STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB COUNTY,
Public Employer-Respondent,

MERC Case No. C16 K-125

-and-

MICHIGAN FRATERNAL ORDER OF POLICE LABOR COUNCIL,
Labor Organization-Charging Party.

_____/

APPEARANCES:

Keller Thoma, P.C., by Steven H. Schwartz and Chelsea K. Ditz, for Respondent

Mark A. Porter & Associates PLLC, by Mark A. Porter, for Charging Party

DECISION AND ORDER

On February 9, 2018, Administrative Law Judge Travis Calderwood (ALJ) issued his Decision and Recommended Order[1] on Motions for Summary Disposition in the above matter finding that Respondent did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Charging Party's pleadings were devoid of any factual allegation to support its claim and actually established that the Respondent acted in accordance with PERA and established Commission precedent. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Charging Party filed a request for oral argument, exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on Motions for Summary Disposition on March 5, 2018. Respondent filed its brief in support of the ALJ's Decision and Recommended Order on Motions for Summary Disposition on March 15, 2018.

In its exceptions, Charging Party contends that the ALJ erred by concluding that the Respondent had an established legal obligation to continue transferring dues to an incumbent union after the incumbent union lost an election to the Charging Party.

In its brief in support, Respondent contends that the ALJ's findings were based on applicable law and should be affirmed.

[1] MAHS Hearing Docket No. 16-033035

We find that oral argument would not materially assist us in deciding this matter, and therefore, Charging Party's request for oral argument is hereby denied.

We have reviewed the exceptions filed by Charging Party and find them to be without merit.

Factual Summary:

This case was decided by the ALJ on the basis of a motion for summary disposition. Consequently, the following facts are based on the Charging Party's pleadings and affidavits.

Macomb County (County) and the Police Officers Association of Michigan (POAM) were parties to a collective bargaining agreement that covered a bargaining unit comprised of the deputies and dispatchers employed by the Sherriff's Department of the County. That contract was effective from January 1, 2014, through December 31, 2016.

On August 5, 2016, the Michigan Fraternal Order of Police Labor Council (Charging Party or Union) filed a representation petition with the Commission and sought to replace the POAM as the authorized agent for all "Sheriff Department Deputies and Dispatchers," Case No. R16 G-067.

An election was conducted by mail, and all ballots were due by October 6, 2016. Ballots were counted the following day, and Charging Party defeated the incumbent POAM by a vote total of 108 to 13. Consequently, on October 18, 2016, the Commission certified Charging Party as the authorized bargaining representative for the deputies and dispatchers.

On October 19, 2016, Charging Party wrote the POAM and offered to assume its bargaining and representation duties with respect to the bargaining unit as of November 2, 2016. In return, Charging Party asked the POAM to agree to cease collecting dues as of that date. The letter stated, in relevant part:

> The Labor Council is offering to take up the legal and daily responsibilities of contract representation and enforcement as of the November 2, 2016 pay period, in return for an agreement with the POAM that will concurrently conclude POAM's collection of the members' dues payments on that date.
>
> As you are aware, in lieu of that agreement, the POAM will be obligated to carry forward its legal and daily responsibilities for representation of the Macomb County Deputy and Dispatchers Union through the expiration date of the current contract, pursuant to *Quinn v. POLC [and POAM]*, 456 Mich. 478, 485-486 (1998).

On October 19, 2016, Charging Party's Director, Dave Willis, contacted the County's Human Resources Department, by email, in an attempt to set up the transfer of membership dues to the Charging Party.

Between October 21 and October 25, 2016, Willis received several emails from Eric Herppich, the County's Director of Human Resources. According to Willis' affidavit, Herppich sought certain changes to the bargaining unit's health insurance prior to the contract's expiration and Willis agreed to the proposed changes.

On October 27, 2016, Charging Party Steward Clifton Morgan II was notified by a supervisor that Dispatcher Eddie Oworoetop was under investigation for a "very serious incident." According to Morgan's affidavit, he then attempted to contact POAM Business Agent Gary Pushee, but was unable to do so. Morgan then contacted Willis, who told Morgan to request an adjournment of an investigatory interview scheduled for October 27, 2016. The County granted Morgan's request and rescheduled the interview to October 31, 2016. On October 28, 2016, Willis sent a letter to the County's Undersheriff and indicated that one of Charging Party's Business Agents would be present for Oworoetop's interview. The interview occurred on October 31, 2016, and Charging Party Business Agent Leonard Paquette was present and participated in the interview.

