STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF WASHTENAW, Respondent, and WASHTENAW COUNTY TREASURER, Respondent-Appellant, v AFSCME COUNCIL 25, Charging Party-Appellee.	UNPUBLISHED July 29, 2010 No. 286874 MERC LC No. 04-000162

Before: K.F. KELLY, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Respondent Washtenaw County Treasurer (the Treasurer) appeals as of right under MCL 423.216(e), the Michigan Employment Relations Commission's (MERC) decision affirming the decision and recommended order of the hearing officer in favor of charging party AFSCME Council 25, Local 2733 (the Union). This case arises out of the Union's unfair labor practice charge against the Treasurer and the County of Washtenaw.[1] We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On appeal, the Treasurer accepts (with a few minor exceptions) the hearing officer's findings of fact and summary of procedural history; thus, we quote that recitation here:

> The Unfair Labor Practice Charge:
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> On June 21, 2004, Charging Party American Federation of State, County and Municipal Employees (AFSCME) Council 25, Local 2733, filed an unfair

[1] The County of Washtenaw is not a party to this appeal.

labor practice charge against the County of Washtenaw. On August 18, 2004, the Union amended the charge to include the Washtenaw County Treasurer as a Respondent. The charge, as amended, alleges that Respondents violated Section 10 of the PERA [public employment relations act] by repudiating a collective bargaining agreement entered into by the parties in 2002. Specifically, AFSCME contends that the Washtenaw County Treasurer, Catherine McClary, prevented bargaining unit member Donald Bilbey from bumping into a position in the Treasurer's Office to which he was entitled pursuant to a "superseniority" provision in the contract. At the hearing, Charging Party once again amended the charges to include an allegation that the Washtenaw County Treasurer was motivated by anti-union animus in refusing to allow Bilbey to bump into a position in her department.

Finding of Facts:

Charging Party is the certified collective bargaining representative of approximately 700 employees of Washtenaw County. AFSCME Local 2733 members are organized in two bargaining units, referred to by the parties as Units A and B. Unit A consists of all nonsupervisory professional employees of the County, excluding employees of the circuit, probate and district courts, the prosecuting attorney's office, the public defender's office, the corporation counsel's office and the human resources department. Unit B is comprised of all non-degreed County employees.

Catherine McClary took office as Washtenaw County Treasurer in January of 1997. She has since been reelected to that office twice, most recently for a term covering the period 2003-2007. Since McClary took office as Washtenaw County Treasurer, AFSCME Local 2733 and the County have been parties to successive collective bargaining agreements covering the periods 1998-2002 and 2003-2007.

The lead negotiator for the County during negotiations on the 1998-2002 contract with Unit A was labor relations director Diane Heidt. The remainder of the County's bargaining team consisted of representatives from the juvenile detention, juvenile court, environmental health and friend of the court. McClary was not present during the negotiations, nor was any member of her department. AFSCME's representatives did not question the absence of the treasurer because it appeared to them that the Employer's bargaining team represented a cross-section of County departments, and because the County had traditionally bargained contracts on behalf of all its elected officials.

After an agreement had been reached between Charging Party and the County's negotiating team, Heidt called McClary and asked her to sign a copy of the contract. McClary refused to sign the agreement, indicating to Heidt that she felt uncomfortable because she "didn't have anything to do with it." The 1998 to 2002 contract was ultimately signed by the chair of the Washtenaw County board of commissioners, the clerk/register of deeds, the drain commissioner, the sheriff

and the prosecuting attorney. There was no signature line for the Washtenaw County Treasurer on the final agreement.

