STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

MERC Case No. C14 E-060
-and- Hearing Docket No. 14-009883

AFSCME COUNCIL 25 AND ITS AFFILIATED
LOCALS 207, 2920 & 2394,
Labor Organization-Charging Party,

-and-

GREAT LAKES WATER AUTHORITY,
Public Employer-Interested Party.
_____/

APPEARANCES:

Steven H. Schwartz and Catherine Ann Heitchue Reed, for Respondent

Miller Cohen, P.L.C. by Richard C. Mack, Jr. for Charging Party

DECISION AND ORDER

On October 4, 2016, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 11, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Steven H. Schwartz and Catherine Heitchue Reed, for Respondent

Miller Cohen, by Richard C. Mack, for Charging Party

DECISION AND RECOMMENDED ORDER ON MOTION FOR SUMMARY DISPOSITION

On May 2, 2014, AFSCME Council 25 and its affiliated Locals 207, 2920, and 2394 filed the above unfair labor practice charge against the City of Detroit (Water and Sewerage Department) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216.[1] The charge was amended on January 9, 2015, December 17, 2015, and January 26, 2016. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

Respondent filed a motion for summary dismissal of the charge on September 25, 2015, a supplement to this motion on January 26, 2016, and another supplemental motion on April 14, 2016. Charging Party filed its response in opposition to these motions on May 9, 2016.

1 The Detroit Water and Sewerage Department is a department of the City of Detroit and not a separate legal entity. However, in this decision the City and the Water and Sewerage Department are referred to collectively as the Respondent, while the Water and Sewerage Department, where appropriate, is referred to individually as the "DWSD."

I find that there are no material issues of fact requiring an evidentiary hearing in this case. Based on undisputed facts set out in the charge, pleadings and, as discussed below, in the record of a previous case, I make the following conclusions of law and recommend that the Commission issue the following order.

Background to the Charge, the Unfair Labor Practice Charge, and Procedural History:

This case has a long and complicated history. On March 3, 2016, the Commission issued a decision on a unit clarification petition, Case No. UC15 L-024, to which the parties to this charge were parties. *City of Detroit (Detroit Water & Sewerage Dept)*, 29 MPER 62 (2016). The relationship of this petition to this charge is explained below. A lengthy record was developed in that case, and certain background facts set out below are drawn from that record.

On November 4, 2011, Federal District Court Judge Sean Cox issued an order in a case that began in 1977 with a lawsuit by the Federal Environmental Protection Agency against the City of Detroit and the DWSD for violations of the Clean Water Act, 33 USC 1251 et seq. The events leading to the November 4, 2011, order are set out in *City of Detroit (Detroit Water & Sewerage Dept)*. The November 4, 2011, order included thirteen numbered paragraphs entitled "Labor Orders" that pertained to the DWSD's relationship with its employees and unions. For purposes of this case, the two relevant paragraphs of the Labor Orders are paragraph 8 and paragraph 13:

> 8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of DWSD employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.
>
> 13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

In April 4, 2012, the City of Detroit, facing a financial emergency, entered into a consent agreement with the State of Michigan under the Local Government and School District Fiscal Accountability Act, 2011 PA 4. Under the terms of this Act, entering into the consent agreement suspended Respondent's duty to bargain under PERA. In November 2012, 2011 PA 4 was repealed by referendum of the voters and was later replaced by the Local Financial Stability and Choice Act, 2012 PA 436, MCL 141.1543 et seq., (Act 436) which took effect on March 28, 2013 .

In March 2013, Governor Rick Snyder appointed Kevin Orr as Respondent's emergency financial manager under Act 436. Appointment of an emergency financial manager placed Respondent "in receivership" and suspended its duty to bargain under Section 15 of PERA for a period not to exceed five years. On July 18, 2013, Respondent filed a bankruptcy petition in the Federal Bankruptcy Court. On or about December 10, 2014, after completion of the bankruptcy proceeding, Governor Snyder declared Respondent to have emerged from receivership.