By letter dated November 1, 2016, Willis again requested the County to transmit dues for the bargaining unit to Charging Party, effective November 2, 2016. On November 4, 2016, Herppich responded to Willis' request by email and stated in relevant part:

> There have been several conflicting email and statements regarding the transition of the Deputies and Dispatchers bargaining unit, so I will attempt to clarify:
>
> This bargaining unit's exclusive representative is the POAM until 12-31-2016, so I believe any interpretations, grievances, or other issues of representation belong to POAM until then.
>
> Dues will be deducted and remitted to POAM until 12-31-2016.

On November 9, 2016, Charging Party's attorney sent the County a letter demanding that the County "acknowledge and recognize" Charging Party as the unit's exclusive representative and to immediately cease "all formal or informal recognition of the [POAM]." The letter went on to demand, on behalf of the bargaining unit members, that the County "revoke any claimed authorization for the transmission of dues and fees to the [POAM], effective immediately."

On November 10, 2016, the POAM's General Counsel, Frank Guido, wrote Herppich, copying Charging Party's attorney, in response to the November 9, 2016 letter. Guido's letter stated in part:

> [I]t is POAM's expectation that the County will comply with the CBA through the date of expiration, including proper transmittal of dues to the POAM office … POAM, as always, stands ready to fully perform any obligations it possesses under the CBA, through expiration of the agreement on December 31, 2016.
>
> The County continued to remit dues to the POAM until December 31, 2016.

The instant charge was filed by the Union against the County on November 22, 2016 and amended on December 16, 2016. In the charge, the Union alleged that the Employer violated § 10 (1)(a) and (e) of PERA by failing to recognize it as the authorized bargaining representative under PERA and by failing to remit to the Union all dues collected by the County and paid to the incumbent POAM after Charging Party's certification by the Commission.

On February 9, 2018, ALJ Calderwood recommended that the unfair labor practice charge be dismissed in its entirety. The ALJ found that the Respondent County did recognize Charging Party and allow it to act freely in representing the bargaining unit in various matters before the contract between POAM and the Respondent expired. The ALJ also found that the County acted in accordance with established Commission precedent when it remitted dues to the POAM under the unexpired contract and that punishing the County for doing so would "be manifestly unjust."

Discussion and Conclusions of Law:

Under Commission Rule 165(2), summary disposition is appropriate where a charge fails to state a valid claim under PERA or where there is no genuine issue of material fact. Relying on *Smith v Lansing Sch Dist*, 428 Mich 248 (1987), we have consistently held that an evidentiary hearing is not warranted where no material factual dispute exists. *AFSCME Council 25, Local 207*, 23 MPER 101 (2010); *Muskegon Hts Pub Sch. Dist*, 1993 MERC Lab Op 869, 870; *Police Officers Labor Council*, 25 MPER 57 (2012). Where, however, a material factual dispute exists, summary disposition is not appropriate. *Saginaw Cnty Sheriff*, 1992 MERC Lab Op 639 (no exceptions).

Additionally, the Commission has consistently held that when a representation election is conducted during the term of an existing contract, that contract continues in effect until its expiration even if the incumbent representative is defeated. *Ionia Co. Road Comm.*, 1969 MERC Lab Op 82; *Garden City Pub. Schs.*, 1974 MERC Lab Op 364; *Jonesville Bd. of Ed.*, 1980 MERC Lab Op 891; *City of Romulus*, 1988 MERC Lab Op 504; *Hartland Cons Schs*, 19 MPER 81 (2006) (no exceptions). An employer is obligated to comply with the terms of an existing contract, including provisions requiring it to deduct dues for the former incumbent from employees' paychecks. *West Bloomfield Pub. Schs.*, 1985 MERC Lab Op 24, citing *Columbia Broad. Sys., Inc., Fender Musical Instruments Div., 175 NLRB 873, 874* (1969). The employer, however, has a duty to bargain with the new representative, even though the new representative is also bound by the terms of the contract during its term. *City of Romulus*, supra.