The County's bargaining team for the 2003-2007 contract consisted of Heidt and representatives from public health, juvenile detention and the trial court. Once again, neither McClary nor any representative of the Treasurer's office were present for the negotiations. McClary was aware that bargaining was ongoing, however, as there were brief discussions about the status of negotiations during the departmental meetings which McClary attended. In addition, McClary knew that some of her employees were in Charging Party's bargaining unit and that they paid membership dues to AFSCME. On or about March 18, 2003, Heidt presented McClary with a copy of the 2003-2007 contract for her signature, but McClary again refused to add her signature to the document. The contract was ultimately signed by the chair of the board of commissioners, the clerk/register of deeds, the drain commissioner, the sheriff and the prosecuting attorney. The final version of the agreement contains a line for McClary's signature which was left blank, as was a space intended for the signature of a member of the Union's negotiating team.[2]

The incident which gave rise to this dispute involved Donald Bilbey, an Accountant I/II/II [sic] in the County's support services department. Bilbey served as an AFSCME steward for a number of years and, in early 2003, was elected to the position of Union treasurer. Due to a reorganization which occurred in April of 2004, Bilbey's position in the support services department was eliminated.

Article 15 of the 2003-2007 contract contains a "superseniority" clause which provides that officers of Local 2733, the chapter chairperson, secretary and all stewards shall head the seniority list of the unit for the purpose of layoff during their terms of office. By letter dated April 8, 2004, the County notified Bilbey of his right under Article 15 to bump into the least senior Unit A accountant I/II/II [sic] position in the Treasurer's Office, a position which was held at the time by Jihong Shi, an employee with more overall seniority then Bilbey.

Bilbey accepted the bump and Shi was removed from her position in the Treasurer's Office.[3] Bilbey was scheduled to begin working in the position formerly held by Shi on or about May 3, 2004. Prior to that date, McClary called Charging Party's president, Robert Brabbs, and told him that she was not going to allow Bilbey to bump into a position in her department because she had never agreed to the AFSCME contract and did not believe it was fair for a "new officer" to displace one of her employees. That same day, the Union filed a grievance

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[2] The Treasurer notes that this last statement, while true, is misleading because five other Union representatives did sign the 2003-2007 collective bargaining agreement.

[3] The Treasurer states that Shi was never actually removed from her position.

asserting that Bilbey was being denied his bumping rights under Article 15 of the contract.

On May 5, 2004, the County's corporation counsel sent a letter to McClary requesting that she confirm that it was her position that the Washtenaw County Treasurer was not bound by the contract negotiated between AFSCME and the County. Specifically, the letter stated, in pertinent part:

> It has come to my attention that you have taken the position that you are not bound by the AFSCME Local 2733 collective bargaining agreements. This takes place after several years of accepting and abiding by the terms and conditions of the collective bargaining agreements. You have specifically refused to acknowledge the seniority provisions of the agreement regarding the placement and transfer of employees in the case of a lay-off. [I]t also appears that you are now repudiating the entire collective bargaining agreement between the Board of Commissioners and AFSCME Local 2733.

McClary responded to the corporation counsel by memorandum that same day. The memorandum provided, in relevant part:

> [T]his will confirm that I cannot repudiate the collective bargaining agreement between the Board of Commissioners and AFSCME Local 2733 as I have never negotiated nor been a meaningful party to the agreement. Although I have the legal status as a co-employer with the Board of Commissioners, I am not a party to the agreement because AFSCME has never asked me to bargain with it on terms and conditions of employment within the Office of County Treasurer, nor did I authorize anyone to bargain on behalf of the Treasurer.
>
> I fully support unionized work forces and I am a firm believer in the underlying concepts of collective bargaining. Even so, I do not believe that a Union officer of only a few weeks duration should bump a long-term, highly skilled, experienced employee with more seniority who is supporting two children.
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> As Washtenaw County Treasurer, I am asking Corporation Counsel's Office to represent me in this challenge by AFSCME. I have neither acquiesced nor agreed to "super seniority." AFSCME has an affirmative obligation and burden to submit to the Treasurer a demand to bargain on non-economic terms and conditions within the Treasurer's Office, including seniority. I have never been afforded the opportunity to negotiate, nor accepted or abided by, "super seniority" bumping rights into the Office of County Treasurer. [Emphasis in original.]

