STATE OF MICHIGAN
CIVIL SERVICE COMMISSION
HEARINGS, EMPLOYEE RELATIONS, AND MEDIATION

ASSOCIATION OF STATE EMPLOYEES IN MANAGEMENT, MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES, AND MICHIGAN STATE POLICE COMMAND OFFICERS ASSOCIATION

and

OFFICE OF THE STATE EMPLOYER

HERM 2010-059

Mailing Date: October 5, 2010

Ref. Nos.: 2010-00539
2010-00540
2010-00541
2010-01161
2010-01308

UNFAIR LABOR PRACTICE DECISION

Hearing Officer: William P. Hutchens

Representatives:

Charging Parties: Association of State Employees in Management
Thrun Law Firm, P.C., by Robert G. Huber

Michigan Association of Governmental Employees
Fraser, Trebilcock, Davis & Dunlap P.C., by Brandon W. Zuk

Michigan State Police Command Officers Association
Hankins & Flanigan, by Dan E. Hankins

Respondent: Michael Orrin King, Jr., Assistant Attorney General
Margaret A. Nelson, Assistant Attorney General

CASE SUMMARY

KEY WORDS: **Bargain in Good Faith, Coercion, Discrimination, Duty to Bargain, Interference, and Meet and Confer**

The respondent is found to have violated Civil Service Rules 6-11.1, *Coercion,* 6-11.2, *Interference,* and 6-11.3, *Discrimination*. But for the 1998 amendment to Civil Service Rule 6-11.4, *Refusal to Bargain in Good Faith,* a finding of violation of that rule would have been made as well, but the employer's obligation to meet and confer was removed from that rule at that point. The respondent is directed to pay the charging parties reasonable attorney fees as directed in the opinion and to post the attached notice in conspicuous places where notices would normally be seen by members of the charging parties. In addition, the respondent is to post the notice on its website. The notice shall be posted for one year from the date of its initial posting.

This CASE SUMMARY is not an official part of the decision.

Pursuant to the provisions of the Civil Service Commission's Employee-Employer Relations Rules (ERR) and the attendant regulation on Unfair Labor Practices, this matter came for hearing on May 18, 2010, at the Capitol Commons Center, 400 South Pine Street, Lansing, Michigan. The parties were given full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and present oral argument. Closing briefs were submitted by June 28, 2010; reply briefs were submitted by July 19, 2010, at which point the record was closed.

THE ISSUE

Has the respondent violated Civil Service Rule 6-11, *Unfair Labor Practices for the Employer*?

THE FACTS

In October 2007, the respondent in this case, the Office of the State Employer, through the meet and confer process as described in Civil Service Rule 6-2.2, *Limited-Recognition Organizations Authorized*, reached a consensus agreement as described by Civil Service Regulation 6.06, *Coordinated Compensation Plan*, with the charging parties in this case, the Association of State Employees in Management (ASEM), the Michigan Association of Governmental Employees (MAGE), and the Michigan State Police Command Officers Association (MSPCOA). [See Joint Exhibit #8.] The consensus agreement represented the agreed-upon positions of the parties to be submitted to the Civil Service Coordinated Compensation Panel (CCP) for fiscal years 2009, 2010, and 2011. Ignoring for a moment the insurance and other provisions set forth in that agreement, the parties agreed to recommend to the CCP in the first year no general wage increase, in the second year a 1 percent general wage increase, and in the third year a 3 percent general wage increase. This pattern mirrored the agreements that the respondent had negotiated with employees in exclusively represented bargaining units for the same time periods.

The parties abided by the consensus agreement until the CCP hearings for the fiscal year of 2011. On December 21, 2009, Sharon Bommarito, the director of the Office of the State Employer, sent a letter to the CCP (Joint Exhibit #2, Attachment 3) repudiating the terms of that agreement. In the last paragraph of that letter, Director Bommarito stated:

> . . . given the significant change in circumstances, it is the Employer's position that there should be no compensation increases for MSCs and NEREs only, for FY 2011. The Employer will present exhibits and testimony from the State Budget Office and the Department of Treasury in support of this position statement.

The penultimate sentence of the first paragraph of the consensus agreement reads as follows:

> The Parties further agree that, except as provided in this Consensus Agreement, they will not submit any proposals to the Employment Relations Board for such employees for Fiscal Years 2009, 2010, or 2011 without the mutual written agreement of all Parties. (Joint Exhibit #8)

The decision on the part of the employer not to support the recommendation for a 3 percent general wage increase for nonexclusively represented employees (NERE) only for the fiscal year 2011 was a unilateral decision on its part. There was no mutual written agreement executed with the other parties to the consensus agreement, as referenced above. On that basis, the three limited-recognition organizations (LROs) referenced above filed unfair labor practice charges with this office on February 1, 2010. The CCP hearing was held on February 4, 2010 (Charging Party ASEM Exhibit #2).

The charge filed by charging party ASEM is reference number (Ref. No.) 2010-00539, dated February 1, 2010. (Joint Exhibit #2) The charge filed by charging party MAGE is Ref. No. 2010-00540, dated February 1, 2010. (Joint Exhibit #3) The charge filed by charging party MSPCOA is Ref. No. 2010-00541, received February 1, 2010. (Joint Exhibit #4) Subsequently, due to what they viewed as a similar repudiation by the respondent of the consensus agreement before the Civil Service Commission on February 10, 2010, charging parties ASEM and MSPCOA filed unfair labor practice charges regarding that conduct. The subsequent ASEM charge is Ref. No. 2010-01161, received March 5, 2010. (Joint Exhibit #5) The subsequent MSPCOA charge is Ref. No. 2010-01308, received March 16, 2010. (Joint Exhibit #6) Charging party MAGE did not file a separate subsequent charge based upon the conduct of the employer before the Civil Service Commission. It instead on March 11, 2010, filed an amendment to its original charge incorporating that conduct into its original charge. The original charge and the amendment can be found together at Joint Exhibit #3.

On April 16, 2010, the respondent filed a motion to sever the subsequent charges from the original charges and a motion to dismiss the charges altogether. (Respondent Exhibit #1) Responsive pleadings were received from the charging parties by May 7, 2010. After conducting a telephone pre-hearing conference with counsel for all parties, the undersigned determined to take the motions and responsive pleadings under advisement and proceed to the scheduled hearing of May 18, 2010.

At the hearing, the late Dale Threehouse, at the time MAGE president, testified that as President of MAGE, he has been involved in the CCP hearing process since 2004. He offered several past consensus agreements that MAGE has entered into with the employer (Charging Party MAGE Exhibits #s 2-6) and indicated that MAGE has always considered itself to be bound by such agreements. He stated that the purpose of entering into such agreements was for the limited-recognition organizations and the employer to present a unified front to the CCP and that generally such agreements were patterned after collective bargaining agreements that the

employer had negotiated with exclusively-represented bargaining unit members and their unions. He stated his belief that no limited-recognition organization has ever violated the terms of a consensus agreement during the term of the agreement. (Tr., p. 38)

Threehouse testified that the agreement here in dispute followed several meetings that the LROs had with the employer in 2007, in which the employer had expressed an interest in increasing employees' share of healthcare costs. He stated that the employer wanted to increase health insurance premiums, increase the co-pays that employees would pay for drugs and office visits and increase the deductibles associated with the State Health Plan. The LROs were told that these issues were being discussed with the exclusive representative unions in bargaining during that bargaining cycle. Threehouse testified that the employer then met with MAGE, ASEM, and the MSPCOA, and presented the consensus agreement here in dispute to the LROs and told them that they would like them to sign it immediately. He indicated that the employer was represented in that meeting by Thomas Hall, the deputy director of the Office of the State Employer. He could not recall if the director of the Office of the State Employer (OSE) at the time, M. Scott Bowen, was present at the meeting or not. The consensus agreement was signed as presented to the LROs by the employer. (Joint Exhibit #8)

For the CCP hearings for the fiscal years 2009 and 2010, all parties abided by the agreement, Threehouse testified. He stated that in late 2009, there had been discussions between the LROs and the employer regarding the 2011 fiscal year and the employer's desire for concessions. He stated that various avenues of achieving savings had been discussed with the employer, but then several scheduled meetings with the employer were abruptly canceled. Threehouse stated that on December 21, 2009, the employer called in MAGE, ASEM, and MSPCOA, for a meeting. At that meeting, Threehouse expected that issues for the current fiscal year would still be discussed. He stated that the current OSE director, Sharon Bommarito, was present at the meeting in addition to Thomas Hall. At the meeting, Director Bommarito asked the assembled LROs what they would think if the employer failed to recommend the scheduled 3 percent general wage increase solely for nonexclusively represented employees. After receiving unfavorable reaction from the assembled LROs and being told that the employer should live up to its agreements, Bommarito told the LROs that was what they were thinking of doing and ended the meeting.

Later that same day, December 21, 2009, Bommarito sent a letter to the CCP (Joint Exhibit #10) recommending that the CCP not award nonexclusively represented employees the previously agreed-to recommendation for a 3 percent general wage increase for fiscal year 2011.

Threehouse stated that he attended the CCP hearing. The employer, he stated, was represented by Thomas Hall. Hall, he stated, recommended to the CCP that NEREs receive no general wage increase for fiscal year 2011. Threehouse stated that the LROs raised vehement objection to the position put forth by the employer at the CCP hearing. Their objections are set forth in Charging Party ASEM Exhibit #2, the transcript of the CCP hearing of February 4, 2010, and will not be

repeated here. Threehouse indicated that it was unfair that the exclusively represented bargaining unit members were still getting the 3 percent general wage increase that they had negotiated with the employer while the employer, who had signed the consensus agreement agreeing to recommend the same 3 percent general wage increase for NEREs, was now recommending against the 3 percent general wage increase, but only for NEREs. He stated that the LROs contended that the Civil Service Commission had a responsibility to nonexclusively represented employees that it had alluded to in the past that all employees would be treated fairly and equitably. (Tr., pp. 45-46)

Following the CCP hearing, the panel issued its proposal to the Civil Service Commission. (Joint Exhibit #11) In that proposal, it stated as follows regarding the consensus agreement and the employer's attempt to void it before the panel:

> The OSE has entered a voluntary, three-year agreement with the LROs providing that it will support the 3% increase for FY 2011. The OSE is under no obligation to enter any such agreements under the meet-and-confer system of labor relations established by the Commission in its rules for NEREs, but it has. The signed agreement explicitly prevents the OSE from offering other proposals without the written consent of the LROs, who have given up rights to petition the Panel and Commission in previous CCP proceedings as a result of the agreement. Allowing this agreement to be overlooked would place the credibility of the CCP process at risk. While defenses could exist to excuse honoring the agreement, the Panel finds that no such defense has been convincingly demonstrated by the OSE. There was no fraud by the LROs in reaching the consensus agreement, no duress, no mistake, no reserved right to rescission or termination. It is assumed that the OSE is arguing a variety of impossibility of compliance, but the record from the hearing weakens such claims.
>
> The LROs are labor organizations recognized under the civil service rules and regulations. The agreements entered between the OSE and LROs within the CCP process bind the parties in this forum, absent an adequate legal basis for them to be disregarded. The Panel, therefore grants the following relief pursuant to the motions filed by the LROs:
>
> - The December 21, 2009 proposal of the OSE is disregarded as improperly filed in light of the OSE's obligations under the consensus agreement.
> - The 3% increase for FY 2011 is treated as the consensus agreement between the OSE and LROs.
> - The motions to limit the rights of OSE to present economic and budget data and responses to the LRO and employee proposals are denied.
>
> While a consensus agreement may bind the parties, it does not bind the Civil Service Commission or this Panel. Consensus agreements are but one of

> many factors that the Panel is instructed to consider. Ultimately, the Panel finds itself weighing the severe budget constraints and the historic primacy of equity in CCP considerations.

