STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

-and-

SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
Labor Organization-Charging Party in MERC Case No. C16 F-068;
Hearing Docket No. 16-018889,

-and-

ASSOCIATION OF DETROIT ENGINEERS,
Labor Organization-Charging Party in MERC Case No. C16 F-070;
Hearing Docket No. 16-018890.
_____/

APPEARANCES:

Steven H. Schwartz & Associates, P.L.C., by Steven H. Schwartz, for Respondent

Sachs Waldman, by John P. Runyan, Jr., for Charging Parties

DECISION AND ORDER

On February 3, 2017, Administrative Law Judge Travis Calderwood (ALJ) issued his Decision and Recommended Order on Motions for Summary Disposition in the above matter finding that the charges should be dismissed as untimely under § 16(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216(a).

Charging Parties filed exceptions to the ALJ's Decision and Recommended Order on February 27, 2017. After being granted an extension of time, Respondent filed its brief in support of the ALJ's Decision and Recommended Order on March 31, 2017.

On May 9, 2017, the Commission received a letter from Charging Parties requesting leave to withdraw the exceptions. The Commission received a letter from Charging Parties on May 17, 2017, in which they requested leave to withdraw the charges. Charging Parties' requests are hereby approved. This Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

ORDER

The unfair labor practice charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: June 12, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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CITY OF DETROIT (DEPARTMENT OF WATER & SEWERAGE),
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SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
Labor Organization-Charging Party in Case No. C16 F-068; Docket No. 16-018889-MERC,

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_____/

APPEARANCES:

Steven H. Schwartz & Associates, P.L.C., by Steven H. Schwartz for Respondent

Sachs Waldman, by John P. Runyan, Jr., for Charging Parties

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON
MOTIONS FOR SUMMARY DISPOSITION

On June 29, 2016, the Sanitary Chemists and Technicians Association (SCATA), filed the above unfair labor practice charge in Case No. C16 F-068/Docket No. 16-018889-MERC with the Michigan Employment Relations Commission (Commission) against the City of Detroit, Water and Sewerage Department (DWSD). On June 30, 2016, the Association of Detroit Engineers (ADE) filed the charge in Case No. C16 F-070; Docket No. 16-018890-MERC, also against the City of Detroit, Water and Sewerage Department. The action complained of by both Charging Parties as alleged in their respective filings is that the DWSD committed an unfair labor practice when it implemented a 10% wage reduction.

Both charges were filed pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216 and assigned to Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System (MAHS). The two charges were consolidated.

With respect to the actual charge brought by the ADE, the Union claims that the DWSD imposed the 10% wage reduction following the expiration of their contract because it asked to negotiate a successor agreement; such a charge claims a violation of Section 10(1)(c) of PERA. With SCATA, however, it is unclear if the Union is challenging the imposition of the wage reduction as a failure to bargain or whether it too, like the ADE, is claiming that the wage cut was imposed as punishment for seeking to negotiate a successor agreement. As explained below, such a distinction is immaterial for purposes of disposition in the present proceedings.

On July 21, 2016, Respondent filed separate motions for summary dismissal of the charges against each Charging Party. Respondent asserts in its motions: (1) that the charges are barred by PERA's six-month statute of limitations; (2) that Section 15b of PERA precludes the retroactive award of wage increases; and (3) that because the wage cut was implemented while the City was under a consent agreement, the duty to bargain over wages had been suspended. A telephone pre-hearing conference was held on August 3, 2016. Neither Charging Party had secured legal representation at the time of the pre-hearing conference. Charging Parties, collectively, requested by email dated that same day that I withhold taking action on Respondent's motions for one month so that they could make arrangements for representation.

On August 31, 2016, attorney John P. Runyan filed his appearance on behalf of both Charging Parties. Attorney Runyan requested that oral argument be conducted. Said argument was held on September 12, 2016, before the undersigned in Detroit, Michigan.

I find that there are no material issues of fact requiring an evidentiary hearing in these cases. Based on the undisputed facts set out in the charges, pleadings and during the parties' arguments before the undersigned, as well as pursuant to matters covered fully in the public record, I make the following conclusions of law and recommend that the Commission issue the following order**.**

Background:

The DWSD's long history of being overseen by Federal District Court Judge John Feikens, and then later by Federal District Court Judge Sean Cox, as a result of its failure to comply with the Clean Water Act, 33 USC 1251 et seq., has been described in detail in many recent decisions issued by the Commission.[1] As such, the extensive history will not be repeated herein except as necessary to address the arguments of the parties.

On November 4, 2011, Judge Cox issued an Order in which he directed the DWSD to undertake several actions in attempt to come into compliance with federal law. Relevant to the present situation are paragraphs 8 and 13 of that Order which read:

[1] For a detailed history regarding the DWSD's oversight by the Federal Court, in addition to the series of Orders issued by Judge Cox see *City of Detroit (Water and Sewerage Dept)*, 29 MPER 62 (2016).

