STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION),
Public Employer-Respondent,

MERC Case No. 20-A-0190-CE

-and-

AMALGAMATED TRANSIT UNION DIVISION 26,
Labor Organization-Charging Party.
_____/

Appearances:

The Allen Law Group, P.C., by Shaun P. Ayer and Amy M. Robertson, for Respondent

Cousens Law, by Mark H. Cousens, for Charging Party

ORDER DENYING CHARGING PARTY'S MOTION FOR RECONSIDERATION AND REMANDING CASE TO THE ADMINISTRATIVE LAW JUDGE FOR SUPPLEMENTAL PROCEEDINGS

On September 14, 2021, the Commission issued its Decision and Order adopting Administrative Law Judge (ALJ) Travis Calderwood's decision that City of Detroit Department of Transportation (Respondent or Employer) had violated Section 10(1)(e) of PERA by refusing to bargain in good faith concerning a change to the payroll period for employees represented by Amalgamated Transit Union Division 26 (Charging Party or Union). We concluded however, that although the change had been announced by the Employer as a *fait accompli*, the ALJ's recommended Order requiring a return to the *status quo* was not supported by the record because there was no evidence that a change had ever been implemented.[1] Accordingly, we modified the ALJ's recommended order to remove the *status quo* remedy.

In the same Decision and Order, we denied the Employer's June 14, 2021 Motion to Reopen the Record to present evidence concerning additional bargaining which purportedly occurred on November 6, 2020, November 9, 2020, and November 12, 2020, subsequent to the close of the ALJ hearing, and on its claim that the parties reached a bargaining impasse on

[1] As of the date we issued our Decision and Order, nearly one year after the close of the hearing, neither party, either by way of a post-hearing motion to the ALJ, or in subsequent motions and responses to the Commission, had advised either the ALJ or the Commission that the Employer had implemented the change to the payroll period.

November 12, 2020. We denied the motion because all of the purported facts which the Employer sought to adduce occurred subsequent to the close of the ALJ hearing, and were not newly discovered facts, or facts which had occurred prior to the hearing of which the Employer was unaware. As such, the motion failed to meet the criteria for re-opening the record under Rule 166 of the General Rules of Michigan Employment Relations Commission, 2002 AACS, R 423.166.

On September 28, 2021, Charging Party filed a Motion for Reconsideration, in which it requested to supplement the record with the affidavit testimony of ATU Local 26 President Glenn Tolbert concerning the Employer's eventual implementation of the payroll change on December 4, 2020. The Union asserts that because the payroll change was actually implemented, albeit after the close of the ALJ hearing, the Commission's decision to remove the *status quo* remedial relief was improper and should be reversed. Charging Party also asserts that the Commission should receive this additional evidence pursuant to Rule 166 because "this information could not have been produced at the hearing because it describes an event that had not yet occurred... [until] following close of the [ALJ] record and after submission of briefs."

Respondent opposed the Reconsideration Motion, noting, in part, that the Union had previously opposed the Employer's request to re-open the record by asserting that "any post hearing facts are inadmissible." We note that contrary to the Union's current position, it previously asserted in its brief in opposition to Respondent's Motion to Re-open the Record, that the Employer's Motion should be denied because "the events to which Respondent refers allegedly occurred five days after the briefs [to the ALJ] were filed. It is now eight months later. Nothing about these events is 'newly discovered.'"

The Union admits that as of the close of the hearing, the Employer had not implemented the payroll change. It further admits that "neither party sought to add to the record and the Administrative Law Judge was unaware that the change had been implemented." It now asserts, however, that "the Commission should have inquired about the facts or remanded the matter to the Administrative Law Judge for a determination of facts before issuing an incorrect decision." We reject this proposition. Foremost, the Union opposed the Employer's earlier Motion which, if granted, would have resulted in the remand it now advocates for. Next, both the Union and the Employer failed to advise this Commission in any of their respective prior filings that the payroll change had actually occurred. It is the responsibility of the parties to advise the ALJ or the Commission of any subsequent facts that are relevant to a determination concerning a pending case, rather than to assume the Commission would *sua sponte* seek out additional evidence from the parties which is not part of the record before it.

Rule 167 provides, in relevant part, that "a motion for reconsideration which merely presents the same issues ruled on by the commission, either expressly or by reasonable implication, will not be granted." Also, Rule 166 provides, among other things, that one of the criteria which must be met to sustain a motion to re-open the record is that "the additional evidence itself, and not merely its materiality is newly discovered."

Here, we have already considered the Union's arguments concerning the Employer's *fait accompli* announcement of its intention to implement the change to biweekly pay periods, and the Union raises no new issues concerning that matter. The fact remains that the change had not been implemented as of the close of the ALJ hearing. In addition, until now, there was no indication to the contrary despite the lengthy passage of time since the payroll change actually occurred. With regard to the implicit motion to re-open the record, the additional evidence sought to be presented by the Union, like that proffered by the Employer in its prior motion, is not newly discovered. Accordingly, we deny the Union's request to supplement the record in this case. See also, *Service Employees International Union (SEIU), Local 517M*, 27 MPER 47 (2013); *Birmingham Public Schools*, 33 MPER 12 (2019).

Alternatively, we find the Union's Motion deficient for a more fundamental reason. Specifically, it represents the Employer's unilateral implementation as having occurred in a vacuum. However, according to the Employer, the parties engaged in three additional bargaining sessions prior to the Employer's declaration of impasse and subsequent implementation, a fact which does not appear to be disputed by the Union. As noted previously, these bargaining sessions, like the implementation itself, were not a part of the ALJ record as they all occurred after the close of that hearing. Evidence concerning these and possibly other bargaining sessions is, however, relevant to a determination concerning whether the parties reached a valid bargaining impasse, and the legality of the Employer's unilateral implementation of the payroll change. Merely because an employer announces a change as a *fait accompli* does not mean that the implementation of that change is "per se" unlawful regardless of the circumstances under which it occurs.