The panel went on to weigh the equity of the OSE just having concluded negotiations with four bargaining units that not only affirmed their 3 percent general wage increases for fiscal year 2011, but extended those contracts at the higher pay rates for another year. Recognizing the budget crisis, the panel believed that raises for any classified employees were not justified for fiscal year 2011; to give them to one group while recommending they be denied to another, however, was beyond the panel's ability to comprehend. (Joint Exhibit #11, p. 7)

It therefore recommended to the Civil Service Commission that to the extent that bargaining unit members were being granted their negotiated 3 percent general wage increase for fiscal year 2011, and given the historical importance of equity between bargaining unit members and NEREs repeatedly stated by Civil Service commissioners and OSE directors in the past, that nonexclusively represented employees be granted the same consideration. It therefore recommended the 3 percent general wage increase set forth in the consensus agreement.

The Civil Service Commission met on February 10, 2010. One of the items on its agenda was the recommendation of the CCP. Threehouse testified that he attended the Civil Service Commission meeting. At that meeting, he stated, OSE Director Bommarito urged the commissioners not to grant the 3 percent general wage increase. The LROs, Threehouse stated, voiced their objections to this position by the employer and recommended that the proposal of the CCP be adopted. On a motion to adopt the proposal, he testified, commissioners Keenan and Wardrop voted against the adoption, leaving the Civil Service Commission split 2-2. That split meant that the proposal of the panel would not be adopted and NEREs would not receive the 3 percent general pay increase set forth in the consensus agreement and in the recommendation of the CCP.

On cross-examination, Threehouse was asked if there was any language in the consensus agreement that would specifically prohibit any party to it from putting forth a position contrary to that stated in the agreement to the Civil Service Commission (as opposed to the CCP). He stated that while that was not his understanding of the agreement, there was no such language. The undersigned would note that it apparently was not the understanding of the CCP, either, if one reviews the language quoted from their proposal set forth above. The CCP, which has reviewed many such consensus agreements, was of the opinion that such agreements bind the parties before the panel as well as the Civil Service Commission.

The hearing also included the testimony of ASEM board member Martha Yoder. While currently an ASEM board member, Yoder was ASEM's president from 2007 through 2008. She indicated her agreement with the testimony put forth by MAGE President Threehouse and indicated that the actions of the OSE caused shock and disbelief among ASEM members. She

stated that ASEM leadership talked about possibly losing members regarding this issue but that they had in fact gained some because employees told them that they wanted to help in the fight; that the employer reneging on the 3 percent general wage increase was the last straw as far as disparate treatment of NEREs was concerned.

On cross-examination, Yoder indicated that ASEM learned of the OSE's position regarding the 3 percent general wage increase at the December 21, 2009 meeting. Joint Exhibit #12 was entered, however, showing a printout from an ASEM website posting of December 9, 2009, demonstrating that as of December 9, 2009, ASEM was aware that OSE was considering eliminating the 3 percent general wage increase for fiscal year 2011.

Charging party MSPCOA called its executive director, Diane Garrison, to testify. Garrison stated that she was a party to the consensus agreement. She stated that the terms of the agreement were presented to the LROs (MAGE, MSPCOA, and ASEM) at a meeting of October 23, 2007. She stated that OSE was represented by Hall, and also by Cheryl Schmittdiel and Jill Nowicki. Hall went over the wage portion of the agreement while the other two delineated the benefits (the health insurance concessions) in more detail. MSPCOA entered Garrison's notes of the meeting as Charging Party MSPCOA Exhibit #2. Those notes show that the employer needed a decision from the LROs "by tomorrow." Charging Party MSPCOA Exhibit #3 is Garrison's copy of the consensus agreement given to her at the meeting by Hall. It contains her notes made at the meeting and after. One of those notes, she testified, at the lower right corner of the front page, was made during a telephone conversation with Hall the next day. Since this was her first consensus agreement (she had begun as MSPCOA Executive Director on January 1, 2005) she asked him the effect of her failure to sign it on behalf of her organization. Her notes show that Hall's response was "potentially you don't have a wage increase locked in (and you) don't have benefits locked in . . . ." (Tr., p. 143)

On cross-examination from the attorney general, Garrison disagreed somewhat with the testimony of Threehouse that the employer presented the consensus agreement draft with a "here, sign this" type of attitude. She said that the LROs were allowed to ask questions. But, she testified:

> . . . let there be no mistake. There was no deviation from anything he said. So, "Here's the deal. Take it back to your board. See what they think. And you come back and you sign it or not." (Tr., pp. 145-146)

She further testified:

> . . . but the term "meet and confer" I take a little bit of exception to. It's "meet and listen." There's no confer on any of this process. We meet. We hear what they have to say. (Tr., p. 147)

Thomas Hall was called to testify as an adverse witness by charging party ASEM. Hall testified that in his many years at OSE, he has negotiated many collective bargaining agreements, letters

of understanding and grievance settlements. He stated that when he signs such a document, his intent is to bind his office to that agreement. He stated that he had not signed a consensus agreement that he did not consider to be binding. The same would be true, he stated, for anyone from his office who would sign a consensus agreement. He did state, however, that such agreements are based upon circumstances in existence at the time the agreements are reached. That would stand to reason, since any person contemplating entering into any type of agreement would solely base their decision on circumstances as they exist at the time that they enter into the agreement. Such would certainly seem to have been the case here when, according to the testimony of Threehouse, Hall presented the drafted consensus agreement to the assembled LROs and wanted them to sign it immediately.

The consensus agreement, according to circumstances existing in 2007, would provide the employer with substantial savings in its healthcare costs through increases in employee healthcare premiums, increases to the deductible amounts on the State Health Plan and increases in prescription and office visit co-pays. As the *quid pro quo*, the employer proposed to recommend to the CCP, in line with the union collective bargaining agreements it had just negotiated, no general wage increase for the first year, a 1 percent general wage increase for the second year, and a 3 percent general wage increase for the third year. That 3 percent general wage increase was the pot of gold at the end of this rainbow which no doubt sold the health insurance concessions in collective bargaining with the exclusive representatives, and which apparently made the consensus agreement palatable to the LROs. Once the LROs signed off on this agreement drafted by the employer, as noted above, the terms of the consensus agreement could not be modified except by mutual written agreement. It should be noted at this point that the consensus agreement was not an agreement negotiated at arms-length between the parties. It was presented to the parties by OSE Deputy Director Hall as a completed document based upon negotiations that had already taken place between the OSE and the exclusive bargaining representatives. To the extent that it is viewed as a contract, therefore, OSE was its drafter and the one who initiated the agreement. Any claim that it subsequently could not live with the terms of an agreement that it drafted must be viewed in that light.

Witness Hall testified that he met with the LROs on December 21, 2009, and told them that the employer's ability to recommend the 3 percent general wage increase for NEREs was under review. He told them that the employer might not be able to make that recommendation and asked for their thoughts, according to his testimony. He asked for their thoughts and told them that the employer would get back to them regarding their final position. (Tr., p. 73)

Hall testified that he authored a draft of the letter that OSE Director Bommarito ultimately sent to the CCP on December 21, 2009, on December 10, 2009. (Joint Exhibit #7, pp. 1-2) He testified that he did not know who told him to draft it, but that he would not have drafted it of his own volition. He stated that he takes his direction from Director Bommarito and that none of his subordinates would have directed him to draft it. (Tr., p. 75) The December 10, 2009 draft

states that as of December 21, 2009, the employer had already met with the LROs who were parties to the consensus agreement "to discuss some resolution of this difficult situation we find ourselves in, but no resolution was identified." This testimony and the document in question are indicative that the decision to recommend against the 3 percent general wage increase and the outcome of the December 21, 2009 meeting were a *fait accompli* in the mind of the respondent as of December 10.

Hall testified that the issue of backing away from the 3 percent wage increase recommendation agreed to in the consensus agreement had been discussed in the December 7, 2009 meeting with the executive office prior to his having drafted that letter of December 10, 2009. He stated that he attended that meeting, along with Director Bommarito, Budget Director Bob Emerson, Cabinet Secretary Nate Lake, governor's legal counsel, Steve Liedel, and Deputy Budget Director Nancy Duncan. He stated that while such meetings to discuss state employee compensation are more common with the budget director, it is not common, in his experience, to have such meetings with staff from the executive office.

Hall stated that the subject of the December 7, 2009 meeting was the upcoming CCP process and the budget situation. He believed that the consensus agreement with the LROs was discussed at the meeting. Hall stated that he mentioned the possibility of an unfair labor practice charge being filed if the employer were to back away from its support for the 3 percent general wage increase contained in the consensus agreement. He testified that he did not state in the meeting that by backing away from support for the 3 percent general wage increase in the face of a budget shortfall that the employer would be violating the consensus agreement, but felt that there were arguments that could be made that they would be violating it.

Hall testified that he did not know who made the decision not to adhere to the consensus agreement. (Tr., p. 84) He stated that he assumed that it was made by the executive office, potentially by the governor, but he had no personal knowledge. (Tr., p. 85)

Hall testified that the final decision of the employer regarding its position before the CCP was not made until the afternoon of December 21, 2009, after meeting with the LROs. He stated that late that afternoon, he telephoned the LROs to let them know that the employer had finalized its position and would be recommending against the 3 percent general wage increase to the CCP. (Tr., p. 87)

Hall testified that the recommendation against the 3 percent general wage increase was not due to an inability to pay. (Tr., p. 104) He stated that the employer's position was based upon an unprecedented projected $1.5 to $1.7 billion budget deficit for the fiscal year 2011, which would have been exacerbated by the additional $45 million in wage increase costs that the 3 percent would have generated for NEREs wage increases.

Hall disagreed that the consensus agreement was breached before the CCP. His reasoning was that the employer had bound itself based upon economic factors as they existed in 2007. Those factors, he stated, had changed markedly by 2009, and with the massive budget shortfall predicted for fiscal year 2011, circumstances had changed to the extent that the employer could not abide by the agreement which called for a 3 percent general wage increase for NEREs.

On examination from counsel from the MSPCOA, Hall testified that all other components of the consensus agreement remained intact as agreed to in 2007, including the increases in healthcare premiums, co-pays on prescription medications and physician office visits and deductibles on the State Health Plan. When asked if the employer had received all of the fruits of the consensus agreement while the NEREs received as their wage increases, zero percent, 1 percent, and zero percent, Hall responded:

> A. I would say that the only thing that was different was the 3 percent pay raise.
>
> Q. So they got a zero at this point in time?
>
> A. That's correct.
>
> Q. But the state received all the benefits of the agreement?
>
> A. All of the rest of the agreement remained intact. (Tr., p. 108)

Hall could not off the top of his head come up with the cost of the 3 percent general wage increases that were awarded to members of exclusively represented bargaining units for fiscal year 2011, the same year in which the NEREs got zero percent. Prior to the end of the hearing, however, the parties were able to stipulate that the figure was $77.3 million, exclusive of the state trooper contract.

Hall testified that Joint Exhibit #7, p. 8, is an email from Director Bommarito to himself regarding "Keenan's and Boyd's CCP bullets." "Keenan," he testified, was Civil Service Commissioner Kelly Keenan, while "Boyd" was Governor Granholm's press secretary, Liz Boyd. In the email, Bommarito asks him to prepare a side-by-side comparison of what NEREs and exclusively represented employees have received since 2007 when the collective bargaining agreements and the consensus agreement were approved. She asked him to prepare a document listing the differences and similarities of the two for Keenan. This request was December 23, 2009, after the OSE had transmitted its position to the CCP.