In 2012, Respondent began a general reorganization of the DWSD to comply with the November 4, 2011, court order. One of the aims of the reorganization was to reduce the number of the DWSD's job classifications, as the DWSD had been ordered to do by the Court. After hiring a consultant and doing a lengthy study, Respondent made the decision to abolish all its existing job classifications, which at that time numbered about 257, and consolidate them into about 57 new classifications. The DWSD's existing employees were told to apply for new classifications. After an assessment process, the DWSD filled the new positions from among its existing employees. The process of filling the new classifications began in early 2014 and extended through 2015.

The DWSD grouped the new positions into bargaining units and, sometime in late 2013 or early 2014, decided which of the unions representing its employees would represent each classification. These decisions were made without input from its unions. AFSCME was assigned a bargaining unit of new classifications that included some, but not all, of the employees that it was representing at the time the DWSD made its unit placement decisions.

As part of the reorganization, DWSD planned to cross-train employees to do many types of work that they had never done in the past in order to, as Judge Cox had ordered, increase workplace flexibility. However, the DWSD had not yet made much progress toward this goal when it began reclassifying employees. Many of the employees, including many or most employees in the new classifications Plant Technician and Office Support Specialist, continued to perform the same job duties after they received their new titles as they had before their reclassification.

As indicated above, the DWSD took nearly three years to complete its reorganization. For some of this period, Respondent's duty to bargain with Charging Party under PERA was clearly suspended. However, for the period between November 2012 and March 28, 2013, whether Respondent had a duty to bargain with Charging Party is subject to debate. After December 2014, Respondent no longer had an emergency manager and its duty to bargain was clearly restored.

In the charge filed on May 4, 2014, Charging Party asserted that on March 25, 2014, the DWSD orally informed Charging Party of its plan to move more than 1,100 members of Charging Party's bargaining unit into other bargaining units not represented by AFSCME. According to the charge, Charging Party made a request for more information about the changes in job classifications. On April 8, 2014, the DWSD provided Charging Party with a list of fourteen new job classifications and the unions assigned to represent them. The DWSD also gave Charging Party a guide describing the process it used to "map" the old classifications to the new ones, and a chart showing which old classifications, including unrepresented ones, had been "mapped" to which new classifications. The charge, as filed on May 4, 2014, alleged that Respondent violated its duty to bargain under Section 10(1)(e) by unilaterally seeking to alter the unit placement of numerous positions in Charging Party's bargaining unit and by refusing to bargain over the impact of layoffs and changes to the wages and other terms and conditions of employment of members of Charging Party's bargaining unit. Insofar as the pleadings disclose, no employee had been laid off as a direct result of the reorganization at the time the charge was filed.

I issued a complaint on the charge on May 29, 2014. However, a hearing was not scheduled because of the pending bankruptcy proceeding.

In June 2014, Charging Party filed a petition for unit clarification, Case No. UC14 F-010. In the unit clarification petition, Charging Party sought an order from the Commission clarifying its bargaining unit of DWSD employees to include certain new classifications to which Charging Party's existing classifications had been mapped, but which Respondent had assigned to be represented by other unions. This petition was also held in abeyance because of the bankruptcy proceeding.

On or about December 10, 2014, Governor Snyder declared Respondent to have emerged from receivership. The Commission, however, did not immediately reactivate any of the charges that had been held in abeyance pending completion of the bankruptcy. The petition in Case No. UC14 F-10 also continued to be held in abeyance. On January 9, 2015, Charging Party filed its "first amended charge." The first amended charge asserted that Respondent had refused to bargain over the DWSD's plan to remove a number of Charging Party's members from Charging Party's bargaining unit or the effects of this plan on employees. It also asserted that the DWSD had refused to respond to Charging Party's request for information about its reorganization plan, a request that Charging Party had made in November 2014 and again in January 2015. Charging Party asserted, in addition, that on January 8, 2015, it learned that certain of its members who had been reclassified as Field Service Technicians had been removed from Charging Party's bargaining unit. According to the charge, this was the first group of its members who had actually been removed from its unit. The first amended charge alleged that Respondent violated its duty to bargain by failing to bargain in good faith over its plan to remove employees from the bargaining unit and/or the effects of this plan, failing to provide information, and "illegal erosion of the bargaining unit."

