from their previous agreement:

> The Department shall notify the Union in writing 60 days in advance of any merger, sale, transfer consolidation or lease of the Detroit Department of Transportation (D-DOT). The terms of this Supplemental Agreement shall be binding and shall not be modified or changed for the remainder of this Agreement.
>
> If designated as a Successor Agency of the D-DOT, Successor Agency shall assume and be bound by any existing applicable collective bargaining agreements applicable to the D-DOT for the remainder of the term of this agreement and, except where the collective bargaining agreement may otherwise permit, shall retain the employees covered by this collective bargaining agreement.
>
> In addition, the president or his designated representative will be notified and allowed to attend any and all official negotiations or meetings which take place dealing with the proposed merger, sale, transfer, consolidation or leases of the D-DOT in regard to any area where AFSCME Local 312 bargaining members are concerned. [Emphasis added]

[1] SMART is a mass transportation and public authority organized under Section 5 of the Metropolitan Transportation Authorities Act of 1967, MCL 124.405. The RTCC is a council created by the Metropolitan Transportation Authorities Act of 1967, MCL 124.401 et seq. The RTCC consists of the chief executives of the City of Detroit, County of Wayne, County of Oakland, and County of Macomb.

Events Leading to the DARTA Agreement

During 2001 and 2002, the Michigan legislature considered House Bill 5467, a bill to create a regional transportation authority for the Detroit metropolitan area. The bill was introduced in the house by then-Representative Kwame Kilpatrick, now Mayor of the City of Detroit. The bill provided that the authority would become the "designated recipient" of federal transportation funds for Detroit area public transportation. The bill did not provide for the immediate transfer of transportation services provided by D-DOT to the regional authority, but gave it the power to operate public transportation in the metropolitan area and/or contract with D-DOT and other transportation providers for these services. The bill clearly contemplated that at some point employees of D-DOT might become employees of the regional authority. The bill required the regional authority to assume existing collective bargaining agreements and bargain collectively with unions representing the authority's employees, and guaranteed that existing employees of transportation providers would not lose benefits in the event that they became employees of the authority.

A representative of the AFL-CIO, on behalf of unions representing employees of D-DOT and SMART, was part of the "working group" that drafted the bill. Leamon Wilson, the president of Local 312, attended some legislative hearings or subcommittee sessions on the bill. Wilson was firmly opposed to the legislation as written. Wilson's opposition was based in part on his concern that his union might not, over time, fare well in bargaining with an authority controlled by suburban interests. Wilson also felt that the protections for employees contained in the bill were inadequate to compensate his members for other benefits they might lose by changing employers, such as preferences for jobs in other departments of the City. Despite opposition from unions and others, the bill was passed by the legislature. However, then-Governor John Engler vetoed the bill in late December 2002.

In early 2003, a new bill similar to House Bill 5467 was introduced in the legislature. Around the beginning of March, newly elected Governor Jennifer Granholm spoke to Robert Davis, Director of the Governor's Office for Southeast Michigan, about the bill and the need for regional coordination of public transportation in the Detroit area. Davis contacted representatives of the City of Detroit, Macomb, Wayne and Oakland Counties, the Detroit Regional Chamber of Commerce and the Southeast Michigan Council of Governments (SEMCOG) and invited them to a meeting at the Governor's Detroit offices to discuss this issue. Davis spoke to Derrick Miller, executive assistant to Kilpatrick, who by then had become the Mayor. Miller designated Mary Blazevich, the Mayor's Director of Intergovernmental Affairs, to be the City's representative at the meeting, which was held a few days later. The topic at this meeting was the pending legislation and strategies for convincing lawmakers to support the bill. The attendees agreed to contact their principals and come up with ideas for achieving their objective. On April 9, the same representatives met again at the Governor's Detroit office. The consensus reached at this time was that legislative efforts would be doomed.

Respondent did not inform Charging Parties of these meetings. Blazevich testified that she was not aware of the existence of any provision in a labor contract that required AFSCME to be given notice of meetings. Respondent's labor relations director, Roger Cheek, testified that he

was not contacted by anyone from the Mayor's office about these meetings and did not know that DARTA was being formed until he later read it in the newspaper.