That evening, the Washtenaw County Board of Commissioners voted unanimously to adopt a resolution which conveyed to the County administration its "support of their execution" of the collective bargaining agreement and called for the faithful execution of "all clauses of all of the County's bargaining agreements."

On May 19, 2004, the Board of Commissioners voted to eliminate the accountant position in the Treasurer's Office into which Bilbey was supposed to have bumped. The County then bumped Bilbey into a different accountant position in the Treasurer's Office, effective June 11, 2004. The employee who held that position, Jacco Gelderloos, was moved to a position in another department. Once again, however, McClary refused to allow Bilbey to bump into a position in the Treasurer's Office. In response, on or about June 2, 2004, the Board eliminated the position in the Treasurer's Office formerly held by Gelderloos and bumped Bilbey to an accountant position in the County's finance department, where he remained at the time of hearing in this matter. Thereafter, on August 18, 2004, the Union filed the instant charge against the County and the Treasurer.

At the hearing in this matter, Charging Party's witnesses testified about various incidents that occurred between 1998 and 2005 which purportedly caused the Union to believe that McClary was bound by the terms and conditions set forth in the contracts negotiated by the County.

* * *

In 2000, Betty Mastichelli, an employee of the Treasurer's Office and a member of AFSCME Local 2733 Unit B, was disciplined. McClary asked the County's human resources department to transfer Mastichelli out of the Treasurer's Office. Negotiations ensued between McClary, Brabbs and representatives from the County's human resources department. Ultimately, the County and the Union agreed that Mastichelli would be moved to another department and that her wages would be red-circled. Brabbs believed that the settlement agreement had been approved by McClary since the terms of the agreement were fully implemented and Mastichelli was ultimately relocated to a position outside of the Treasurer's Office.[4]

Another employee of the Treasurer's Office, Stephanie Battle, was terminated by McClary for poor performance. AFSCME filed a grievance over the termination and, pursuant to the terms and conditions set forth in the AFSCME contract, it went directly to Heidt, who is Step 3 of the grievance procedure. The grievance was ultimately settled as a result of negotiations which

[4] The Treasurer contends that once Mastichelli was removed, the Treasurer was simply "happy to be rid of [Mastichelli] and had no further involvement or concern."

took place involving Heidt and Brabbs. Although McClary did not participate in these discussions, Brabbs testified credibly that Heidt held herself out as a representative of both the County and the Treasurer's Office for purposes of resolving the dispute. McClary was aware of the settlement, but took no action to oppose it. At hearing, McClary testified "[Heidt] told me it was less expensive to settle [than] to go to arbitration. And I didn't sign anything or agree to it or not agree to it, if it's cheaper for the County that's what they decided to do."

On another occasion, McClary consulted with Heidt and Vera McDaniel concerning a problem employee. On advice of Heidt and McDaniel, McClary began imposing progressive discipline on the employee. In addition, McClary started documenting the employee's conduct by filling out "union performance evaluation" forms. Ultimately, McClary went to Heidt and asked for the County's assistance in getting the employee moved to another department. Heidt indicated to McClary that there was an employee in the IT department, Lois Merritt, who was eligible to bump into the position. Merritt was transferred to the Treasurer's Office in 2003 pursuant to the bumping procedure set forth in the AFSCME contract.

A few years prior to the hearing in this matter, a part-time employee of the Treasurer's Office began experiencing medical problems and needed to retire. In an attempt to find a way to get health insurance for this employee, McClary called a conference with Brabbs and a representative of the County's labor relations department. According to Brabbs, this conference was held pursuant to the terms and conditions set forth in the AFSCME contract.