After filing the first amended charge, Charging Party requested that a joint conference and hearing be scheduled on both the charge and the petition in Case No. UC14 F-010. On January 21, 2015, Respondent responded that it had conducted the reorganization pursuant to directives in Judge Cox's order November 4, 2011, order. Respondent also pointed out that Judge Cox's November 4, 2011, order enjoined the Commission from exercising jurisdiction over disputes arising from the changes ordered by the Court. Respondent asserted that the Commission was enjoined by paragraph 13 of Judge Cox's November 4, 2011, order from taking action on either the charge or the petition. No conference or hearing was scheduled on the charge or petition.

On August 26, 2015, I sent the parties in all the cases before me that had been held in abeyance during the bankruptcy letters announcing my intention to reactivate their charges. The letter stated that if either party believed that placing the case back on the active docket would be in contravention of an order issued by the U.S. Bankruptcy Court or any other lawfully issued order, that party should file a written position statement, with supporting documentation. The parties to this case received this letter. I did not send a letter referencing the petition in Case No. UC14 F-010 because that case had not yet been assigned to me.

On September 25, 2015, in response to my letter, Respondent filed an objection to the reactivation of the case and a motion for summary disposition. In the motion, Respondent admitted that it had eliminated classifications in the AFSCME bargaining unit and transferred AFSCME members occupying those classifications and their work to newly-created classifications represented by other unions. However, it argued that moving work between bargaining units was necessary to comply with Judge Cox's November 4, 2011, directive to consolidate job classifications to increase

workplace flexibility, and that for that reason the charge should be dismissed. It also argued, as it had on January 21, 2015, that the Commission was enjoined from taking action on the charge because it involved a dispute arising from changes ordered by Judge Cox. At about the same time that the motion was filed, the petition in UC14 F-010 was assigned to me in anticipation that it would be consolidated with the charge in Case No. C14 E-060, although no actual order consolidating the cases was issued.

On October 7, 2015, Charging Party asked me to hold the charge in abeyance, and to grant it an indefinite extension of time to respond to the motion for summary disposition, because the parties were involved in mediation in the U.S. Bankruptcy Court over claims that included claims covered by this charge. On October 30, 2015, Respondent confirmed that the motion should be held in abeyance because active settlement discussions were taking place in federal court.

During mediation, the parties resolved some of their disputes over what new classifications should be included in Charging Party's bargaining unit. On December 8, December 10, and December 15, United States District Court Judge Victoria Roberts, who had been acting as mediator between the parties, issued orders directing AFSCME to file a unit clarification petition regarding two DWSD positions, Plant Technician and Office Support Specialist, whose bargaining unit status remained in dispute. On December 14 and December 15, Judge Cox also issued orders which elaborated upon and replaced his November 4, 2011, order. The December 14, 2015, order was a stipulated order to which Charging Party was a party. The stipulated order included modified Labor Orders, now called Labor Mandates. Paragraph thirteen of the Labor Mandates in the December 14, 2015, stipulated order included this language:

> (a) Except as provided in this Order, labor claims filed or later filed that challenge actions of DWSD which were ordered or specifically permitted by the Labor Orders, are permanently enjoined unless dismissed with prejudice by the parties.
>
> (b) Upon execution of this Order, the injunction previously issued is modified to return jurisdiction to Wayne County Circuit Court, MERC, and grievance arbitrators for those claims challenging DWSD actions which were neither ordered nor specifically permitted by Labor Orders. These labor claims may proceed whether filed before or after this Order's date.
>
> (c) There are also certain pending claims where the parties disagree as to whether or not DWSD's action were ordered by Labor Orders. This shall also occur for claims yet to be filed.
>
> (d) The following labor claims are enjoined or dismissed:
>
> (i)UC-14-F010/C-14-E-60 ─ *Unit clarification petition and related ULP. AFSCME will amend its Charge and Unit Clarification Petition to dismiss all challenges and issues except for the placement of the positions of Plant Technician and Office Support Specialist.*

** *

(e) The following labor claims may proceed:

(i)UC-14-F010/C-14-E-060 ─ Unit clarification petition and related ULP. Charge and Unit Clarification Petition may proceed with respect to the placement of the positions of Plant Technician and Office Support Specialist.