Hall testified that the information was provided to Commissioner Keenan only, not to the other three Civil Service commissioners. He stated that it was provided due to the strong reaction that the OSE received from the LROs from their December 21, 2009 meeting. The LROs had stated that they would pull out all the stops, that they would sue, according to Hall. He stated MAGE had contacted Civil Service commissioners before, regarding issues that were before them, and the OSE wanted to make sure that Keenan and Boyd were aware that this very likely could be something that would be raised by the limited-recognition organizations. (Tr., p. 96)

Hall testified that in his 30 years with the OSE, he could not recall another time in which the employer had submitted materials to the Civil Service Commission regarding the CCP process in advance of the matter coming before the commission.

Hall stated that he had one other conversation with Commissioner Keenan regarding this issue. That involved an inquiry on the part of Keenan regarding a court decision that Keenan recalled, and he asked Hall if he could help him recall it specifically. Hall indicated that he gave the commissioner the case citation. He stated that would have been in early February 2010, prior to the meeting of the Civil Service Commission. He stated that Commissioner Keenan knew in advance of the February 2010 Civil Service Commission meeting that the OSE would be recommending against the 3 percent general wage increase. He testified that information was communicated in the bullet points called for in the December 23, 2009 communication referenced above. Those are set forth at Joint Exhibit #7, pp. 10-11.

On questioning from the attorney general, Hall stated that the first meeting that his office had with the LROs regarding this issue was on December 21, 2009. He stated that at the December 7, 2009 meeting with the executive office, no preliminary or final decision was made regarding this issue. He testified that he prepared the December 10, 2009 draft, of the director's eventual December 21, 2009 letter to the CCP, because the employer knew by then that it was a possible position that they would be taking and the matter would be due to be sent to the CCP by December 21, 2009.

Hall stated that no meeting was held with the LROs prior to December 21, 2009, because no decision had been made. The decision, he stated, was made on the 21st. He did not recall the LROs giving them any ideas at that meeting as to how they could otherwise save $45 million. The LROs were told at the meeting, he stated, that no final decision had been made. (Tr., p. 114) He stated his belief that the OSE's decision not to follow the consensus agreement included the budget office and the executive office. (Tr., p. 115) He stated that while his office has never taken a position on a consensus agreement like this before, they have never been faced with a budget deficit like this before. He stated that to the best of his knowledge, Commissioner Keenan was not involved in any of the discussions leading to the decision not to recommend the 3 percent general wage increase. The commissioner's first awareness, he believed, would have been on or after the communication of December 23, 2009, set forth in Joint Exhibit #7.

Hall noted in conclusion that failure on the part of the employer to meet and confer in good faith, while formerly an unfair labor practice under the Employee-Employer Relations Rules, was eliminated as an unfair labor practice from Civil Service Rule 6-11.4, *Refusal to Bargain in Good Faith*, in 1998 by the Civil Service Commission.

The charging parties next attempted to call the OSE director, Sharon Bommarito to testify. Director Bommarito was subpoenaed to testify at the request of charging party ASEM. Counsel for the respondent again raised the objection made prior to the hearing in his motion to quash the subpoena for Director Bommarito, claiming that her testimony was not necessary due to the testimony of Deputy Director Hall and renewing the claim of executive deliberative privilege. The hearing officer informed the parties that no such privilege exists in this forum. The undersigned, in over 33 years of conducting hearings of this nature on behalf of this agency and the Civil Service Commission, has had the good fortune to not have to subpoena high-ranking officials often. Two examples of when it was necessary readily come to mind, and the two individuals involved would have had a much greater claim to executive privilege, or that their testimony could have been handled by subordinate staff, than did Bommarito.

The first example would be *Kalvans and Department of Attorney General*, HO 43-85, a*ff'd*, ERB 85-122, CSC *approved* December 11, 1986, *aff'd*, Ingham Circuit, June 25, 1986, 85-055530-AA; *aff'd*, Michigan Court of Appeals, October 13, 1987; *lv. den*., 430 Mich 863 (1988), in which this hearing officer issued a subpoena to then Attorney General of the State of Michigan Frank J. Kelley. By the time the matter went to hearing, the case had been reassigned to another hearing officer at this hearing officer's request. Attorney General Kelley promptly and without objection complied with the subpoena. He was not only the head of a department, he was an elected official as well.

The second case coming to mind involved the late Michigan Secretary of State, Richard H. Austin, also an elected official in addition to being the head of a department. This hearing officer subpoenaed Secretary of State Austin to testify in the case of *Shader-Patterson and Department of State*, HO 041-92, *lv. den.,* ERB 92-102, CSC *approved* December 9, 1992, *aff'd,* Ingham Circuit, June 30, 1994, 93-73917-AA.

Like Attorney General Kelley, Secretary of State Austin, apparently being mindful of and having respect for the constitutional authority of the Civil Service Commission, promptly obeyed the subpoena, appeared at the hearing and offered his testimony. The difference between the appearance of Attorney General Kelley and Secretary of State Austin and the non-appearance of OSE Director Bommarito seems obvious. In the cases in which they were called to testify, the attorney general and the secretary of state were not afraid to subject their actions to public scrutiny. The proper manner in which to invoke a theory of executive deliberative privilege would have been for Bommarito to appear at the hearing, be sworn as a witness and let her counsel raise that objection as questions were asked that he viewed to be objectionable. Her complete refusal to appear raises suspicion as to the reason for it.

The authority of the Civil Service Commission to enact a rule providing for the subpoena of persons not in the classified service to appear as witnesses before the commission was recognized by the attorney general in Opinion No. 6003, dated October 29, 1981. In that

opinion, the attorney general also recognized, as was stated by the undersigned in this record when Bommarito refused to obey the subpoena appropriately issued for her, that the commission has no enforcement powers regarding those subpoenas. As the hearing officer told counsel for the charging parties, he would have suspended the proceedings while they went to Circuit Court, which does have such enforcement powers, to compel the testimony of Director Bommarito. The charging parties suggested, and the undersigned agreed, that as an alternative, he would take under advisement certain negative inferences to be drawn against the respondent based upon Director Bommarito's refusal to testify.

The charging parties read negative inferences into the record that they asked the hearing officer to consider based upon Bommarito's refusal to obey the subpoena. Those negative inferences are as follows:

1. At the December 7, 2009, meeting in the executive office, the decision was made to repudiate the consensus agreement. This, the charging parties contended, has support in the testimony of witness Hall and is warranted based upon a reasonable review of the exhibits, particularly Joint Exhibit #7 which shows a December 10, 2009 memorandum written by witness Hall identifying that the consensus agreement was to be repudiated.

2. The final decision to revoke the consensus agreement was made by the governor. That is due to the fact the she is the head of the executive office. It was clear from the testimony of Hall that there was a meeting in her office including her budget director and her legal counsel, and it can be reasonably concluded that information from that meeting was transmitted back to the governor, or that she had some role in the process.

3. That as of the time that the OSE met with the LROs on December 21, 2009, a decision had already been made to revoke the consensus agreement.

4. That OSE, its staff and all of those in attendance at the December 7, 2009 executive office meeting either knew or should have known that the activity in question was violative of the consensus agreement.

5. That the OSE engaged in *ex parte* communication with Commissioner Kelly Keenan and attempted to impermissibly influence his vote regarding the 3 percent general wage increase recommendation. Commissioner Keenan, it was noted, voted against that recommendation from the CCP when it came before the commission. That conclusion is warranted, it was contended, because Keenan, according to the testimony in this record, learned about the position of the OSE in advance and the records show complicity in the process.

Counsels for the charging parties asked the undersigned to draw the above negative inferences against the respondent. Counsel for the respondent was given the opportunity to address those inferences in his closing brief.

After the issue of the failure of the OSE director to appear had been addressed, the assistant attorney general asked the undersigned to recuse himself on the ground that as a nonexclusively represented employee, the undersigned has a vested interest in the outcome of this case. That interest, it was claimed, impacted the due process rights of the respondent and the fundamental fairness of the administrative proceeding. The undersigned dismissed the motion as being both untimely and frivolous. The assistant attorney general representing the respondent in this matter was also a NERE, as was witness Hall, both of whom, according to the theory put forth by the respondent in its motion for recusal, could have been similarly motivated to undermine their own case in order to promote their self interests.

The undersigned has more faith in the professionalism and integrity of the assistant attorney general and witness Hall than to believe that such would be the case. The motion for recusal, in order to have been timely filed, would have needed to have been filed at least 14 calendar days after the moving party discovered or, in the exercise of reasonable diligence, should have discovered, the ground for disqualification. See Civil Service Regulation 8.01, *Grievance and Grievance Appeal Procedures,* §4(B)(7)(c). The parties were aware of the undersigned's NERE status from the time he was assigned the case. The motion to disqualify was therefore grossly untimely and for the reasons stated above frivolous as well.

The employer, in its closing brief, responded to the issue of the hearing officer drawing negative inferences based upon the failure of Director Bommarito to appear pursuant to the subpoena issued to her. It cited the 1992 decision of Hearing Officer Wallace K. Sagendorph in *Mitchell and Department of Licensing & Regulation*, HO 082-92, *appeal dismissed*, ERB 92-138, CSC February 5, 1993, in which a subpoena *duces tecum* was originally served upon then-Governor John Engler for certain documents related to his transition team. That subpoena was subsequently issued to the then-OSE director, William C. Whitbeck. Hearing Officer Sagendorph's ruling, which constitutes mere persuasive precedent, addressed the former Civil Service subpoena rule and the portion dealing with revocation, §2-20.2(g), which stated in pertinent part as follows:

> The adjudicating officer shall revoke a subpoena if the evidence required to be produced does not relate to the matter in issue or if the subpoena does not describe said evidence with sufficient particularity, or if, for any other reasons sufficient in law the subpoena is invalid.

The above rule no longer exists. It has been replaced by Civil Service Regulation 8.01, §4(B)(12)(d)(7). That portion of the language regarding revocation of a subpoena contained in that section is similar to that set forth above in the previous rule:

> . . . The hearing officer may revoke a subpoena if the evidence required to be produced does not relate to the matter in issue, if the subpoena does not describe the requested evidence with sufficient particularity, or if the subpoena is invalid for any other sufficient reason.

The phrase that is missing from the section immediately above that was present in the previous rule is "sufficient in law." The respondent has claimed in this case, as was claimed in *Mitchell*, that a substantial issue of executive and deliberative privilege exists that precludes the production of this witness and the documents that were sought in the subpoena. The respondent also cited *Redmond and Department of Labor*, HERM 058-95 for the same proposition. *Redmond, supra*, which would also constitute mere persuasive precedent, merely cites the decision of the hearing officer in *Mitchell* in granting the motion to quash the subpoena based upon the notion of executive/deliberative privilege.

Hearing Officer Sagendorph, in *Mitchell*, *supra*, after rejecting the notion of attorney-client privilege as it pertained to the relationship between the OSE director and the governor, opined as follows:

> Executive privilege, however, is another matter. The transition team reports are as referenced in the *McClellan* decision, **supra:** "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." The testimony of Mr. Whitbeck and the nature of the transition team operation all point to the fact that the purpose of Mr. Whitbeck's group was to prepare such intra-governmental documents "reflecting advisory opinions, recommendations and deliberations" in order for the new Governor to make official decisions and establish policies. In the course of preparation of these reports the team members were admonished to be frank and direct. It was assumed these issues would remain confidential and only such candid discussion of the issues would adequately inform the new Governor and provide the framework for effective executive action. Consequently, this Hearing Officer finds that the transition team reports and related documents described in the March 31, 1992 Subpoena Duces Tecum are barred from disclosure by "deliberative process" executive privilege. (*Mitchell*, at p. 7)

The subpoena in question in this case calls for the testimony of Director Bommarito. Respondent, citing *Fitzpatrick v Secretary of State*, 176 Mich App 615, 618 (1989), *lv. den.* 433 Mich 877 (1989), contended that the head of a state agency should not be compelled to testify "unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it." This is done, it contended, again citing *Fitzpatrick,* to: "protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." It contended that the undersigned, again citing the *Fitzpatrick* case, must first look to whether the testimony can be obtained through a lower ranking official or through other discovery mechanisms. It further contended that the charging parties must demonstrate that the testimony is "necessary to obtain relevant information that cannot be obtained from any other discovery source or mechanism." *Hamed v Wayne County*, *et. al.*, 271 Mich App 106, 111 (2006). Respondent conceded that *Hamed, supra*, and *Fitzpatrick, supra*, address deposition

testimony, but contended that the same principles should apply to the proposed testimony of Director Bommarito in this proceeding.