Upon concluding his finding of facts, the hearing officer then went to explain the governing principles of law:

It is well established that a county treasurer is a co-employer of her appointed duties. MCL 78.37; *Branch County Bd of Commissioners v UAW*, 260 Mich App 189 (2003); *Berrien Co*, 1987 MERC Lab Op 306. As a co-employer, the treasurer has the right to bargain and to approve any agreement pertaining to her duties. *St. Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204 (1987). With this right, however, comes certain obligations, including the obligation to bargain in good faith with the certified representative of her employees. *County of Wexford*, 1992 MERC Lab Op 444; *St. Clair County Sheriff*, 1976 MERC Lab Op 708.

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It is a violation of Section 10(1)(e) of PERA for a public employer to refuse to bargain collectively with the representatives of its employees. However, PERA does not require the employer to initiate bargaining. Rather, an employer's duty to bargain under the Act is conditioned on there being a request to bargain from the employees or the employee representative. *St. Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204, 247 (1986); *Local 586, SEIU v Union City*, 135 Mich App 553, 558 (1984). The requirement that there be a bargaining

> demand can be impliedly or expressly waived by a public employer. *St. Clair Prosecutor, supra* at 247-248 (1986). Waiver may be implied by acquiescence that would reasonably lead the other parties to believe that a co-employer considered herself to be represented by another employer during negotiations and ultimately to be bound by the agreement struck by the other participating parties. *Id*.

In rendering his determination on the Union's charge, the hearing officer first pointed out that there was no dispute that the Union did not directly bargain with the Treasurer and that the Treasurer never directly authorized the County to bargain on her behalf. However, noting that it was the County's practice to negotiate on behalf of its elected officials, the hearing officer concluded that the Union "reasonably believed that the Treasurer was bound by the contracts it negotiated with the County." And although the Treasurer apparently disagreed with this practice and indeed refused to sign the collective bargaining agreements that she did not negotiate for, the hearing officer found it significant that the Treasurer did not disclose her objections to the Union until the present dispute over Bilbey's super-seniority bump arose. The hearing officer then went on to recap the various prior, employee/union interactions that the Treasurer took part in (as explained above) and concluded that her involvement and conduct evidenced "an implied waiver by acquiescence." The hearing officer concluded that

> McClary waived the right to assert her bargaining authority as a co-employer of [the Union's] members. See e.g. *Wexford, supra* (treasurer estopped from denying agreement where he failed to communicate his dissatisfaction with disputed clause until six months after contract had been ratified and implemented). *Cf. St. Clair Prosecutor, supra* (waiver of bargaining authority did not occur where prosecutor did nothing which would have led parties to believe that he took a different position than his predecessor with respect to his employer prerogative to bargain over the terms and conditions of employees within his office).

Accordingly, the hearing officer held that the Treasurer was estopped from rejecting the collective bargaining agreement as implemented by Washtenaw County.

The hearing officer then went on to dismiss the Treasurer's contention that Article 15 (the super-seniority clause) was unlawful. Although noting that MERC has previously held that Article 15 violates the PERA "when granted to union officers who do not perform steward or other on-the-job contract administration functions[,]" the hearing officer found that the present record was lacking in evidence regarding Bilbey's duties. And, regardless, the hearing officer pointed out, the legality of Article 15 was not the question at issue in the present challenge.

Last, the hearing officer addressed whether the Treasurer's refusal to comply with the collective bargaining agreement constituted an unlawful discrimination in violation of Section 10(1)(c) of the PERA. The hearing officer found that the Treasurer "testified credibly" that she refused to accept Bilbey's bump because of her non-participation in the collective bargaining agreement negotiations and her disagreement with the displacement of another more qualified and more senior union member. According to the hearing officer, "There is simply nothing in the record to suggest that [the Treasurer] was in [sic] motivated by anti-union animus or hostility

to employees' exercise of protected rights in attempting to prevent Bilbey from bumping into a position in the Treasurer's Office."

