STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BIRMINGHAM SCHOOL DISTRICT,
Respondent-Public Employer,

Case No. C06 L-308

-and-

BIRMINGHAM ASSOCIATION OF
EDUCATIONAL OFFICE PERSONNEL,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by William G. Albertson, Esq., for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee, Esq., for the Labor Organization

DECISION AND ORDER

On June 29, 2010, Administrative Law Judge David M. Peltz issued his 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

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated:_____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER ON 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 January 20, 2009, before David M. Peltz, Administrative Law Judge of the State Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and briefs filed by the parties on or before May 11, 2009, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On December 21, 2006, the Birmingham Association of Educational Office Personnel (BAEOP or the Union) filed an unfair labor practice charge against the Birmingham School District (the school district or the Employer). The charge alleges that the Employer violated PERA by unilaterally transferring bargaining unit work to non-unit employees, and by refusing to provide the Union with information relating to the enforcement of the collective bargaining agreement.

Findings of Fact:

This dispute arises from Respondent's elimination of the purchasing assistant position, a position within the purchasing department of the Birmingham School District. Purchasing, which is part of the school district's auxiliary business services department, is responsible for the procurement of all services and products within the school district. The purchasing assistant was the only bargaining unit position within the purchasing department. The other two positions within that department, public buyer and project and technology coordinator, remain in existence and are not represented for purposes of collective bargaining.

Prior to August of 2006, the purchasing department operated on a centralized, paper-driven system. A school district employee making a request for the purchase of goods or services would draft a purchase order on a typewriter or complete a requisition form for goods maintained in the district warehouse. The order was then delivered to the purchasing department, where it was copied, or "bursted", to multiple recipients, including the vendor, the originator and the accounts payable department. In addition, one copy of each purchase order was maintained by the purchasing department for its records.

The purchasing assistant position was most recently held by Marlene Cogan. Cogan's duties included: the dissemination of purchase orders; arranging for the disposal of obsolete and surplus items, including obtaining and completing the necessary forms; providing pricing assistance to third parties, such as members of the community or other educators; assisting in the resolution of problems with particular purchase orders; and responding to requests for vendor contact information. Other tasks performed by Cogan prior to the elimination of the purchasing assistant position included assisting in the purchase of furniture for other departments within the school district and making travel reservations for Respondent's employees.

Although the above duties were primarily Cogan's responsibility, she was not the only employee to whom such work was assigned. Cogan's supervisor, Norman McGarry, testified credibly and without contradiction that the two non-unit employees in the purchasing department also performed these duties on an "as needed" basis. According to McGarry, manager of the district's auxiliary business services department, the decision regarding who would perform a particular task was made based upon "[w]hoever was available at that time." The only duties specifically identified by McGarry as having been performed exclusively by Cogan involved maintaining departmental files and vendor catalogs.[1]

In March of 2006, Respondent met with Charging Party's vice president, Denise Wahl, and advised her of the school district's budget reduction plan, which included reorganization of the auxiliary business services department and elimination of the

[1] McGarry was the only witness to testify in detail regarding the specific duties performed by employees of the purchasing department prior to and following the reorganization of that department. Neither Cogan, nor the two non-unit employees were called by either party as witnesses.

purchasing assistant position. Respondent indicated that the duties of the purchasing assistant "could be eliminated or taken on another way" as the district attempted to streamline its operations. Wahl immediately notified MEA Uniserv director Steven Amberg regarding the planned reorganization. According to Amberg, Charging Party's immediate concern was Cogan's welfare, including her ability to transfer to another position within the district.

The purchasing assistant position was eliminated on or about August 1, 2006. As a result of the reorganization, the only employees left in the purchasing department are Jessica Ritchie, the public buyer, and Tasha Johnson, the project and technology coordinator. The reorganization introduced a decentralized, paperless ordering system which functions, in large part, electronically. The duties which Cogan previously performed have either been eliminated entirely or substantially reduced. For example, the department no longer disseminates multiple copies of purchase orders. Under the new system, the originator prepares a requisition form on his or her desktop computer. The requisition is then transmitted electronically to the purchasing department, where it is instantaneously converted into a purchase order and submitted for review by a supervisor. The order is then printed and mailed to the vendor.