In the present case, the bargaining unit now represented by Charging Party exercised its right to designate a bargaining agent in October of 2016 by choosing to replace the POAM with the Charging Party. The Employer then recognized Charging Party and allowed it to represent the bargaining unit in various matters before the contract between POAM and the Respondent expired. Specifically, the County negotiated changes to the bargaining unit's health insurance with Charging Party prior to the contract's expiration and allowed Charging Party's representatives to participate in an investigatory interview. There is no allegation that the County refused to meet with Charging Party to discuss any grievance.

In its exceptions, Charging Party admits that the County met with it and negotiated changes to health insurance prior to the contract's expiration. Charging Party further admits that "the County recognized Charging Party as the proper representative for all matters related to *Weingarten* and *Loudermill* hearings, as well as discipline settlements during the period between election certification and the expiration of the contract." Charging Party, nonetheless, contends that it had the right to receive payment of dues under the collective bargaining agreement until the agreement expired because the County's recognition of Charging Party "completely terminated and extinguished all contractual relationships with the incumbent union."

In *West Bloomfield Pub Schs,* supra, the Commission rejected an identical argument and held that an employer must continue to deduct dues, pursuant to the dues check-off provision of a collective bargaining agreement, on behalf of a union after another union has been certified as the exclusive bargaining representative of the employees in the unit following a consent election. The Commission noted that "any certification by the Commission prior to the contact term is issued by consent of the parties and in anticipation of the contract expiration." See also *Hartland Cons Schs*, 19 MPER 81 (2006) (no exceptions).

Charging Party is, thus, asking the Commission to overturn longstanding precedent but has not cited any compelling reason that would require the Commission to do so. See *McCormick v Carrier*, 487 Mich 180, 211 (2010); *Wayne Co.*, 22 MPER 36 (2009); and *City of Detroit*, 23 MPER 94 (2010).

In its exceptions, Charging Party also argues that the ALJ erred in concluding that the Michigan Supreme Court's decision in *Quinn v Police Officers Labor Council*, 456 Mich 478 (1998), should be expanded to prohibit an elected and MERC-certified bargaining representative from voluntarily assuming an unexpired collective bargaining agreement. A review of the ALJ's decision, however, does not establish that the ALJ did this. In *Quinn*, the Supreme Court affirmed the Commission's ruling that a union that had been the collective bargaining agent for a bargaining unit during the term of the contract, and had filed and processed grievances under that contract before being replaced by another union, had a duty to process these grievances to their completion. The Court found that the incumbent union was in the best position to efficiently and knowledgeably see a grievance to its completion, and that shifting the responsibility from the incumbent union to the successor union improperly imposed the former's judgments, contract interpretations, and financial considerations upon the latter. In *Quinn*, the collective bargaining agreement had actually expired. Therefore, the Court did not address an employer's obligation to continue to deduct dues, pursuant to a dues check-off agreement, on behalf of a union after another union has been certified.

In his Decision and Recommended Order, the ALJ merely quoted Footnote 5 of the *Quinn* decision and noted that nothing in *Quinn* should be construed as preventing a new representative from voluntarily assuming pursuit of existing grievances, provided the aggrieved employee or employees consent to the new representative's assumption of the duty. Although *Quinn* involved an alleged breach of the duty of fair representation and not the duty to bargain, the ALJ noted that, in the present case, no charge alleging a breach of the duty of fair representation had been levied against the POAM and that Charging Party went to great lengths, in its response to one of Respondent's motions, to clarify that it was not pursuing a charge

against the POAM. The ALJ did not conclude that *Quinn* prohibited an elected and certified bargaining representative from voluntarily assuming the representation of employees under an unexpired collective bargaining agreement.

Although Charging Party appears to argue that the established legal obligation for the Employer to continue transferring dues to the incumbent union is unfair in light of the Supreme Court's decision in *Quinn*, Charging Party was aware of and consented to just that outcome when it petitioned for the unit and agreed to hold the election prior to the expiration of the contract. Although Charging Party offered to assume the POAM's bargaining and representation duties as of November 2, 2016 in return for an agreement that would end the POAM's entitlement to dues, the POAM rejected Charging Party's offer and never disclaimed interest in the unit. Additionally, even if one were to ignore Charging Party's awareness and consent, Charging Party's demand for dues prior to the expiration of the POAM contract forced the County to make a choice between submitting to Charging Party's demand and complying with established precedent. The County chose to follow established Commission precedent and to now punish it for doing so would, as correctly noted by the ALJ, be manifestly unjust. Consequently, the Commission agrees that even if all of the allegations in the charge are accepted as true, dismissal of the charge on summary disposition is nonetheless warranted.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 14, 2018

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MACOMB COUNTY,
Public Employer-Respondent,

Case No. C16 K-125
-and- Docket Number. 16-033035-MERC

MICHIGAN FRATERNAL ORDER OF POLICE LABOR COUNCIL,
Labor Organization-Charging Party.