(f*) Labor claims not addressed in paragraphs (d) and (e) may proceed, if the tribunal where the claims were filed determines that the claims do not challenge DWSD actions which were ordered or specifically permitted by a Labor Order.* Cases which will be determined in the tribunal where they were filed include: [Emphasis added, cases specifically listed in paragraph f omitted.]

** *

The December 14, 2015, stipulated order also included these paragraphs:

E. The MERC unfair labor practice charge and unit clarification petition of Michigan AFSCME Council 25, Case No. C14 E-060 and Case No. UC14 F-010 is not entirely resolved. The union representation issue of the positions of Plant Technician and Office Support Specialist has not been resolved. AFSCME and IUOE are disputing over the proper union representation for these two positions. These and certain other disputes are subject to the orders entered by the Hon. Victoria Roberts on December 8, 2015, and December 10, 2015, in *In re City of Detroit,* Case No. 13-53846 (Docket Nos. 10689 and 10698), which are hereby adopted as orders of this Court.

F. Any labor contracts which have been executed shall be adjusted to reflect the MERC award in Case No. C14 E-060 and UC14 F-010, after a final order is entered.

The following day, December 15, 2015, Judge Cox issued another order. The December 15, 2015, order contained provisions applicable to unions representing DWSD employees who had not been parties to the stipulated order. Paragraph 13(c) of the December 15, 2015, order reads as follows:

c. There are also certain pending claims where the parties disagree as to whether or not DWSD's actions, which were challenged with such claims, were ordered or specifically permitted to be taken by the Labor Orders. For such claims, the tribunal where the matter is pending will decide whether DWSD's actions were ordered by Labor Orders. This shall occur also for claims yet to be filed.

On December 17, 2015, Charging Party, pursuant to Judge Roberts' order, filed a new unit clarification petition, Case No. UC15 L-024, seeking to add the Plant Technician and Office Support Specialist positions to its bargaining unit of DWSD employees. As discussed above, a lengthy hearing was conducted on the petition. On March 3, 2016, the Commission issued a decision which

clarified Charging Party's bargaining unit to add the two positions. *City of Detroit (Detroit Water & Sewerage Dept),* 29 MPER 62 (2016).

On the same date that it filed the new petition, December 17, 2015, Charging Party filed a "second amended" charge in the instant case. This charge began by stating that the allegations that followed applied only to the job classifications of Plant Technician and Office Support Specialist, "per order of the Federal Court of December 14, 2015." The second amended charge then restated the allegations contained in the January 9, 2015 first amended charge.

On January 1, 2016, a new public entity, the Great Lakes Water Authority (GLWA) came into existence. Pursuant to the terms of the agreements that created it, the GLWA took over many functions previously performed by the DWSD for water customers both within the City of Detroit and in its surrounding suburbs. The GLWA, per agreement, also became the employer of the employees who did the work. Thus, many individuals who had been employed by Respondent became employees of the GLWA. The GLWA also recognized the bargaining units that were in place at the time of the takeover and the bargaining representatives for these units.

On January 26, 2016, Respondent filed a supplement to its September 25, 2015, motion for summary disposition. In the supplement, Respondent argued that all allegations in the charge and amended charge, except for Charging Party's claim to represent the Plant Technician and Office Support Specialist positions, had been enjoined and dismissed by Judge Cox's December 14, 2015, order.

