STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

36th DISTRICT COURT,
Public Employer-Respondent,

MERC Case No. C13 I-163
-and- Hearing Docket No. 13-012254

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 917,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Howard L. Shifman PC, by Howard L. Shifman; and Kienbaum, Opperwall, Hardy and Pelton PLC, by Thomas G. Kienbaum, for Respondent

Miller Cohen PLC, by Robert D. Fetter and Keith Flynn, for Charging Party

DECISION AND ORDER

On September 11, 2015, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Following the Commission's order granting Respondent's request for an extension of time, the Employer filed exceptions to the ALJ's Decision and Recommended Order on November 10, 2015. After requesting and receiving an extension of time, Charging Party filed cross exceptions on January 13, 2016. Respondent requested and was granted extensions of time until March 28, 2016, to file its response to the Charging Party's cross exceptions.

On March 18, 2016, Charging Party filed its petition to withdraw the charge in this matter. In its petition, Charging Party stated that the dispute underlying the charge has been settled. The Commission received a letter from Respondent on March 23, 2016, which requested that the Charging Party's petition to withdraw the charge be granted. Respondent confirmed that, upon withdrawal of the charge, all issues with respect to Respondent's exceptions would be resolved.

Charging Party's petition to withdraw its unfair labor practice charge against Respondent is 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.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: April 19, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

36th DISTRICT COURT,
Public Employer-Respondent,

Case No. C13 I-163
Docket No. 13-012254-MERC

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 917,
Labor Organization-Charging Party.
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APPEARANCES:

Howard L. Shifman and Kienbaum, Opperwall, Hardy and Pelton PLC, by Thomas G. Kienbaum, for Respondent

Miller Cohen PLC, by Robert D. Fetter and Keith Flynn, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

The above unfair labor practice charge was filed on October 11, 2013, with the Michigan Employment Relations Commission (the Commission) by AFSCME Council 25 and its affiliated Local 917 against the 36th District Court (the Court) pursuant to §10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The charge was amended on November 21, 2013, and again on June 10, 2014. In accord with §16 of PERA, the case was assigned for hearing to Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

On February 13, 2014, the Court filed a motion for summary dismissal of the allegations in the charge that it violated its duty to bargain. The Court argued that the Commission lacks jurisdiction over these claims because, under the circumstances of this case, the Commission's assertion of jurisdiction would impermissibly infringe upon the Michigan Supreme Court's constitutional powers of superintending control over lower courts. On May 23, 2014, after holding oral argument, I denied the motion for the reasons discussed below. An evidentiary hearing was then held on July 23 and August 4, 2014. Based upon the entire record in this case, including pleadings filed in connection with the motion, transcripts of the hearing, evidence presented at the hearing, and post-hearing briefs filed by the parties on October 20, 2014, I make the following findings of fact and conclusions of law and recommend that the Commission issue the order set forth below.

I. The Unfair Labor Practice Charge and History:

Charging Party represents a bargaining unit of court officers and bailiffs employed by the Court to serve process (court papers) for litigants and to both serve and execute Court orders for seizure of property and eviction. The duties of the bailiffs and court officers are essentially identical. The current bailiffs were grandfathered into their positions when the Court was created in a court reorganization in 1981. At the time that the events that form the basis for this charge began, there were between nineteen and twenty-four court officers and three bailiffs in the bargaining unit.

On May 28, 2013, the Supreme Court issued an order appointing Judge Michael Talbot of the Michigan Court of Appeals as temporary special judicial administrator for the Court. The Supreme Court's order gave Talbot the authority to exercise the power of superintending control over lower courts granted to the Supreme Court by Article 6,§4 of the Michigan Constitution. On July 26, 2013, the Court informed Charging Party that after the Court's individual contracts with court officers expired in the spring of 2014, it was contemplating offering the court officers new contracts as independent contractors. The Court took the position that converting the court officers to independent contractors was a managerial decision over which it had no duty to bargain, but offered to bargain over the impact of its decision on employees. The Court told Charging Party that it was not considering a change in the status of the bailiffs.

The parties met once in September 2013 and again on October 3, 2013. On October 3, Charging Party filed a petition for fact finding. On October 11, 2013, Charging Party filed this unfair labor practice charge. The charge alleged, first, that the Court violated its duty to bargain in good faith under §10(1)(e) of PERA by presenting its plan to convert the court officers to independent contractors to Charging Party as a "fait accompli" over which it had no obligation to bargain. Charging Party also maintained that the Court could not lawfully proceed with a plan to convert the court officers to independent contractors without Charging Party's agreement because the Court's plan altered the scope of the existing bargaining unit. The charge alleged, in addition, that the Court engaged in surface bargaining over a new collective bargaining agreement by refusing to bargain a new agreement that covered the court officers after April 2014. Finally, the charge alleged that the Court's announcement of its plan to convert the court officers to independent contractors constituted an unlawful threat to retaliate against them because they had exercised their rights under §9 of PERA to file and pursue grievances.

The parties continued to meet, including meeting with a Commission-appointed mediator. On November 21, 2013, Charging Party amended its charge to allege that the Court had violated its duty to bargain in good faith by unlawfully declaring impasse in the parties' negotiations.

On December 19, 2013, the Court informed Charging Party that it had decided to proceed with its plans to make the court officers independent contractors. However, it also stated that it would abandon these plans if Charging Party agreed to certain conditions, including that the court officers be "at will" employees. Charging Party made a counterproposal, and the parties exchanged emails until on or about February 12, 2014, but did not reach agreement.

On February 11, 2014, the Court sent letters to the court officers stating that their individual contracts would be extended on a day-to-day basis after they expired on March 11, 2014, but that sometime thereafter they would be offered new agreements as independent contractors. The parties held their last meeting on February 27, 2014. At the meeting, Charging Party asked to see the contracts before they were distributed and to be present when Court representatives met with the court officers to discuss them. The Court refused on the grounds that Charging Party would cease to be the court officers' bargaining representatives after the contracts were signed.

Court officers were informed that if they did not sign the new contracts, their relationship with the Court would be terminated. The new contracts took effect on April 14, 2014. The Court then ceased recognizing Charging Party as bargaining representative for the court officers. Fringe benefits the court officers had been receiving, including health and life insurance and contributions to a defined contribution retirement plan, were terminated. Under the terms of the new contracts, the court officers were required to buy liability insurance to indemnify the Court for expenses incurred in legal actions brought against the Court based on the court officers' conduct. As discussed below, the Court implemented other changes, including changes in the way work was assigned. Some of these changes affected both bailiffs and court officers.

On June 10, 2014, Charging Party filed a second amended charge alleging that the Court violated its duty to bargain by ceasing to recognize Charging Party as the court officers' bargaining representative. Charging Party asserts in the amended charge that the court officers continue to be employees of the Court within the meaning of PERA. The charge, as amended, also alleges that the Court violated PERA by unilaterally altering terms and conditions of employment for both the court officers and the bailiffs before reaching a good faith impasse on the terms of a new contract and while a fact finding petition was pending.

Charging Party asserts that the Court could not lawfully convert the court officers from employees to independent contractors because the Court could not lawfully alter the composition of the bargaining unit by removing the court officers from the unit without Charging Party's agreement. It also alleges that the Court removed the court officers from its bargaining unit because the court officers, and Charging Party on their behalf, successfully pursued a grievance that ultimately resulted in a $5.5 million backpay award. Thus, Charging Party alleges that the Court's actions constituted both a violation of its duty to bargain under §10(1)(e) of PERA and unlawful discrimination against the court officers in violation of §10(1)(c) of PERA.

Charging Party also argues that if the Court's decision to convert the court officers to independent contractors were held to be a mandatory subject of bargaining, the Court violated its duty to bargain because it did not bargain in good faith over this decision, did not reach a good faith impasse on this decision, and in any case could not lawfully implement this decision while a fact finding petition was pending.

Charging Party also alleges that the Court unlawfully insisted to impasse on an illegal subject of bargaining, i.e., eliminating the rotation of assignments among court officers and bailiffs. According to Charging Party, MCL 600.8322 (hereinafter "the bailiff's statute"), requires the Court to rotate assignments as it did prior to April 14, 2014.

Finally, Charging Party alleges that the Court engaged in unlawful direct dealing in violation of §10(1)(e) of PERA by meeting directly with the court officers for the purpose of establishing or changing terms and conditions of employment. That is, Charging Party alleges that the Court violated its duty to bargain when it met with the court officers to give them new "independent contractor" agreements that altered their terms and conditions of employment without allowing Charging Party representatives to be present.

II. Findings of Fact:

A. Background Facts

As noted above, bailiffs and court officers serve process, including complaints and summonses, subpoenas, liens against property, orders for seizure of property and orders of eviction, and other legal documents. They also execute orders for seizure of property and eviction, including evictions resulting from property foreclosures. When a judgment is issued in an eviction case, the defendant is either given a period of time to move or a period of time to either move or pay rent. If the defendant remains in possession of the property, the plaintiff can apply to the Court for an order of eviction. The order is assigned to a court officer or bailiff to serve and execute, and the court officer or bailiff then makes arrangements with the plaintiff or plaintiff's attorney to serve the order and carry out the eviction. This includes arranging for a dumpster or dumpsters to be on site on the arranged day as required by a City of Detroit ordinance.

MCR 2.103(A) states, "Process in civil actions may be served by any legally competent adult who is not a party or an officer of a corporate party." Therefore, a plaintiff is not required to use a bailiff or court officer to serve a complaint and summons, including the complaint in an action seeking to evict or foreclose upon property, but may hire a third party process server or make other arrangements for service of papers and subpoenas. This court rule also provides, however, that orders of eviction and other orders involving the seizure of property can be served and executed only by certain types of law enforcement officers or by bailiffs and court officers appointed by a court for that purpose. Within the City of Detroit, court officers and bailiffs appointed by the Court are currently the only individuals who serve and execute orders of eviction and orders for the seizure of property.

The bailiff's statute, MCL 600.8322, was adopted at the time the Court was created in a court reorganization in 1981 and continues to govern the Court's relationship with its remaining bailiffs. The Court is the only district court in Michigan with bailiffs in addition to court officers. Pursuant to that statute, bailiffs who had worked for other courts were grandfathered into positions with the Court. The bailiff statute states that these grandfathered bailiffs hold office until death, retirement, resignation, or removal by the Court for misfeasance or malfeasance in office. When a grandfathered bailiff leaves his position for any reason, the bailiff's statute authorizes the Court's chief judge to appoint a court officer as his replacement. The bailiff's statute provides that the bailiffs will be paid a salary by the Court of $20,000 per year in addition to the fees and mileage prescribed by statute for serving process. The bailiff's statute states, "All process issued by the district court in summary proceedings shall be rotated among the bailiffs pursuant to rules adopted by the court, except that a writ of restitution [i.e., order of eviction or

order for seizure of property] shall be issued to the bailiff to whom the summons was issued in the particular proceeding."

The Court recognized AFSCME as the representative of the grandfathered bailiffs shortly after the Court was created, but the parties made no attempt to negotiate a collective bargaining agreement until 1987. By that time, an entity known as the State Judicial Council had become the employer of employees at the Court. The State Judicial Council, relying on an opinion by the Attorney General that the grandfathered bailiffs were neither employees nor independent contractors but "officers of the court," refused to bargain.[1] In *State Judicial Council (36th Dist Court),* 1991 MERC Lab Op 266, an ALJ decision adopted by the Commission when no exceptions were filed, the Commission rejected that argument and held that the grandfathered bailiffs were employees within the meaning of PERA. The Commission found that the State Judicial Council paid the bailiffs' wages, noting that this entity paid the bailiffs the annual salary set by the bailiff's statute. It found that the State Judicial Council, through the Court, had the power to discipline and dismiss the bailiffs. Finally, it found that although bailiffs had some independence in setting their own work schedules, the Court exercised extensive control over them. Based on these findings, it held that the relationship between the bailiffs and the Court/State Judicial Council was that of employee/employer.

MCR 3.106 is entitled "Procedures Regarding Orders for the Seizure of Property and Orders of Eviction." As indicated by the title, the court rule establishes procedures to be followed by individuals, including bailiffs and court officers, authorized to serve and execute court orders for the seizure of property and orders of eviction throughout the State of Michigan. The court rule allows a chief judge to appoint court officers for a term not to exceed two years and requires the appointing court to "specify the nature of the court officer's employment relationship at the time of employment."

