STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

MERC Case No. C16 K-126

-and-

AFSCME COUNCIL 25, LOCAL 3317,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Wayne County Assistant Corporation Counsel, Bruce Campbell, and The Mike Cox Law Firm, PLLC, by Michael A. Cox and Joseph P. Furton, Jr., for Respondent

Jamil Akhtar, for Charging Party

DECISION AND ORDER

On September 10, 2018, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 27, 2018

[1] MAHS Hearing Docket No. 16-033168

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY,
Respondent-Public Employer,

Case No. C16 K-126
Docket No: 16-033168-MERC

-and-

AFSCME COUNCIL 25, LOCAL 3317,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Wayne County Assistant Corporation Counsel, Bruce Campbell, and The Mike Cox Law Firm, PLLC, by Michael A. Cox and Joseph P. Furton, Jr., for the Respondent-Public Employer

Jamil Akhtar, for the Charging Party-Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

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, filed on November 28, 2016, 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). Based upon the entire record, including the transcripts of hearings held on October 4, 2017 and November 6, 2017, the exhibits admitted into the record and post hearing briefs, I make the following findings of fact, conclusions of law and recommended order.2

Procedural History and Unfair Labor Practice Charge:

For a more detailed procedural history in this matter and the related charges see C14 G-079A; Docket No. 15-037169-MERC and C16 B-015; Docket No. 16-003534-MERC, both issued this same day.

On November 28, 2016, AFSCME Council 25, Local 3317 ("Charging Party" or the "Union"), filed the present charge, discussed more fully below.

On August 21, 2015, the County and the State Treasurer entered into a Consent Agreement

2 The parties stipulated that exhibits entered into during this proceeding's hearing as well as the hearings for related cases C14 G-079A; Docket No. 15-037169-MERC and Case No. C16 B-015; Docket No. 16-003534-MERC may be considered in total, where relevant, for each of the individual cases.

pursuant to PA 436. Under the terms of that agreement and consistent with Section 8(11) of Local Financial Stability and Choice Act, 2012 PA 436 (PA 436), effective September 20, 2015, the County would no longer be subject to Section 15(1) of PERA for the term of the agreement. The effective import of the Consent Agreement was that the County was under no obligation to bargain in good faith while the agreement remained in effect.

Sometime in early October of 2016, Wayne County CEO Warren Evans wrote to the State Treasurer and indicated that the County was in position to be removed from the Consent Agreement.

On October 18, 2016, the State Treasurer sent a letter to the County which stated in part:

> I am in receipt of your letter dated October 6, 2016, in which you certified that Wayne County is eligible for release from the Consent Agreement entered into on August 21, 2015. I am pleased to agree with your certification. Specifically, I find that the county has satisfied the Consent Agreement terms found in Subsections 11(a)(1)-(3) of the Agreement. As a result of this determination, the County has successfully completed and is hereby released from its Consent Agreement.

The above purported release by the State Treasurer at first appeared, and as argued by Local 3317, to indicate that the County's exemption from its obligations under Section 15(1) of PERA had now to come to end and that it would need to begin bargaining with Charging Party. The County objected to the preceding, arguing that by the Consent Agreement's express terms and the timing of its budget adoption that it would remain exempted from Section 15(1) until October 1, 2019, later amended to October 1, 2018.

On November 22, 2016, the County filed a Position Statement and Motion to Dismiss in Case Nos. C14-G-079A and C16 B-015.

On November 28, 2016, Local 3317 filed the present charge against the County, Case No. C16 K-125, claiming that with the apparent October 18, 2016, release from the Consent Agreement, the County's continued refusal to bargain was in violation of PERA. In addition to the above failure to bargain allegations, Local 3317 also alleged violations of Section 10(1)(a), (b), and (c), relating to the County's termination of dues collection in August 2016, the imposition of modified employment terms in September 2016, and attempts to interfere with the administration of the Union.

On December 21, 2016, I received notice from the County that it wished its motion to dismiss filed in Case Nos. 14 G-079A and C16 B-015 to apply to Case No. C16 K-125 as well. On January 13, 2017, I received Local 3317's response to the County's motion. Oral argument was heard on January 20, 2017, in Detroit, Michigan.