On the same date that Respondent filed the supplement to its motion for summary disposition, Charging Party filed a third amended charge, naming as parties both Respondent and the GLWA as a successor employer. The third amended charge begins with the statement that its allegations "apply only to the job classifications of Plant Technician and Office Support Specialist, per Order of the Federal Court of December 14, 2015." The charge then alleges that Respondent violated its duty to bargain in good faith by: (1) refusing to bargain over the reorganization plan or its effects on employees; and (2) failing to provide Charging Party with information it requested concerning the specifics of the plan. It also alleges that Respondent, and the GLWA as a successor employer, violated their duty to bargain in good faith by: (1) refusing to recognize AFSCME as the bargaining representative for Plant Technicians and Office Support Specialists; and (2) failing to apply the terms of the AFSCME collective bargaining agreement to these employees. Finally, Charging Party alleges that Respondent and the GLWA violated Sections 10(1)(a) and (c) of PERA because their refusal to recognize AFSCME as the bargaining representative for the two classifications was motivated by animus against AFSCME for its protected activities, which included the filing of numerous grievances.

Respondent was granted permission to file another supplement to its motion for summary disposition and filed this supplement on April 14, 2015. On May 9, 2016, Charging Party filed its response in opposition to Respondent's motion for summary disposition, as supplemented.

Arguments of the Parties:

As discussed above, in the motion for summary disposition it filed on September 25, 2015, Respondent argues that moving work between bargaining units was necessary to comply with Judge Cox's November 4, 2011, directive to consolidate job classifications to increase workplace flexibility, and that for that reason the charge should be dismissed. In its January 26, 2016, supplement to the motion, Respondent also argues that all allegations in the charge and first and second amended charges, except for Charging Party's claim to represent the Plant Technician and Office Support Specialist positions, were enjoined and dismissed by Judge Cox in his December 14, 2015, order. Charging Party's claim to represent the two positions, according to Respondent, was fully addressed by the Commission in *City of Detroit (Detroit Water & Sewerage Dept).*

In its April 14, 2016, supplement, Respondent argues that Charging Party should not be allowed to amend its charge to add the allegations included in its third amended charge. Respondent points out that, according to the charge, members of the Charging Party's bargaining unit were removed from its unit on or about January 8, 2015. Respondent asserts that any claim relating to this action that was not filed within six months of this date, or after June 2015, was untimely under Section 16(a) of PERA. Respondent acknowledges that amendments to charges that relate back to the initial claim and merely provide a new theory of recovery are allowed, even if filed more than six months after the events the constitute the alleged unfair labor practice. However, it argues that the claim of retaliation does not relate back to the original charge because it asserts a new cause of action. It also argues that the addition of new parties is not allowed under the relation back doctrine, and that Charging Party should not be permitted to add GLWA as a party.

In its April supplemental motion, Respondent also argues that the third amended charge violates the provision in Judge Cox's December 14, 2015, order that AFSCME amend its unfair labor practice charge to "dismiss all challenges and issues except for the placement of the positions of Plant Technicians and Office Support Specialists." It argues that December 14, 2015, stipulated order was intended to reduce the claim to that specific issue, and to prohibit AFSCME from amending the charge to add new parties or claims.

On May 9, 2016, Charging Party filed its response in opposition to Respondent's motions for summary disposition. Charging Party argues that paragraph 13(c) of Judge Cox's December 15, 2015, order gives the Commission jurisdiction to determine whether the DWSD's actions in this case were "ordered or specifically permitted" by Judge Cox's November 4, 2011, order. Charging Party also argues that adjusting the union representation of new classifications was neither ordered nor specifically permitted by paragraph 8, or any other provision, of Judge Cox's November 4, 2011, order. It maintains that the DWSD could have, consistent with PERA, lawfully unilaterally undertaken the actions which it was actually ordered to take in paragraph 8 of the November 4, 2011, order. According to Charging Party, these actions were the elimination of job titles, the creation of new ones, and the assignment of new job duties to the new titles. However, according to Charging Party, Judge Cox's November 4, 2011, order did not order or specifically permit Respondent to remove employees from their existing bargaining units without changing their job duties.