In 1998, the Court appointed nine court officers to fill vacancies created by the departure of bailiffs. The nine court officers signed individual contracts with the Court that described them as independent contractors. These contracts had two year terms, but were subject to automatic renewal unless the court officer materially neglected his or her duties or committed acts of gross negligence, dishonesty, fraud or misrepresentation. The Court and the Detroit Judicial Council, the entity which was then the employer of employees at the Court, refused to recognize AFSCME as the court officers' bargaining representative on the basis that the court officers were not employees but independent contractors. In *Detroit Judicial Council and 36th Dist Court,* 2000 MERC Lab Op 7, another ALJ decision adopted by the Commission when no exceptions were filed, the Commission rejected this argument. The Commission first noted that the fact that an individual has executed a contract stating that he or she is an independent contractor is not determinative of the question of whether an employment relationship exists under PERA. In support, the Commission cited, among other cases, *Detroit v Salaried Physicians Prof Ass'n,* 165 Mich App 142 (1987). The Commission acknowledged that, unlike the grandfathered bailiffs, the court officers were not paid a salary and that their income was derived solely from statutory fees

[1] In its post-hearing brief in the instant case, the Court, for the first time in this proceeding, argues that the bailiffs are not employees within the meaning of PERA but "public officials." Because this argument was raised for the first time in the Court's post-hearing brief, and Charging Party had no opportunity to present evidence in response, I have not addressed this argument in my decision.

collected from litigants. It also found that, like bailiffs, the court officers had considerable independence in establishing their work schedules. It noted, however, that the court officers were expected to report to the Court each day to get their work assignments and discuss any problems with their supervisor. The Commission also found that the court officers and bailiffs reported to the same supervisors, were subject to the same oversight over their finances, received assignments in the same manner, were required to wear Court-issued identification, and were expected to use their best efforts to promote the Court's interests. It found that the bailiffs and court officers were both required, under threat of discipline, to comply with the Court's policies and directives, including an 8-page document issued by the Court entitled "Guidelines & Requirements for Court Officers" governing the manner in which the bailiffs and court officers did their work. The Commission noted that the court officers and bailiffs were required to notify the Court if they were unavailable for work for more than two days or if two court officers switched assignments. The Commission held that the Court exercised the same degree of control over the manner and means by which the court officers performed their work that it exercised over bailiffs, and that the court officers, like the bailiffs, were employees within the meaning of PERA. The Commission also held that the court officers were appropriately included in the existing unit of bailiffs, and ordered the Court and the Detroit Judicial Council, which by this time was the entity employing Court employees, to recognize Charging Party as the bargaining representative for this unit.

After the Commission's decision finding the Court's court officers to be employees and ordering the Court to recognize Charging Party as the court officers' bargaining agent, Charging Party and the Court entered into a collective bargaining agreement governing terms and conditions of employment for court officers and bailiffs. This collective bargaining agreement contained no provision for wages, but did provide the court officers and bailiffs with health and life insurance benefits and established a defined contribution retirement plan for court officers. It also contained a grievance procedure with binding arbitration and a disciplinary procedure provision that stated that disciplinary action, including discharge, could be imposed only for just cause, including, but not limited to, misfeasance and malfeasance. The Court continued to enter into individual agreements with court officers with two-year terms pursuant to MCR 3.106.

In 2004, Charging Party filed grievances when two court officers were not reappointed at the end of their individual contract terms. It filed two more grievances in 2007 when the Court refused to reappoint two other court officers. These grievances gave rise to extended litigation. Among the issues litigated was whether the just cause standard in the parties' collective bargaining agreement applied to the decision whether to reappoint court officers after the expiration of their two-year terms. In *36th Dist Court v AFSCME Local 917*, 493 Mich 879 (2012), the Michigan Supreme Court held that nothing in MCR 3.106 precluded a chief judge from agreeing to make reappointment decisions based on a just cause standard, and agreed with the lower courts that the Court had done so in this case. The Supreme Court also affirmed the trial court's order enforcing an arbitration award finding that the Court lacked just cause for failing to reappoint the four court officers and requiring the Court to reinstate them with backpay. In ordering reinstatement, the Supreme Court reversed the Court of Appeals' conclusion that the arbitrator exceeded his jurisdiction by ordering reinstatement. The Court of Appeals panel, which included Judge Talbot, had held that under MCR 3.106 only a chief judge has this authority. See *36th District Court v AFSCME Local 917*, 295 Mich 502 (2012).

Three of the four court officers were reinstated, and the case was returned to the arbitrator to determine the amount of backpay. In August 2013, after conducting additional hearings, the arbitrator concluded that the 36th District Court owed the four officers approximately $5.5 million in backpay. By this time, the District Court's funding unit, the City of Detroit, had filed for bankruptcy. On May 28, 2013, the Michigan Supreme Court had issued an order appointing Talbot as the District Court's special judicial administrator. Talbot brought the arbitration award to the attention of the City. On October 25, 2013, the judge in the pending bankruptcy proceeding, Steven Rhoades, extended the stay on collection of claims against the City to claims against the 36th District Court. Payment of the award was stayed, although the City continued to pay smaller claims against the District Court. At the time of the instant unfair labor practice hearing, AFSCME and the City of Detroit had reached a tentative settlement of claims that included the arbitration award.

Talbot's appointment was only the second time in the Supreme Court's history that it had appointed a special judicial administrator for a trial court, with the previous appointment occurring in 1977. The events leading to Talbot's appointment were as follows. In the years preceding 2013, it became increasingly obvious to observers, including the State Court Administrative Office (SCAO), the administrative office of the Michigan Supreme Court, that the 36th District Court was having operational difficulties. Evidence of the District Court's difficulties included the Court's repeated failure to keep its annual spending within the amounts budgeted for its operations by the City of Detroit. In April 2013, the Michigan Supreme Court asked the National Center for State Courts (NCSC) to conduct a review of the 36th District Court's operations and prepare a report. In addition to making specific recommendations for reform, the NCSC's report concluded that the District Court currently lacked the managerial resources to repair its financial and operational problems. In response, the Supreme Court issued the order appointing Judge Talbot of the Michigan Court of Appeals as temporary special judicial administrator over the 36th District Court. The Supreme Court's order gave Talbot the authority to exercise the power of superintending control over lower courts granted to the Supreme Court by Article 6, § 4 of the Michigan Constitution.

The SCAO loaned several staff members to assist Talbot in his task which, according to Talbot's testimony, was to institute the operational and structural changes that he deemed necessary to increase the Court's operational effectiveness and efficiency, while also achieving the reductions in the Court's budget that were being demanded by the City.

When Talbot was appointed, contract negotiations between the Court and a number of its unions, including Charging Party, had stalled. Charging Party and the Court had not had a collective bargaining agreement for many years. Shortly after his appointment, Talbot held a joint meeting with representatives of all the Court's unions, and Attorney Thomas Kienbaum was selected by Talbot to serve as the Court's chief spokesperson in labor negotiations with its unions.

On July 22, 2013, the Supreme Court issued a second order removing the Court's chief judge. The July 22 order made reference to Talbot's earlier appointment to address the Court's "financial and operational crises." In August 2013, Judge Nancy Blount was appointed as the

new chief judge. However, Talbot continued as special judicial administrator and was still in this role at the time of the hearing on this charge.

B. Employment of Court Officers Before and After April 14, 2014

Prior to April 14, 2014, the court officers received health and life insurance benefits and payments to a defined contribution retirement fund paid for by the Court from its general budget. These benefits were terminated for court officers on April 14, 2014, although bailiffs continue to receive fringe benefits. Aside from these fringe benefits, court officers' compensation has always come solely from the statutory and other fees paid by litigants for the court officers' services.[2] MCL 600.2559 sets out the fees and mileage to be paid by litigants for service of process and the service of various types of court orders, including orders of eviction. Neither the court rules nor the Michigan statutes establish fees for carrying out evictions. However, a City of Detroit ordinance sets a "normal" per room fee for carrying out evictions in residential properties and another "normal" per room fee for evictions in commercial properties within the City of Detroit. The ordinance allows a court officer or bailiff to negotiate additional amounts with the landlord or property owner to cover additional expenses required for a particular eviction.

Prior to April 14, 2014, litigants who elected to have a court officer or bailiff serve process paid the statutory fee for service of a complaint and summons, as set out in MCL 600.2559, to the Court at the time the complaint was filed. The fee for service of an order of eviction or seizure of property was paid to the Court when the plaintiff applied for the order. Upon a bailiff's or court officer's submission of returns showing service had been carried out, the Court transferred the statutory fees and mileage payments to his or her account with the Court. Bailiffs and court officers then received regular bi-weekly checks from the Court. For the court officers, these checks represented the sums in their accounts at the end of a payroll period. The Court deducted taxes and, at the end of the year, issued them W-2 forms showing these sums as wages.

Although the Court collected the statutory fees for serving process and serving orders, the court officers and bailiffs were responsible for collecting their fees and other expenses for carrying out evictions or orders to seize property directly from plaintiffs or their attorneys. At the end of the year, the court officers and bailiffs received 1099 forms from the persons for whom they had performed these services. At one time, plaintiffs could, if they wished, leave these payments with a Court clerk. However, the Court stopped accepting these payments in 2012.

On April 14, 2014, the Court stopped collecting the statutory fees for both bailiffs and court officers. Both bailiffs and court officers are now responsible for obtaining payment directly from the litigants for all services provided. After litigants complained to the Court, the Court installed mailboxes for both the court officers and bailiffs in a public area of the Court where litigants can leave checks for bailiffs and court officers, and also notes and papers to file. Court officers and bailiffs, however, must bill and collect for serving process as well as for executing orders of eviction.

[2] As noted above, the bailiffs, pursuant to the bailiff's statute, receive both the statutory fees and a salary of $20,000 per year.

As noted above, the bailiff's statute, adopted in 1981, states that all "service of process in summary proceedings issued by the Court" shall be rotated among the bailiffs. After the court officers and bailiffs became part of the same bargaining unit in 2000, the parties agreed that the rotation system then in effect for distribution of assignments to bailiffs would be extended to court officers. Under that system, as new cases were filed with the Court, the Court's filing clerk assigned the case to a court officer or bailiff, in rotation, unless the filing party notified the clerk that it did not need a court officer or bailiff to serve process. Plaintiffs were not explicitly informed by the filing clerk or cashier that they could select their own court officer or bailiff or hire a third party process server. Although MCR 3.106 requires a district court to post a list of the names of its bailiffs and court officers in a public place at the court (and provide the State Court Administrative Office with an updated copy of that list), it is unclear from the record if the Court posted such a list prior to April 14, 2014. If a so-called "bulk filer" came in with ten or twenty new real estate cases at one time, each case would be assigned to a different court officer or bailiff. In addition to collecting the statutory service of process fee from the filing party at the time of filing, the court clerk placed a copy of the complaint and summons that needed to be served in the assigned court officer's or bailiff's mail box.

As noted above, in a real estate case, a plaintiff may apply for an order of eviction if the defendant fails to vacate after a judgment is issued. Prior to April 14, 2014, after the order was signed by a judge, it was returned to a court clerk. The clerk put a copy of the order in the mailbox of the court officer or bailiff who had been assigned to the case at the time it was filed, if one had been assigned at the time. If not, the court clerk automatically assigned a bailiff or court officer when the order was signed and put a copy of the order in his or her mailbox. The court officer or bailiff then served the order and contacted the litigant, or the litigant contacted him or her, to finalize arrangements for executing the order and receiving payment. Because the court officer or bailiff was already in possession of the order, these arrangements could often be concluded by phone.

After April 14, 2014, the Court's computer continued to be programmed to assign a court officer or bailiff, by rotation, to every new case as it was filed. However, sometime between April and August 2014, the Court reprogrammed its computer so that all new cases are now recorded as "plaintiff service." Since April 14, 2014, there has been a posting at the Court's cashier window that lists the filing fees for various types of cases. This same posting also lists the names and telephone numbers of all the court officers and bailiffs. According to the Court's chief judge, Nancy Blount, when a new case is filed, the clerk at the cashier's window is supposed to ask the filing party whether he wants to make his own arrangements for serving the complaint and summons, if he wants a court officer assigned by rotation, or if he wants to choose a bailiff or court officer from the names listed on the posting. If the filing party asks for an assigned bailiff or court officer, one is selected by rotation and the filing party is given the name of the assigned officer to contact. A filing party may reject the assigned officer, and either obtain another assigned officer or select a name from the posted list. A court clerk who works near the Court's filing desk, however, testified that the cashiers at the filing desks in fact tell plaintiffs that the Court cannot choose a court officer or bailiff for them and direct their attention to the list of court officers and bailiffs posted on the wall. I see no reason not to credit the clerk's uncontradicted testimony regarding the actual practice as she has observed it. Court officers and bailiffs also no longer receive copies of complaints or summons from the Court in their

mailboxes Instead, these documents are returned to the plaintiff and it is the plaintiff's responsibility to contact a court officer or bailiff, or leave the pleadings in their mailboxes, if the plaintiff wishes to use their services.[3]

If a plaintiff choses a court officer or bailiff to serve the initial complaint and summons, that court officer will be automatically assigned to serve and execute any order of eviction or order to seize property issued in connection with that case. If the plaintiff in an eviction action did not use a court officer or bailiff to serve process when he or she filed the complaint, the plaintiff is asked at the time the order is issued if he or she wants to select a court officer or bailiff from the posted listing or to have a court officer or bailiff assigned. In either case, however, the Court does not transmit a copy of the order to a court officer or bailiff, but leaves it to the plaintiff to initiate contact. Nothing in the current system prevents a plaintiff from contacting any court officer or bailiff he chooses to serve and execute an order of eviction or order for seizure of property. Court Officer Carleton Carter also testified that he had concluded, from monitoring police radios, that more plaintiffs are now attempting to do their own evictions to avoid paying a court officer or bailiff.