_____/

APPEARANCES:

Keller Thoma, P.C., by Steven H. Schwartz and Chelsea K. Ditz, for the Respondent

Mark A. Porter & Associates PLLC, by Mark A. Porter, for the Charging Party

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

On November 22, 2016, the Michigan Fraternal Order of Police Labor Council (Charging Party or Union) filed the present unfair labor practice charge against Macomb County (Respondent or County). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the above captioned case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

Charging Party's initial filing sets forth a series of factual allegations detailing the Union's attempts to voluntarily assume the bargaining obligation for the County's deputies and dispatchers following its successful election campaign over the incumbent union but before the County's agreement with the incumbent expired. Despite claiming that the County violated Section 10(a) and (e) of PERA, Charging Party's initial filing did not assert the remedy that it was seeking.

A pre-hearing conference call occurred on December 14, 2016, at which time Charging Party's pleading deficiencies were discussed. Charging Party agreed to file an amended charge. Also during that call Charging Party indicated that it intended to file a motion for summary disposition.

Charging Party's amended charge, filed on December 19, 2016, repeated the prior filing's factual allegations but made it very clear that the remedy sought was an order requiring the County to immediately recognize the Union as the authorized bargaining representative under Section 11 of PERA and to remit to the Union all dues collected by the County and paid to the incumbent union since Charging Party's certification by the Commission.

On January 4, 2017, Charging Party filed its motion for summary disposition under Commission Rule 165(2)(f) of the Commission's General Rules, R 423.165, 2002 AACS; 2014 AACS.

A second pre-hearing conference call was held on January 18, 2017. At that time, counsel for the County argued that joinder of the Police Officers Association of Michigan (POAM), the incumbent union defeated by Charging Party, was necessary. The decision was made at that time to hold Charging Party's motion for summary disposition in abeyance pending resolution of the County's joinder request.

On January 18, 2017, the County filed its motion for joinder pursuant to Rule 157 of the Commission's General Rules, R 423.157, 2002 AACS. Charging Party filed its response on January 23, 2017. On January 30, 2017, the County filed a rebuttal response to Charging Party's reply brief.[2]

During a February 10, 2017, pre-hearing conference I informed the parties that I would be denying the County's motion seeking to join the POAM as a necessary party. I also asked Charging Party to provide supplemental briefing with respect to *Hartland Consolidated Schools*, 19 MPER 81 (2006), *West Bloomfield Pub Schs*, 1985 MERC Lab Op 24, and *Fender Musical Instruments*, 175 NLRB 873 (1969). Following the filing of the above supplemental briefing, Respondent would file its response to Charging Party's motion. Charging Party's supplemental brief was received on February 23, 2017, while Respondent's response and cross-motion for summary disposition was received on March 23, 2017.

Background:

On December 27, 2013, the County and the POAM executed a collective bargaining agreement covering a bargaining unit comprised of the Macomb County Sheriff's Deputies and Dispatchers. That contract's express effective period was January 1, 2014, through December 31, 2016.

Article 2 of the contract, entitled "Dues/Service Fee Collection" contained in Paragraph A an agreement by the County to "deduct [m]embership [d]ues, initiation fees, assessments,

[2] As Respondent did not seek permission to file a response brief it has not been considered for purposes of deciding the motion seeking to join the POAM as a necessary party.

service fees or service charges" from bargaining unit members and to remit those monies to the POAM. Article 3 contained a union security clause.