Charging Party admits, as the Commission noted in *City of Detroit (Water & Sewerage Dept),* that reducing the number of classifications from 257 to 57 meant that not every employee could remain in his or her same union. However, it argues that where the job duties of a position did not change after it was reclassified, nothing in Judge Cox's order required or specifically permitted

the DWSD to arbitrarily change the union affiliation of the employee. Charging Party argues that now that jurisdiction has been returned to the Commission to resolve disputes related to the reorganization, the Commission has jurisdiction to analyze DWSD's actions using the principles it normally uses in determining whether an employer has violated its duty to bargain under PERA.

Under these principles, Charging Party argues, Respondent could not lawfully remove the positions of Plant Technician and Office Support Specialist from Charging Party's bargaining unit without a substantial change in the job duties of these positions or Charging Party's agreement. Charging Party cites *Detroit Pub Schs,* 23 MPER 62 (2010) and *City of Detroit (Fire Dept),* 20 MPER 79(2007). Charging Party also quotes from the ALJ decision in *City of Grand Rapids,* 19 MPER 69 (2006) as follows:

> An employer's decision to eliminate unit positions and redistribute their work among positions outside the bargaining unit may be either a mandatory subject of bargaining or a matter of managerial prerogative, depending on whether the decision is part of a legitimate reorganization, whether the transfer of work has a significant adverse impact on unit employees and whether the employer's decision is based at least in part on cost factors which could be affected by the bargaining process.[citations omitted] *None of these factors are relevant, however, when an employer takes an existing unit position and, without changing its duties, transfers it to another unit or declares it to be an unrepresented position.*

Charging Party asserts that since there was no significant change in job duties between the former and current classifications of the Plant Technician and Office Support Specialist positions, Respondent violated its duty to bargain under PERA by removing the employees in these classifications from Charging Party's unit and refusing to recognize Charging Party as the bargaining agent for these employees.

Charging Party also argues that it should be permitted to amend its charge to add the new allegations included in the third amended charge. It asserts that the amendments relate back to the original charge because they merely add new theories for relief related to the events that were already the subject of the original, timely, charge. According to Charging Party, it has consistently alleged, since the charge was originally filed in May 2014, that Respondent violated its duty to bargain by unilaterally removing work from its bargaining unit. According to Charging Party, the only thing added by the third amended charge is a new theory for relief, i.e., that the motive for the removal of work was retaliatory. In support of its argument that the retaliation claim related back to the original claim, Charging Party cites two decisions of the National Labor Relations Board (NLRB), *Kelly-Goodwin Forest Industries,* 269 NLRB 33 (1984), and *W.H. Froh, Inc,* 310 NLRB 384 (1993). In *Kelly-Goodwin,* the union's original charge alleged that the employer violated its duty to bargain by locking out bargaining unit employees and making unilateral changes in wages, hours and working condition in violation of an existing collective bargaining agreement, i.e., paying individuals hired to replace the locked out workers' wages different from those in the collective bargaining agreement. The union later amended its charge to allege that the employer engaged in unlawful discrimination to discourage union activity by hiring replacements for the locked out individuals and paying them at a wage rate above that contained in the employer's last offer to the union at the bargaining table. The refusal to bargain portion of the charge was withdrawn before the hearing. Although the hiring of

replacements began more than six months before the charge was amended, the NLRB held that the amended charge was timely. It concluded that the amendments, because they were similar to, and arose out of the same course of conduct as the matters alleged in the original charge, should be deemed to relate back to the original charge for statute of limitations purposes even though the original charge and the amendments alleged violations of different sections of the National Labor Relations Act, 29 USC 150 et seq. In *Froh,* the original, timely filed, charge alleged that the employer's unilateral subcontracting of unit work and the termination of the employees who did the work violated the employer's duty to bargain. More than six months after the terminations, the charge was amended to add the allegation that the employees' termination constituted unlawful discrimination against them for their union activity. The NLRB's ALJ held that the amendments were timely because they were closely related to the original charge as they arose out of the same factual situation or sequence of events as the allegations in the original charge.