Executing orders of eviction is more lucrative for court officers and bailiffs than serving process. Prior to April 14, 2014, the four lowest seniority court officers were assigned to the civil division of the Court, where they served summonses and executions and liens against property but had no opportunity to do evictions. The other court officers, and the bailiffs, were assigned to the real estate division. These individuals served complaints and summons in real estate cases and served and executed orders of eviction after they were issued by the Court. After April 14, 2014, this distinction was abolished and all appointed court officers and bailiffs are eligible for both civil and real estate assignments.

Eviction work can be lucrative, but is also dangerous. The court officers and bailiffs regularly employ crews of individuals who assist them in carrying out evictions. These individuals are employed by the court officers and bailiffs and not the Court, and the court officers are required to make unemployment insurance payments and have worker's compensation insurance for their employees. However, under MCR 3.106, the court officers and bailiffs must keep the names and phone numbers of their crew members on file with the Court. The bailiffs and court officers pay wages to their crews and purchase the supplies and equipment used by them and their crews. At the end of the year, they deduct the cost of supplies, equipment, vehicle use, and pay for their crews as business expenses on their income tax forms.

Bailiffs and court officers carry identification from the Court. Prior to April 14, 2014, their identification designated them as employees. After that date, the court officers were given identification identifying them as contractors. Bailiffs and court officers typically have concealed weapons permits and carry firearms on the job. Prior to April 14, 2014, the court officers had access, as employees, to nonpublic areas of the Court and could keep their weapons with them on Court premises. After April 14, 2014, court officers must pass through the same security check as members of the public before entering the building and cannot enter the building with a weapon. Prior to April 14, 2014, the court officers had radios that connected them directly with a

[3] The Court has also stopped mailing copies of the complaint and summons to the defendant.

Detroit Police Department dispatcher. However, the Police Department insisted that they turn in these radios after the Court declared them to be independent contractors.

Prior to April 14, 2014, the court officers and bailiffs reported to a position within the Court entitled Court Services Supervisor. Since that date, the court officers and bailiffs have had no assigned supervisor at the Court. Court officers are subject to direction from the Court's judges in certain circumstances. For example, a judge may call a court officer directly to notify him or her that an eviction order has been stayed. Judges also, of course, have jurisdiction to determine that service of a complaint or order has not been properly carried out, and to direct that these papers be re-served. The record indicates that some of the Court's judges, when this occurs, prepare an order to be delivered to a court officer directing that the paperwork be re-served and that others simply telephone the court officer and tell him or her to serve the papers again. There was no change in the relationship between court officers' and the Court's judges after April 14, 2014.

By the terms of their new contracts, a court officer is required to "use his best efforts to perform any and all services for the Court in an efficient, diligent and responsible manner that complies with all applicable statutes, court rules or constitutional provisions." The court officers' contracts state that they terminate at midnight on April 13, 2016. However, they also state that they may be terminated by the chief judge of the Court in his or her complete discretion and by the court officer upon 30 days written notice, presumably at any time.

Charging Party's expired collective bargaining contract contained a disciplinary procedure that included progressive discipline. Talbot testified that the chief judge now has the authority to investigate complaints made by litigants, and that Chief Judge Blount would have the discretion to take any action from admonishing a court officer to terminating his or her contract in response to a meritorious complaint. However, the court officers' contracts, by their terms, do not authorize the Court to take disciplinary action short of terminating the contract, and there is no longer any formal disciplinary procedure in effect that covers the court officers.

Prior to April 14, 2014, court officers had desks and mailboxes in a nonpublic area of the Court. As noted above, they could enter the nonpublic areas of the Court without going through the security check required of the public and were not prohibited from having firearms on the Court's premises. They had some access to the Court's computer system. Since April 14, 2014, the court officers have no access to nonpublic areas of the Court or its computers and have no office space at the Court. Both their mailboxes and the bailiff's mailboxes are now located in a public area of the Court.

Court officers and bailiffs do not have any fixed working hours and there are no rules or policies governing when they can or must perform their duties. In 1999, when *Detroit Judicial Council* was heard, the court officers were required to check in every day at the Court and to report periodically on their activities to their supervisor. The requirement that court officers check in every day was eliminated sometime prior to April 14, 2014. Court officers are no longer required to report to the Court on their activities and their contracts include a provision to this effect. Court officers are not prohibited from working for other courts or holding other jobs.

Per MCR 2.102, a summons issued by any court expires ninety-one days after a complaint is filed, although a judge can grant an extension. The date by which the summons expires is typically stamped on the summons at the time the case is filed. There is also a statutory deadline for serving orders of eviction. Prior to April 14, 2014, a court officer had to notify his or her supervisor at the Court if he or she was going to be unable serve process for any appreciable amount of time, and the supervisor would reassign the work to another court officer and take the court officer off the rotation. It is not clear from the record what, if any, steps the Court would now take if a court officer suddenly became unable to perform his or her duties.

At one time, as discussed in the Commission's decision in *Detroit Judicial Council*, the Court had written guidelines for court officers and bailiffs which it issued to them in the form of a manual. Some of the items covered by the manual were in the court rules, some were internal Court procedures, including the Court's emergency evacuation procedure, and others were reminders of other rules or regulations, e.g., a reminder that the federal government, in order to approve payment for an eviction, requires "before and after" photos of the eviction. The manual included a training module for new court officers, although the testimony indicated that the Court had not held any formal training for new or existing court officers for many years prior to April 2014. Judge Blount testified that since April 14, 2014, this manual has not been in effect, although court officers are still required to follow all pertinent court rules and laws.

MCR 3.106 contains various provisions to ensure that court officers and bailiffs who execute orders of eviction and orders for seizure of property do not improperly abscond with property that comes into their possession. They must provide their appointing court with the names and addresses of all financial institutions in which they deposit funds collected in the course of seizing property or conducting evictions and their bank account numbers. They must also keep copies of all bills and receipts related to their performance of these services. As noted above, the same rule requires court officers and bailiffs to provide the Court with the names and addresses of their regular crew members.

Prior to April 14, 2014, both bailiffs and court officers were required by the Court to keep records of financial transactions related to their performance of services for the Court, including service of process in civil matters. The Court conducted and paid for periodic audits of their financial records. The training module in the employee handbook included training in how to keep the appropriate financial records. Under the terms of the court officers' contracts, they now must keep auditable records of all their financial transactions, records described in their contracts as "the date, amount and nature of each financial transaction conducted by either Contractor or his employees, agents or subcontractors in the course of any service performed by litigants." The court officers' contracts require the court officers to submit these records for audit "if required to do so by law." However, Judge Blount testified that the Court had no current plans to audit the court officers' financial records, and it is not clear what law might require a court officer to submit to a regular audit.

MCR 3.106 requires court officers to file a surety bond with the Court to ensure that they pay over money or property collected by them to the persons lawfully entitled to it. Prior to April 14, 2014, the Court paid the fee for the surety bond, and continues to do so for bailiffs. However, since April 14, 2014, the court officers have been required to pay the fee themselves.

Under the terms of their contracts with the Court, court officers are required to purchase liability insurance with a minimum coverage of $1 million dollars, and to indemnify the Court for losses and expenses, including attorneys' fees, arising from legal actions based on the court officers' performance of their duties. Court officers were not required to purchase liability insurance prior to April 14, 2014, and there was no indemnification agreement between them and the Court. In fact, the collective bargaining agreement between Charging Party and the Court contained a provision requiring the Court to indemnify bargaining unit members against lawsuits in certain circumstances.

Court officer Carleton Carter testified that the changes implemented by the Court after April 14, 2014, have significantly decreased the percentage of plaintiffs who use court officers or bailiffs, rather than third party process servers, to serve process. As a result, both bailiffs and court officers have experienced a drop in overall income. He also testified that the cost of serving process and executing orders has significantly increased for court officers and bailiffs, since they now frequently have to travel to different locations throughout the City of Detroit to pick up paperwork. Finally, he testified that the new system encourages plaintiffs, particularly bulk filers, to attempt to negotiate deals with court officers and bailiffs to charge less than the statutory fees in exchange for receiving their work. Carter testified that he himself had been approached with such offers.

C. The Court Announces its Plan to Make Court Officers Independent Contractors

The April 2013 NCSC report on the operations of the Court did not specifically address the Court's employment or use of court officers. Talbot had many pressing matters requiring immediate attention after his appointment. However, according to Talbot's testimony, shortly after his appointment he participated in settlement discussions on the part of the Court over a lawsuit involving a court officer's conduct. He became aware that in Charging Party's expired collective bargaining agreement, the Court had agreed to indemnity employees for civil claims and actions arising from their employment if the employee reasonably believed that he or she was acting within the scope of his or her authority. Talbot was concerned over this requirement. Talbot was also aware of the arbitration award discussed above, and concerned, according to his testimony, that the Court had given up all control over how the court officers comported themselves in the community once they were appointed. Talbot also testified that, in his view, giving away discretion to reappoint and unappoint court officers was giving away the Court's ability to be certain that the court officers would perform their tasks properly. Talbot also discovered that the Court was spending approximately $300,000 per year to handle the collection of statutory fees going to court officers. Talbot did not consider this to be a core function of the Court, and concluded that the court personnel handling that function could be better deployed elsewhere. Finally, Talbot's discussions with SCAO staff assigned to assist him made him aware that in many or most district courts, the court officers were independent contractors. After talking to counsel and his staff, he concluded, according to his testimony, that the above concerns could be best addressed by converting the Court's court officers to independent contractors.

On July 26, 2013, Kienbaum sent Charging Party a letter stating that the Court was "contemplating" converting the court officers to independent contractors after their contracts expired and offering to bargain over the impact of this decision. On August 1, 2013, Charging Party, through its attorney Robert Fetter, sent Kienbaum a letter stating that the Court did not

have the authority to convert court officers to independent contractors, since their status as employees had already been confirmed by the Commission. Fetter accused the Court of making an unlawful threat to retaliate against the court officers because Charging Party had been successful with the grievances over the court officers' reappointments.

Blount testified that when she became chief judge on August 26, 2013, the decision to convert the court officers to independent contractors was "95% made" but not final. She testified that the final decision was made by Talbot, with some input from her. According to Blount, they both agreed that the Court did not exercise the kind of control over the court officers that an employer normally would have. That is, the court officers hired their own crews to do evictions, worked entirely out in the field where they could not be supervised, and did not work regular work hours. Blount and Talbot also concluded that offering plaintiffs the opportunity to choose their court officers would be a desirable efficiency because the marketplace would eventually weed out the court officers who were not doing a good job. They also agreed, according to Blount, that MCR 3.106 contemplated that court officers would serve at the absolute discretion of the chief judge. According to Blount, although making the court officers independent contractors would save some money, economics was not a deciding factor in the decision, and the fact the court officers had filed a grievance that resulted in a substantial arbitration award was not a factor at all.

D. Bargaining Sessions and Discussions

Charging Party's bargaining team met with Kienbaum sometime in September 2013. At this meeting, Kienbaum said that the Court was proposing to replace the current Blue Cross plan with a HAP plan for all employees, and that it wanted to implement this change as soon as possible. The Court pointed out that switching to the lower cost HAP plan would lower the employees' premium share costs. Charging Party requested information on the comparative costs of the plans. According to Charging Party President Jonathan Mapp, the Court said that it was "leaning toward" making the court officers independent contractors in April 2014. It told Charging Party that it would not bargain that decision but only bargain the impact. Charging Party responded that it could not see how the Court could lawfully do this, since the court officers had been determined by the Commission to be employees and not independent contractors.

The next meeting between the parties was October 3, 2013. The Court said at that meeting that they were going to move the court officers to being independent contractors in the spring, and reiterated that it would not bargain over that decision. Charging Party again expressed its opposition to the change. There was also some discussion of the proposed change in health care plans, and Charging Party asked the Court to give it a written proposal.

On October 3, 2013, Charging Party filed a petition, Case No. D13 J-0818, with the Commission for fact finding. The petition cited the unresolved issues as "wages, health care, job security, and contract duration." It stated on the petition that the Court had not engaged in any bargaining since the appointment of a special judicial administrator.