The undersigned was frankly hopeful that the testimony of Bommarito's lieutenant, Hall, would eliminate the need for her testimony at this hearing. Hall knew, or should have known, much of the information sought by the charging parties when he testified. If he did have knowledge of the information in question, such as who made the decision not to abide by the consensus agreement, who ordered him to draft the letter to the CCP and so forth, he was not forthcoming with it. His lack of knowledge regarding the information being sought by the charging parties, which the undersigned believes to have been material to the matters in dispute, meant that it needed to be elicited from someone higher in the chain of command. No one at the Office of the State Employer was higher in the chain of command than Hall except for Director Bommarito. The above, in my opinion, constitutes a clear showing that her testimony was necessary to prevent prejudice or injustice to the charging parties in this case. There is no evidence to suggest that her testimony would have caused Bommarito oppression, undue burden or expense. Annoyance and embarrassment were possibilities, but those possibilities balance out in the negative against the necessity to prevent prejudice or injustice to the party seeking the testimony.

Regarding the citation from Hearing Officer Sagendorph's opinion above, there is no evidence to indicate that the group meeting of December 7, 2009, was the sort of executive politically-oriented confidential cabal set forth in the *Mitchell* decision. It was merely a budget meeting to discuss the shortfall for fiscal year 2011 and the issue of the NEREs 3 percent general wage increase was obviously discussed at that meeting. The information that the charging parties were trying to elicit is who made the decision not to abide by the consensus agreement and at what point was that decision made. The basis for the decision is clear and need not be explained further. As a matter of policy, the administration felt that it could not justify tacking on an additional $45 million to a projected budget deficit of $1.5 to $1.7 billion. There is nothing confidential or deliberative about who made that decision or when it was made. If it was not made by Hall, then it was either made by Bommarito, or by consensus of the group with whom she met, or by the governor herself after counsel from that group.

The undersigned finds that while certain hearing officers have given credence to the notion of deliberative executive privilege, there is no Employment Relations Board or Civil Service Commission precedent recognizing it. To the extent that it has been recognized under certain circumstances in the courts, those circumstances have been found not to exist here. Further, this forum is an administrative proceeding of a body with plenary authority to regulate terms and conditions of employment in the classified service, not a Circuit or Appellate Court. If the Civil Service Commission wants to establish a policy by which deliberative executive privilege is recognized, it is free to do so. To date, it has not. The hearing officer therefore stands by his ruling in the hearing that it does not exist in this forum.

Having found that the claim of privilege is without basis, the hearing officer finds it appropriate to presume that the testimony of Bommarito would have been adverse to the interests of the respondent. The hearing officer is authorized to draw such inferences by Civil Service Regulation 8.01, §4(B)(12)(d)(9). I adopt the proposed adverse inferences of the charging parties with a few exceptions:

Inference 1 is adopted, though the decision to repudiate the consensus agreement may have been made shortly after the meeting of December 7, 2009, but it appears to have been made prior to December 10, 2009.

Inference 2 is adopted because Bommarito is the agent of the governor in labor relations matters within the Civil Service system. It is highly doubtful that she could have made this decision on her own without the approval of her principal. That would make the governor the ultimate decision maker. The charging parties contend that Bommarito had been advised by Hall that arguments could at least be made that the repudiation would possibly violate Civil Service rules. The document on its face says that it cannot be modified except by mutual agreement in writing. For that reason, it is reasonable for the hearing officer to conclude that the party unilaterally repudiating it would know its actions to be improper.

Inference 3 is adopted.

Inference 4 is adopted in part. OSE engaged in *ex parte* communication with Commissioner Keenan. I cannot characterize the communication as improper since the Civil Service Commission was acting in its legislative capacity, not in its quasi-judicial capacity. It is common for labor and management to lobby Civil Service commissioners to attempt to sway them to their viewpoints.

Inference 5 is rejected for this same reason. The Civil Service Commission, acting in its legislative capacity, is subject to lobbying from both sides. This invariably involves *ex parte* communication for the purpose of attempting to sway commission policy. There is nothing impermissible about this. The recommendation of the CCP was a matter of policy. It is not as if the commissioners were taking up review, for example, of the Employment Relations Board's decision on appeal of a grievance or unfair labor practice decision. In that case, the Civil Service Commission would be acting in a quasi-judicial capacity, and any *ex parte* communication would be strictly prohibited.

CONTENTIONS OF THE PARTIES

The respondent contended that its decision not to abide by the consensus agreement was not due to an inability to pay. Instead, it argued that it would have been fiscally irresponsible to award general wage increases for fiscal year 2011 to those not covered by a collective bargaining

agreement given the unprecedented budget shortfalls (Respondent's closing brief, p. 14). The respondent contended that there is no provision within Civil Service Regulation 6.02, *Unfair Labor Practice Charges,* for the awarding of attorney fees. Within that Regulation, it cited §3(C)(3), as follows:

> **Decision**. The hearing officer shall issue a written decision. The hearing officer shall dismiss or sustain each charge in whole or part. The hearing officer shall order that the respondent (1) cease and desist any unfair labor practices found and (2) take action to remedy their effects.

The respondent contended that the regulation fails to list attorney fees as a remedy for an unfair labor practice nor are they recognized as an effect of such conduct, if a finding is made. It further cited the decision of the undersigned in *Fischer and Michigan Corrections Organization*, HERM 2002-024, *lv. den.*, ERB 2006-067, *aff'd* CSC 2006-063, December 13, 2006, for the proposition that attorney fees cannot be awarded in this forum.

The respondent further contended that since many sections of Civil Service Regulation 8.01, *Grievance and Grievance Appeal Procedures* are adopted by this agency for the conduct of unfair labor practice hearings, which are actually conducted pursuant to Civil Service Regulation 6.02, and since charging parties have relied on many of those sections in subpoenaing witnesses, filing of motions, and so forth, those portions of the Grievance and Grievance Appeal Procedures addressing attorney fees should rightly be considered by the undersigned in rendering his decision. Civil Service Regulation 8.01, §4(B)(15)(a)(1), specifically prohibits a hearing officer from awarding attorney fees in a grievance hearing.

Respondent further contended that charging parties' reliance on *City of Detroit v Amalgamated Transit Union*, 1984 MERC Lab Op 937, is misplaced, given that the Michigan Employment Relations Commission awarded attorney fees as an "extraordinary remedy" for the city's refusal to honor a collective bargaining agreement claiming an inability to pay. That case, it was argued, addressed a collective bargaining agreement that had been negotiated and ratified. Here, there was no agreement on wages that had been negotiated between the parties or ratified by the Civil Service Commission. The agreement, it contended, was to recommend a general wage increase to the CCP. Respondent further argued that there was no harm to the charging parties because the CCP accepted the 3 percent general wage increase recommendation contained in the 2007 consensus agreement despite the employer's contrary position.

The respondent contended that the consensus agreement did not constitute a valid contract since the LROs are not competent to enter into contracts under Civil Service Rules and there was no consideration given for this agreement. It contended that the only purpose of the 2007 agreement was to present a united front to the CCP. It contended that in order for a promise to constitute consideration, it must have value to both sides and be enforceable. It further contended that a promise that is voidable by one side is unenforceable and therefore illusory.

The respondent contended that the consideration claimed to have been given by the charging parties (refraining from putting forth any other position on wages or benefits) is no consideration at all, since the CCP generally follows the patterns negotiated between the employer and the exclusive representatives. The claimed givebacks regarding medical benefits amount to the same thing, it argued, since those had already been negotiated between the employer and the exclusive representatives.

The respondent contended that the change of position in its letter of December 21, 2009, to the CCP was a valid change in position after a meet and confer meeting between the parties.

The respondent contended that the charging parties have failed to establish a *prima facie* case in its motion to dismiss the charge, and contended that the record established at the hearing confirmed that contention.

Regarding the charge of a violation of Civil Service Rule 6-11.1, *Coercion*, the respondent identified the rights granted to employees under Civil Service Rule 6-5.1, *Participation by Employees*:

> Employees may organize, form, assist, join, or refrain from joining labor organizations. Eligible employees may also engage in concerted activities for collective bargaining with the employer.

Civil Service Rule 6-11.1, *Coercion*, reads as follows:

> It is an unfair labor practice for the employer to interfere with, restrain, coerce, discriminate against, or retaliate against employees in the exercise of rights granted by these rules.

The respondent contended that the record is devoid of any evidence from any witness of violation of any of the above rights. It asked that the charge be dismissed.

Regarding the charge of violation of Civil Service Rule 6-11.2, *Interference*, the respondent contended that this is the crux of charging parties case. The charging parties, it contended, are claiming that by arguing against a general wage increase for NEREs, it has treated LROs and their members as second-class citizens. The respondent contended that the LROs are not to be treated as though they possess the rights granted to exclusively represented bargaining members under the Civil Service Commission's Employee-Employer Relations Rules. They have no right to bargain regarding wages, benefits and other terms and conditions of employment as do the exclusively represented.

The respondent contended that a separate set of rights are granted to nonexclusively represented employees. The rights of exclusively represented employees are set forth in Civil Service Rule 6-8.1, *Rights of Exclusive Representatives,* while those of nonexclusively represented employees are set forth in Civil Service Rule 6-8.3, *Limited-Recognition Organizations*. The employer did

nothing, it contended, to prevent the LROs from making their presentation to the CCP and further, it contended, the LROs prevailed before the CCP, which adopted their position and not that of the employer. Nothing in the consensus agreement, it was contended, prevented a party from making separate or inconsistent statements before the Civil Service Commission, contrary to the positions taken by charging parties ASEM and MSPCOA in their follow-up unfair labor practice charges, and by charging party MAGE in the amendment to its original charge. The separate presentation by the employer before the Civil Service Commission, it was contended, was due to the significant change in circumstances between the signing of the 2007 consensus agreement and the implementation of the budget process for fiscal year 2011.

The respondent next contended that there was no testimony indicating that rights granted by Civil Service Rule 6-5, *Rights of Employees,* were interfered with in any manner by the employer's actions in this case. The testimony of Threehouse, it was contended, was conflicting as to the effect of the CCP's and Civil Service Commission's action upon the membership of MAGE. By the respondent's calculations of the figures presented by Threehouse in his testimony, MAGE suffered a net loss of 93 members, equaling a 6 percent loss. It contended that this did not amount to a substantial loss and is probably within normal turnover for the organization. Respondent contended that there is no indication as to why the members left the organization or whether the loss was greater or less than in past years. The respondent contended that of those membership forms provided by charging party MAGE (CP MAGE Exhibit #8) the statements presented on the four forms were inconclusive as to the reasons for leaving or if in fact the member(s) actually left.

The respondent noted the testimony of charging party ASEM witness Martha Yoder that ASEM actually gained members as a result of the CCP and board decisions, and noted that an increase in membership cannot be described as an adverse effect. Charging party MSPCOA, it contended, gave no evidence one way or another as to the effect that the employer's decision had upon its membership.