Article 2, Paragraph L provided the County with indemnification with respect to legal disputes concerning Article 2 or Article 3, and stated:

> The Union will protect and save harmless the Employer from any and all claims, demands, suits, and other forms of liability, by reason of action taken or not taken by the Employer for the purpose of complying with Article 2, Dues/Service Fee Collection and Article 3, Agency Shop of the Agreement. The Union agrees that in the event of litigation against the Employer, its Agent or Employees, arising out of this provision the Union will co-defend, indemnify and hold harmless the Employer, its Agents or Employees for any monetary award arising out of such litigation.

On August 5, 2016, Charging Party filed a petition with the Commission seeking to replace the POAM as the authorized agent for all "Sheriff Department Deputies and Dispatchers," Case No. R16 G-067. During the election campaign, Charging Party informed bargaining unit members that, if it were selected, the members would automatically be enrolled in the Fraternal Order of Police Labor Council Legal Defense Plan at no additional cost over their dues. Additionally, Charging Party informed bargaining unit members that monthly dues, if it won, would be one third less than dues under POAM.

An election was conducted by mail with all ballots due by October 6, 2016. Ballots were counted the following day with Charging Party defeating the incumbent union by a vote total of 108 to 13. On October 18, 2016, the Commission certified Charging Party as the authorized bargaining representative for the deputies and dispatchers.

By letter dated October 19, 2016, Charging Party offered to assume POAM's bargaining and representation duties as it related to the bargaining unit as of November 2, 2016. According to Charging Party the POAM, never responded to its offer. That letter stated in the relevant part the following:

> The Labor Council is offering to take up the legal and daily responsibilities of contract representation and enforcement as of the November 2, 2016 pay period, in return for an agreement with the POAM that will concurrently conclude POAM's collection of the members' dues payments on that date.
>
> As you are aware, in lieu of that agreement, the POAM will be obligated to carry forward its legal and daily responsibilities for representation of the Macomb County Deputy and Dispatchers Union through the expiration date of the current contract, pursuant to *Quinn v. POLC [and POAM]*, 456 Mich. 478, 485-486 (1998).

Also on October 19, 2016, Dave Willis, Charging Party's Chief Operating Officer and Director, contacted the Employer's Human Resources Department, by email, to "set up transfer of membership dues to the [Charging Party]."

Between October 21 and October 25, 2016, Willis received several emails from Eric Herppich, the County's Director of Human Resources at the time. According to Willis, Herppich was seeking Charging Party's agreement to changes to the bargaining unit's health insurance prior to the contract's expiration on December 31, 2016. According to Willis's affidavit, Charging Party agreed to the proposed changes.

On October 27, 2016, bargaining unit Sergeant at Arms, Clifton Morgan II, was notified by a supervisor that Dispatcher Eddie Oworoetop was under investigation for a "very serious incident." Morgan claims, in an affidavit initially attached to the original unfair labor practice charge, that he then contacted the POAM Business Agent Gary Pushee and upon receiving no answer left a message. Morgan then contacted Willis. Willis claims, in his affidavit, that he instructed Morgan to request an adjournment of an investigatory interview presumably scheduled for October 27, 2016. The Employer complied with Morgan's request and rescheduled the interview to October 31, 2016. On October 28, 2016, Willis sent a letter to the Undersheriff, by facsimile, wherein Willis indicated that one of Charging Party's Business Agents would be present for Oworoetop's interview. The interview occurred on October 31, 2016, at which Charging Party Business Agent Leonard Paquette was present and participated.

By letter dated November 1, 2016, sent by email, Willis again requested to have dues for the bargaining unit sent to Charging Party effective November 2, 2016. On November 4, 2016, Herppich responded by email and stated in the relevant part:

> There have been several conflicting email and statements regarding the transition of the Deputies and Dispatchers bargaining unit, so I will attempt to clarify:
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> This bargaining unit's exclusive representative is the POAM until 12-31-2016, so I believe any interpretations, grievances, or other issues of representation belong to POAM until then. Dues will be deducted and remitted to POAM until 12-31-2016.

On November 9, 2016, Charging Party's attorney sent the Employer a letter demanding that the County "acknowledge and recognize" Charging Party as the unit's exclusive representative and to immediately cease "all formal or informal recognition of the [POAM]." The letter went on to demand, on behalf of the bargaining unit members, that the County "revoke any claimed authorization for the transmission of dues and fees to the [POAM], effective immediately."