The parties met again on October 14, 2013, this time with a mediator. The Court gave Charging Party a set of written proposals for changes to the expired collective bargaining agreement. The written proposals stated that the duration of the contract was "negotiable," but the Court said at that meeting that their proposal was for a collective bargaining agreement ending on April 14, 2014. The Court proposed amending the recognition clause to state that all members of the bargaining unit, except bailiffs, would be terminable at will, and that the Court would have the right to discharge and discipline employees, except bailiffs, without just cause. The Court proposed language stating that discharge and discipline would not be subject to the grievance procedure and proposed deleting the language in the expired contract providing for a progressive discipline system and all references in the grievance procedure to discipline or discharge. It proposed deleting the maintenance of conditions clause. It proposed language stating that the health insurance provided to unit members would match that provided to members of two other bargaining units of Court employees. The Court proposed modifying union security and dues checkoff language to conform to recent statutory changes. The Court's proposal concluded with this statement, "The Court is considering appointing court officers as independent contractors. The decision as to whether the Court will utilize independent contractors as court officers is a management decision. The Court is willing to bargain the impact of any such decision."

Charging Party also presented a proposal on October 14, 2013. Charging Party's proposal was entitled "Proposed Changes to Enhance Efficiency in the Bailiffs/Court Officers Department." The document identified four problems: (1) lack of continuous training; (2) overstaffing of court officers; (3) no revisions to standard operating procedures; and (4) no established communications mechanisms. The proposal suggested solutions to each. The proposal included a suggestion that the Court cut the number of court officers through layoffs. Charging Party suggested that this would help the Court cut costs, although it also said that court officers' incomes had suffered because too many court officers had been appointed. There was discussion of whether the Court could legally lay off court officers during the terms of their individual contracts. Charging Party agreed to the Court's health care proposal and to modify the union security and dues checkoff clauses, although not to specific language, on the condition that the parties were able to reach agreement on a contract extending past April 14, 2014. It rejected the Court's other proposals. Charging Party told the Court at that meeting that it considered continuation of the just cause standard for discharge and discipline to be vital because, in the past, court officers had lost their jobs because they had not worked on a judge's election campaign.

The parties met again with the mediator on October 21, 2013. At some point, possibly at this meeting, Charging Party proposed that the parties agree to limit an arbitrator's authority to award back pay to "wages," which the contract would define as excluding the sums the court officers and bailiffs collected from litigants for doing evictions.[4]

[4] The definition of back pay for court officers had been an issue in the arbitration, and the arbitrator had concluded that the four terminated court officers had also been entitled to compensation for the income they would have received directly from litigants.

On October 23, 2013, Kienbaum sent Fetter a letter stating that the October 21 session had confirmed that there was "no room for movement on any of the issues we have discussed," that further meetings would be futile because the parties were at impasse, and that moving forward with the fact finding petition would be appropriate. The letter noted that Charging Party had confirmed its "steadfast" opposition to having a collective bargaining agreement which established the court officers as at-will employees. Kienbaum also stated that the Court was open to discussing who would receive independent contractor offers, how many would be offered and perhaps assuring that the appointment and reappointment process was screened against improper favoritism, but that Charging Party had stated that it would not discuss the impact of independent contractor status. Kienbaum's letter stated that Charging Party had also rejected entering into a contract ending in April 2014, and had stated that it would only agree to the change to a HAP plan as part of a multi-year collective bargaining agreement, to which the Court was not willing to agree. In the letter, Kienbaum proposed an agreement covering only the bailiffs that maintained the status quo through June 30, 2014, except for modification to the union security language and an immediate switch to the HAP plan.

Fetter responded with a letter dated October 28, 2013. Fetter disputed Kienbaum's contention that the parties were at impasse. Fetter contended that the parties had made significant progress in that they had agreed on healthcare insurance, on union security, on new language for life insurance and, according to Fetter, had made progress on laying off/reducing the number of court officers. Fetter pointed out that these changes would save the Court a considerable amount of money. Fetter stated that the employment at will issue "might be the only issue remaining," but accused the Court of refusing to move on any issue and of presenting a take it or leave it offer.

Kienbaum responded with a letter dated October 30, 2013. With respect to the layoff of court officers, Kienbaum reminded Fetter that the Court was concerned about exposure if a court officer was laid off during the term of his or her appointment, and said that the Court would need indemnification from Charging Party in case it was sued. Kienbaum said that it was his understanding that Charging Party's position was that it was unable or unwilling to discuss the impact on court officers of a change to independent contractor status, and that the Court's demand for at-will language for court officers was unacceptable to Charging Party and an absolute impediment to an agreement. He asked Fetter to let him know if Charging Party had changed positions on either of these issues. Kienbaum told Fetter if Charging Party was flexible on these subjects, the parties should meet again. Fetter's response, dated November 18, 2013, was that the parties should meet again. Fetter stated that while he did not completely agree with Kienbaum's summary of the parties' positions, this could be discussed at the next meeting.

The parties met again on December 16, 2013. Neither party made new proposals. However, Charging Party asked the Court to provide information about how other courts handled fees for service of process and whether the courts collected these fees for court officers. At an earlier meeting, the Court had said that it would save $300,000 per year by making the court officers independent contractors. On December 16, Charging Party asked for a breakdown of these savings. The parties also discussed rotation of assignments. The Court said that it was going to get rid of the rotation. Charging Party said that preserving the rotation was important to

avoid corruption because, without the rotation, court officers, could pay kickbacks to bulk filers in order to get all of their work. Charging Party also argued that eliminating the rotation would not be fair because the work would be distributed unevenly.

On December 19, 2013, Kienbaum sent Fetter a letter informing him that the Court was gathering information on district courts in southeastern Michigan that had independent contractor relationships with their court officers and would also provide "the cost of the services the Court provides in order to manage its current arrangement with the court officers." Kienbaum also told Fetter that the Court had decided to "go to independent contractor status with the Court officers," and, as he understood it, Charging Party's position was that this was a permissive subject of bargain and that Charging Party exercised its option not to bargain over this permissive subject. Despite the Court's decision, Kienbaum stated that the Court would be willing to discuss retaining the court officers as employees under these conditions: (1) court officers would be appointed, and could be unappointed, at the complete discretion of the chief judge; (2) the Court would cease collecting service and mileage fees for the court officers, and the court officers would be paid directly by parties or attorneys for the work they did; (3) rotation would continue to be managed by the Court, but court officers could skip their rotation if they chose to do so; (4) court officers would have to obtain their own insurance coverage, including liability insurance naming the Court as co-insured; (5) no fringe benefits, except as mandated by law; (6) further discussions between Charging Party and the Court's chief judge regarding the number of court officers appointed, with the chief judge retaining the final authority to determine the number. However, Kienbaum cautioned:

> However, the first point, dealing with the Chief Judge's prerogative, is an absolute requirement to consideration of this alternative approach. Unless we have an early tentative agreement on that point, we will to continue to focus only on the independent contractor approach.

Also on December 19, 2013, the Commission appointed a fact finder pursuant to Charging Party's October 3, 2013, petition. According to the Commission's records, the fact finder held pre-hearing conferences on January 14, 2014, February 7, 2014, and March 4, 2014. Fact finding was then held in abeyance pending a decision on this unfair labor practice charge.

On January 6, 2014, Kienbaum wrote to Fetter stating that the court had determined that the Court's administrative support costs for handling the court officers' service fees was approximately $300,000. Kienbaum also gave Fetter the names of nine district courts in southeastern Michigan that had independent contractor arrangements with their court officers.

On January 31, 2014, Fetter sent Kienbaum an email response to his December 19, 2013, proposal. Fetter stated that, assuming that the court officers remained a bargaining unit, Charging Party might agree to something like an arbitrary and capricious standard for reappointments, while retaining just cause during the appointment period. He told Kienbaum that he did not have sufficient information to respond to Kienbaum's proposal that the court officers begin collecting their own fees. Fetter stated that Charging Party had asked for a breakdown of how the $300,000 in administrative costs was calculated to see if it could come up with some savings, but the Court had not yet provided it. Fetter also asked how the Court proposed to implement its plan to have

the court officers collect their own fees, what litigants would be told, and whether the fees would still be collected for the bailiffs. Fetter told Kienbaum that Charging Party believed that other district courts collected their court officers' fees, and that without more information he could not make a firm proposal.

Kienbaum responded that he would inquire from his client whether it made any sense to talk further given that Fetter had said that Charging Party would not ratify an agreement giving the chief judge absolute discretion to appoint and unappoint. On February 6, 2014, Kienbaum sent Fetter a letter stating that he had discussed the matter with Judge Talbot, and that Talbot wanted the chief judge to have full discretion in making appointments of court officers, including the authority to unappoint them. Kienbaum told Fetter that Charging Party needed to decide whether it could agree to this, in which case they could continue discussing the details of a new contract. If not, the Court would proceed with its plans to make the court officers independent contractors. Fetter responded with an email dated February 13, 2014, stating that he was no longer participating in bargaining, and asking Kienbaum to forward his correspondence to the Local.

An exchange of emails then took place between Court representatives and AFSCME Staff Representative Robert Davis. Kienbaum told Davis that the Court had agreed to consider alternatives to making the court officers independent contractors, but only if there was an understanding that the chief judge would have absolute discretion in making appointments. If not, Kienbaum said, there was only the impact to discuss. Davis asked to meet face to face to discuss the Court's position.

The parties met again on February 27, 2014, this time without Fetter or Kienbaum. The Court's new court administrator, Pamela Griffin, was present at this meeting for the first time. Davis told Griffin that Charging Party wanted to resume bargaining a contract for the entire bargaining unit. Davis asked her if she could provide the names of additional district courts that had independent contractor relationships with their court officers. He also said that Charging Party wanted more information about the financial savings to the Court from converting the court officers to independent contractors. Griffin told him that the Court had decided to make the court officers independent contractors when their contracts expired at the end of that month, and that unless Charging Party wanted to discuss how that transition was going to occur, there was nothing left to discuss. She told Davis that she and her deputy would be meeting with individual court officers to give them copies of the Court's new contracts. Davis asked for a copy of the contract, but Griffin refused, stating that the court officers would no longer be represented by AFSCME. Davis also said he wanted to be present at the meetings with each court officer, but Griffin repeated that by that time the court officers would no longer be represented by AFSCME.

E. The Appointment of the Court Officers as Independent Contractors

On February 11, 2014, Chief Judge Blount sent letters to all the court officers notifying them that at the end of the terms of their individual contracts they would be offered independent contractor agreements. Blount's letter stated that the Court would discuss the contracts with each court officer individually. She stated that the court officers' appointments would be extended on

a day-to-day basis after the expiration date of their contracts, March 11, 2014, but would expire on the date they were presented with new agreements by the Court.

Thornton Jackson, a bailiff and Charging Party's acting Vice President, testified that around the beginning of April 2014, he asked for a meeting with Blount. Jackson attempted to persuade Blount not to go through with the plan to make the court officers independent contractors and, as Jackson described it, let "outside folks do our work." According to Jackson, Blount did not respond to his arguments and appeared to have already made up her mind. Jackson testified that during this same conversation, Blount asked him why Charging Party had decided to go to arbitration over the reappointment of the four court officers. Jackson replied that it did not have any choice because the chief judge at the time would not work with the union. Jackson testified that Blount "made me feel that [the change to independent contractor status] was all about the money that my brothers had received in the arbitration decision." Although both Jackson and Blount testified that Jackson raised the issue of the change to independent contractor status at the beginning of the meeting, Blount testified that Jackson, and not she, brought up the topic of the arbitration award. According to Blount, she and Jackson discussed "the arbitration award and whether it would be included as an obligation in the City's bankruptcy."

Sometime in February 2014, the Court held individual meetings with court officers at which it presented each court officer with a standard contract with terms as discussed in Section IIB above. The court officers were told that if they did not sign this contract, their appointments would not be renewed and their employment would be terminated. The contracts were dated to take effect on April 14, 2014. As discussed in Section IIB, after April 14, 2014, the court officers no longer received any fringe benefits, the Court ceased collecting statutory fees for the court officers' services from litigants, and the Court altered its previous system of assigning new cases in rotation.

III. Discussion and Conclusions of Law

A. Commission Jurisdiction

The Court argues that the Commission lacks jurisdiction over Charging Party's allegations that it violated its duty to bargain in this case. The Court does not dispute that the Commission has jurisdiction to decide whether the Court's actions constituted retaliation for the court officers' protected concerted activity in violation of §10(1)(c) of PERA. However, it asserts that for the Commission to direct Talbot to bargain with Charging Party over a change in the status of the court officers to independent contractors, to decide how much bargaining over this issue was sufficient, or to determine that the court officers continued to be employees after the Court declared them to be independent contractors, would impermissibly infringe upon the Supreme Court's constitutional power of superintending control over lower courts.