On the basis of the above contentions, the respondent asked that the charge of violation of Civil Service Rule 6-11.2, *Interference*, be dismissed.

Regarding the issue of alleged violation of Civil Service Rule 6-11.3, *Discrimination*, the respondent contended that it is true that the employer treated them differently than it treated the exclusively represented members' bargaining agents. It noted that they are recognized as different creatures under Civil Service rules and regulations. It contended that the testimony of witness Hall established that there were collective bargaining agreements in effect that had been ratified by the Civil Service Commission governing the general wage increases of exclusively represented employees for fiscal year 2011. To alter those wage provisions would have taken a two-thirds majority vote of the State legislature pursuant to Article 11, §5 of the Michigan Constitution.

Respondent contended that the general wage increase never belonged to the charging parties, their members, or any other NERE. No such increase is valid, it contended, until approved by the Civil Service Commission. It contended that for the employer to treat the charging parties the same as the exclusively represented members' bargaining agents would render the Civil Service rules that differentiate the groups superfluous.

The respondent renewed its claim stated in the original motion to dismiss, filed prior to the hearing along with its motion to sever the subsequent charges involving the employer's conduct before the Civil Service Commission, that the charging parties lacked standing to bring the unfair labor practice charges in question, since they had not suffered any injury. It further claimed that the issues raised in the original charges were moot since the CCP had rejected the employer's position regarding the 3 percent general wage increase. It also alleged that the charges fail to state a claim upon which relief can be granted and that the Civil Service Office of Hearings, Employee Relations, and Mediation lacks jurisdiction over the charges.

Regarding the issue of alleged failure to bargain in good faith, the respondent stated that the charging parties lack standing to bring such a charge since they have no right to bargain collectively under the ERR. At most, the respondent contended, the charging parties have a right to meet and confer with the employer, but the failure to meet and confer on the part of the employer is not an unfair labor practice. It noted that the failure to meet and confer in good faith was stricken from Civil Service Rule 6-11.4, *Refusal to Bargain in Good Faith*, as an unfair labor practice by the Civil Service Commission when it amended the ERR in 1998.

Rather than presenting the contentions of the charging parties *seriatim*, since there is a great deal of overlap in those contentions, the hearing officer will attempt to set forth salient points presented by each, which hopefully will cover for the reader all contentions made by the three parties.

Charging party ASEM, summarizing its position in its closing brief, contended that the conduct of the employer as exhibited in this record is indicative that the employer and the governor's office viewed the consensus agreement as toothless and that there would be no significant penalty were they to ignore it. The charging party contended that never in the history of the state classified service has the Office of the State Employer, presumably at the direction of the governor's office, exhibited such egregious conduct, knowing it to be illegal. They took these actions, it was alleged, because they believed that they could get away with them. The charging party contended that traditional remedies such as the finding of an unfair labor practice and the ordering of a posting of such would be insufficient to deter the employer and the executive office from engaging in such conduct in the future.

Charging party MSPCOA contended that the consensus agreement reached between the parties for the fiscal years 2009, 2010, and 2011 constituted a meeting of the minds between the parties

based upon an offer made by the Office of the State Employer. The charging parties, it contended, accepted the offer of the OSE. The consideration involved was the agreement of the charging parties to the concessions regarding the healthcare costs mentioned above, and both sides agreed that for fiscal year 2009, those cost reductions along with a zero percent wage increase would be recommended to the CCP. For fiscal year 2010, a 1 percent general wage increase for NEREs would be jointly recommended, and for fiscal year 2011, the disputed 3 percent wage increase would be recommended. Based upon the meeting of the minds of the parties, the offer, acceptance and consideration, the charging party contended that a contract was formed between the parties at the time that they signed the consensus agreement. The employer's letter to the CCP of December 21, 2009, it argued, constituted total breach of that contract. That breach, it contended, gives rise to damages for all past, present and future injuries to the charging parties.

Charging party MSPCOA contended that the 3 percent wage increase was promised in a contract by the employer to members of exclusively represented bargaining units as well as to the membership represented by the charging parties. The employer chose, however, to single out the LRO membership for differential treatment, which constitutes discrimination regarding terms and conditions of employment that would serve to discourage membership in the limited-recognition organizations, as well as unlawful interference with the meet and confer rights granted to charging parties under the ERR.

The charging party contended that given the fact that the 3 percent general wage increase was granted to exclusively represented employees while the employer repudiated its agreement regarding the 3 percent general wage increase recommendation owed to the NEREs under the consensus agreement, the effect was to paint the charging parties as impotent. The employer, it argued, discriminated against the LROs and their members when it repudiated the agreed-upon recommendation for a 3 percent general wage increase for the LROs while continuing to advocate for the exclusively represented bargaining unit members who received the 3 percent general wage increase. The employer's actions, it contended, were repugnant to Civil Service rules 6-11.1, *Coercion,* 6-11.2, *Interference,* and 6-11.3, *Discrimination*.

Charging party MSPCOA contended, citing *Radio Officers' Union of the Commercial Telegraphers Union, AFL v National Labor Relations Board*, 347 US 17 (1954), that specific evidence of subjective intent or motive to discriminate or to interfere with union rights is not an indispensable element of proof of violation:

> . . . the intent (may be) founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his action . . .

This case, like many of the others cited by this charging party and the others, as well as the respondent, is of limited direct benefit to the undersigned in resolving this dispute, given that it arose out of a bargaining relationship. No such relationship existed here. Any of the case

citations provided to the hearing officer therefore, other than providing logical guidance, which is present in *Radio Officers, supra*, are in the opinion of the hearing officer best left uncited in this fact finding and opinion. The hearing officer will borrow from the logic put forth in some of the cases, but it must be recognized that the Michigan Civil Service labor relations system is *sui generis*; while it may have similarities to other systems and the framers may have borrowed from other systems in its creation, it is its own creature with its own case law and precedent. Therefore, most of the case law citations presented in the briefs of the parties will not be presented here.

Charging party MSPCOA contended that the actions of the employer in repudiating the consensus agreement were deliberate and well thought out. The respondent's position in these proceedings, the charging party contended, would void the duty to meet and confer and tar the charging party as powerless and weak. The claim of a budget shortfall, it argued, was no justification for the invasion of the rights of the charging parties by advocating that they lose their agreed-upon 3 percent general wage increase while the employer advocated for the 3 percent general wage increase for exclusively represented employees.

Charging party MAGE cited Civil Service Rule 6-5.1, *Participation by Employees,* as granting employees the right to organize and join a labor organization. The word "employees" it contended, includes both eligible and excluded employees, as is evidenced by the second sentence of Civil Service Rule 6-5.1, which states that:

> Eligible employees may also engage in concerted activities for collective bargaining with the employer.

MAGE next cited Civil Service Rule 6-8.3, *Limited-Recognition Organizations,* in relevant part:

> Employees in excluded positions are not eligible for exclusive recognition but may join *and be represented by* limited-recognition organizations unless otherwise prohibited by this Rule. (Emphasis in Charging Party MAGE Exhibit #1)

Such representation, it was argued, extends to the coordinated compensation process, per Civil Service Rule 6-2.2, *Limited-Recognition Organizations Authorized*:

> The Civil Service Commission authorizes classified employees in nonexclusively represented positions to designate limited-recognition organizations *to meet and confer with the employer over rates of compensation and other conditions of employment* and to represent members in civil service grievance proceedings. *The employer, employees, and the limited recognition organizations shall have the rights and obligations provided in the civil service Rules and Regulations*. (Emphasis in Charging Party MAGE Exhibit #1)

MAGE cited the definition of "meet and confer" as set forth in Chapter 9 of the Civil Service Rules:

> . . . the mutual obligation of employees or their representatives and the employer to meet at reasonable times and to confer in good faith regarding rates of compensation and other conditions of employment. (Charging Party MAGE Exhibit #1)

MAGE noted that the language above confers an obligation on the employer to meet with employee representatives regarding rates of compensation and requires that the employer do so in good faith.

MAGE further cited Civil Service Regulation 6.01, *Limited-Recognition Organizations,* §C(2), in pertinent part:

> **Interest Representation.** LROs may represent the interests of members at meetings with the Office of the State Employer, appointing authorities, Civil Service staff, Coordinated Compensation Panel, or the Civil Service Commission. (Charging Party MAGE Exhibit #1)

It also noted that Civil Service Regulation 6.06, *Coordinated Compensation Plan*, §4(D)(2), recognizes that the meet and confer process may produce consensus agreements:

> **Consensus Agreements**. The [Coordinated Compensation] Panel shall also consider any recommendations that represent an agreement or consensus between the OSE and limited-recognition organizations or between the OSE and other participants in the coordinated compensation process. (Charging Party MAGE Exhibit #1)

Charging party MAGE indicated that the reason for setting forth all of the rules and regulations above is to indicate that the Civil Service unfair labor practice provisions protect employee rights granted by "these rules."

Charging party MAGE contended that even though the CCP struck the position statement of the employer and recommended the 3 percent general wage increase to the Civil Service Commission, by its actions the employer was successful in signaling to the Civil Service Commission that it did not support the increase. By repudiating the contract, the charging party argued, the employer deprived the LROs and their members the united front that was to be presented to the CCP and Civil Service Commission regarding the 3 percent general wage increase. It further contended that when Civil Service Rules impose upon the parties an obligation to meet and confer in good faith and when Civil Service Regulation 6.06 expressly recognizes that the coordinated compensation process may result in a consensus agreement, when the employer enters into such an agreement, bad faith is demonstrated when it repudiates the agreement as blatantly as it has done in this case. That violation of its duty to meet and

confer in good faith, it argued, interferes with, restrains, or coerces employees in the exercise of rights granted by these rules and/or interferes with the existence of a labor organization.

Charging party MAGE contended that it and its members have standing to pursue this matter in this forum, having suffered an injury in fact. Those injuries were suffered, it contended, when the respondent was able, through its repudiation of the consensus agreement, to signal the Civil Service Commission that there no longer existed a united labor/management front in support of the 3 percent general wage increase. Further, the injury suffered by the organization and its employees concerns the future impairment of the meet and confer process.

Charging party ASEM contended that the testimony of OSE Deputy Director Hall confirmed that the 2007 consensus agreement was intended to be binding upon all parties who signed it. Hall testified, it was contended, that in his 30 years with the OSE, consensus agreements have been treated as binding and the employer has acted in accord with those agreements. ASEM contended that Hall was less than candid in his characterization of the December 7, 2009, meeting in the executive office as an information sharing process and in his claim that no agreement to repudiate the consensus agreement was reached at that meeting. It contended that the record demonstrates that a letter was drafted recommending rejection of the 3 percent general wage increase as of December 10, 2009 (Joint Exhibit #7, pp. 1-2).

Charging party ASEM noted that at the meet and confer meeting of December 21, 2009, Hall told the assembled LROs that there existed a possibility that the 3 percent general wage increase would not be recommended. In their questioning of him (Tr., p. 123) he was asked if he told the LROs that it was more likely than not that the employer would not be supporting the 3 percent general wage increase. Hall stated that he told them that it was a possibility and indicated that he did not see the difference between that and the words more likely than not. ASEM contended that this was an indication of the evasive nature of the testimony of the witness.