On November 10, 2016, POAM's General Counsel Frank Guido, sent an email to Herppich, copying Charging Party's attorney, addressing the latter's November 9, 2016, letter. That letter stated in part:

> [I]t is POAM's expectation that the County will comply with the CBA through the date of expiration, including proper transmittal of dues to the POAM office … POAM, as always, stands ready to fully perform any obligations it possesses under the CBA, through expiration of the agreement on December 31, 2016.

As stated above, the original charge was filed on November 22, 2016. Attached to that charge were affidavits of Morgan, Paquette and Willis in support of the allegations set forth therein.

In a second affidavit sworn to by Paquette and attached to Charging Party's motion for summary disposition, Paquette states that he received another call from Morgan during the last week of November regarding an upcoming "Loudermill" meeting for Oworoetop scheduled for November 30, 2016. According to Paquette, Charging Party sent another facsimile to the County indicating that Paquette would be attending the meeting on behalf of Oworoetop. Paquette did attend the meeting, however, no POAM representative was present.

Respondent's Motion for Joinder under Rule 157:

Rule 157 provides the following:

> Persons having such an interest in the subject of the action that their presence in the action is essential to permit the commission to render complete relief shall be made parties and aligned as charging parties or respondents in accordance with their respective interests. If the persons have not been made parties, then the commission or administrative law judge shall, on motion of either party, order them to appear in the action, and may prescribe the time and order of pleading.

Respondent's motion seeking joinder claims that because Charging Party is seeking an order requiring Respondent to reimburse it "for all lost monies, dues and funds subsequent to its certification", the POAM is an "indispensable" party and must be joined. Respondent bases this claim on its assertion that the "monies" Charging Party is seeking is money that has already been paid to the POAM in November and December of 2016 pursuant to the collective bargaining agreement in effect at that time. Respondent also claims that because Charging Party, as part of its pleadings, made allegations that the POAM was failing to represent its members during the last several months before its contract expired, further grounds existed supporting joinder of the POAM to this action.

Charging Party argues in its response to the motion that joinder of the POAM is not necessary as no charges have been levied against the POAM. Furthermore, Charging Party claims that the relief it is seeking can be effectuated without the need of the POAM.

It is clear to the undersigned that the joinder of the POAM is not necessary or required under Rule 157. Charging Party's claims are against the Respondent alone. While Charging Party does in fact make allegations that the POAM essentially had abandoned the bargaining unit following its defeat in the October election, Charging Party does not allege any violation of PERA against the union nor is it seeking any relief that the POAM can provide. As such, I find

that the relief sought by the Commission could be rendered in full without the inclusion of the POAM as a Respondent.[3]

Motions for Summary Disposition:

Charging Party's motion for summary disposition is brought under Commission Rule 165(2)(f), R 423.165(2)(f), and claims that, except for the remedy, there is no genuine issue of material fact and it is entitled to judgment in its favor by law. More specifically, Charging Party seeks Commission clarification regarding the period between an election and certification of an incoming union and the expiration of a valid collective bargaining agreement between an employer and a defeated incumbent union.

Respondent's cross-motion for summary disposition, brought under Commission Rule 165(2)(d), R 423.165(2)(d), argues that dismissal of the charge is appropriate as Charging Party has failed to state a claim under PERA for which relief could be granted.

Discussion and Conclusions of Law:

Section 9 of PERA guarantees, among other rights, the right of public employees to bargain collectively with their public employers through representatives of their own free choice. Accordingly, and as the Commission so often repeats in representation cases, the fundamental function of the adoption of PERA in 1965 was to recognize and codify the right of public employees to collectively designate an exclusive bargaining agent through which their employer must deal with the workforce collectively, rather than individually. See *Taylor Sch Dist*, 30 MPER 70 (2017); *Three Rivers Community Schools*, 28 MPER 65 (2015); *City of Detroit*, 23 MPER 94 (2010). Here the bargaining unit now represented by Charging Party exercised the above right in October of 2017 by affirmatively choosing to replace the POAM with Charging Party.