Article 6, §4 states that the Supreme Court has general superintending control over all courts. The Supreme Court is constitutionally responsible for the efficient and effective operation of all courts within the state court system, although the day-to-day operation of the trial courts is generally in the hands of the court's chief judge. The chief judges are in turn accountable to the

Supreme Court. *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 299-300 (1998). The chief judges of Michigan's trial courts are appointed by the Supreme Court and their powers and responsibilities are set out in MCR 8.110.

Only once before has the Supreme Court exercised its power of superintending control by appointing a special judicial administrator for a lower court. The issue of whether a special judicial administrator so appointed has a duty to bargain with representatives of the court's employees under §15 of PERA has not been adjudicated. The Supreme Court, however, has acceded to the Commission's assertion of jurisdiction over at least some types of labor disputes involving the lower courts under its control. In *Judges of 74th Judicial Dist v Bay Co*, 385 Mich 710 (1971), the judges of a district court brought suit to enjoin the Commission from proceeding with a hearing on a charge brought by a union alleging that Bay County and the district court judges were guilty of unfair labor practices by refusing to recognize the union as the collective bargaining agent for court employees. The charge also alleged that a judge had violated PERA by instructing his secretary not to join the union. The Supreme Court declined to hold that the Commission's assertion of jurisdiction over unfair labor practices allegedly committed by a district court constituted a per se violation of the separation of powers. However, the Supreme Court emphasized that the Commission has no authority to implement or enforce any of its decisions, and that the Commission's assertion of jurisdiction in a particular case was subject to review by the Court of Appeals on the issue of whether it improperly infringed on inherent judicial powers.

Since that decision, Michigan's trial courts have been considered public employers within the meaning of PERA and subject to the obligations of the Act, including the duty to bargain with the exclusive representatives of their employees under §15 of PERA. However, when it is alleged that a trial court has violated a duty allegedly imposed upon it by PERA, the Court of Appeals reviews the facts and determines on a case-by-case basis whether compelling compliance would intrude on the trial court's inherent judicial authority. For example, in *Teamsters Union Local 216 v 60th District Court*, 102 Mich App 216 (1980), the Commission asserted jurisdiction over an unfair labor practice charge alleging that a district court had discharged an employee because of her union activities. The Court of Appeals concluded that the Commission's jurisdiction over this dispute did not infringe on the district court's inherent judicial powers. By contrast, in *AFSCME Council 25 v Wayne Co*, 292 Mich App 68 (2011), the Court of Appeals refused to enforce an arbitration award ordering Wayne County to post and award circuit court deputy clerk assignments by seniority in accord with the collective bargaining agreement. In that case, the Court of Appeals concluded that the award infringed on the inherent and exclusive authority of judges in a circuit court to select a particular deputy clerk to serve in the judge's courtroom and that "PERA must bow to the judiciary's inherent constitutional powers."

In *In the Matter of a Petition for Representation Election Among Supreme Court Staff Employees*, 406 Mich 647 (1979), the Supreme Court held that the doctrine of separation of powers precluded the Commission from asserting jurisdiction over the Supreme Court itself. In that case, a petition was filed with the Commission by a union seeking to represent Supreme Court employees. The Supreme Court, in a series of letters sent by the Court's chief justice to the Commission chairman, objected to the Commission's assertion of jurisdiction over the dispute.

The Commission, however, issued a decision concluding that it did have jurisdiction and directed an election. In a brief opinion, the Supreme Court reversed. It held that whether or not certain Supreme Court employees were subject to PERA was irrelevant; the Commission had no authority to bring the Supreme Court before it as a party defendant. It noted, at 663:

> As already indicated, there is no prior Michigan case that has addressed itself to [the issue of whether the Commission has jurisdiction over the Supreme Court]. This may well be because it is such an anomalous situation. It is difficult to envision any comparable situation where a subordinate arm of the judicial branch of government would attempt to exercise an Executive power over the Governor or a Legislative power over the Legislature. But here an executive agency is attempting to exercise adjudicative authority over the Michigan Supreme Court.

In the instant case, neither party asserts that individuals previously considered employees of the 36th District Court became employees of the Supreme Court by virtue of Talbot's temporary appointment as the Court's special judicial administrator. The Supreme Court is not, and no one maintains that it should be, a party to the case.

The District Court points out that the Supreme Court appointed Talbot as special judicial administrator because there was an urgent need to streamline and improve the Court's operations and respond sensibly to the City of Detroit's financial emergency. The District Court argues that the structural changes that the Supreme Court expected Talbot to make, and that he did make, were not typical, everyday employment decisions. Moreover, according to the Court, not only did the Court's operations need to be reformed, these reforms needed to be carried out quickly.

The changes recommended by the NCSC report, however, were managerial and administrative changes that the Court could have implemented without the Supreme Court's intervention if previous chief judges had had the will and the managerial ability to undertake them. Clearly, the Supreme Court appointed Talbot because it had confidence in his ability to implement necessary reforms. However, there is no indication in the record that the Supreme Court expected Talbot, in carrying out his mission, to disregard laws, including PERA, to which the 36th District Court's previous chief judges had been subject. Indeed, Talbot did not, in his initial dealings with Charging Party or the Court's other unions, assert that he had no duty to bargain because of his appointment as special judicial administrator. Rather, he asserted that the decision to *convert* the court officers to independent contractors after their individual contracts expired was a matter of managerial prerogative, a defense that would have been available to the Court's chief judge if Talbot had not been appointed.

The Court also argues that because the needed reforms at the Court impacted the City of Detroit's financial emergency, they needed to be carried out quickly. According to the Court, bargaining over the conversion of the court officers to independent contractors would have been too cumbersome. Clearly, there was an acute need to reduce the Court's expenses. As the Court's witnesses repeatedly emphasized, however, the amount of money saved by the conversion of court officers to independent contractors was relatively small, and cost savings were not the determinative factor in the Court's decision. Moreover, the conversion could not be implemented before the individual contracts between the court officers and the Court expired in the spring of

2014. In short, the need to reform the court officer function was not so immediate that bargaining with Charging Party over this issue would have interfered with Talbot's ability to carry out the Supreme Court's mandate.

I conclude that a finding by the Commission that the court officers continued to be employees of the 36th District Court within the meaning of PERA after April 14, 2014, and that the Court continued to have a duty to recognize them as such and to bargain with Charging Party as their bargaining representative, would not impermissibly intrude on the Michigan Supreme Court's inherent judicial authority or impinge upon the separation of powers. I reach the same conclusion with respect to a finding on the 36th District Court's duty to bargain over the conversion of court officers to independent contractors and the other allegations in the charge alleging that the Court violated its duty to bargain under PERA. I have, therefore, made findings and conclusions of law below on these issues as necessary to resolve these allegations.

B. Court Officers as Independent Contractors or Employees

As discussed in *Detroit Judicial Council and 36th Dist Court*, 2000 MERC Lab Op 7, it is well established that individuals may be public employees within the meaning of PERA despite signing a contract stating that they are independent contractors. If the court officers continued to be employees of the Court after April 14, 2014, the Court had a continuing obligation to recognize Charging Party as their bargaining agent and to bargain with it over their terms and conditions of employment. On the other hand, if the Court did not, in fact, convert the court officers to independent contractors, it is irrelevant whether it had a duty to bargain over a decision to convert them or whether it satisfied this duty or its duty to bargain over the decision's impact. Whether the court officers are now independent contractors, therefore, is the first issue to be decided in this case.

Charging Party argues that the court officers cannot be held to be independent contractors because the Commission previously held, in *Detroit Judicial Council*, that they were employees. This argument has no merit. The holding in *Detroit Judicial Council* was based on the facts at the time the hearing in that case was held in April 1999 and, in particular, the amount of control exercised by the Court over the court officers' performance of their duties at that time. My conclusion in this case must be based on the facts on the record before me at this time. I also reject Charging Party's argument that the court officers must be considered employees because the bailiffs are employees and the court officers and bailiffs perform the same work under the same conditions. The bailiff's statute arguably requires the Court to maintain an employment relationship between the Court and the grandfathered bailiffs. The fact that the Court was willing to concede that the grandfathered bailiffs remain its employees does not preclude it from arguing that its relationship with the court officers is not now that of an employer and employee.

Charging Party also argues that the Court could not convert the court officers to independent contractors without Charging Party's agreement because this action altered the scope of Charging Party's bargaining unit. The redefinition or constitution of a bargaining unit is a permissive subject of bargaining over which neither party can be compelled to bargain. *Detroit Fire Fighters Ass'n, Local 344, IAFF v City of Detroit*, 96 Mich App 543, 546 (1980). Bargaining unit placement is neither a mandatory subject of bargaining nor a matter of

managerial prerogative, but an issue reserved to the Commission under §13 of PERA when the parties are unable to agree. See *City of Warren,* 1994 MERC Lab Op 1019, and cases cited therein. This case, however, does not involve unit placement, but whether the court officers have become independent contractors, rather than employees, of the Court. I conclude that the cases cited by Charging Party in its brief involving an employer's unilateral removal of a position from a bargaining unit are not on point.

The test for determining whether an employer-employee relationship exists under PERA was set out initially in *Wayne Co Civil Service Comm v Wayne Co Bd of Supervisors,* 22 Mich App 297 (1970). The Court in that case set out four factors indicating employer status: (1) it selects and engages the employees; (2) it pays their wages; (3) it has the power to dismiss them; and (4) it has the power of control over their conduct. The issue in *Wayne Co,* however, was which of several competing public entities were employers or the employer of the individuals in question, not whether the individuals were independent contractors. In determining whether individuals are employees within the meaning of PERA or independent contractors, the Commission looks at two factors: (1) whether the employer maintains control over the manner and means of performing the work as well as the end to be achieved, and (2) whether the work done by the individual can be characterized as an integral part of a common task. See *City of Detroit v Salaried Physicians Professional Ass'n, UAW,* and Commission cases cited therein at 147.

The core function of the Court is adjudication. However, providing ongoing assistance to litigants with serving process and enforcing court orders arguably helps keep the wheels of justice running smoothly. It appears that the Court is not required by either statute or court rule to appoint court officers. However, the court rules contemplate that a district court will do so. The record also indicates that the Court's failing to do so in this case would leave the citizens of the City of Detroit without legal means to enforce orders of eviction or orders for seizure of property. I conclude that the work done by the court officers is an integral, if ancillary, part of the Court's task of enforcing the laws and providing justice.

However, the extent of control exercised by the employer is the determinative factor in determining whether an individual is an employee or independent contractor. An employment relationship exists when the person or organization for which the services are performed has the right to control the manner and means by which the result is to be accomplished. Where such control has not been reserved, the relationship is that of an independent contractor. *City of Detroit,* 1986 MERC Lab Op 395, 397; *Univ of Michigan,* 21 MPER 11 (2008).

I note here, first, that the Court has ultimate control over the court officers under the terms of their contracts. Although the contracts have a nominal two year term, the Court can terminate a court officer's contract at any time for any reason and without notice.

However, the record indicates that the Court no longer even attempts to supervise court officers' work on a day-to-day basis. The court officers, as they did prior to April 14, 2014, perform their work entirely in the field. They set their own work hours and are not required to work any specific number of hours per week. They are not required to devote themselves entirely to work for the Court or prohibited from holding other jobs. Although in 1999 the court officers were required to provide a supervisor with regular reports on their activities, this requirement

was abolished prior to April 14, 2014. They are not now required to even check in with the Court to confirm their availability to accept assignments. Since April 14, 2014, they have had no assigned supervisor.

As Judge Blount explained, the Court concluded that it was not possible to effectively supervise the court officers' work with available resources. The system of assigning cases was thus changed to encourage more plaintiffs to choose a court officer in hopes that the market would weed out the less efficient or less satisfactory court officers. Although the Court will respond to complaints made by litigants or citizens about court officers, and Talbot offered opinions about how the Court might respond to complaints, the contract itself does not allow the Court to suspend or impose any other type of discipline short of terminating the contract. Moreover, instead of obligating itself to indemnify court officers when they are sued by by citizens, the court officer is now required to indemnify the Court for its costs in defending suits brought against it based on a court officer's conduct.

The Court contends that it, in fact, assigns new cases by rotation to court officers and bailiffs, although it does so only when a plaintiff asks for an assigned court officer or bailiff. However, whether or not the current practice satisfies the requirement of the bailiff's statute, it is clear that under this system the Court exercises no actual control over which court officer or bailiff receives the work.