Charging party ASEM noted that Hall in his testimony indicated that he had discussions with and supplied materials regarding the decision of the employer not to follow the consensus agreement to Civil Service Commissioner Kelly Keenan. It noted Hall's testimony that he could not recall in his 30 years of experience of dealing with the CCP process submitting materials in advance to one Civil Service commissioner but not to all of them. (Tr., pp. 96-97)

Charging party ASEM contended that it must be presumed that the final decision to repudiate the consensus agreement was made by Governor Granholm. The charging party contended that this is buttressed by the fact that after Director Bommarito failed to appear at the hearing and the charging parties read into the record their proposed adverse inferences to be drawn by the undersigned due to her absence, a second break in the hearing was taken to again attempt to secure her testimony. It must be assumed at that point, it argued, that the adverse inferences

were communicated to her. Her continued refusal to testify, it argued, was an attempt to keep the public and the hearing officer from discovering the truth with regard to who it was who made the decision to repudiate the consensus agreement, why it was made, and when it was made.
Charging party ASEM concluded by alleging that given the nature of the conduct of the OSE in the coordinated compensation process, it is obvious that the OSE and the governor's office concluded that the consensus agreement was toothless in nature and that there would be no significant harm incurred by simply ignoring it. It asked the undersigned to note that never in the history of the classified service has the OSE engaged in such egregious conduct, knowing it to be illegal. It contended that the traditional remedy of a finding of an unfair labor practice and a posting would be insufficient to deter such conduct in the future and to make whole ASEM members for the losses they had sustained.

All three charging parties in this case seek the following remedies for what they perceive to be the employer's unfair labor practices:

1. Reasonable attorney fees. The parties recognize that the hearing officer has indicated before that he has no authority in these cases to award attorney fees, but contended that his statement in the prior case, given that the charge was dismissed, amounted to dicta. They contended that Civil Service Regulation 6.02, *Unfair Labor Practice Charges*, gives the hearing officer the authority to (1) order the respondent to cease and desist unfair labor practices when they are found, and (2) take action to remedy their effects.

   The charging parties contended that while Civil Service Regulation 8.01, *Grievance and Grievance Appeal Procedures,* strictly prohibits the award of attorney fees in grievance cases, no such prohibition exists in Civil Service Regulation 6.02. Applying the doctrine of *expressio unius est exclusio alterius* (i.e., the expression of one thing is the exclusion of another) the charging parties contended that Civil Service regulations allow the hearing officer to award attorney fees in cases such as this, where the conduct of the employer is egregious and the defense put forth is frivolous in nature. (*Amalgamated Transit Union v City of Detroit*, 150 Mich App 605, 389 NW 2d 98 (1985))

   The charging parties contended that the traditional remedies of a cease and desist order and posting are insufficient to remedy the harm done in this case by the respondent. Reasonable attorney fees, they contended, were therefore justified.

2. That respondent, be ordered to cease and desist from repudiating this or any consensus agreement that it has entered into or will enter into with the charging parties. They asked that the order address the respondent's failure to abide by the agreement both in front of the CCP and the Civil Service Commission.

3. That respondent be ordered to jointly recommend, with the charging parties, a 3 percent general wage increase, with interest, for nonexclusively represented employees retroactive to October 1, 2010, in the next coordinated compensation process without regard to any other recommendation that might be agreed to in the process.
4. That respondent be ordered to post copies of a notice to all nonexclusively represented employees in conspicuous places where notices to such employees are customarily posted (including on appropriate state websites) for an appropriate period of time.

5. Charging party ASEM sought an order disenfranchising OSE Director Sharon Bommarito from future participation in the coordinated compensation process. It contended that the consequences of her actions willfully violating Civil Service Rules, disregarded lawful service of process, harmed the processes of the Civil Service Commission in total, including the CCP process, the pay setting process before the Civil Service Commission, and in this unfair labor practice hearing, cannot be overstated. They show contempt for the authority of the Civil Service Commission, which created her office and her position in the labor relations system that the Civil Service Commission established. ASEM therefore asked the hearing officer to take what it recognized as the extraordinary step of concluding that Bommarito's actions were contemptuous, constituted misconduct and render her unfit to continue to participate in the CCP process. It asked the hearing officer to recommend that she be disenfranchised from participating in further CCP proceedings given her acts and omissions in this case.

The respondent contended that attorney fees could not be awarded to the charging parties by the hearing officer. The respondent noted that many of the procedures utilized to govern the unfair labor practice hearing in question come directly from the Civil Service Regulation 8.01, *Grievance and Grievance Appeal Procedures*. The processes utilized to file motions, to govern discovery and for the production of witnesses, including the issuance of subpoenas, it contended, come from the grievance and grievance appeal procedures. Since the charging parties have utilized those portions of that procedure in order to prosecute their cases, it contended, they cannot ignore the prohibition within that procedure on the awarding of attorney fees. The respondent contended that its position statement did not affect the charging parties' rights to express the interests of their members. The respondent contended that the consensus agreement itself was not a binding agreement. (Respondent's closing brief, p. 17) The respondent again noted that the charging parties have no right to bargain on behalf of their members and note that they have stated that past consensus agreements have "been treated by the parties as binding." The respondent contended that there is nothing in Civil Service Rules that requires the parties to treat such agreements as binding.

The respondent contended that while it believed that it did meet and confer as required by the rules with the charging parties, if its actions did violate the meet and confer requirements, those violations cannot be grounds for an unfair labor practice charge.

Respondent concluded by stating that the charging parties have failed to state an unfair labor practice violation under Civil Service Rule 6-8, *Recognition Rights for Labor Organizations*. Hearings, Employee Relations, and Mediation therefore lacks jurisdiction over the subject matter of this case, it argued. Due to its contentions that the charging parties lack standing to bring the charge, their issues are moot and they have failed to state a claim, the respondent again claimed that this office lacks subject matter jurisdiction. The hearing officer was asked to dismiss the charges on that basis.

OPINION

The first issues to be addressed are those of standing to file the charges in question, mootness and subject matter jurisdiction. Under Civil Service Regulation 6.02, *Unfair Labor Practice Charges,* §3(A)(1), the state personnel director delegates administration of unfair labor practice charges to Hearings, Employee Relations, and Mediation (HERM). This office reviewed the charges in question for the issues raised by the respondent before the matter was ever assigned to this hearing officer for adjudication.

The charging parties are recognized limited-recognition organizations within the definition of that term under Civil Service Rules. They have rights and obligations under the Civil Service Commission Rules, Chapter 6, Employee-Employer Relations. If and when they believe that rights granted to them under those rules have been violated by either one of the principal departments of state government or by the Office of the State Employer, a creature of this system created by fiat of the Civil Service Commission to administer the interests of the governor's office in collective bargaining and labor relations, they have the right under this system to file unfair labor practice charges. The actual harm done to them will be determined at hearing and need only be claimed, not proven, prior to the hearing. The charging parties therefore had standing to bring these claims.

The respondent claims that the charges were mooted primarily because the CCP struck the position statement of the respondent and recommended to the Civil Service Commission that the 3 percent general wage increase set forth in the consensus agreement be granted. The language of the CCP in its recommendation to the Civil Service Commission has been set forth in part above, but will be repeated in part here for emphasis:

> . . . The signed agreement explicitly prevents the OSE from offering other proposals without the written consent of the LROs, who have given up rights to petition the Panel and Commission in previous CCP proceedings as a result of the agreement. Allowing the agreement to be overlooked would place the credibility of the CCP process at risk. . . . *It is assumed that the OSE is arguing a variety of impossibility of compliance, but the record from the hearing weakens such claims.*

> The LROs are labor organizations recognized under the civil service rules and regulations. *The agreements entered between the OSE and LROs within the CCP process bind the parties in this forum*, absent an adequate legal basis for them to be disregarded. . . . (Joint Exhibit #11, p. 6) (Emphasis supplied)

The CCP noted in its recommendation to the Civil Service Commission that as to the employer's contentions of fiscal problems:

> . . . In recent months, the OSE has reached agreements with four bargaining units that not only affirm the 3% raise for FY 2011, but extend the contracts at that higher rate for an additional year. The OSE indicated that in the midst of this unprecedented budget crisis it did not even ask these unions to consider revisiting the 3% raises in FY 2011 or their continuation in FY 2012. . . . *If it is impossible to give 15,000 NEREs the same 3% increase for FY 2011, the Panel cannot understand how it is possible to agree to pay those 13,000 represented employees at the higher rate for both FY 2011 and 2012.* (Joint Exhibit #11 p. 7) (Emphasis supplied)

The CCP recognized the conduct of the respondent as inequitable and therefore recommended the 3 percent general wage increase to the Civil Service Commission. The fact that they struck the position statement of the respondent prior to making their recommendation to the Civil Service Commission does not undo the position statement itself nor eliminate the question of whether the employer's repudiation of the consensus agreement constituted an unfair labor practice. The charges filed by the charging parties are therefore not moot.

The charges filed by the charging parties address alleged violations of Civil Service rules 6-11.1, *Coercion,* 6-11.2, *Interference,* 6-11.3, *Discrimination*, and 6-11.4, *Refusal to Bargain in Good Faith.* As was stated above, the state personnel director, under Civil Service Regulation 6.02, *Unfair Labor Practice Charges,* §3(A)(1), has given to this office the authority to administer the adjudication of such charges. Charges falling within the above-cited rules are within the jurisdiction of this office. The sufficiency of the charges themselves are to be adjudicated at the hearing. The motion for dismissal filed by the employer prior to the hearing, therefore, is dismissed on all the grounds that it was brought.

The employer also moved to sever the charges filed by the charging parties regarding the conduct before the Civil Service Commission from those addressing the conduct before the CCP. Obviously, the hearing went forward with no such severance, despite the hearing officer having taken that and the motion for dismissal under advisement. The hearing officer did so at the request of the parties during a teleconference prior to the hearing. The hearing officer had been ready at that point to deny the motions to dismiss and the motion to sever, but took them under advisement instead. The motion to sever violated this office's notions of judicial economy and the subject matter of all charges and amendments were sufficiently similar that it made good sense to combine them for hearing. There was no substantial increased complexity to the case

presentation imposed upon any party causing them prejudice at hearing. All that was alleged to have happened at the Civil Service Commission meeting was that Director Bommarito appeared before the Civil Service Commission and gave a presentation similar to that given by Deputy Hall at the CCP hearing. It was similarly claimed to be conduct constituting an unfair labor practice in violation of Civil Service Rules and the consensus agreement. It would have been an unwise use of limited resources to conduct two separate hearings, one concerning the conduct of the OSE before the CCP, the other concerning its conduct before the Civil Service Commission.

The next issue to be addressed will be that of the failure of the director of the Office of the State Employer, Sharon Bommarito, to appear to testify pursuant to the subpoena issued to her on May 13, 2010. The issue of the claim of executive deliberative privilege has been discussed above and will not be addressed here in detail. The proper method by which this witness should have asserted that privilege would have been to obey the subpoena, appear for the hearing, take the stand, and as questions were asked of her, her counsel could have raised the issue of privilege on a question-by-question basis. Most of the questions that the charging parties would have asked this witness would not have delved into areas in which such objections would have been raised. Any such questions that may have gone into those areas could have been addressed at the hearing. For the director of the Office of the State Employer, an officer who exercises her labor relations authority solely under the constitutional authority of the Civil Service Commission, to exhibit manifest disrespect for the authority of the Civil Service Commission to subpoena her to attend a hearing regulating that system, is execrable behavior. It shows absolute contempt for the body that is effectively responsible for the very existence of her office. As was noted above, had this subpoena created undue burden or expense for the director, those issues could have been addressed.

As was noted above, Attorney General Frank J. Kelley appeared before this body and offered testimony pursuant to subpoena in *Kalvans, supra*. Secretary of State Richard H. Austin appeared before this body to offer testimony pursuant to subpoena in *Shader-Patterson, supra*. Both of those individuals were not only the heads of state departments, they were elected officials. Both, however, were mindful of and exhibited respect for the constitutional authority of the Civil Service Commission. That same respect exhibited is found sorely lacking in the conduct of OSE Director Bommarito, at best a subaltern when compared to the aforementioned elected officials.