As a result of the implementation of the paperless office, files and vendor catalogs are now maintained electronically without any employee involvement in the process. The purchasing department no longer directly assists other departments in resolving problems with individual purchase orders. Instead, the department provides the vendor contact information to the originator. If the order has not been received or a return is required, it is now the originator who must contact the vendor to address the issue. The department has also stopped making travel arrangements and assisting in the purchase of furniture. The purchasing department still disposes of obsolete and surplus items and provides pricing assistance to third parties, but the amount of time now spent on these activities has been significantly reduced.

According to McGarry, the work previously performed by Cogan has been reduced by approximately eighty-five percent as a result of the reorganization. Of the duties which were assigned primarily to Cogan and which continue to be performed, all were tasks also previously performed by the public buyer and the project technology coordinator.

Following the reorganization, Cogan was transferred to a position as an elementary school secretary. Thereafter, the Employer, the Union and Cogan entered into a settlement agreement which resulted in Cogan's resignation from employment with the school district effective December 31, 2006. In the agreement, which was dated August 1, 2006, the parties acknowledged that the intent of the settlement was to "avoid any and all proceedings, litigation or administrative action to which any party might have been entitled."[2]

[2] At hearing, Respondent asserted that the settlement agreement served to bar the Union from bringing the instant charge. However, because Respondent did not raise this argument in its post-hearing brief, I consider the issue to have been abandoned.

At some point, likely after the settlement agreement was reached, Amberg became aware that certain duties previously performed by Cogan had been assigned to non-unit employees. The Union wrote to E.R. Scales, the district's executive director for human resources, and requested a meeting to discuss the "usurping" of bargaining unit work. On or about August 15, 2006, Scales responded with a request for additional information from the Union regarding its claims. Thereafter, Amberg provided the requested information to the Employer.

On October 2, 2006, Amberg presented the Employer with a proposal which he claimed would "result in substantial savings to the district while permitting the recapture of the position formerly within the bargaining unit." Respondent's deputy superintendent for business services responded on October 17, 2006 with a letter rejecting the Charging Party's proposal. Thereafter, in an e-mail to Scales dated October 23, 2006, Amberg wrote:

> The Association's proposal to restructure the purchasing department is currently not a viable solution. Accordingly, the Association must renew its request for the information sought in my two August 2006 e-mails to you. As discussed the Association believes bargaining unit work is being performed by non bargaining unit personnel. Thank you for your anticipated prompt attention to this request.

At hearing, Amberg testified that he was unable to locate copies of the August 2006 information requests referred to in his email to Scales, and no evidence was introduced regarding the substance of those communications or the specific information allegedly requested by the Union. Moreover, the record is silent with respect to whether Scales or any other representative of the school district ever responded to Amberg's October 23, 2006 request for information.

Discussion and Conclusions of Law:

Respondent asserts that the charge is untimely because it was filed nine months after the Union learned of its plan to reorganize the purchasing department. 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 each of the named respondents. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 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).

Although Charging Party was made aware of the Employer's plan to reorganize the auxiliary business services department and eliminate the purchasing assistant position during a meeting which occurred in March of 2006, there is nothing in the record to suggest that the Union knew or should have known at that time that the work primarily performed by Cogan would continue to exist in some form following the reorganization. In fact, the purchasing

assistant position was not actually eliminated until August 1, 2006, less than six months prior to the filing of the charge in this matter. Accordingly, I find no basis upon which to dismiss the charge as untimely under Section 16(a) of PERA.

I do agree, however, with Respondent's contention that the charge must be dismissed because the Union failed to prove that the school district unlawfully transferred work out of the bargaining unit. An employer's decision to remove work previously performed by bargaining unit members and transfer the work to employees outside the unit may constitute a mandatory subject of bargaining for purposes of PERA. *Ishpeming Supervisory Employees, v City of Ishpeming*, 155 Mich App 501 (1986); *Lansing Fire Fighters, Local 421 v Lansing*, 133 Mich App 56 (1984). The Commission has held, however, that an employer has a duty to bargain over the transfer of work performed by a bargaining unit position or positions only when certain conditions are met. In order to prevail on a charge alleging the unlawful removal of bargaining unit work, the charging party must first establish that the work at issue has been exclusively performed by members of its bargaining unit. *City of Southfield*, 433 Mich 168, 185 (1989), aff'g 1985 MERC Lab Op 1025; *Kent County Sheriff*, 1996 MERC Lab Op 294.