The Court does not provide the court officers with the supplies, equipment, office space, or the additional staff they need to perform their duties. Under MCR 3.106, the court officers must provide the Court with certain information, including the names and addresses of their regular employees and the bank accounts in which they deposit funds obtained in the course of executing orders to seize property and orders of eviction. The court officers' current contract also requires them to keep "auditable" records of other financial transactions connected to their appointments, but the Court does not plan to regularly audit these records as it once did. It also no longer provides training to court officers in keeping the proper records. There is no indication in the record that the Court intends to exercise control over the court officers' financial affairs beyond the minimal supervision required by MCR 3.106.

The court officers, even in 1999, were paid only for the services they provided to litigants. Except for their fringe benefits, their compensation also came solely from fees paid by litigants and not from the Court's general budget. As Charging Party rightly points out, the source and method of their compensation did not establish that the court officers were independent contractors. However, prior to April 14, 2014, the court officers received bi-weekly checks that the Court treated as wages for tax purposes, as well as fringe benefits paid for from the Court's budget. Now, however, court officers are paid directly and solely by the litigants who use their services. The Court has relinquished control over even the means by which the court officers are paid.

The core question in determining whether an individual providing services to a public entity under PERA is an independent contractor or employee is whether the public entity has reserved the right to control the manner and means by which the services are provided. Here the record establishes that the court officers work independently. The Court does not supervise or monitor their work on a regular basis; set their hours or place limitations on when they can

perform their work; control who will receive which assignments; provide the court officers with equipment, supplies, office space or staff; or collect or disburse money owed them for their services. I conclude that these facts establish that at the time of the hearing, the court officers were, as their contracts state, independent contractors and not employees.

C. Alleged Discrimination

Charging Party alleges that making the court officers independent contractors and removing them from the unit constituted unlawful discrimination against them for their union activities and thus violated §10(1)(c) of PERA.

In order to establish a prima facie case of unlawful discrimination under PERA, a charging party must show, in addition to an adverse employment action: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) union animus or hostility to the employees' protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006); *Grandvue Medical Care Facility,* 1993 MERC Lab Op 686. If the charging party alleges that the employer's action or actions were motivated by union animus, the charging party bears the burden of demonstrating that protected conduct was a motivating or substantial factor in the employer's decision. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Southfield Pub Schs*, 25 MPER 36 (2011). Only after a charging party establishes a prima facie case of unlawful discrimination does the burden shift to the respondent to demonstrate with credible evidence that the same action would have taken place even in the absence of the protected conduct. *Evart* at 74.

The court officers clearly engaged in union or other "concerted activity for mutual aid or protection" within the meaning of §9 of PERA when they, and Charging Party on their behalf, successfully pursued the grievance over the Court's termination of four court officers. However, Charging Party must establish both that the Court had animus and that this animus was a motivating cause of its actions. Union animus can be established by either direct or circumstantial evidence, including suspicious timing or evidence that the employer's stated motive was pretextual. *City of Royal Oak*, 22 MPER 67 (2009); *Wayne Co,* 28 MPER 58 (2014). However, there must be substantial evidence from which a reasonable inference of discrimination can be drawn, and the Commission must avoid mere speculation as to motive. *Michigan Employment Relations Comm'n v Detroit Symphony Orchestra, Inc*., 393 Mich 116, 126 (1974).

There is no direct evidence of union animus on the part of Talbot or any other representative of the Court in this case. Charging Party points to the testimony of Thornton Jackson, Charging Party's vice-president, about his conversation with Chief Judge Nancy Blount in early April 2014. Jackson testified that he met with Blount in attempt to persuade her not to proceed with converting the court officers to independent contractors. Blount listened to his arguments but told him the decision was already made. Then, according to Jackson, Blount asked him why Charging Party had pursued the grievances to arbitration. Jackson testified that Blount made him feel that the huge amount of money the Court owed the terminated court officers was why the Court had decided to make the court officers into independent contractors. However, according to my review of his testimony, the only support Jackson offered for his conclusion was

that Blount asked him about the union's decision to pursue the grievance after – although not necessarily immediately after – he made his plea to retain the court officers as employees. I cannot, even if I were to credit Jackson's testimony, conclude that Blount admitted to Jackson that the amount of the arbitration award motivated the Court's decision to convert the court officers to independent contractors.

As the Court acknowledges, there was a connection between the arbitration award and the Court's decision to make the court officers independent contractors. That is, the litigation surrounding the award established that MCR 3.106 did not give the Court unfettered discretion to appoint and unappoint court officers. Talbot was aware of the litigation, and, in fact, had been part of a Court of Appeals panel ruling on the case. He also believed that it was important for the chief judge to have unfettered discretion to appoint and unappoint court officers. As his testimony made clear, one of the primary reasons he decided to convert the court officers to independent contractors was that he wanted the Court to have contracts with the court officers that gave the chief judge absolute discretion to terminate them at any time. Talbot's position that the court officers should be "at will" appointees was anathema to the court officers. However, Talbot's position on this issue did not establish that union animus or that the Court's decision to convert the court officers to independent contractors was motivated by union animus.

Charging Party also argues that the reasons given by the Court for making the court officers independent contractors were pretextual. Charging Party cites *Starbucks Corp*, 354 NLRB 876 (2009), for the proposition that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent wishes to conceal. Charging Party argues that in this case the Court provided shifting reasons for its decisions, and that on the witness stand Talbot "backed away" from the reasons the Court had given Charging Party at the bargaining table. I do not agree with Charging Party's characterization of Talbot's testimony or that the Court provided shifting reasons for its decision. Charging Party argues that the Court claimed that it would save money by converting the court officers to independent contractors, but then admitted that no other court employees were actually laid off as a result. The Court told Charging Party at the bargaining table that it would save $300,000 in administrative costs by converting the court officers to independent contractors. Although it never provided Charging Party with figures showing how it had calculated those costs, it was clear, both at the bargaining table and at the hearing, that these savings would come primarily from reassigning court clerks to other duties within the Court. Charging Party also asserts that the Court told Charging Party at the bargaining table that by making the court officers independent contractors it would bring its policies in line with other district courts, but that Talbot had no information about how these courts operated. Talbot testified that he knew, at the time the Court first announced its plan in July, that many other district courts employed court officers as independent contractors. However, he testified that the Court did not have specific information about whether these courts collected fees for their independent contractors or rotated assignments. The Court consistently gave its desire to have control over the appointment and termination of the court officers as the primary reason for making the court officers independent contractors. I see no significant inconsistency between the reasons the Court gave Charging Party for wanting to convert the court officers to independent contractors and the explanations it provided at the hearing, and I find no basis to conclude that the Court's reasons were pretextual.

Charging Party also argues that an inference of unlawful motive should be made from the timing of the Court's final decision, i.e., the fact that the Court did not make its final decision to convert the court officers to independent contractors until after the arbitrator issued his backpay award in August 2013. This argument does not make sense based on the established facts. The Court announced in July 2013 that it was considering making the court officers independent contractors. This announcement was made before the arbitrator's backpay award was issued. Although the Court stated that it had no duty to bargain over this decision, the fact that the decision was not yet final gave Charging Party the opportunity to both argue against it and provide an alternative. It is not clear from the record just when the Court made a "final" decision. In any case, I see no material temporal connection between the issuance of the backpay award, per se, and the Court's actions.

Finally, Charging Party argues that an inference of unlawful motive should be drawn from the proposals the Court made for a new collective bargaining agreement in the fall of 2013. At that time, the Court's proposals included a short agreement terminating in the spring of 2014, immediate conversion of the court officers into at-will employees, and a clause recognizing the Court's managerial right to make the court officers independent contractors. However, given that the Court had already announced that it was considering converting the court officers to independent contractors in the spring of 2014, and court officers comprised most of the unit, it was reasonable for the Court to propose a contract of short duration. The other terms proposed by the Court merely reflected its positions that the court officers should be at-will and that converting the court officers to independent contractors was a management issue over which it should retain discretion.

The alleged circumstantial evidence above is not sufficient, I conclude, to support a finding that union animus was a partial or motivating cause of the Court's decision to convert the court officers to independent contractors. I conclude that Charging Party failed to establish a prima facie case that the Court's motive for converting the court officers to independent contractors was to retaliate against them for their concerted protected activity of successfully pursuing a grievance.

D. Duty to Bargain over the Change to Independent Contractor Status

The original charge alleged that the Court violated §10(1)(e) of PERA by presenting Charging Party with the conversion of the court officers to independent contractors as a "fait accompli." However, both parties consistently maintained that they had no duty to bargain over the conversation, albeit for different reasons. Charging Party asserted that it had no duty to bargain over the conversion of the Court officers to independent contractors because the issue was, at most, a permissive subject of bargaining. It argued, further, that the Court could not lawfully convert the court officers to independent contractors without its agreement because the Court's actions altered the scope of the existing unit and also because the Commission had previously found the court officers to be employees. As discussed in subsection II(B) above, I disagree with Charging Party that this case represents a dispute between the parties over whether the court officers are properly placed in Charging Party's bargaining unit. I also reject Charging Party's argument that since the court officers were found by the Commission in 2000 to be

employees and not independent contractors, the Court could never thereafter legitimately change its relationship with the court officers so that they became independent contractors.

The Court maintains that it had no duty to bargain because its decision to convert the court officers to independent contractors was within its inherent managerial prerogative. It cites two seminal U.S. Supreme Court cases, *Fibreboard Paper Products Corp v NLRB,* 379 US 203 (1964), and *First National Maintenance Corporation v NLRB*, 452 US 66 (1981), for the now well-established proposition that managerial decisions which lie at the core of entrepreneurial control, including decisions concerning the commitment of investment capital and the basic scope of the enterprise, are not primarily about conditions of employment, even though the effect of the decision may be necessarily to terminate employment. According to the Court, its decision to "change direction" by converting the court officers to independent contractors was such a decision.

Because §15 of PERA, in its original form, was patterned after §8(d) of the National Labor Relations Act (NLRA) 29 USC §158(d), the Commission and the Courts have long looked to precedent developed under the NLRA in defining the scope of the duty to bargain under PERA. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44 (1974); *Pontiac Police Officers Ass'n v City of Pontiac*, 397 Mich 674, 680, (1976). In the seminal decision finding the subcontracting of unit work to a third party contractor to constitute a mandatory subject of bargaining, *Van Buren School District v Wayne Circuit Judge*, 61 Mich App 6 (1975), the Court of Appeals began by analyzing the case under the principles set out in *Fibreboard.* After *First National* was decided, the Michigan Courts expanded their discussion of subcontracting or implied subcontracting to incorporate a *First National* maintenance analysis. See, e.g., *Bay City Ed Ass'n v Bay City Public Schs,* 430 Mich 370 (1988); *Detroit Police Officers Ass'n v City of Detroit,* 428 Mich 79 (1986).

Although the changes implemented by the Court on April 14, 2014, allowed the Court to reassign certain administrative employees to other duties, converting the court officers to independent contractors clearly did not involve any capital investment or recoupment or a major shift in the use of the Court's economic resources. I conclude that the Court's decision to convert the court officers to independent contractors also did not represent a significant change in the scope of its operations equivalent to the employer's decision in *First National Maintenance* to abandon one of its maintenance contracts or the decision of the school district in *Bay City Education Ass'n* to transfer its responsibility for providing special education services to its intermediate school district. The Court in its brief seems to suggest that the court officers now work only for the litigants, but this is not the case. The Court, by exercising its authority under MCR 3.106 to appoint court officers and entering into individual contracts with them, guarantees that court officers will be available to litigants who need them to execute the Court's orders of eviction and orders to seize property. By appointing court officers and providing their names to plaintiffs, the Court also provides a service to litigants who need help finding reliable process servers. The Court, I find, has not "gone out of the business" of providing its constituents with court officer services. Rather, it has contracted with third parties, its former employees, to provide these services to its constituents. As is typical when services are subcontracted, the Court retains ultimate control in that if court officers' work is not satisfactory, their appointments

can be terminated. Without appointment from the Court, a court officer can no longer carry out evictions, the most lucrative part of his or her job.

I conclude that, except for the fact that the Court does not pay the court officers for the services they provide, the Court's contracts with the court officers constituted *Fibreboard* subcontracting, i.e., contracts to do the same work in the same locations under the ultimate control of the employer. I note that the National Labor Relations Board appears to view an employer's decision to "change its business model" by converting former employees to independent contractors as a mandatory subject of bargaining analogous to *Fibreboard*-type subcontracting. See, e.g. *Naperville Ready-Mix, Inc,* 329 NLRB 174 (1996) and the decision of the ALJ in *Unimark Truck Transport,* 2014 WL 7009761 (2014).