After the April 9 meeting, Davis spoke to the Governor's legal staff about ways to legally create a regional transportation authority without legislative action. Deputy Counsel Steve Liedel suggested an "interlocal" agreement among local communities under the authority of the Urban Cooperation Act. Liedel agreed to draft a proposed agreement. The draft was based as closely as possible on the vetoed bill. The parties to the proposed agreement were SMART, the City of Detroit, and the RTCC. The first draft of the DARTA agreement was circulated among the representatives who had attended the first two meetings. Informal discussions took place by e-mail among representatives of the entities listed above and their principals, with Davis coordinating the discussions. The agreement went through several drafts. Much of the discussion concerned the composition of the DARTA governing board.

By May 9, 2003, Davis had a draft agreement ready to present to Respondent. On that date, he sent Blazevich an e-mail setting up a meeting with Miller and Respondent's Corporation Counsel. Wilson was not notified of the above meeting between Davis and Respondent's representatives, and did not receive a copy of the May 9 draft agreement.

On the morning of May 19, representatives of the Governor's office held another meeting with representatives of the parties who had attended the first two meetings, including Miller and Blazevich. This meeting produced a fourth draft of the proposed agreement. The fourth draft was sent to the representatives by e-mail later that afternoon. Oakland County suggested some changes, and, in the early afternoon of May 20, Davis sent both Blazevich and Miller copies of a fifth draft. In the late afternoon of that day, Liedel e-mailed copies of what became the final DARTA agreement to 16 individuals, including representatives of Respondent, the three counties and other interested organizations. The e-mail was not sent to Wilson or any other AFSCME representative. The e-mail included a summary of the agreement, a draft resolution for the RTCC approving the agreement, and similar resolutions for SMART and the City of Detroit.

The Governor's office arranged for a special meeting of the RTCC to be scheduled for the afternoon of May 22. On May 21, Liedel e-mailed the representatives a copy of a meeting notice that complied with the requirements of the Open Meetings Act, MCL 15.261 et seq, and instructed them to post the notice at their respective offices not later than 4:00 p.m. that day. The meeting notice did not state the purpose of the meeting, but included a phone number to call for further information. The notice was posted in several places, including the main office of D-DOT. Wilson did not see this notice.

On the morning of May 22, an article appeared in the *Detroit Free Press* stating that the elected leaders of Wayne, Oakland and Macomb Counties were meeting in the Governor's southeast Michigan offices and were expected to sign an agreement to create DARTA. The article explained that representatives of these entities had been working with the Governor for several weeks to figure out a way to save DARTA. Wilson did not see the newspaper article.

The May 22 RTCC meeting was attended by all members of the RTCC, including Mayor Kilpatrick and the chief executives of Wayne, Oakland, and Macomb Counties. About 25 other

people, including the Governor, were also present. No representative of Charging Parties attended. At the meeting, the RTCC unanimously passed a resolution approving the DARTA agreement, subject to technical, typographical, or nonsubstantial modifications before its effective date. The DARTA agreement was subsequently approved by Respondent's City Council and by SMART's Board of Directors, and became effective June 19, 2003.

In addition to this unfair labor practice charge, Charging Parties filed an action in circuit court challenging the creation of DARTA on multiple grounds. Wilson testified that Charging Parties decided to file a lawsuit rather than a grievance in order to obtain immediate injunctive relief, although the circuit court ultimately did not grant that relief. However, in June 2003, the parties, at the court's urging, entered into a stipulation that required Respondent to notify Wilson of all DARTA meetings.

Terms of the DARTA Agreement

The DARTA agreement begins with a section titled "Recitals," including the following:

> Each party desires to further coordinate, enhance and improve delivery of public transportation systems . . . by transferring to DARTA those functions and responsibilities necessary to effectuate this interlocal and intergovernmental agreement.
>
> It is the intent of the Parties to utilize existing constitutional and statutory law to establish a mechanism for providing more effective and efficient public transportation services between and among the RTCC, the City, and SMART. The Parties intend to achieve their goal by creating an administrative entity named the Detroit Area Regional Transportation Authority (DARTA). Under this agreement the Parties agree to transfer to DARTA such existing powers, duties, functions, responsibilities and authority possessed by one or more of the Parties believed essential to the provision of quality public transportation services.
>
> . . . DARTA may not and shall not bind any unit of state, county, city, township or village government without the express consent of the individual unit.
>
> While this agreement is designed to enhance cooperation between City's [sic] Department of Transportation (DDOT) and SMART, it neither merges nor eliminates SMART or DDOT. This agreement does not and shall not be construed to transfer any tort, pension, health care, salary, contract or other employment obligation(s) of liabilities of SMART or DDOT to any other governmental unit agency or board, except as expressly provided in this agreement.