The Treasurer then filed exceptions to the hearing officer's decision. The Treasurer argued that the hearing officer erred in finding that she was bound by the collective bargaining agreement between AFSCME and the County. The Treasurer also argued that the hearing officer erred in finding the matter justiciable. According to the Treasurer, the Board of Commissioners' decision to eliminate the positions in question before the filing of this charge made it impossible to fashion a remedy and, therefore, rendered the matter moot. The Treasurer again contended that the super-seniority clause of the agreement was unlawful. And, last, the Treasurer argued that, even assuming the legality of the clause, her refusal to abide by the terms of the collective bargaining agreement did not constitute an unfair labor practice. On May 15, 2008, MERC issued its decision, upholding the hearing officer's recommended order.

MERC later granted the Treasurer's motion for reconsideration, but ultimately adhered to its original decision to uphold the hearing officer's recommendation. The Treasurer now appeals.

II. THE MERC DECISION

A. STANDARD OF REVIEW

"We review MERC decisions 'pursuant to Const 1963, art 6, § 28, and MCL 423.216(e).'"[5] "MERC's 'findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole.'"[6] "'This evidentiary standard is equal to "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance."'"[7] We must undertake review of MERC's factual findings "'with sensitivity, and due deference must be accorded to administrative expertise."[8] And we will not "'invade the exclusive fact-finding province of administrative agencies by displacing an agency's choice between two reasonably differing views of the evidence.'"[9]

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[5] *Branch Co Bd of Comm'rs v MERC Int'l Union*, 260 Mich App 189, 192; 677 NW2d 333 (2003), quoting *Grandville Municipal Executive Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996).

[6] *Branch*, 260 Mich App at 192-193, quoting *Grandville*, 453 Mich at 436.

[7] *Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 630; 669 NW2d 315 (2003) (quotations and citations omitted).

[8] *Gogebic Community College v Gogebic Community College Michigan Educ Support Personnel Ass'n*, 246 Mich App 342, 348-349; 632 NW2d 517 (2001), quoting *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 450; 473 NW2d 249 (1991).

[9] *Gogebic*, 246 Mich App at 349, quoting *Amalgamated*, 437 Mich at 450 (citation omitted).

"MERC's 'legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law.'"[10] Stated differently, "[w]e *will* set aside a legal ruling by MERC if it runs afoul of the law or is otherwise tainted by a serious legal error."[11] "'In contrast to [] MERC's factual findings, its legal rulings "are afforded a lesser degree of deference" because review of legal questions remains de novo, even in MERC cases.'"[12] However, "[a]lthough [this Court's] deference to the MERC is less with regard to questions of law, 'the [MERC] is the state agency specially empowered to protect employees' rights [and] . . . , we acknowledge the MERC's expertise and judgment [sic] in the area of labor relations.'"[13]

B. WAIVER BY ACQUIESCENCE

The Treasurer argues that MERC erred in ruling that an elected county treasurer, as a public employer, can be deemed party to a collective bargaining agreement that she refused to sign or accept, and therefore can be guilty of an unfair labor practice for failing to adhere to any terms of a contract between other parties. The Treasurer further argues that MERC erred in holding that arguable compliance by a public employer with some provisions of a third-party contract, which the public employer is required by law to recognize,[14] and over which the Treasurer has no authority or control, is tantamount to binding adoption of the entire contract. In sum, the Treasurer essentially argues that MERC erred in holding that she was bound to the collective bargaining agreement on the theory that she waived any right to object to its terms. According to the Treasurer, the Union should have been on notice of her lack of acceptance of the agreement by the lack of her signature on the contract.

In *County of Wexford and Wexford County Treasurer*,[15] MERC affirmed the hearing officer's conclusion that the Wexford County Treasurer was estopped from challenging the validity of a collective bargaining agreement between the County of Wexford and the United Steelworkers of America, AFL-CIO, CLC, because he failed to communicate his objections to the Steelworkers in a timely fashion. As in this case, the hearing officer in *Wexford* first noted that the Wexford County Treasurer was a co-employer with the County and that, accordingly, he was entitled to certain rights, but also subject to certain obligations, including the obligation to bargain in good faith. The hearing officer explained that "if the treasurer had reservations about

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[10] *Branch*, 260 Mich App at 193-194, quoting *Grandville*, 453 Mich at 436, citing MCL 24.306(1)(a), (f).