Director Bommarito is the agent of the governor for labor relations matters in this system. Her conduct in refusing to appear before this hearing pursuant to a lawfully issued subpoena indicates to the hearing officer that she had contempt for the process (both the CCP process and the unfair labor practice process) or she had information that she did not want exposed to the light of day. One of the negative inferences that the charging parties asked the hearing officer to draw is that the decision to repudiate the consensus agreement was made by the governor herself with

knowledge that the action to repudiate would violate Civil Service Rules. Based upon the facts in this record and Director Bommarito's absolute refusal to appear for the hearing, I believe such an inference is justified, as noted earlier in the fact finding above.

While the hearing officer has stated above that Bommarito or the group that met on December 7, 2009, could have made the decision, they are all subordinates of the governor. It is highly unlikely that they would have made the decision without her approval. Witness Hall had advised at that meeting (with Bommarito in attendance) that refusal to abide by the agreement might well generate unfair labor practice charges from the limited-recognition organizations. It is reasonable to conclude that at a minimum, Bommarito, the governor and her legal counsel concluded that the interest of saving $45 million outweighed the possibility of a negative outcome in an unfair labor practice hearing and made the decision to repudiate the consensus agreement, knowing full well that their actions may be violative of Civil Service Rules. They viewed the consensus agreement and any effort to enforce it in this process as essentially toothless, with the worst-case scenario being a finding of an unfair labor practice and the possibility of the requirement of posting of a notice that the employer had committed an unfair labor practice. It is for that reason that the charging parties have sought harsher remedies in this case.

The other negative inferences that the hearing officer draws from Bommarito's failure to appear are as follows:

At the meeting of December 7, 2009, the recommendation was made to repudiate the consensus agreement. That recommendation was forwarded to the governor. Based upon the recommendation of her executive staff, the governor made the decision to repudiate the consensus agreement before the CCP. She transmitted that decision to Bommarito, who asked Hall to draft the letter to the coordinated compensation panel entered into this record as Joint Exhibit 7, p. 2. At the time that the respondent met with the charging parties on December 21, 2009, it had already made its decision to repudiate the consensus agreement before the coordinated compensation panel, but met with the charging parties in order to go through the motions of the meet and confer process. It told the charging parties that no decision had been made when in fact a decision had already been made. This constitutes evidence that on December 21, 2009, the employer did not meet and confer in good faith with the charging parties. That very afternoon, Director Bommarito transmitted another version of the letter that her office had been drafting since December 10, 2009, to the CCP indicating that they could no longer support the 3 percent general pay increase agreed to in the 2007 consensus agreement. (Joint Exhibit #8) These adverse inferences are drawn based upon the authority granted to me to draw such inferences by Civil Service Regulation 8.01, §4(B)(12)(d)(9).

The hearing officer will next address the specific merit issues brought as charges by the charging parties. The charge of violation of Civil Service Rule 6-11.4, involves allegations of failure to meet and confer in good faith. The rule states:

> **Refusal to Bargain in Good Faith**
>
> It is an unfair labor practice for the employer to refuse to bargain in good faith over mandatory subjects of bargaining as required by these rules.

Civil Service Rule 6-11.4 was amended by the Civil Service Commission on December 18, 1998. Prior to that time, in all of its prior iterations, it consistently contained language that also made it an unfair labor practice for the employer to fail to meet and confer in good faith "as required by these rules." The fact that the Civil Service Commission eliminated that language in the 1998 rule revision cannot be ignored. The definition of the term "meet and confer" contained in Chapter 9 of the Civil Service Commission's current rules reads as follows:

> ***Meet and confer*** means the mutual obligation of employees or their representatives and the employer to meet at reasonable times and to confer in good faith regarding rates of compensation and other conditions of employment.

The Civil Service Commission's definition of the term requires the parties to meet and confer "in good faith." By its amendment of Civil Service Rule 6-11.4, however, the Civil Service Commission seems to have taken away any remedy that limited-recognition organizations have when, as here, the employer fails to meet and confer in good faith. It is clear in this case that the employer failed to meet and confer in good faith on December 21, 2009. It told the charging parties that no decision had been made as to whether it would support the 3 percent general wage increase or not when that decision had been made days if not weeks beforehand. The charging parties have alleged that the employer's repudiation of the consensus agreement constitutes a failure to meet and confer in good faith.

The hearing officer believes that the employer entered into the consensus agreement in good faith. Hall testified that the document was intended to bind his office, as has been the case with all other consensus agreements that he has entered into in his 30 years with the OSE. Despite the case law citations and argument presented by the respondent, the consensus agreement must be regarded as a contract between the signatories. There was clearly an offer, acceptance and consideration. While the document was a contract, it was not, and the charging parties do not claim it to be, a collective bargaining agreement. The respondent has made much of the fact that this cannot be a contract because the charging parties have no bargaining rights under this system. The charging parties do not, as limited-recognition organizations, have bargaining rights. They are the recognized representatives of their members, however, and no one would seriously argue that when they enter into a grievance settlement on behalf of their members regarding legitimate subjects to be addressed in such settlements, that contractual rights are not created. Similarly, in the CCP process, when the parties voluntarily bind themselves, as they did here, to a series of givebacks regarding healthcare benefits in exchange for an agreed-upon

three-year progression of general wage increases of zero percent, 1 percent, and 3 percent, as the pot of gold at the end of that rainbow, and further agree that they will not modify that agreement except by mutual agreement in writing, they have created a mutually binding contract. Further, since the respondent was the one who drafted the contractual language based upon collective bargaining agreements that it had just concluded with exclusive bargaining agents, the consensus agreement was entered into at its behest, using its language. It is not as if the OSE acceded to the demands of the LROs. The OSE provided all of the language and terms to the LROs. It cannot just walk away from an obligation that was solely its creation.

The problem in this forum seems to be that the Civil Service Commission, by its modification of the language of Civil Service Rule 6-11.4, *Refusal to Bargain in Good Faith,* while leaving the requirement of meeting and conferring in good faith in Chapter 9, seems to have created a right without a remedy. The hearing officer can clearly see a wrong in this case, but is constrained by the language of Civil Service Rule 6-11.4, particularly the 1998 amendment, from finding a violation, since it no longer seems to be an unfair labor practice to meet and confer in bad faith. Since the parties have a contract, but do not have a remedy in this forum, unless the Civil Service Commission decides that they do have a remedy in this forum on appeal, they may have an action for damages on a breach of contract theory in a court of competent jurisdiction since they appear to have no administrative remedy for the harm done them.

The issue of alleged violations of Civil Service rules 6-11.1, *Coercion,* 6-11.2, *Interference,* and 6-11.3, *Discrimination,* will be addressed next. The hearing officer believes the facts and the findings related to those allegations to be interrelated and that it will make more sense to the reader to have them addressed together. In citing the rules below, I have bolded those portions that I believe to be potentially in controversy in this opinion.

Civil Service Rule 6-11.1, *Coercion,* reads as follows:

> **It is an unfair labor practice for the employer to interfere with**, restrain, coerce, **discriminate against**, or retaliate against **employees in the exercise of rights granted by these rules**.

Civil Service Rule 6-11.2, *Interference,* reads as follows:

> **It is an unfair labor practice for the employer to** dominate, **interfere with**, or assist in **the** formation, **existence**, or administration **of a labor organization**.

Civil Service Rule 6-11.3, *Discrimination,* reads as follows:

> **It is an unfair labor practice for the employer to discriminate** or retaliate **against an employee because that employee has** (1) filed and affidavit, petition or complaint; (2) given information or testimony; (3) formed, **joined, or chosen to be represented by a labor organization**; or (4) participated in a campaign or election to certify, change, or decertify an exclusive representative.

One of the "rights granted by these rules" has been set forth above in the definitions listed in the Civil Service Commission Rules, Chapter 9, that being the mutual obligation of the parties to meet and confer regarding rates of compensation and other conditions of employment. The hearing officer interprets the words "mutual obligation" as creating a right in employees and their representative organizations to participate in the meet and confer process. That same right is set forth in Civil Service Rule 6-2.2, *Limited-Recognition Organizations Authorized,* albeit with no notation of the obligation to do so in good faith. Civil Service Rule 6-2.2 establishes the right of NEREs to designate LROs as their representatives to meet and confer with the employer; the definition in Civil Service Commission Rules, Chapter 9 affirms the duty to do so in good faith.

It is clear that the employer by its conduct in underlying the charges in this case has destroyed any opportunity for employees and their representative organizations to meet and confer in good faith with the employer. How, given the conduct of the employer in this case, can the charging parties ever believe anything the employer says again in the meet and confer process? The decision maker who decided that saving $45 million was worth the cost of a potential unfair labor practice charge ignored the fact that in the process she was destroying the better part of 30 years of trust that had been built up between the parties within this labor relations system. No such trust can be expected to exist at this point. It is true in many professions but particularly in labor relations that an advocate's only stock-in-trade is his or her credibility. With the stroke of her pen in signing the December 21, 2009, letter to the CCP, Bommarito destroyed the credibility that her advocates had established through the years with the limited-recognition organizations. That conduct constitutes interference with and discrimination against employees in the exercise of rights granted by these rules. That is an unfair labor practice in violation of Civil Service Rule 6-11.1, *Coercion*.

The conduct of the employer, as criticized by the CCP in its recommendation to the Civil Service Commission of reopening negotiations with the exclusive representatives and extending their contracts for a year, shortly before recommending that the nonexclusively represented receive nothing, constitutes discriminatory conduct toward NEREs. It must be kept in mind that many NERE members of the charging parties are not excluded employees, but are employees who are members of the Business and Administrative bargaining unit, a unit that has never been organized despite repeated efforts on the part of some of the exclusive bargaining agents. It seems clear to the undersigned that by extending the collective bargaining agreements of the exclusively represented in the face of the same budget crisis facing the nonexclusively represented, the administration has indicated a clear preference for exclusive representation as opposed to limited-recognition organizations. The employer in its testimony indicated that it was not claiming an inability to pay the 3 percent pay increase for the NEREs. It indicated that it viewed adding such a payment to a looming massive budget deficit as irresponsible. As was noted by the CCP, however, in the face of the same budget deficit, it negotiated extensions to the collective bargaining agreements of the exclusively represented and did not even *ask* them to

revisit the issue of the 3 percent general wage increase. That indicates a clear preference, in the opinion of the undersigned, for an exclusive bargaining agent as the representative of the Business and Administrative bargaining unit, a sufficient motive to undermine the credibility of the limited-recognition organizations with their membership. As was claimed by charging party MSPCOA, by providing the 3 percent general wage increase to the 35,000 employees protected by collective bargaining agreements and then repudiating the 3 percent general wage increase recommendation to the CCP that it had negotiated with the LROs, the charging parties were made to look powerless. It signaled to their members, it was claimed, that the LROs, as opposed to the exclusive representatives, were mere paper tigers, thereby discouraging membership in them.

The respondent has correctly contended that the evidence presented at hearing is inconclusive as to the effect that the Civil Service Commission's failure to grant the 3 percent general wage increase has had on the membership of the charging parties. The testimony of Threehouse was to the effect that MAGE had lost some membership and had gained some membership, with the overall trend being downward. Martha Yoder of ASEM indicated that her organization saw an upswing in membership as employees who felt that the repudiation of the consensus agreement was the last straw in disparate treatment of NEREs joined in an effort to help with the fight. The hearing officer believes that no statistical evidence is likely to be conclusive in the short term. The short-term information provided by Threehouse and Yoder is at best anecdotal in nature. The respondent in this case engaged in the conduct exhibited because it clearly felt that it could do so without significant consequence. That conduct and the contempt that it showed for the charging parties and their members, as compared to the exclusively represented employees, did make charging parties MAGE, MSPCOA, and ASEM out to be paper tigers. The actions of the employer were more likely than not designed to promote membership in an exclusive representative organization at the expense of the LROs. It therefore constituted an attempt at interference with the existence of labor organizations in violation of Civil Service Rule 6-11.2, *Interference*.