On February 9, 2017, the County filed a Motion to Enforce Commission Order Dismissing Act 312 or in the Alternative, Motion to Dismiss Union's Request for Mediation Pursuant to a Consent Agreement between Wayne County and the State of Michigan and PA 436.[3] As part of its

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3 As discussed in the other companion cases issued this same day, the Commission, in Case No. D14 A-0018, *Wayne County*, 29 MPER 26 (2015), dismissed a previously filed petition for Act 312 arbitration after the County had entered into the Consent Agreement with the State Treasurer.

motion, the County also argued for dismissal of the four then-pending unfair labor practice charges against it.

In an interim order denying the County's motion to dismiss dated March 3, 2017, I held that the terms of the Consent Agreement notwithstanding, the County's duty to bargain was reinstated as of the October 18, 2016, letter from the State Treasurer.

On May 12, 2017, the Commission issued its Decision and Order in D16 K-0900 finding that PA 436 and PERA gave the State Treasurer authority to draft a consent agreement where the suspension of the duty to bargain could remain in effect past the agreement's release date. As such the Commission held that the County's duty to bargain was suspended until October 1, 2018, thereby dismissing the Union's request for mediation.

Accepting the Commission's decision that the County's duty to bargain remain suspended until October 1, 2018, as controlling, the limited questions addressable by the undersigned are those allegations brought under Sections 10(1)(a), (b) and (c).

Findings of Fact:

My findings as set forth in Case Nos. C14 G-079A; Docket No. 15-037169-MERC and C16 B-015; Docket No. 16-16-003534-MERC, both issued this same day, unless otherwise indicated, are incorporated by reference herein, and will not be repeated except as necessary.

As indicated above, the County and the State Treasurer entered into a Consent Agreement on August 21, 2015. Per the terms of that agreement and in accordance with Section 8(11) of PA 436, the County's duty to bargain under Section 15(1) of PERA would be suspended. Section 2(c) of the agreement provided:

> Beginning 30 days after the effective date of this agreement, if a collective bargaining agreement has expired, the County Executive may exercise the powers prescribed for emergency managers under section 12(1)(ee) of Act 436 to impose by order matters relating to wages, hours, and other terms and conditions of employment, whether economic or noneconomic, for County employees previously covered by the expired collective bargaining agreement. Matters imposed under this section 2(c) will remain in effect for those employees until a new collective bargaining agreement for the employees takes effect under 1947 PA 336, as amended, MCL 423.201 to MCL 423.217, or other applicable law. The authority described in this section 2(c) is in addition to the powers retained and granted under sections 1 and 2(a).

The County was subsequently able to reach collective bargaining agreements with each of its collectively bargained units except Charging Party. On September 21, 2015, because there was no valid and effective collective bargaining agreement effective between the parties, the County, pursuant to Section 2(c) of the Consent Agreement, imposed the County's Employment Terms (CET) on Local 3317.4 The CET stated in Article 1.01:

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4 To the extent that Charging Party is challenging the imposition of the CET, such claims are first and foremost barred by PERA's six-month statute of limitations. Moreover, in no less than three separate decisions, the Commission determined

> These County Employment Terms are applicable to all employees represented by the Wayne County Law Enforcement Supervisory Local 3317, AFL-CIO, AFSCME Council 25 (hereinafter referred to as the "Union"), until modified by the County Executive of the County of Wayne, Michigan (hereinafter referred to as the "CEO") or replaced by a successor collective bargaining agreement.

Article 6.01 stated that the County would no longer deduct "Union Membership dues, and or any other fees levied for any bargaining unit member's paycheck on behalf of the Union." However, as will be discussed below, the County refrained from terminating dues collection until the following year.

The wage rates set forth in the CET were identical to those set forth in the parties' prior and expired collective bargaining agreement. The medical insurance employee share contribution was set at 25%. With respect to retirement changes, the CET tracked with the County's April 2015 bargaining proposal in so far as it included a pension multiplier of 1.25% with a lookback of ten years; a 7% employee contribution for defined benefit plans 1, 3, 5 and 6 for those making less than $52,155.00 annual wage and an 8% contribution level for those with a higher annual wage; and a 4% employee contribution for those in the defined compensation plan. The CET also made other changes to the employment terms of Charging Party's members; however, as indicated above, any challenge to the imposition of the CET in September 2015 is untimely for purposes of this proceeding.