Section 10(1)(a) of PERA makes it unlawful for a "public employer or an officer or agent of a public employer" to "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed" by PERA. It is well established that a determination of whether an employer's conduct violates Section 10(1)(a) is not based on either the employer' s motive for the proscribed conduct or the employee' s subjective reactions thereto. *City of Greenville*, 2001 MERC Lab Op 55, 58. Instead, the test is whether a reasonable employee would interpret the statement as an express or implied threat. *Id.;* See also *Eaton Co Transp Auth*, 21 MPER 35 (2008). In order to properly make such a determination, both the content and the context of the employer's statement must be examined. *City of Inkster*, 26 MPER 5 (2012); *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47.

An employer violates Section 10(1)(e) of PERA when it refuses to collectively bargain with the its employees' authorized bargaining representative.

[3] I note that under Article 2, Paragraph L of the contract between the Respondent and the POAM, the POAM did agree to indemnify the Respondent in cases of challenges regarding the Respondent's payment of dues to the POAM. However, that indemnification language would represent a claim between Respondent and the POAM and is separate and distinct from the claims being asserted by Charging Party in the present matter.

Charging Party claims that the Respondent's actions and posture towards it, following its certification as the authorized bargaining representative, including the continued transmission of dues payments to the POAM, amounts to a refusal to recognize it under Section 11 of PERA in violation of Section 10(1)(e). Charging Party's allegations of a Section 10(1)(a) violation are based on the notion that the Respondent's actions with it as well as the continued transmission of dues to the POAM "disrupted employee's rights." The preceding claims notwithstanding, the factual allegations made by Charging Party reveals that, except for the dues payments Charging Party sought and demanded, the Employer did in fact recognize Charging Party and allowed it to act freely in representing the bargaining unit in various matters before the contract between POAM and the Respondent had expired; i.e., the Employer's request to and subsequent bargaining over changes to the healthcare and the continued allowance of Charging Party's representatives to participate in investigatory meetings. Charging Party's pleadings are devoid of any actual factual allegation to support its claim and rather establish that the Respondent acted in accordance with PERA and established Commission precedent.[4]

As our Commission has repeatedly stated, when a representation election is conducted during the term of an existing contract, that contract continues in effect until its expiration even if the incumbent representative is defeated. See *Ionia Co Road Comm*, 1969 MERC Lab Op 82; *Garden City Pub Schs*, 1974 MERC Lab Op 364; *Jonesville Bd of Ed*, 1980 MERC Lab Op 891; *Hartland Consolidated Schools*, 19 MPER 81 (2006). Despite the enforceability of a predecessor's contract following a new representative's certification, a public employer nonetheless has a duty to bargain with that new representative. *City of Romulus*, 1988 MERC Lab Op 504; *Hartland Consolidated Schools*, supra.

Included within such enforceability of pre-existing and unexpired contracts following elections is the right of the incumbent union to continue receive dues payments provided for under said agreements. See *West Bloomfield Pub Schs*, 1985 MERC Lab Op 24, citing *Fender Musical Instruments*, 175 NLRB 873, 874 (1969), motion for reconsideration denied 1985 MERC Lab Op 238; See also *Hartland Consolidated Schools*, supra. In *West Bloomfield Pub Schs*, 1985 MERC Lab Op 24, at 26, the Commission held that "any certification by the Commission prior to the contact term is issued by consent of the parties and in anticipation of the contract expiration."

Additionally, an outgoing union is obligated to process to completion grievances initiated under the contract despite its being replaced by another union. *Quinn v POLC*, 456 Mich 78 (1998). While the outgoing union remains obligated to complete grievances, the *Quinn* Court did note in a footnote that:

> [T]hat nothing in this opinion should be construed as preventing the new representative from *voluntarily* assuming pursuit of existing grievances, provided

[4] I note that Charging Party spent considerable time within each of its pleadings painting a picture of abandonment by the POAM following its loss to Charging Party, even going so far as to allege that such abandonment is the "standard operating procedure of the incumbent parent organization-union." However, no charge, either by Charging Party or an individual member of the bargaining unit, has been levied against the POAM. Rather, Charging Party took great lengths, in its response to Respondent's motion to join POAM, to clarify that it was not pursuing a charge against the POAM.

> the aggrieved employee or employees consent to the new representative's assumption of the duty. [Emphasis in original.]