Article V sets out DARTA's powers. They include the authority to make or enter into contracts; employ agencies or employees; plan, acquire, construct, manage…operate … public transportation facilities; engage, compensate, transfer, or discharge necessary personnel; acquire, own…operate, maintain…lease… or sell real or personnel property; make claims for federal or state aid payable to a party; assist a public transportation system(s) that are operated within the

region by any governmental entity; and contract with … any unit of government including transportation authorities or public transportation systems located inside or outside the region or private enterprise for service contracts, joint use contracts, and contracts for the construction or operation of any part of the public transportation facilities.

Article VI, Section 1 states that DARTA is to become the designated recipient for federal and state transportation operating and capital assistance grants. It also states that DARTA may designate the City of Detroit, SMART and any other public transportation system within the region as sub-recipients.

Article VI, Section 2 requires DARTA, within one year after appointment of the its chief operating officer, to develop a comprehensive regional public transportation service plan to be presented to the Governor, the Michigan Legislature and Michigan Department of Transportation. The specific areas to be covered by this plan are set out in the agreement. Under Section 3, DARTA may "contract with transportation operations within the Region to provide services that the Authority considers necessary for implementation and execution" of the plan.

Article VI, Section 4 states that unless this coordination results in a reduction in the "number of represented employees" employed by SMART or D-DOT, DARTA shall coordinate service overlap, rates, routing, scheduling and "any other function authorized under this agreement that the Authority considers necessary to coordinate in order to implement or execute the comprehensive regional public transportation service plan." Under Section 5, an owner or operator of a public transportation facility that fails to comply with a DARTA coordination decision may be declared ineligible for grant assistance.

Other provisions of Article VI deal with the status of DARTA as an employer and the benefits to be provided to employees of public transportation systems or other entities that DARTA may acquire. Section 10 gives DARTA the right to bargain collectively and enter into agreements with labor organizations, and provides that it shall be bound by existing collective bargaining agreements with publicly or privately owned entities that are acquired, purchased or condemned by it. This section also states that members and beneficiaries of any pension or retirement system established by an acquired transportation system shall continue to have rights, privileges, benefits, obligations and status under the acquired pension or retirement system. Section 11 provides that DARTA will assume the obligations of any transportation facility or transportation system that it acquires with respect to wages and salaries, hours and working conditions, sick leave, health and welfare benefits, and pension or retirement benefits, including retiree health care benefits. Section 14 states that "to the extent permitted under Michigan law," DARTA's Board may elect to become a participating municipality in the Michigan Municipal Employees Retirement System.

Discussion and Conclusions of Law:

Although a breach of a collective bargaining agreement is not per se a violation of PERA, the Commission has recognized that an employer's "repudiation" of a provision or provisions of a collective bargaining agreement may, in rare circumstances, be tantamount to a rejection of its obligation to bargain. See, e.g., *City of Detroit, Dep't of Transportation*, 1984 MERC Lab Op

937, *aff'd* 150 Mich App 605 (1985); *Jonesville Board of Ed*, 1980 MERC Lab Op 891. The Commission has described repudiation as an attempt to rewrite the contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501; *Redford Twp Bd of Ed*, 1992 MERC Lab Op 894. For the Commission to find repudiation (1) the contract breach must be substantial, and have a significant impact on the bargaining unit, and (2) there must be no bona fide dispute over interpretation of the contract. *Plymouth-Canton C.*, 1984 MERC Lab Op 894, 897; *Twp of Redford Police Dep't*, 1992 MERC Lab Op 49, 56 (no exceptions); *Linden CS.*, 1993 MERC Lab Op 763, 772 (no exceptions).