In the instant case, Charging Party failed to introduce any evidence establishing that the duties performed by the purchasing assistant prior to the reorganization were exclusive to the bargaining unit. The vice president of the BAEOP was the only Charging Party witness with any direct knowledge of the work performed by Cogan. Although she described generally the duties which the purchasing assistant performed, she did not assert that Cogan was the only employee to whom such work was assigned. In contrast, Cogan's supervisor, McGarry, testified credibly and without contradiction that prior to the reorganization, the public buyer and the coordinator also copied and disseminated purchase orders, disposed of obsolete and surplus items, provided pricing assistance to third parties, resolved problems with individual purchase orders, assisted with furniture purchases and responded to requests for vendor contact information. The only duties which McGarry identified as having been performed exclusively by Cogan pertained to maintenance of the purchasing department's internal files and vendor catalogs, tasks which are no longer in existence as a result of the change to a paperless office. A showing of exclusivity is essential to establish that an employer has a duty to bargain over the transfer of work outside the unit, and the Union carries the burden of proof as to that issue. See *Kent County Sheriff*, *supra*. I find that it has not met that burden in the instant case.

Even assuming *arguendo* that the duties in question were exclusive to Charging Party's bargaining unit, I would nevertheless conclude that the school district had no duty to bargain over the alleged transfer of work. To establish a PERA violation based upon the unilateral transfer of unit work, the charging party must also establish that the transfer had a significant impact on unit employees. The record must show for example that unit employees were laid off, terminated, demoted, not recalled or lost a significant amount of overtime as a result of the transfer of work. The mere loss of unit positions or speculation regarding the loss of promotional opportunities within the unit does not constitute a significant adverse impact. *City of Detroit (Water & Sewerage Dep't)*, 1990 MERC Lab Op 34.

In the instant case, Charging Party has failed to demonstrate that its members suffered any significant adverse impact which would give rise to a bargaining duty on the part of the school district. Despite the elimination of the purchasing assistant position, there is no evidence that any bargaining unit member became unemployed as a result of the 2006 reorganization, nor did the Union present any evidence that its members lost benefits or overtime due to the transfer of work. Cogan, the only bargaining unit member identified as having lost her position due to the reorganization, took another job within the school district after her position in the purchasing department was eliminated. She subsequently resigned her employment with the district as part of a voluntary settlement agreement reached between the parties. For all of the above reasons, I find that Charging Party has failed to establish that Respondent unlawfully transferred bargaining unit work to non-unit members in violation of PERA.

The record also fails to establish that Respondent violated PERA by refusing to provide information to the Union. It is well established that in order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must supply in a timely manner requested information which will permit the union to engage in collective bargaining and to police the administration of the contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. Where the information sought relates to discipline or to the wages, hours or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer rebuts the presumption. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op 205; *Wayne County*, *supra*. See also *E.I. DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538 (CA 6, 1984). The standard applied is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *Wayne County*, *supra*; *SMART*, 1993 MERC Lab Op 355, 357. See also *Pfizer, Inc*, 268 NLRB 916 (1984), enforced 763 F2d 887 (CA 7, 1985).

In the instant case, the charge asserts that the school district refused the Union's "repeated requests for information pertaining to its restructuring." At hearing, however, Charging Party essentially treated this element of the charge as an afterthought. The requests, which the Union allegedly made in August of 2006, were not made part of the record, nor was the subject matter of those requests described even minimally by the Union's witnesses. Although the record indicates that Amberg "renewed" the earlier requests via an October 2006 e-mail to Scales, once again there was no explanation provided regarding the substance of that request or even a description of the specific information sought therein. There is also no evidence indicating that the Employer failed to properly respond to that "renewed" request. Accordingly, I conclude that the Union has not met its burden of establishing a Section 10(1)(e) violation.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: June 29, 2010