I am not persuaded that requiring the Court to bargain over its decision to convert the court officers to independent contractors would have unduly restricted it from exercising its inherent right to make decisions regarding the size and/or scope of the services it provides to its constituents. See *Local 1277, Metropolitan Council No. 23, AFSCME v Center Line,* 414 Mich 642 (1982). A requirement that an employer bargain in good faith before subcontracting unit work does not ordinarily constitute an undue restriction on its ability to function and establish policy. *Plymouth Fire Fighters Ass'n, Local 1811, IAFF, AFL-CIO v. City of Plymouth,* 156 Mich App 220, 223-24 (1986).

Although whether a decision to subcontract bargaining unit work is subject to the duty to bargain under PERA depends on the particular facts, the Commission and the Courts have repeatedly found such decisions to be mandatory subjects. For example, in *Detroit Police Officers Ass'n v City of Detroit,* the Supreme Court affirmed the Commission's finding that the City had a duty to bargain over the subcontracting to a private contractor of court security in the 36th District Court. The Court agreed with the Commission's rejection of the City's argument that the subcontract was analogous to a "partial closure" of a business, noting that similar work continued to be performed, albeit by different personnel. Also see *Pontiac Sch Dist,* 23 MPER 81 (2010) (the subcontracting of unit work to a third party has "historically" been considered to be a mandatory subject of bargaining; *City of Detroit (Dept of Transportation),* 18 MPER 67 (2005) (no exceptions); *Interurban Transit Partnership,* 17 MPER 40 (2004).

In *Van Buren School District,* the Court affirmed the Commission's finding that a public employer had a duty to bargain over the decision to subcontract to a private company the transportation services previously provided by its own employees. Significantly, the Court in *Van Buren* rejected the employer's assertion that the decision to subcontract was not amenable to collective bargaining because the change was made to improve service rather than save money. The Court noted that discussion of the subject would have given the union the opportunity to offer an alternative to subcontracting which would have protected the interests, and met the objectives, of both parties, thus furthering PERA's goal of promoting the peaceful settlement of industrial disputes. The Court said, at 25-26:

> We are not convinced that bargaining would have served no purpose. The merits of Van Buren's decision to subcontract are not so clear as to eliminate the need for discussion. Union input might reveal aspects of the problem previously ignored or inadequately studied by Van Buren. The union may well be able to

> offer an alternative to the one chosen by Van Buren which would fairly protect the interests and meet the objectives of both. Surely discussion of the subject would have done much to promote industrial peace and might even have prevented the present lawsuits. Negotiation, even if ultimately unsuccessful, does much to appease; explanation at the bargaining table will sooner quell anger than receipt of a tersely worded termination slip. The *Fibreboard* Court responded to a similar argument by saying: "The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations."

As *Van Buren* recognized, and the Court in *First National Maintenance* explicitly stated at 678, ordering an employer to bargain serves the purposes of PERA, or the NLRA, only if the subject proposed for discussion is amenable to resolution through the bargaining process. I conclude in this case that the issue of the conversion of the court officers to independent contractors was amenable to resolution through the collective bargaining process. I recognize that labor costs, which in this case were essentially limited to the court officers' fringe benefits, appear to have played little role in the Court's decision to convert the court officers to independent contractors. Nevertheless, cost savings, in the form of the administrative costs the Court incurred in collecting and processing payment for the court officers' services and handling their paperwork, were one of the Court's concerns. Charging Party might have satisfied these concerns by offering to reimburse the Court for some or all of these costs. The primary factor motivating the Court's decision was clearly the preservation of the right to terminate the Court officers at will. However, "at-will employee" is not an oxymoron, and the parties might have found a way to satisfy both the Court's desire to retain the ability to terminate court officers without establishing just cause and the court officers' concerns about political favoritism. As stated above, I find that the issue of the conversion of the court officers to independent contractors was amenable to resolution through collective bargaining, and I conclude, for the reasons outlined above, that the Court's decision to convert the court officers to independent contractors was a mandatory subject of bargaining.

E. Bargaining Over the Decision and the Effect of the Fact Finding Petition

As noted above, the stated position of both parties was that they had no obligation to bargain over the decision to convert the court officers to independent contractors. Insofar as the record indicates, prior to December 19, 2013, the parties did not discuss the terms on which the Court might agree to retain the court officers as employees, although they did discuss the reasons the Court offered for wanting to convert them to independent contractors. Although the parties discussed the terms of a proposed contract during the fall of 2013, the Court's proposal was for a collective bargaining agreement covering the court officers that expired with the expiration of the court officers' individual contracts the following spring, not an offer to bargain over the decision to make the court officers independent contractors. There is no suggestion in these proposals, or in the record, that the Court was willing to entertain proposals that would influence its decision on whether to convert the court officers to independent contractors. Moreover, Charging Party still maintained that it had no duty to bargain over the conversion. Whether or not the parties reached impasse in their negotiations over the Court's proposed short-term

collective bargaining agreement is irrelevant, since the Court never implemented its contract proposals.

The parties did, however, eventually discuss the possibility of retaining the court officers as employees. On December 19, 2013, Kienbaum sent Fetter a letter announcing that the Court had decided to "go to independent contractor status with the Court officers," and sought confirmation that Charging Party agreed that this was a permissive subject of bargaining. At the same time, however, the letter offered to retain the court officers as employees if Charging Party agreed to certain terms. These terms were: complete discretion for the chief judge in making appointments and unappointing court officers during the terms of their appointments; the Court's ceasing to collect statutory service and mileage fees for the court officers; elimination of all fringe benefits except health benefits required by law; and requiring court officers to obtain their own liability insurance, including insurance to indemnify the Court. Kienbaum offered to maintain the rotation. Except for continuing the rotation, the terms the Court proposed to Charging Party were exactly the same as the conditions under which it intended to employ the court officers as independent contractors. Fetter, on January 31, 2014, responded with a counterproposal; Charging Party would abandon the just cause standard in favor of an "arbitrary and capricious" standard with respect to the decision to reappoint a court officer at the end of his or her term. Fetter's letter stated that since the Court had not provided all the information that Charging Party's had requested, including a breakdown of the $300,000 in administrative costs that the Court claimed it would save, he could not respond to the other proposals. On February 6, 2014, Kienbaum notified Charging Party that the Court was not willing to compromise on the issue of converting the court officers to at-will employees. Kienbaum said that unless Charging Party acceded to this proposal, there was no point to further discussion.

In determining whether an employer has violated its statutory duty to bargain in good faith, the totality of the employer's conduct must be examined to determine "whether it has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement," as opposed to going through the motions to avoid agreement in order to impose its own terms. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 53-54 (1975); *Unionville-Sebewaing Area Schools*, 1988 MERC Lab Op 86, 89; *City of Pontiac*, 20 MPER 30 (2007). Although neither party is required to yield on any mandatory subject, the Commission may consider a party's proposals, in the context of its other conduct, in determining whether the party has bargained in good faith. *Oakland Cmty College*, 2001 MERC Lab Op 273, 278; *City of Lowell*, 28 MPER 62 (2015). In *Lowell*, for example, the employer took a fixed position that employees be employed at will; that the employer be the final arbiter of all grievances; that full-time employees could be replaced with non-bargaining unit part-time employees, and that the employer have the right to subcontract all bargaining unit work without restrictions. The Commission affirmed the ALJ's conclusion that, in the context of the employer's other conduct, the employer's bargaining proposals were evidence that it had not bargained in good faith.

In this case, the offer the Court made to Charging Party on December 19, 2013 was, as noted above, essentially the terms it intended to impose on the court officers if it converted them to independent contractors. The Court's offer removed all the protections and benefits the court officers had gained from employee status through collective bargaining. The Court had previously refused to bargain over the conversion of the court officers to independent

contractors, and, in the same December 19, 2013, letter in which it made its offer, stated its intention to implement the conversion within a short period if Charging Party did not accept the Court's terms. Further, on February 6, 2014, the Court informed Charging Party that there was no point to further discussion unless it accepted the Court's condition that the chief judge have absolute discretion to terminate the court officers at all times. Based on these facts, I conclude that the Court did not bargain in good faith with a sincere desire to reach agreement with Charging Party over the Court's decision to convert the court officers to independent contractors.

I also conclude that Charging Party did not waive its right to bargain over the decision. Charging Party consistently took the position that it had no duty to bargain over the conversion of court officers to independent contractors. However, the Court also took the position that it had no duty and would not bargain over that decision. Charging Party's failure to demand bargaining in the face of the Court's stated position cannot be considered a waiver of its bargaining rights As discussed above, Kienbaum's December 19, 2013, letter was the Court's first indication that it might consider retaining the court officers as employees in exchange for Charging Party's agreement to certain terms. Charging Party responded to the Court's offer with a counter-offer. Again, the facts do not indicate that Charging Party waived its right to bargain under the circumstances of this case.

Next, I conclude that even if the Court had bargained in good faith over its decision, it could not lawfully implement this decision while a fact finding petition was pending. In *Wayne Co,* 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244, aff'd *AFSCME Council 25 v Wayne Co,* 152 Mich App 87 (1986), the Commission held that an employer cannot lawfully implement its last best offer while a fact finding petition is pending because fact finding is an integral part of the dispute resolution mechanism provided by PERA and implementation during fact finding tends to forestall the possibility of reaching agreement through this mechanism. The Commission applies this rule to unilateral changes in terms and conditions of employment implemented after a fact finding petition has been filed and before the parties have exhausted bargaining over the substance of the fact finder's report. *Oakland Co Cmty College,* 2001 MERC Lab Op 273; *Wayne Co,* 24 MPER 25 (2011), aff'd in an unpublished opinion, *Wayne Co v AFSCME Council 25,* 27 MPER 43 (2014); *Wayne Co,* 29 MPER 1 (2015).

Section 25(1) of the Labor Mediation Act, MCL 423.25(1) states:

> When in the course of mediation under section 7 of Act No. 336 of the Public Acts of 1947, as amended, being section 423.207 of the Michigan Compiled Laws, it shall become apparent to the commission that matters in disagreement between the parties might be more readily settled if the facts involved in the disagreement were determined and publicly known, the commission may make written findings with respect to the matters in disagreement. The findings shall not be binding upon the parties but shall be made public.

Section 25(1) is broadly worded; it is not limited to disputes over the terms of a new contract but, rather, provides for fact finding with respect to "matters in disagreement." Moreover, there is no requirement in §25(1) that the parties be at impasse before a fact finding petition can be filed or a fact finding proceeding conducted.

In the Commission's supplemental opinion in *Wayne Co*, 1985 MERC Lab Op 244, 249, it elaborated upon its reasons for prohibiting an employer from implementing changes in terms and conditions of employment while fact finding is pending:

> This procedure [fact finding] is not contained in the federal law and is clearly intended, in part, to balance the fact that under PERA employees do not have the right to strike. The legislature was clearly sensitive to the special role that public opinion plays in a labor dispute in the public sector, and it expressed its will that an objective view of the facts and positions of both parties be made public where appropriate. As we indicated earlier, much of the benefit of this objective and public review is lost where a public employer, fact finding having been initiated but not completed, seizes the initiative by implementing its "bottom line" position. As previously stated, we find Respondent's implementation of its "last best offer" under these circumstances to be inconsistent with the statutory scheme and with its duty to bargain in good faith.

The Court argues that the fact finding petition filed by Charging Party on October 3, 2013, was not valid because it was filed as a "stratagem to foreclose [unilateral] action" by the employer and because it was premature. However, the Court did not object to the petition as premature when it was filed, even though no mediation had yet taken place. After the petition was filed, the parties met with a mediator, the petition was processed, and a fact finder was appointed by the Commission. Several prehearing conferences were held before the Court implemented its decision to convert the court officers to independent contractors in April 2014.

The Court also argues that even if the petition had been validly filed, there "could not have been any real purpose to fact-finding here" since the parties were clearly deadlocked. However, although the Commission may order fact finding even when there is no impasse, it is often the case that the parties enter fact finding having reached a deadlock. Breaking bargaining impasses is one of the primary goals of the fact finding process.

As the Commission concluded in *Wayne Co,* 1985 MERC Lab Op 244, 249, the Legislature created fact finding as a statutory dispute resolution mechanism for public employees in part to balance the fact that public employee unions do not have the right under PERA to strike.. Fact finding does not always resolve the parties' dispute. However, fact finding cannot be expected to do its work if the process is interrupted by an employer's unilateral action. In the instant case, a fact finding petition had been filed and the process was well underway when the Court implemented its decision to convert the court officers to independent contractors. There was no deadline outside the Court's control for implementation of this decision. The Court extended the court officers' individual contracts after they expired on March 11, 2014, until the Court was prepared to offer them new contracts to sign. It could have extended their contracts, or given them short-term contracts, until fact finding was completed and the parties had met and bargained over the fact finder's recommendations. I conclude that the Court violated §10(1)(a) and (e) of PERA by implementing its decision to convert the court officers to independent contractors on April 14, 2014, after a fact finding petition had been filed and before the process was completed.