I find that a refusal by Respondent to recognize or comply with its obligations under Article 26 of the Local 312 supplemental agreement, if it were to occur, would be a substantial breach of the collective bargaining agreement. Employees obviously have a strong interest in the identity of their employer, in the terms and conditions of their future employment if that employer changes, and in having a voice, through their collective bargaining representative, in negotiations between their employer and third parties over these terms. I find that Respondent's refusal to meet its Article 26 obligations would have an impact on employees in this unit comparable to the employer's refusal to recognize the wage provisions of its collective bargaining agreement in *Jonesville* or *City of Detroit, Dep't of Transportation, supra.*

In this case, however, the parties have different views on whether the meetings and negotiations that took place between early March and May 22, 2003 triggered Respondent's obligations under the final paragraph of Article 26. This disagreement is based on differing interpretations of the contract language. Charging Parties' position is that the DARTA agreement clearly "deals with" the proposed transfer of D-DOT operations to that authority. Charging Parties point out that the parties to the DARTA agreement, including Respondent, agreed in that document to transfer certain powers and responsibilities to DARTA; that the DARTA agreement explicitly gave DARTA the authority to operate public transportation facilities, contract with public transportation systems for their services, and employ employees; and that the DARTA agreement also gave DARTA the right to cut off funding to public transportation systems. Charging Parties also point out that the DARTA agreement devotes an entire section to employment matters, including DARTA's duty to assume the existing collective bargaining agreements of publicly owned entities, e.g. D-DOT, acquired by DARTA. According to Charging Parties, because the DARTA agreement clearly "deals with" the proposed transfer of D-DOT operations, Local 312 clearly had the right under Article 26 to be present at the meetings and negotiations that immediately preceded and led to that agreement. Charging Parties also argue that Article 26's obligation to provide notice extends to "any area where AFSCME Local 312 members are concerned," and not merely to negotiations which result in immediate job losses. In this case, however, the parties have different views on whether the meetings and negotiations that took place between early March and May 22, 2003 triggered Respondent's obligations under the final paragraph of Article 26. This disagreement is based on differing interpretations of the contract language. Charging Parties' position is that the DARTA agreement clearly "deals with" the proposed transfer of D-DOT operations to that authority. Charging Parties point out that the parties to the DARTA agreement, including Respondent, agreed in that document to transfer certain powers and responsibilities to DARTA; that the DARTA agreement explicitly gave DARTA the authority to operate public transportation facilities, contract with

public transportation systems for their services, and employ employees; and that the DARTA agreement also gave DARTA the right to cut off funding to public transportation systems. Charging Parties also point out that the DARTA agreement devotes an entire section to employment matters, including DARTA's duty to assume the existing collective bargaining agreements of publicly owned entities, e.g. D-DOT, acquired by DARTA. According to Charging Parties, because the DARTA agreement clearly "deals with" the proposed transfer of D-DOT operations, Local 312 clearly had the right under Article 26 to be present at the meetings and negotiations that immediately preceded and led to that agreement. Charging Parties also argue that Article 26's obligation to provide notice extends to "any area where AFSCME Local 312 members are concerned," and not merely to negotiations which result in immediate job losses.

Respondent maintains, however, that the meetings and other activities that took place from the beginning of March through May 22 did not "deal with" the proposed merger, sale, transfer, consolidation, or lease of D-DOT operations. Respondent points out that the DARTA agreement, despite language in the "Recitals," does not transfer D-DOT's operations to DARTA, or mandate that this transfer take place sometime in the future. Rather, the DARTA agreement simply requires DARTA to coordinate certain activities of the D-DOT and other public transportation systems. Respondent also maintains that the meetings and discussions did not "deal with" the transfer of D-DOT since the subject of these meetings and discussions was the formation of DARTA, and not the transfer of D-DOT or any labor matters. Finally, Respondent argues that the meetings and discussions were not "official," since none of the representatives had the authority to act.

The DARTA agreement did not transfer D-DOT to DARTA. Rather, like the vetoed House Bill 5467, the DARTA agreement required DARTA to coordinate D-DOT's services with transportation services provided by SMART and other entities and also provided the framework for DARTA, as part of a comprehensive regional transportation service plan, to acquire and operate D-DOT's transportation services or to contract with Respondent for these services. I find that a bona fide dispute exists between the parties over whether the meetings and negotiations over the DARTA agreement that took place from early March to May 22, 2003 "dealt with" the proposed transfer of D-DOT or its operations, and thus served to trigger the notice and other requirements of Article 26. For this reason, I conclude that Charging Parties have not demonstrated that Respondent "repudiated" Article 26 by failing to give Local 312 notice and an opportunity to participate in the meetings and discussions that preceded the RTCC's approval of the DARTA agreement on May 22, 2003. Therefore, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____