With respect to dues collection, both Director of Labor Relations Kenneth Wilson and Deputy County Executive Richard Kaufman admitted, at various times through these related proceedings, that Local 3317 was the only bargaining unit for which the County no longer collected dues. Both Wilson and Kaufman also indicated that the reason why the County did not immediately terminate dues collection upon the adoption of the CET on September 21, 2015, was because at that time there was a lawsuit pending before Judith E. Levy in the Eastern District of Michigan, Southern Division, Case No. 15-13288-CV, which, among other things, was challenging the imposition of the CET in federal court.[5] Kaufman, when explaining the delay, testified:

> We would have stopped collecting the dues immediately on imposition in order to save some administrative fees, but you filed a case in court that raised an objection to that with respect to the court. We had the issue before them. We thought it was a sign of respect to the court to let the court decide the validity of the County imposed terms before we took that action, so we waited for the federal court judge to make that decision.

On July 21, 2016, Judge Levy issued a written decision granting the County's motion to dismiss and dismissing the case with prejudice.

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that, as of late September 2015, the County's duty to bargain under Section 15(1) was suspended by nature of the Consent Agreement. See Case Nos. D14 A-0018, D16 K-0900 and D16 K-0900 on reconsideration. For these reasons, the original terms of the CET will not be discussed herein except to address Charging Party's claims, where timely, that the County's eventual modification of the CET in September of 2016 or other actions related thereto were in some way unlawful under PERA.

5 See Case No. C14 G-079A for a more detailed treatment of *AFSCME Council 25 v Charter County of Wayne,* 2016 WL 3924114.

Wilson testified that following the above dismissal of the case before Judge Levy, he received instructions from Kaufman to terminate dues deduction. Kauffman claimed that the ultimate decision to terminate collection occurred as a result of discussions between several people including himself, Wayne County CEO Warren Evans, Wilson and others.

Sergeant Robert Keyes, Local 3317 President, when asked about the collection of union dues, testified:

> It was stopped. Out of the blue I got, started getting phone calls from members asking why it wasn't being taken out of their paychecks.

Sergeant Jacques Belanger, Local 3317 Executive Board Member, received a letter dated August 10, 2016, from a County Deputy Chief Financial Officer, which stated:

> We are advising you that, effective with the payroll of August 19, 2016, the County will no longer deduct Union Membership dues from bargaining unit members' pay check on behalf of the Union.

Belanger testified that prior to the receipt of the above letter, neither he nor any other Local 3317 Officer receive any notice that the County would terminate dues collection. Charging Party asserts in its post-hearing brief that the County "bypassed the leadership of the Union and communicated directly with Local 3317 members" with respect to the termination of dues check-off by sending letters to the unit members' home addresses. However, the record as established does not support such a finding. Rather, the only fact clearly evidenced by the record is that Belanger received the above letter. Absent evidence that other unit members received the letter as well, the undersigned cannot make such a finding.6 Both Keyes and Belanger testified that the termination of dues collection by the County had an impact on the Union as it had to now determine how to collect dues from its members on its own. Keyes further claimed that following the County's termination of the dues collection, approximately 10% of Local 3317's members stopped and/or refused to pay dues directly to the Union.

On September 23, 2016, the County, by way of Evans issued an Order Amending County Employment Terms for Local 3317 (Amended CET). The Amended CET's modifications included, but were not limited to, changes in various time frames, language changes to seniority, transfer, and promotion provisions. Additionally, Sergeants in the unit at the first step on the wage scale received a raise of $0.99 a year.