[11] *Michigan Educ Ass'n v MERC*, 267 Mich App 660, 663; 706 NW2d 423 (2005) (emphasis added).

[12] *Branch*, 260 Mich App at 194 (quotations and citations omitted).

[13] *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323 n 18, 550 NW2d 228 (1996) (quotations and citations omitted)).

[14] Citing MCL 46.11(g) and (m); MCL 48.40.

[15] *County of Wexford and Wexford County Treasurer*, 1992 MERC Lab Op 444; 5 MPER 23059 (1992).

the [contract], he had ample opportunity to convey that doubt and have the problem presented in negotiations with the [Steelworkers'] bargaining team immediately after" the meeting at which the tentative agreement was reached. And while the hearing officer acknowledged that "there may be numerous difficulties in concluding an agreement where the employer is a multi-headed entity, *simple communication between the parties is still basic to a good faith bargaining relationship*."[16]

Notably, the hearing officer in *Wexford* also pointed out that a co-employer need not sign the completed contract to express his ratification of the document.[17] According to the hearing officer, "The right of the co-employers, including the treasurer, to participate in collective bargaining with the County carries with it the obligation to maintain close communication with their agents as the negotiations progress and to act definitively and expeditiously on matters affecting their area of concern." MERC agreed that the Treasurer's "total failure to communicate" *with the Steelworkers* until after the contract was ratified and implemented was the dispositive factor and entitled the Steelworkers to rely on the agreement.

Here, the undisputed facts show that the Treasurer told the County's labor relations director that she did not want to sign the 1998-2002 contract because she "didn't have anything to do with it." And the Treasurer again refused to sign the 2003-2007 contract when the labor relations director presented it to her. However, the undisputed facts also show that the Treasurer never communicated her objections to the contract *to the Union* until long after the contract had been ratified and implemented. And as in *Wexford*, the Treasurer here was obligated to communicate her objections to the Union so that the issue could be negotiated because "simple communication between the parties is still basic to a good faith bargaining relationship." We therefore find no material error in the hearing officer's conclusion that, in the absence of such communication, the Union was entitled to rely on the bargained-for agreement as applying to the Treasurer's Office. By engaging in negotiations and discussions with the Union about union employees in her office, the Treasurer operated in a manner that evidenced "an implied waiver by acquiescence." Indeed, we find most significant the Treasurer's lack of objection when another union employee, Lois Merritt, was bumped into a position in the Treasurer's Office. In that instance, the Treasurer had no apparent objection to the bumping procedure (the same procedure that she now takes issue with in this matter) when it suited her need to replace another problem employee.

The Treasurer nevertheless argues that it was not her responsibility to contact the Union to voice her objections, contending that it was the Union's duty to request to bargain with her.[18]

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[16] Emphasis added.

[17] Citing *Shelby Twp*, 1989 MERC Lab Op 704, 708-709, 715-716; *Kalamazoo Twp*, 1982 MERC Lab Op 1018, 1022; *City of Lincoln Park*, 1982 MERC Lab Op 479, 492-493; *Village of Chesaning*, 1974 MERC Lab Op 580, 586, 594-597.

[18] *St Clair Prosecutor v American Federation of State, Local 1518*, 425 Mich 204, 242; 388 NW2d 231 (1986); *Local 586, Service Employees Int'l Union v Union City*, 135 Mich App 553, 557; 355 NW2d 275 (1984).