> 8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.
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> * * *
>
> 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 union from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

In April of 2012, the City entered into a consent agreement, entitled the Financial Stability Agreement (FSA) with the State pursuant to Public Act 4 of 2011 (PA 4).[2] The City then drafted what it referred to as the "City's Employment Terms" (CET) pursuant to the FSA. The CET materially altered wages and other terms and conditions of employment, one of which was a 10% wage reduction. On June 27, 2012, the Board of Water Commissioners, the governing body over the DWSD, passed a resolution which indicated that any bargaining unit that had an expired collective bargaining agreement and had failed to ratify a successor agreement at the time of the resolution would have the CET imposed upon them. Neither Charging Party disputed that they were operating under expired collective bargaining agreements at the time of the resolution or that they had not yet ratified a successor agreement.

Prior to the City's execution of the consent agreement with the State in April of 2012, a petition seeking a public referendum on PA 4 was filed with the Secretary of State on February 20, 2012. PA 4 was suspended on August 12, 2012, pending the outcome of the referendum initiative. At the November general election in 2012, a majority of voters rejected PA 4. On November 26, 2012, the state board of canvassers certified the vote and PA 4 was officially repealed at which time Public Act 72 of 1990 (PA 72), the Local Government Fiscal Responsibility Act, and the predecessor to PA 4 once again became effective.

In September of 2012, both Charging Parties along with a third union, the Association of Municipal Engineers (AME) filed for fact-finding with the Commission. In October and November of 2012, Charging Parties and AME filed grievances over the imposition of the CET, which included the wage reduction.

[2] Public Act 4 of 2011, enacted by the Legislature and effective March 16, 2011, had the stated purpose of placing financial checks and balances on public employers in a state of financial stress or emergency. Under PA 4, once a state of emergency has been declared in a local governmental unit, the State Treasurer is authorized to enter into a consent agreement with the local governmental unit for a period necessary to achieve the goals and objectives of that agreement. Section 14a of PA 4, provided that after a period of 30 days following the execution of a consent agreement or unless directed otherwise by the State Treasurer, the local governmental unit's obligation to bargain under Section 15(1) of PERA is suspended.

At some point in November of 2012, the City imposed the CET, including the 10% wage cut, on both SCATA and ADE, the only two DWSD bargaining units existing at the time that had not ratified a successor agreement.

In response to the public's rejection of PA 4, the state legislature, in December of 2012, enacted and the Governor signed into law Public Act 436 of 2012 (PA 436). PA 436, also known as the Local Financial Stability and Choice Act, took effect on March 28, 2013. Like its predecessor PA 4, PA 436 authorizes the State Treasurer to enter into a consent agreement with a local government in a state of financial stress or emergency for a period necessary to achieve the goals and objectives of that agreement. Section 8(11) of PA 436, MCL 141.1548(11), suspends the duty to bargain set forth in Section 15(1) of PERA for employers subject to a consent agreement. Notably, Section 4(6) of PA 436 provides, in pertinent part:

> All proceedings and actions taken by the governor, the state treasurer, the superintendent of public instruction, the local emergency financial assistance loan board, or a review team under former 2011 PA 4, former 1988 PA 101, or former 1990 PA 72 before the effective date of this act are ratified and are enforceable as if the proceedings and actions were taken under this act, and a consent agreement entered into under former 2011 PA 4, former 1988 PA 101, or former 1990 PA 72 that was in effect immediately prior to the effective date of this act is ratified and is binding and enforceable under this act.

In early March of 2013, Governor Snyder confirmed the existence of a financial emergency in the City of Detroit and on March 13, 2013, appointed Kevin Orr as the City's Emergency Manager (EM) under PA 72, the authorizing statute then in effect. Effective March 28, 2013, PA 72 was replaced by PA 436. PA 436 provides, in Section 31, that an EM appointed under PA 72 would continue to act in that capacity for the local government under the new law. MCL 141.1571.

In July of 2013, the City filed for protection under the United States Bankruptcy Code. On July 25, 2013, Federal Bankruptcy Judge Steven W. Rhodes issued an Order which essentially stayed any judicial, administrative or other proceeding against the City (Stay Order). Pursuant to the Stay Order, the Commission, and by extension any ALJ hearing cases on behalf of the Commission, placed all pending matters involving the City in abeyance. This included Charging Parties' fact-finding. The Commission continued to accept for filing new unfair labor practice charges or other petitions filed pursuant to PERA involving the City, but placed each new filing in abeyance as well.

In December of 2014 the City was discharged from the bankruptcy proceeding. In mid to late 2015, the parties with cases before ALJs acting on behalf of the Commission began to receive notice that those cases would no longer be held in abeyance.