Discussion and Conclusions of Law:

As indicated above, by nature of the Commission's decision in Case No. D16 K-0900, the County's duty to bargain is suspended until October 1, 2018, as such any allegation predicated on a failure of the County to bargain with Charging Party will not be considered. What remains of Charging party's allegations are challenges to the County's termination of dues collection in August 2016 and the

6 During the examination of Kaufman in Case No. C16 B-015, Charging Party's counsel appeared to attempt to elicit testimony from the Deputy CEO that the County sent a letter to all members of the bargaining unit. However, Kauffman's testimony established that he was not aware how the County went about notifying the Union of the termination of dues collection and that he relied on Wilson, as the Direction of Labor Relations to handle such; Wilson's testimony was devoid of any facts regarding the same.

imposition of the Amended CET in September 2016. I note that while Charging Party's original filing alleged violations of Section 10(1)(a), (b) and (c) with respect to the preceding actions, its post-hearing brief analyzes the County's actions from the position of a Section 10(1)(c) violation. 7 Notwithstanding Charging Party's failure, either intentional or otherwise, to articulate specific 10(1)(a) or (b) allegations as originally pled, I will address the facts presented above with respect to such possible violations.

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. While anti-union animus is not a required element to sustain a charge based on a Section 10(1)(a) violation, a party must still demonstrate that the complained of actions by an employer have "objectively" interfered with that party's exercise of protected concerted activity. *Macomb Academy*, 25 MPER 56 (2012). 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 determine what actions violate Section 10(1)(a) of PERA, in so far as they can be seen to restrain or coerce a public employee in the exercise of his or her rights under the Act, it is necessary to consider the actual actions in the context in which they occurred. See *City of Ferndale*, 1998 MERC Lab Op 274, 277; *New Haven Community Schools*, 1990 MERC Lab Op 167, 179. Furthermore, it is the chilling effect of a threat and not its subjective intent which PERA was created to reach. *University of Michigan*, 1990 MERC Lab Op 272.

Section 10(1)(b) of PERA provides, in relevant part, "It shall be unlawful for a public employer or an officer or agent of a public employer ... to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization." This section protects the independence of labor organizations by prohibiting public employers from dominating unions or, to a lesser degree, interfering with their administration.

Section 10(1)(c) of PERA makes it unlawful for a public employer to discriminate against a public employee in retaliation for engaging in protected activity. In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, a charging party must show, in addition to an adverse employment action: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of

7 Furthermore, in the charge as filed, Charging Party alleged, as part of an interference claim, that the County had spread "rumors that there will be a 20% reduction in salary in order that the Union will have to repay the County's expense for the litigation." However, the record is devoid of any testimony and/or evidence of such a claim.

the evidence as a whole. *Id* at 74; *City of Grand Rapids (Fire Dep't),* supra.

In both the related cases issued this same day, Case Nos. C14 G-079A and C16 B-105, I have held that, when considering Charging Party's allegations in the totality of the circumstances surrounding the County's actions, there is no evidence upon which to conclude that that the County engaged in regressive bargaining in violation of the Act or that it failed to bargain in good faith in the thirty-day period from the Consent Agreement's execution to when the County's duty to bargain became suspended. It is with a continued view of the totality of the circumstances that I make the conclusions as to the present charge as set forth below.

Addressing first the County's decision to terminate dues deduction in August 2016 pursuant to the original CET imposed in late September 2015, I am mindful that under Commission precedent, first established in *Warren Consolidated Sch*, 1975 MERC Lab Op 129, and the progeny of cases that have succeeded it, that a public employer may legally discontinue dues deductions after the expiration of the collective bargaining agreement. See also *City of Detroit*, 22 MPER 41 (2002); *City of Dearborn*, 1987 MERC Lab Op 61. At the time of the Commission's decision, its policy regarding dues deduction was in line with federal labor law precedent as established by the National Labor Relations Board (NLRB) in *Bethlehem Steel Co,* 136 NLRB 1500 (1962). However, in 2012, the NLRB in *WKYC-TV*, 359 NLRB No 30 (2012) overturned *Bethlehem Steel Co*, now deciding that dues deduction requirements continue in effect upon the expiration of a collective bargaining agreement which an employer must continue to honor. While the NLRB's treatment of dues deduction in *WKYC-TV* was later overturned on procedural grounds in *NLRB v Noel Canning*, 134 S. Ct. 2550 (2014), by nature of the fact that the two members of the Board at the time of that decision were invalid appointees, the Board again addressed the issue in *Lincoln Lutheran of Racine*, 362 NLRB No 188 (2015). In *Lincoln*, in language similar to *WKYC-TV*, the Board again held that an employer's obligation to continue dues deduction continues post contract expiration. However, as it is the belief of the undersigned that it is the role of the Commission, and not the Administrative Law Judges which act on its behalf, to make decisions regarding the overturning of long standing precedent, I decline to address whether the Board's reversal as it relates to post contract expiration dues collection should warrant such a finding here.8