It should be clear that the employer has from the actions set forth above discriminated against the membership of the charging parties by recommending against their agreed-upon 3 percent general wage increase to the CCP and to the Civil Service Commission, while negotiating extensions to the collective bargaining agreements calling for the same 3 percent general wage increases, never making an effort to address those increases in the process of those negotiations. The respondent has contended that the consensus agreement has no language preventing it from making a separate presentation to the Civil Service Commission. Clearly, that was not the intent of the consensus agreement, however. No such separate presentation has been made in the past, according to this record, when consensus agreements have been entered into. The CCP, in its recommendation to the Civil Service Commission, cited above in this opinion, referenced the parties giving up their rights to petition "the Panel and Commission in previous CCP proceedings as a result of the agreement."

Clearly, the conduct of the respondent in repudiating the consensus agreement before both the CCP and the Civil Service Commission has treated the LROs in a substantially different manner than they have treated the exclusive representatives. Despite a lengthy history of treating exclusively and nonexclusively represented employees equitably, in this instance a choice was made to single out a group not represented by traditional organized labor for inequitable treatment. The conduct of the respondent in repudiating the consensus agreement before the CCP and the Civil Service Commission therefore violated Civil Service Rule 6-11.3, *Discrimination*.

In the above fact-finding and opinion, the hearing officer has found violations of Civil Service rules 6-11.1, *Coercion,* 6-11.2, *Interference,* and 6-11.3, *Discrimination*. The hearing officer is convinced that the decision on the part of the respondent to repudiate the consensus agreement was based upon its opinion that the worst that could happen to it would be a finding of one or more unfair labor practices and being ordered to post a notice of same. That is where the respondent was wrong.

Civil Service Regulation 6.02, *Unfair Labor Practice Charges,* governing the conduct of unfair labor practice hearings gives to Civil Service hearing officers the authority to, upon sustaining an unfair labor practice charge, order the respondent to (1) cease and desist that conduct and (2) take action to remedy the effects of that conduct. The respondent has contended that since many of the provisions of Civil Service Regulation 8.01, *Grievance and Grievance Appeal Procedures,* are utilized to conduct these proceedings, the prohibition against attorney fees set forth in Civil Service Regulation 8.01 should apply here as well. The logic is that since discovery, motions and subpoenas are regulated by Civil Service Regulation 8.01 for hearings conducted under Regulation 6.02, attorney fees should be as well. Civil Service Regulation 6.02, however, is silent when it comes to issues of discovery and motion practice, and the subpoena rule, formerly set forth in the general Civil Service Rules, was moved into Civil Service Regulation 8.01 upon its adoption. Civil Service Regulation 8.01 contains its own language as to relief to be awarded to grievants. That language is specific and somewhat restrictive upon the authority of hearing officers. Civil Service Regulation 6.02 is *not* silent on relief to be awarded to charging parties upon the finding of unfair labor practices. It is broad and general in nature, leaving much to the discretion of the hearing officer in fashioning appropriate relief. It allows the hearing officer to direct the respondents to "take action to remedy their effects" upon the finding of an unfair labor practice. Traditionally, this has amounted to a finding of a unfair labor practice and a cease and desist order and an order for a posting of the cease and desist order. This is not a traditional case. It is an unprecedented one.

In this case, the employer through its actions has undermined that portion of the labor relations system in the state classified service dealing with nonexclusively represented employees and the meet and confer process. It has by its actions made the charging parties out to be ineffective representatives of employee interests; paper tigers, as was asserted by MSPCOA. This cannot

help but have a deleterious effect upon the efforts of the charging parties to recruit and retain members. What accomplishments can they point to, if the agreements that they reach with the employer can be evaded at will and without consequence?

The hearing officer will award the traditional relief for the finding of unfair labor practices in this case. The employer is directed to cease and desist from failing to abide by the terms of consensus agreements that are entered into with limited-recognition organizations. Such agreements, to the extent that they contain, as here, offer, acceptance and consideration (rates of compensation) are contractual in nature and are intended by the parties to be binding agreements. Here, there was a provision that the agreement could only be modified by mutual agreement in writing. No such mutual agreement was reached. The employer unilaterally repudiated the terms of the agreement. That constituted unfair labor practices as set forth above. The employer is directed to cease and desist from such conduct and to post the attached notice of a finding of unfair labor practice charges and the remedy at places in the worksite where notices to employees are regularly posted. It is also to be posted on the website of the Office of the State Employer. That notice shall be posted within 14 calendar days of the date of issuance of this decision and shall remain posted for one year from the date of its initial posting.

In addition to the above relief, due to the egregious nature of the conduct by the employer, the charging parties are awarded reasonable attorney fees occasioned by the necessity of prosecuting this action. Those fees are intended to assure that conduct of this type on the part of the OSE will not be repeated; in other words, they are awarded to make the employer take an action to truly remedy the effects of its conduct in this case, pursuant to the authority granted to me to make such awards by Civil Service Regulation 6.02, §3(C)(3). Without such an award, with a mere cease and desist order and posting, this employer might well be willing to repeat the conduct that has been demonstrated in this case. The attorney fees shall include all reasonable fees supported by billable hours through the conclusion of this hearing and any appeal that may take place through the level of the Civil Service Commission. In any appeal to the courts, the courts would exercise jurisdiction over any claim to such fees.

The attorney fees are also awarded on the basis of what amounts to a frivolous defense put forward by respondent in this case. Respondent could have couched its defense in terms of the inability to pay, but the testimony of witness Hall clearly indicates that such was not the case. The respondent in this case clearly engaged in the conduct in question because it felt that it could save $45 million, the only potential cost being a slap on the wrist in the form of an unfair labor practice charge, a cease and desist order and a posting of same. When viewed in isolation, the employer's claim of fiscal responsibility may seem logical, but in the broader context of granting and extending for an additional year a 3 percent general wage increase to 35,000 bargaining unit employees while recommending that it be denied to the membership of the charging parties, that logic fails. To come into this forum and claim that it was not unable to pay, yet it would have been irresponsible for it to pay, when it had just negotiated an extension of the same increase

with four other bargaining units *without even asking them to discuss their 3 percent general wage increases*, amounts to either a frivolous defense or something very much like it. That defense cost the charging parties a great deal of money to overcome. On that basis as well as on the basis of the egregious conduct of the employer, attorney fees are justified.

Within 14 calendar days of the issuance of this decision, counsel for all three charging parties shall submit itemized records of the fees paid to them by the charging parties, supported by their billing records. They shall supply a copy of those documents to the respondent. The respondent will then have 14 calendar days in which to submit any objections to the amounts set forth in the billings provided by the charging parties. The undersigned will then render a decision as to the amount to be awarded to each firm. The undersigned will retain jurisdiction to determine what attorney fees, if any, are appropriate based upon any appeal to the Employment Relations Board or Civil Service Commission.

The charging parties had also sought damages equal to the 3 percent general wage increase denied to their membership. The hearing officer believes that to be beyond the scope of his authority, since such damages would be awarded for breach of contract. The hearing officer has no authority to adjudicate breach of contract disputes of the nature presented in this hearing.

Charging party ASEM also sought damages in the form of reimbursement for the dues payments paid to it for its members for the time period in question. The hearing officer finds no basis for the awarding of such damages.

The charging parties also sought an order from the undersigned that the respondent be directed at the next Coordinated Compensation Panel proceeding to join with the charging parties in recommending the restoration of the 3 percent general wage increase for NEREs, retroactive to the beginning of fiscal year 2011. Given that the CCP already recommended to the Civil Service Commission that NEREs be granted the same 3 percent general wage increase for that period as the exclusively represented employees, and given that the Civil Service Commission is well aware that the governor and the employer oppose that increase, the hearing officer believes that such an order would ring hollow if issued. The charging parties will have the opportunity to make their presentations to the CCP, including the findings of this hearing officer, at the next CCP hearing. They can make their case in equity to the CCP that such an award from the Civil Service Commission would be justified. The undersigned believes that it would be a meaningless addition to this award.

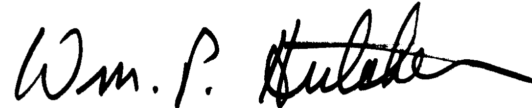
Charging party ASEM also sought as damages a recommendation from the undersigned that OSE Director Bommarito be disenfranchised from participation in future Coordinated Compensation Panel proceedings. That relief is beyond the scope of the authority of the hearing officer to grant.

SUMMARY

The respondent is found to have violated Civil Service rules 6-11.1, *Coercion,* 6-11.2, *Interference,* and 6-11.3, *Discrimination*. But for the 1998 amendment to Civil Service Rule 6-11.4, *Refusal to Bargain in Good Faith,* a finding of violation of that rule would have been made as well, but the employer's obligation to meet and confer was removed from that rule at that point. The respondent is directed to pay the charging parties reasonable attorney fees and to post the attached notice in conspicuous places where notices would normally be seen by members of the charging parties. In addition, the respondent is to prominently post the notice on its website. The notice shall be posted for one year from the date of its initial posting.

DECISION

The charges are granted in part as set forth above. The hearing officer retains jurisdiction to determine attorney fees. The appeal period shall begin after the initial award of attorney fees is finalized.



William P. Hutchens, Hearing Officer

STATE OF MICHIGAN
CIVIL SERVICE COMMISSION
HEARINGS, EMPLOYEE RELATIONS, AND MEDIATION

NOTICE TO ALL NONEXCLUSIVELY REPRESENTED EMPLOYEES OF FINDING OF UNFAIR LABOR PRACTICES

ASSOCIATION OF STATE EMPLOYEES IN MANAGEMENT, MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES, AND MICHIGAN STATE POLICE COMMAND OFFICERS ASSOCIATION

and

OFFICE OF THE STATE EMPLOYER

Date: October 5, 2010

Ref. Nos.: 2010-00539
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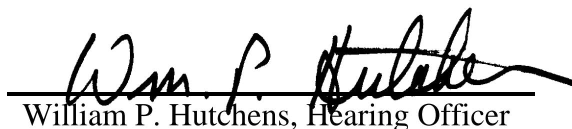
2010-00541
2010-01161
2010-01308

Be advised that the undersigned has determined, following hearing, that the respondent Office of the State Employer, by repudiating the consensus agreement that it entered into with the charging parties, committed unfair labor practices in violation of Civil Service Rules 6-11.1, *Coercion,* 6-11.2, *Interference,* and 6-11.3, *Discrimination,* against the charging parties and their members.

Due to this finding, the respondent Office of the State Employer is directed to **CEASE AND DESIST** from entering into such agreements and subsequently unilaterally repudiating them. Due to the conduct that was found on the part of the respondent, in addition to posting this notice in conspicuous places in its worksites where such notices would normally be viewed by nonexclusively represented employees (NEREs) it is directed to post it on its website. The posting shall remain in place for one year from the date of the original posting. In addition, due to the egregious nature of its conduct and what was determined to be the frivolous nature of its defense to the charges, the respondent is directed to **pay the reasonable attorney fees** of the charging parties occasioned by the necessity of having to prosecute these charges against the respondent.



William P. Hutchens, Hearing Officer

[This notice must remain posted for one year from the date of posting and must not be altered, defaced, or hidden by other material. It must be prominently displaced on the OSE website.]