On December 14, 2015, Judge Cox issued a Stipulated Order applicable to a union involved in the dispute over federal oversight of the DWSD, separate and apart from Charging Parties, that represented DWSD employees. Paragraph 13 of that order read in the relevant part the following:

> (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 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.

The following day, December 15, 2015, Judge Cox entered his final order which included a recitation of his prior day's order, but made them applicable "prospectively to the City/DWSD and any labor unions that were not a party to the December 14, 2015 Stipulated Order Regarding Labor Matters."

The grievances filed in October and November of 2012, were eventually submitted for arbitration. On November 24, 2015, the parties submitted their stipulated facts, exhibits and briefs to the Arbitrator. On January 27, 2016, the Arbitrator determined that he did not possess authority by nature of the parties' contracts to decide the issues presented to him. The Fact-Finding petitions, originally filed in September of 2012, by Respondents and a third union, were administratively dismissed by the Director of the Bureau of Employment Relations on February 22, 2016, upon the recommendation of the Fact-Finder previously appointed by the Commission.

Charging Parties filed their charges on June 29, and June 30, 2016, respectively.

Discussion and Conclusions of Law:

Charges under PERA must be filed within six months of the alleged unfair labor practice. MCL 423.216(a). The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 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). The statute of limitations is not tolled by the attempts of an employee or a union to seek a remedy elsewhere, including the filing of a grievance, or while another proceeding involving the dispute is pending. See e.g. *Univ Of Michigan*, 23 MPER 6 (2010); *Wayne County*, 1998 MERC Lab Op 560. In situations where a public employer's governing body adopts a resolution materially changing a term or condition of an employment, the statute of limitations begins to toll on the date that the body passes such resolution, announces the change, or takes other actions

finalizing the change, rather than the date the unilateral change is actually implemented. *City of Alpena*, 1982 MERC Lab Op 1210. The statute of limitations can also begin to run from the date the employer announces the change in working conditions and communicates the same to the union. *City of Detroit, Dep't of Water and Sewerage*, 1990 MERC Lab Op 400.

By statute, PERA's only exception to the strict six-month statute of limitations as set forth in Section 16(1) of the Act, is to allow a public employee who is prevented from filing a charge because of service in the armed forces, six months from the date of discharge from service and not from date that the public employee knew or should have known the acts giving rise to the charge. Under Commission case law, questions of whether an action is barred by the strict statutory constraint of the six-month limitation almost invariably involve a factual determination as to when the charging party knew or should have known of the act giving rise to an alleged violation of PERA occurred. In the instant situation, while it is not entirely clear whether the June 27, 2012, resolution by the Board of Governors acted as sufficient notice to both Charging Parties that the Respondent was going to implement the CET, what is clear is that the actual imposition of the wage cut did occur in November of 2012. Accordingly, whether PERA's statute of limitations began in June or November of 2012, is immaterial because in either situation the charges were not filed until June of 2016. At the very least, Charging Parties had knowledge of the wage reduction no later than October of 2012, when they filed their grievances protesting the cut. As noted however, Charging Parties did not file their unfair labor practice charges until June of 2016.

Charging Parties argue that the statute of limitations did not begin to run in 2012, but rather began to run in January of 2016, the point in time that Judge Cox's December 15, 2015, Order became final as no appeal had been filed.[3] Charging Parties state that because of Judge Cox's 2011 Order, they were precluded from filing their unfair labor practice charge during the enjoinment of the Commission's jurisdiction over the parties. Such an argument, as established above, is not supported by either PERA or Commission case law. Additionally, Charging Parties' claims are belied by their own actions since, despite claiming they were precluded from coming to the Commission due to Judge Cox's enjoinment of jurisdiction, they admitted to filing for fact finding in September of 2012, filing grievances over the CET in October and November of 2012, and proceeding to arbitration in November of 2015, all acts also, arguably, enjoined by Judge Cox's 2011 Order. Lastly, while it is unclear from the charges as filed whether both Charging Parties, or just the ADE, alleged that the act of imposing the CET violated Section 10(1)(c) of PERA, as retaliation for ADE's request to bargain a new contract, I am not of the opinion that Judge Cox's 2011 Order was intended to extend his enjoinment of the Commission's jurisdiction over claims rooted in allegations that a party's Section 9 rights under PERA were being violated. Rather, Judge Cox's 2011 Order and all subsequent Orders were meant to address the DWSD's long standing violations of federal environmental law.

Having determined that Charging Parties filed their charges several years outside of PERA's six-month statute of limitations, it is not necessary to consider Respondent's other two asserted grounds for dismissal - that Section 15b of PERA precludes the retroactive award of wage increases or that because the wage cut was implemented while the City was under a

[3] 28 USC § 2107, provides a 30 day deadline from the date of a judgment or order under which a notice of appeal must be filed.

consent agreement, the duty to bargain over wages had been suspended. I have considered all other arguments made by the parties, both in brief and at oral argument, and conclude that such does not warrant a change in this outcome. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 3, 2017