The Commission in *Wayne County and Wayne County Sheriff*, 22 MPER 36 (2009), recognizing the significance of the Court's footnote in *Quinn*, considered whether to overrule an earlier decision in *Huntington Woods*, 1992 MERC Lab Op 389, in which a divided Commission had held that a newly certified union was precluded from seeking retroactive contractual benefits to a point in time preceding the certification date.[5] In *Wayne County*, the Commission, in expressly reversing *Huntington Woods* in light of *Quinn v POLC* stated*:*

> We accept that ruling as controlling and see no conceptual distinction between a newly certified union representing some members of the bargaining unit on issues arising before the new agent's certification and representing the entire unit on such issues. We find that the *Huntington Woods* rationale does not survive the superseding Supreme Court decision in *Quinn*. We see no reason why a currently certified bargaining agent should be barred from representing its bargaining unit on any currently unresolved disputes.

At no point within Charging Party's pleadings does it make any allegation that the Respondent's actions violated any of the above cited, and still good, Commission precedent. Rather, what has been alleged is that the Respondent sought to bargain with Charging Party and eventually reached an agreement regarding changes to healthcare prior to the expiration of the POAM's contract with the County. Furthermore, there is no factually supported allegation that Respondent refused or otherwise attempted prevent Charging Party from representation of bargaining unit members, after its certification, as it relates to discipline and investigations into alleged misconduct. While Herppich's November 4, 2016, letter may not have been a completely accurate statement of the law as it related to POAM's status following decertification or that of Charging Party's ability and right to assume some duties and roles, as stated above, Charging Party failed to allege any actual action by the County that violated the rights of Charging Party as the incoming bargaining representative during the interim period between certification and prior contract expiration.

Moving on to the issue of dues, Charging Party is asking this ALJ to overturn longstanding NLRB and Commission precedent and cites to *AFSCME Council 25 v Wayne County*, 152 Mich App 87 (1986); *lv den*, 426 Mich 875 (1986), as the "proper legal standard to adjudicate" its above claims. Specifically, Charging Party quoted the following from page 98:

> It is impossible to promulgate specific administrative rules in anticipation of every conceivable situation prior to the enforcement of a statute. An administrative agency may thus announce new principles of law through

[5] At issue within *Wayne County and Wayne County Sheriff*, an election preceding, giving rise to the application and consideration of *Quinn v POLC*, was whether a petitioning union seeking to represent an Act 312 eligible unit and the sought unit, could be harmed by *Huntington Woods* precedent, because "continued application of the *Huntington Woods* rule would preclude the new representative from demanding retroactivity during bargaining, and would preclude an Act 312 arbitration panel from considering such a demand if the dispute ultimately reached interest arbitration proceedings.

> adjudicative proceedings in addition to doing so through its rule-making powers. The effective administration of a statute by an administrative agency cannot always be accomplished through application of predetermined general rules. Rather, some principles of interpretation must evolve in response to actual cases in controversy presented to the agency. An administrative agency must therefore have the authority to act either by general rule or by individual order. The decision of an agency to promulgate law through rule-making or through adjudication rests within the sound discretion of that agency even where a rule breaks from past decisions or where previously established rules are reconsidered. [Internal citations omitted.]

However, Charging Party has not cited to any recent change in statutory law or precedent, Commission or otherwise, that would prompt this ALJ to unilaterally overturn established Commission case law. Such a decision is one reserved for the Commission.

Additionally, Charging Party argues that the established legal obligation for the Employer to continue transferring dues to the incumbent union despite losing the election has the "unintended collateral effect of keeping the deputies and dispatchers out of the FOLPLC's Legal Defense Plan, which takes effect immediately upon recognition and payment of dues." While the preceding may be true, under the rationale of *West Bloomfield Pub Schs,* Charging Party was aware of and consented to just that outcome when it petitioned for the unit and campaigned under that promise. Even ignoring the assumed awareness and consent, Charging Party's demand for dues prior to the expiration of the POAM contract, forces the Employer to make a choice between longstanding established precedent or risking legal action, either before the Commission or the Courts if it chooses to disregard the valid agreement between it and the POAM. More simply put, Charging Party knew the rules of the game when it decided to play the way it did, and the Employer followed established Commission precedent with respect to the dues, and rewarding the former and/or punishing the latter for their actions would be manifestly unjust.

I have considered all other arguments as set forth by the parties and have determined such does not warrant any change in the outcome. As such, and for the reasons set forth above I recommend that the Commission issue the following order:

RECOMMENDED ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 9, 2018