To the extent that Charging Party implicated Sections 10(1)(a), (b) and (c) of PERA in its charge, understanding that the Commission has long-held that such a termination is not unlawful per se, it stands that such a termination could not violate either (a) or (b). With respect to (c) however, Charging Party argues that the County was angry that the Union continued to press litigation and that terminating the dues deduction was retaliatory. While the timing could appear suspect, Charging Party was not able to provide any other credible or tangible evidence that the County harbored anti-union animus or otherwise acted with unlawful motive. Though I would concede that direct evidence is often times elusive in Section 10(1)(c) cases and that often the unlawful motive is proven through indirect evidence, given my holdings in the Case Nos. C14 G-079A and C16 B-015, issued concurrent with this, and considering the facts presented herein, I cannot conclude that the Union met its burden in establishing either that the County harbored anti-animus and/or that protected activity was the motivating cause of the dues collection termination. To do so in this situation I believe would be to

8 To this last point, I do note that in both *WKYC-TV* and *Lincoln*, the Board, in recognizing that its actions were an extreme departure from longstanding labor precedent, chose to make their rulings prospective in nature only. Accordingly, should the same conclusion be reached by the Commission with respect to its long-standing precedent, it would stand that such a decision would only be reasonable prospectively.

inappropriately engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*. Moreover, were I to conclude that the timing alone was enough to establish a *prima facie*, the County's witnesses were steadfast in their claims that the decision to terminate the deduction was done to save administrative costs and because they were under no obligation to continue by nature of the lack of a contractual obligation to do so with Local 3317. Furthermore, Kaufman testified that it was not until after Judge Levi issued her decision that the County actually moved to terminate the practice. For these reasons I reject Charging Party's claim that the County's decision to terminate dues deduction was predicated on an unlawful motive in violation of the Act.

Addressing next Charging Party's claims that the imposition of the Amended CET in September 2016 was unlawful under PERA, I first note that Charging Party took effort in establishing that the Consent Agreement appeared to indicate in Section 2(c) that the terms imposed could only be replaced by a successor bargaining agreement. However, the Consent Agreement is an agreement between the State Treasurer and the County and any violation thereof is not a question implicating PERA. Put another way, whether the Consent Agreement was violated is not a question relevant to this proceeding, rather, whether the Amended CET was imposed for unlawful reasons is the appropriate inquiry.

When considering the County's imposition of the Amended CET under Section 10(1)(a), (b), and/or (c) of PERA, Charging Party's arguments focus almost entirely on animus and Section 10(1)(c). To the extent that the issues touching on (a) and (b) are discussed, along with the termination of dues collection, Charging Party presents such as proof of animus. However, as indicated above, I have already found that the decision to terminate dues deduction did not violate the Act, and as such will not consider such as indicative of establishing animus. Here too, Charging Party has failed to provide credible or tangible evidence that the County harbored anti-union animus or otherwise acted with unlawful motive in implementing the Amended CET. Finally, as the presiding ALJ over the entirety of the unfair labor practice charges filed by Charging Party against the County from 2014 on, Case Nos. C14 G-079, C14 G-079A, C16 B-015, and the present matter, C16 K0125, my overarching opinion can be summed up as follows – While Charging Party has continually shouted fire, it has failed to prove the existence of such or offer conclusive evidence of either smoke and/or heat that would allow one to reasonably conclude that there is a fire or that one ever existed.

I have considered all other arguments as put forth by the parties and conclude such does not warrant a change in my findings. As such I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by AFSCME Council 25, Local 3317 against Wayne County in Case No. C16 K-125 be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 10, 2018