F. Unilateral Changes in Terms and Conditions of Employment

As a result of my determination that the Court violated its duty to bargain by unilaterally converting the court officers to independent contractors while fact finding was pending, I must next consider Charging Party's claim that the Court violated its duty to bargain by unilaterally changing terms and conditions for both court officers and bailiffs. As the record shows, some of the changes implemented by the Court after April 14, 2014, affected both the bailiffs and the court officers. As noted in FN 1, in its post-hearing brief the Court argues, for the first time, that the bailiffs are not public employees within the meaning of PERA but "public officials." As stated in FN 1, I find that the Court waived its right to make this argument in this proceeding by failing to raise the argument at or before the hearing. I also note that the Commission previously rejected this argument in *State Judicial Council (36th Dist Court)* in 1991.

The record indicates that on or after April 14, 2014, the Court unilaterally terminated the court officers' fringe benefits, required them to pay the fee for their surety bond, and required them to pay for liability insurance for purposes of indemnifying the Court for legal claims. These changes unilaterally altered the court officers' existing wages and/or benefits.

In addition, after April 14, 2014, the Court ceased collecting statutory fees and mileage for both bailiffs and court officers. It stopped assigning a bailiff or a court officer to every new case when it was filed. It stopped providing the litigant with the name of the assigned bailiff or court officer, and stopped putting copies of complaints and summons in the bailiffs' and court officers' mailboxes. The Court stopped automatically assigning orders of eviction to a bailiff or court officer unless the bailiff or court officer had initially served process in that case. Finally, the Court stopped putting orders of eviction in the mailboxes of court officers and bailiffs even when he or she had served the complaint and summons in the case. The record demonstrates that these actions affected the compensation earned by the bailiffs and court officers. Not assigning a bailiff or court officer to each case when it was filed resulted in fewer plaintiffs using bailiffs and court officers to serve process, thereby reducing the bailiffs' and court officers' income. Not assigning a particular bailiff or court officer to execute every order of eviction or order to seize property caused at least some of the bailiffs and court officers to receive fewer of these lucrative assignments, again affecting their income. Finally, requiring the bailiffs and court officers to collect the statutory fees for service of process they perform reduced their total income because collecting fees entails expense and carries the risk that the plaintiff may not pay.

The Court argues that how cases are assigned for service of process, and how rotation is carried out, "indisputably involves an inherent judicial management function that cannot be subject to a bargaining obligation." However, as indicated above, whether and how the Court assigns a bailiff or court officer to a case, and whether the Court collects from litigants the statutory fees due the bailiffs and court officers for their services, clearly affects their compensation. I find that the Court has not provided any persuasive rationale for its claim that it had no duty to bargain over changes in its system of assigning cases to its employees or its decision to stop collecting its employees' statutory fees. I conclude that on and after April 14, 2014, the Court violated its duty to bargain in good faith by unilaterally altering wages and terms and conditions of employment for its court officer and bailiff employees.

G. Direct Dealing

Charging Party alleges that the Court engaged in unlawful direct dealing when it solicited the court officers to sign contracts as independent contractors which altered their terms and conditions of employment, renounced their union representation, and waived their right to organize and bargain.

PERA prohibits an employer whose employees are represented by a labor organization from dealing directly with employees or groups of employees. *City of Detroit (Fire Dept)*, 1991 MERC Lab Op 443, 448. An employer violates its duty to bargain in good faith when it negotiates or attempts to negotiate directly with employees over changes in terms and conditions of employment because such efforts seriously undermine the authority of the bargaining representative. *West Bloomfield Twp*, 25 MPER 78 (2012). The Commission has adopted criteria developed by the National Labor Relations Board to determine whether an employer has engaged in unlawful direct dealing in violation of its duty to bargain with the exclusive representative of its employees. See *City of Detroit, Detroit Housing Comm*, 2002 MERC Lab Op 368, 375-376 (no exceptions). These are: (1) the employer communicated directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) the communication with employees was to the exclusion of the union. *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000). The Board has also noted that in any case involving an allegation of direct dealing, the inquiry must focus on whether the employer's direct communication with its employees is likely to "erode the union's position as exclusive representative." *Modern Merchandising*, 284 NLRB 1377, 1379 (1987).

Charging Party argues that the Court engaged in unlawful direct dealing because the individual independent contractor agreements altered the court officers' terms and conditions of employment and, according to Charging Party, had the obvious effect of eroding Charging Party's role as the exclusive bargaining representative. The Court asserts that there was no direct dealing because no negotiations took place between the Court and the court officers over the terms of the independent contractor agreement. That is, the Court merely presented them with a form independent contractor agreement on a take-it-or-leave it basis.

Before meeting with the court officers to discuss their individual contracts, the Court informed them that it was converting its court officers from employees to independent contractors. The purpose of these meetings was not to change their conditions of employment, but to announce the terms under which they would work in the future when they became independent contractors. I agree with Charging Party that the Court violated its duty to bargain when it unilaterally altered the wages, hours and terms and conditions of employment of the court officers before exhausting fact finding. I also find that the Court could not evade its bargaining obligation by presenting the court officers with individual contracts that purported to authorize the Court to alter their terms and conditions of employment and informing the court officers that their services would be terminated if they did not sign these contracts. However, I find it immaterial whether the Court's conduct is characterized as unlawful direct dealing or unlawful unilateral action.

IV. Summary of Conclusions

As set out above, I conclude that the changes implemented by the Court on and after April 14, 2014, converted the court officers from employees to independent contractors and, at the time of the hearing in this case, the court officers were independent contractors and not employees of the Court. However, I conclude that the Court had an obligation to bargain with Charging Party over its decision to convert the court officers to independent contractors, that Charging Party did not waive its right to bargain over this decision, and that the Court violated its duty to bargain in good faith over the decision by implementing its decision while a fact finding proceeding was pending. I conclude that requiring the 36th District Court to bargain over the decision, or the Commission's assertion of jurisdiction over the District Court for this purpose, does not impermissibly intrude upon the Michigan Supreme Court's inherent judicial authority or impinge upon the separation of powers. I conclude that the 36th District Court violated §10(1)(a) and (e) of PERA when it converted its court officers to independent contractors in this case. I conclude that Charging Party failed to establish that the conversion was unlawfully motivated or that it violated §10(1)(c) of PERA.

I conclude that the 36th District Court also violated its duty to bargain in good faith, and §10(1)(e) of PERA, by unilaterally altering its employees' terms and conditions of employment while fact finding was pending. Because I have concluded that the Court's implementation of the conversion of court officers to independent contractors on April 14, 2014, was unlawful, I conclude that the Court could not on that date lawfully unilaterally alter the wages, hours and terms and conditions of employment of either the bailiffs or the court officers.

V. Remedy

As discussed above, I find that the Court short-circuited the bargaining process in this case by prematurely implementing its conversion of the court officers to independent contractors and refusing thereafter to recognize Charging Party as their bargaining agent. Any remedial order, therefore, must include an order requiring the Court to recognize and bargain with Charging Party as the representative of both the bailiffs and court officers pending satisfaction of the Court's obligation to bargain over the conversion, including participating in fact finding and bargaining in good faith for a reasonable time over the fact finder's recommendations.

I also find that it is also appropriate to order the Court to reinstate the status quo with respect to terms and conditions of employment. I recommend that the Commission order the Court to do the following:

> 1. Recommence collecting from litigants the statutory fees paid by litigants to court officers and bailiffs for service of process and orders and transferring these fees to accounts maintained by them.
>
> 2. Assign a bailiff or court officer, in rotation, to every new case filed and provide the filing party with the name of the assigned bailiff or court officer. If the filing party elects to use the assigned bailiff or court officer to serve process, place a copy of the complaint and summons in the assigned bailiff's or court officer's mailbox at the Court.

3. Assign a bailiff or court officer, in rotation, to every case in which an order of eviction or order to seize property is issued, including cases in which the initial process was served by someone other than a bailiff or court officer.

4. Place a copy of the order of eviction or order to seize property in the Court mailbox of the court officer or bailiff assigned to the case.

5. Issue both court officers and bailiffs identification that identifies them as employees of the Court and grants them access to nonpublic areas of the Court.

6. Upon Charging Party's request, provide the court officers and bailiffs with desk space in a nonpublic area of the Court.

I also find it appropriate to order the Court to make the court officers whole for the loss of their fringe benefits and for the sums the court officers have been required to pay in fees for their surety bonds and in premiums for the liability insurance they have been required to carry since April 2014.

RECOMMENDED ORDER

Respondent 36th District Court, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally implementing, while a fact finding petition is pending and before satisfying its obligations to bargain in good faith, changes in wages and terms and conditions of employment, including, but not limited, to the conversion of court officers from employees of the Court to independent contractors.

2. Take the following actions to effectuate the purposes of the Act:

a. Pending satisfaction of the Court's obligation to bargain over the conversion of court officers from employees to independent contractors, recognize AFSCME Local 917 as the exclusive bargaining representative for both the Court's bailiffs and court officers appointed by the Court.

b. Bargain in good faith with Local 917 over the conversion of court officers to independent contractors, including participating in fact finding and bargaining in good faith for a reasonable period over the fact finder's recommendations.

c. Pending satisfaction of the Court's obligation to bargain, restore the status quo for both bailiffs and court officers by taking the following actions:

i. Recommence collecting from litigants the statutory fees paid by litigants to court officers and bailiffs for service of process and orders and transferring these fees to accounts maintained by them.

ii. Assign a bailiff or court officer, in rotation, to every new case filed and provide the filing party with the name of the assigned bailiff or court officer. If the filing party elects to use the assigned bailiff or court officer to serve process, place a copy of the complaint and summons in the assigned bailiff's or court officer's mailbox at the Court.

iii. Assign a bailiff or court officer, in rotation, to every case in which an order of eviction or order to seize property is issued, including cases in which the initial process was served by someone other than a bailiff or court officer.

iv. Place a copy of the order of eviction or order to seize property in the Court mailbox of the court officer or bailiff assigned to the case.

v. Issue both court officers and bailiffs identification that identifies them as employees of the Court and grants them access to nonpublic areas of the Court.

vi. Upon Charging Party's request, provide the court officers and bailiffs with desk space in a nonpublic area of the Court.

d. Make the court officers whole for monetary losses suffered as a result of the Court's unlawful unilateral action by paying them a sum equivalent to the amounts they would have received in fringe benefits after April 14, 2014, the surety bond fees paid by them after April 14, 2014, and the premiums they paid for the liability insurance required by the Court after April 14, 2014, plus interest at the statutory rate.

e. Place the attached notice to employees in the mailboxes of the Court's bailiffs and court officers appointed by the Court.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Date: September 11, 2015

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **36TH DISTRICT COURT** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement, while a fact finding petition is pending and before satisfying our obligation to bargain in good faith, changes in wages and terms and conditions of employment, including but not limited to the conversion of court officers from employees of the Court to independent contractors.

WE WILL, pending satisfaction of our obligation to bargain over the conversion of court officers from employees to independent contractors, recognize AFSCME Local 917 as the exclusive bargaining representative for both the Court's bailiffs and court officers appointed by the Court.

WE WILL bargain in good faith with Local 917 over the conversion of court officers to independent contractors, including participating in fact finding and bargaining in good faith for a reasonable period over the fact finder's recommendations.

WE WILL, pending satisfaction of our obligation to bargain, restore the status quo for both bailiffs and court officers by taking the following actions:

1. Recommence collecting from litigants the statutory fees paid by litigants to court officers and bailiffs for service of process and orders and transferring these fees to accounts maintained by them.

2. Assign a bailiff or court officer, in rotation, to every new case filed and provide the filing party with the name of the assigned bailiff or court officer. If the filing party elects to use the assigned bailiff or court officer to serve process, place a copy of the complaint and summons in the assigned bailiff's or court officer's mailbox at the Court.

3. Assign a bailiff or court officer, in rotation, to every case in which an order of eviction or order to seize property is issued, including cases in which the initial process was served by someone other than a bailiff or court officer.

4. Place a copy of the order of eviction or order to seize property in the Court mailbox of the court officer or bailiff assigned to the case.

5. Issue both court officers and bailiffs identification that identifies them as employees of the Court and grants them access to nonpublic areas of the Court.

6. Upon Charging Party's request, provide the court officers and bailiffs with desk space in a nonpublic area of the Court.

WE WILL make the court officers whole for monetary losses suffered as a result of our unlawful unilateral action by paying them a sum equivalent to the amounts they would have received in fringe benefits after April 14, 2014, the surety bond fees paid by them after April 14, 2014, and the premiums they paid for the liability insurance required by the Court after April 14, 2014, plus interest at the statutory rate.

As a public employer under PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment, or other conditions of employment.

36th DISTRICT COURT

By: _____

Title: _____

Date**:** _____