Generally, an employer may not unilaterally impose changes in conditions of employment until an impasse exists following good faith bargaining. *Central Michigan Univ.*, 1997 MERC Lab Op 501. The determination of whether an impasse exists is made on a case-by-case basis, considering the totality of the circumstances and the entire conduct of the parties. *Flint Twp.*, 1974 MERC Lab op 152, 157; *Mecosta Co Park Comm.*, 2001 MERC Lab Op 28, 32 (no exceptions). Among the primary factors reviewed in determining whether a valid impasse exists are whether there has been a reasonable period of bargaining; whether the parties' positions have become fixed, and whether both parties are aware that the positions have solidified. *City of Saginaw*, 1982 MERC Lab Op 727. The party asserting the existence of an impasse bears the burden of establishing that impasse was reached.

A good faith impasse generally will not be found where a party has not bargained in good faith, including where unremedied unfair labor practices have been committed by the party asserting the impasse. *City of Warren*, 1988 MERC Lab Op 761. However, a party may be found to have cured a prior unlawful refusal to bargain by having engaged in subsequent good faith bargaining. *City of Iron Mountain*, 1985 MERC Lab Op 1014 (no exceptions) (ALJ found that although the Employer had bargained in bad faith, the fact that it had participated in subsequent negotiations in good faith cured any misconduct which may have occurred); *Mio AuSable Schools, Board of Educ.*, 10 MPER 28056 (1997) (no exceptions) (Employer delayed for nearly six months by refusing to respond to union proposals, to submit its own proposals, or to schedule negotiations.

Despite these dilatory tactics, the ALJ concluded that any initial delay in bargaining was cured by the subsequent negotiations which took place); *Detroit Public Schools*, 25 MPER 77 (2012) (Commission adopted the ALJ's determination that the employer had cured its prior unlawful bargaining conduct and unilateral implementation by restoring the prior proper wage level and by engaging in further good faith bargaining with the union.)

Here, the ALJ concluded that the Employer's announcement of the change as a *fait accompli*, along with its overall conduct both during, and apart from negotiations, supported a finding that it had bargained in bad faith, a finding with which we agreed. Neither the ALJ, nor the Commission based its determination solely on the fact that the Employer announced the change as a *fait accompli.* We cannot simply ignore the additional bargaining activity which took place prior to the Employer's implementation. Contrary to the Union's assertion, a determination concerning the legality of the Employer's implementation cannot be made in the absence of record evidence concerning the subsequent negotiations, the overall conduct of the parties, both at, and away from, the bargaining table, and other factors bearing on the issue of whether the Employer cured its prior unlawful conduct, and, if so, whether a valid impasse was reached.

This case presents us with a vexing dilemma. On the one hand, we have denied the Union's reconsideration motion and request to supplement the record. On the other hand, we find that it would not effectuate the purposes and policies of PERA to terminate the proceedings in this matter in their current posture. Knowing now that the unilateral change was in fact implemented, but only after further bargaining had occurred, we believe that it would best effectuate the Act to allow additional proceedings, followed by a ruling that brings the underlying issues in this matter to a complete conclusion for all involved parties, as well as for the employees affected by the change.

Rule 179, Commission Action, provides as follows:

> (1) Upon the filing of exceptions or cross-exceptions, the commission may adopt, modify or reverse the administrative law judge's decision and recommended order, or grant such other relief as the commission deems necessary to effectuate the purposes of the act.
>
> (2) If the commission identifies an issue not raised by the parties, it may on its own motion direct the parties to file briefs on the issue, or remand the matter to the administrative law judge for additional findings of fact.

Additionally, Rule 176 (11) provides:

> The commission may, on its own motion, reopen a record in any case and receive further evidence, may close the case upon compliance with the administrative law judge's recommended order, or may make other disposition of the case.

Together, these provisions authorize the return of this matter to the ALJ for supplemental proceedings. We find that the purposes and policies of PERA would be best effectuated by allowing both parties the opportunity to litigate the facts surrounding the Employer's implementation of the payroll change.[2]

Accordingly, we remand this matter to the ALJ for supplemental proceedings concerning the Employer's unilateral implementation of the payroll change, the bargaining and other relevant conduct of the parties, which preceded the implementation, whether the Employer had sufficiently cured its prior unlawful bargaining conduct so that a valid impasse could be reached, and if so, whether the parties had, in fact, reached an impasse as of the date of the unilateral action.[3] Both parties will also have the opportunity to present any factual or legal defenses bearing on these matters, including, but not limited to, arguments concerning the implications of the "covered by" doctrine discussed in our prior Decision and Order.

ORDER

IT IS HEREBY ORDERED pursuant to MERC's General Rules 423.179 and 423.176 (11), that this matter is remanded to the Administrative Law Judge for supplemental proceedings consistent with this Order as set forth herein.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: November 12, 2021

[2] We note that the original charge filed by the Union was sufficiently broad as to encompass the implementation issue to support continued review in a supplement proceeding using a spinoff case number of 20-A-0190-CE-02 to distinguish the initial and supplemental decisions in these related matters

[3] In light of the fact that the subsequent negotiations which purportedly took place are central to a determination of the issues involved, we instruct the ALJ to allow evidence concerning on-the-record proposals presented by the parties, and on-the-record discussions during these negotiations. Proposals and discussions designated as off-the-record should not be admitted, except by stipulation of the parties.