However, we find no error in MERC's finding that "the County had traditionally bargained contracts on behalf of all its elected officials" and that the Union was entitled to rely on the negotiations reached with the County's bargaining team. And, in this respect, this case is distinguishable from *St Clair Prosecutor*, in which the history of negotiations between the union and the prosecutor's office evidenced the prosecutor's stated disagreement with the applicability of some of the contract terms to that office.[19] Therefore, even assuming fault in the Union's failure to extend an express invitation to negotiate to the Treasurer, the Treasurer was not entitled to sit idly by and operate under the terms of the contract until those terms no longer suited her interests. Accordingly, we find no material error in MERC's decision that the Treasurer be estopped from refusing to recognize the 2003-2007 collective bargaining agreement.

C. LEGALITY OF SUPER-SENIORITY CLAUSE

The Treasurer argues that the hearing officer and MERC erred in declaring the Treasurer's refusal to abide by an unlawful super-seniority clause in the collective bargaining contract an unfair labor practice, and correlatively violated the wrongful conduct rule and the "clean hands" doctrine by mandating enforcement of an unlawful contractual provision. The Treasurer also argues that the hearing officer and MERC erroneously shifted the burden of proof, or burden of challenging the unlawful provision, to or upon the Treasurer.

As the hearing officer noted in his decision, MERC has previously held that a super-seniority clause violates the PERA "when granted to union officers who do not perform steward or other on-the-job contract administration functions."[20] However, we find no material error in MERC's conclusion that the Treasurer's argument was not properly and timely presented. The Union's charge as filed was limited to the hearing officer determining whether the Treasurer was engaging in unfair labor practice for failure to recognize the collective bargaining agreement. And the Treasurer did not meet her burden to file a separate charge challenging the legality of the super-seniority clause with six months of the Union's exercise of the allegedly unlawful clause.[21] Indeed, she did not even raise the issue of the clause's alleged illegality until she filed her post-hearing brief. Therefore, we conclude that the hearing officer properly determined that there was "no unfair labor charge presently before this tribunal challenging the legality of Article 15." Moreover, regardless of the timeliness of the argument, as the hearing officer pointed out, the Treasurer "failed to present any evidence on the issue of whether Bilbey is required to

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[19] *St Clair Prosecutor*, 425 Mich at 241, 243 ("Nearly all of Prosecutor Deegan's communications concerning his readiness to bargain, as well as most of the assertions by the APAS, the county, and the successor prosecutor, reserving the prosecutor's statutory prerogatives, were unacknowledged by the collective bargaining agent.").

[20] See *Warren Consolidated School*, 18 MPER 163 (April, 2006); *Grand Rapids Bd of Ed*, 1985 MERC Lab Op 802.

[21] MCL 423.216(a)("No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made . . . ."); *Detroit Assoc of Educational Office Employees*, 19 MPER 5 (July, 2006); *Warren Consolidated School*, 18 MPER 163 (April, 2006).

perform contract administration duties[.]" Therefore, neither the hearing officer nor MERC erred in refusing to rule on an issue for which the requisite evidence was lacking.

D. UNFAIR LABOR PRACTICE

The Treasurer argues that, even assuming that she breached a lawfully enforceable super-seniority provision of the collective bargaining agreement, the claimed breach of contract is not an unfair labor practice and MERC lacked requisite jurisdiction to enforce the claim.

As stated, the Union's charge stated that the charge at issue was whether the Treasurer was engaging in unfair labor practice for failing to recognize the collective bargaining agreement. And, as the hearing officer framed it, the charge was that the Treasurer violated PERA by "repudiating a collective bargaining agreement." Further, in its charge, the Union alleged that, by her May 2004 letter, the Treasurer "served notice of repudiation of the negotiated agreement[.]" Thus, as the Union points out, by framing the issue as a breach of contract claim, the Treasurer mischaracterizes the Union's claims. MERC clearly has jurisdiction to resolve claims involving alleged repudiation of a collective bargaining agreement or a provision thereof, which "may be tantamount to a rejection of its obligation to bargain."[22] Thus, we find no error.