Charging Party also argues that the GLWA, as a successor employer, is liable for the actions of the DWSD. Charging Party cites *Golden State Bottling Co,* v *NLRB,* 414 US 168 (1973), for the principle that a successor employer may be held liable for the actions of its predecessor. In *Golden State,* the Supreme Court held that when an employer purchases a business with knowledge of pending unfair labor practice litigation, the predecessor and successor employers are jointly and severally liable for the unfair labor practices committed by the predecessor.

Discussion and Conclusions of Law:

As Charging Party correctly notes, Judge Cox's December 15, 2015, order states that for pending claims where the parties disagree as to whether or not the DWSD's actions were "ordered or specifically permitted" by his November 4, 2011, Labor Orders, the tribunal (including the Commission) where the claim was brought is to decide whether these actions were ordered or specifically permitted. There is a similar provision in the December 14, 2015, stipulated order, to which Charging Party was a party. However, this provision applied only to claims not addressed in paragraphs 13(d) and (e) of the Labor Mandates section of the December 14, 2015, order. The claims in the instant case were specifically addressed in paragraph 13(d)(i), which directs Charging Party to "dismiss all challenges and issues [in Case No. C14 E-060] except for the placement of the positions of Plant Technician and Office Support Specialist, and paragraph 13(e)(i), which states that Case No. C14 E-060 may "proceed with respect to the placement of the positions of Plant Technician and Office Support Specialist." I conclude that under paragraph 13 of the Labor Mandates, the Commission has jurisdiction to adjudicate only the "placement" of these two positions and is permanently enjoined from ruling on any other issue raised in Case No. C14 E-060.

I find, therefore, that the threshold issue in this case is whether Charging Party's remaining claims in Case No. C14 E-060 are claims over the "placement" of the positions of Plant Technician and Office Support specialist. In the charge as originally filed, Charging Party alleged that Respondent violated its duty to bargain by unilaterally seeking to alter the unit placement of numerous positions in Charging Party's bargaining unit and refusing to bargain over the impact on the wages hours and working conditions of employees of this action. The charge was later amended to allege that Respondent had a duty to bargain over its reorganization plan, which included removing employees in the Plant Technician and Office Support Specialist classifications from Charging Party's bargaining unit, and the effects of this removal on employees. In other words,

Charging Party alleged, prior to Judge Cox's December 14, 2015, order, that Respondent had a duty to bargain with it over the reorganization process to the extent it removed employees in these new classifications from Charging Party's bargaining unit, and also to bargain over the effects on these employees of their removal from their existing unit. [2] These allegations challenge both Respondent's refusal to bargain with Charging Party over the reorganization process and the end result, i.e., the assignment of employees represented by Charging Party to the new classifications of Plant Technician and Office Support Specialist, and the assignment of these two new classifications to a different labor organization, without a substantial change in the employees' job duties. Charging Party's claim that Respondent improperly placed the Plant Technician and Office Support Specialist classifications in a bargaining unit represented by another union, however, challenges only the end result. This claim could be raised in either an unfair labor practice charge or a unit clarification petition, or both.

Near the end of Judge Cox's December 14, 2015, order, in a paragraph E quoted above, Judge Cox explained his understanding of Charging Party's remaining claim in Case No. C14 E-60. As he described it, it involved a dispute between AFSCME and the IUOE over "the proper union representation" for the Plant Technician and Office Support Specialist positions. I conclude that under Judge Cox's December 14, 2015, order, Charging Party was to dismiss all claims in Case No. C14 E-60 alleging that Respondent had violated its duty to bargain except for its allegation that Respondent had improperly placed the new Plant Technician and Office Support Specialist classifications in another union's bargaining unit and was refusing to recognize it as the bargaining agents for these classifications. As Respondent notes, those claims were adjudicated in the unit clarification petition proceeding in *City of Detroit (Detroit Water & Sewerage Dept).* In its decision in that case, the Commission agreed with Charging Party that the positions had been improperly placed. It therefore ordered Charging Party's bargaining unit of Respondent and GLWA employees clarified to include the two positions.

I note that prior to Judge Cox issuing the December 14, 2015, order, Charging Party and the DWSD participated in extensive mediation designed to resolve as many outstanding disputes as possible before the GLWA came into existence on January 1, 2016. I find that if Judge Cox had intended to allow Charging Party to proceed with its claims that Respondent unlawfully refused to bargain over the reorganization or its effects as it pertained to the Office Support Specialist or Plant Technicians positions, he would not have ordered Charging Party to dismiss all challenges and issues in Case No. C14 E-060 except for the "placement" of the positions.

In its third amended charge, filed after Judge Cox issued his December 14, 2015, order, Charging Party added two new allegations. First, it alleged that Respondent violated its duty to

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2 There is no dispute that Respondent did, in fact, refuse to bargain over those issues. I note that in two decisions and recommended orders issued by me on August 24, 2016, I concluded that under paragraph 8 of Judge Cox's Labor Orders and paragraph 13 of his Labor Mandates, the Commission was permanently enjoined from finding that the Respondent in this case violated its duty to bargain by unilaterally eliminating classifications and transferring employees and their work to newly established classifications, despite the fact that this also involved moving employees and their work to bargaining units represented by different labor organizations. *City of Detroit (Water & Sewerage Dept) -and- Sanitary Chemists & Technicians Assn,* Case No. C14 A-013/14-002291-MERC; *City of Detroit (Water & Sewerage Dept) –and- Utility Workers of America,* Case Nos. C15 C-033/15-021093-MERC and C15 C-034/15-021094-MERC.

bargain by refusing to apply the terms of the collective bargaining agreement to the Plant Technician and Office Support Specialist positions and, second, it alleged that Respondent's refusal to recognize Charging Party as the bargaining representative for these two positions was motivated by anti-union animus. I agree with Charging Party that these allegations are not untimely under PERA because they "relate back" to the original charge. MCR 2.118(D) provides that "[a]n amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." An amendment which adds a new party does not relate back to the original charge. *City of Pontiac*, 22 MPER 46 (2009).[3] However, an amendment relates back to the date of original filing if it merely adds a new theory on why relief is warranted in an already pending dispute. *Wayne Co*, 28 MPER 35 (2014). In this case, Charging Party's original charge alleged that Respondent unlawfully removed positions, including the Plant Technician and Office Support Specialist positions, from its bargaining unit. Charging Party's amended charge adds a new theory as to why the positions were removed, i.e., that the removal of the positions was motivated by anti-union animus. It also lays out with more specificity what relief Charging Party seeks, i.e., an order requiring Respondent to make whole the Plant Technicians and Office Support Specialists for monetary losses they suffered as a result of Respondent's failure/refusal to apply the terms of the AFSCME contract to them after they were reclassified.

However, a threshold question is whether under Judge Cox's December 14, 2015, order the Commission has jurisdiction to rule on the claims added by the amended charge. I conclude that the amendments, like the allegations to which they relate back, are not claims over the "placement" of the new Plant Technician and Office Support Specialist positions. I find that Charging Party's claim that these positions were improperly placed in a bargaining unit represented by the IUOE has already been adjudicated by the Commission in *City of Detroit (Water & Sewerage Dept)*, and that the Commission is enjoined, by Judge Sean Cox's December 14, 2015, order, from ruling on the other claims and allegations made by Charging Party in Case No. C14 E-040. I conclude, therefore, that Respondent's motion for summary disposition should be granted.

Based on the facts and conclusions of law set for the above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

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3 In this case, the amendment adding the GLWA as a party was filed less than a month after the GLWA came into existence. Charging Party explained in its response to the motion that GLWA was added as a party because, as a successor to Respondent with knowledge of the pending charge, the GLWA should be jointly and severally liable, with Respondent, for Respondent's unfair labor practices. However, since I find that the Commission is enjoined from adjudicating the unfair labor practice allegations, it is unnecessary for me to decide whether the GLWA is a successor to Respondent for purposes of determining liability.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 4, 2016