E. JUSTICIABILITY

The Treasurer argues that MERC erred in finding a justiciable controversy. The Treasurer points out that both positions in the Treasurer's office to which super-seniority bumping rights were ostensibly denied were eliminated before the filing of the unfair labor practice charge. Therefore, the Treasurer argues that any unfair labor practice charge is moot because it is legally impossible for the Treasurer to "reinstate" Bilbey to a position that he never held and which the Treasurer has no authority to reestablish.

As stated, the crux of the Union's charge was the Treasurer's failure to recognize, or repudiation of, the collective bargaining agreement. Thus, the charge was not moot because a determination was necessary to resolve the Treasurer's obligation to honor the agreement in this instance and in the future. Moreover, as the Union points out, MERC has broad discretion to fashion appropriate remedies to effectuate the purposes of PERA for unfair labor practices, including cease and desist orders, reinstatement, and back pay.[23] There is no evidence that MERC's order "'is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the act.'"[24] Thus, we will not disturb it.[25]

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[22] *City of St Clair Shores*, 22 MPER 50 (May, 2009), citing *City of Detroit, (Dept of Transportation)*, 1984 MERC Lab Op 937, aff'd, 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891.

[23] *Van Buren Public School Dist v Wayne Co Circuit Judge*, 61 Mich App 6, 32-33; 232 NW2d 278 (1975).

[24] *Id*. at 33 (quotations omitted).

[25] *Id.*

F. THE TREASURER'S REPLY BRIEF AND MOTION TO STRIKE

The Treasurer argues that MERC erred in rejecting the Treasurer's reply brief and in refusing to strike the Union's response to the exceptions as untimely.

1. THE TREASURER'S REPLY BRIEF

In its May 2008 decision, MERC acknowledged that the Treasurer had filed a reply brief in support of her exceptions. But the MERC explained that it had not considered that brief in making is decision "because the General Rules of the Michigan Employment Relations Commission do not permit the filing of a reply to the response to exceptions. See Rule 176 of the Commission's General Rules, 2002 AACS, R 423.176." MERC went on to explain, "For the same reason, our review of Respondent Treasurer's Reply in Support of Motion to Strike Charging Party's Brief in Support of the ALJ's Decision and Recommended Order and [her] Answer in Opposition to Counter Motion to Strike Reply Brief, must be limited to the portion of that document answering Charging Party's counter motion to strike." In its July 2008 decision on reconsideration, MERC reiterated that such supplemental filings are not permitted under the Commission's General Rules.[26] MERC added, "Where a party had filed a motion, Rule 161 permits any other party to file a brief in opposition to the motion. However, there is no provision to allow the moving party to reply to the opposing party's brief in opposition to the motion."[27] We find no legal error in MERC's decision not to consider the Treasurer's reply brief.

2. THE TREASURER' S MOTION TO STRIKE

In its May 2008 decision, MERC found the Treasurer's motion to strike the Union's response to the exceptions without merit, explaining as follows:

> Respondent's motion contends that Charging Party's response to the exceptions is untimely. Respondent asserts that her exceptions were served on the other parties by first class mail on August 21, 2006. Therefore, the response to the exceptions[28] or a request for an extension of time to file the response[29] was

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[26] Citing *Brownstown Twp*, 20 MPER 2 (2007); *City of Grand Rapids*, 19 MPER 69 (2006).

[27] Citing *Michigan State Univ Admin-Prof'l Ass'n, MEA/NEA*, 20 MPER 45 (2007) and *Kent Co Sheriff & Kent Co*, 1996 MERC Lab Op 294, 300-301.

[28] MAACS R. 423.176(6) states:

> Within 10 days after service of exceptions, a party may file 1 original and 4 copies of cross exceptions and briefs in support thereof, or 1 original and 4 copies of a brief or legal memorandum in support of the decision and recommended order. Copies of these documents shall be served on each party to the proceedings.

[29] MAACS R. 423.176(8) states:

> A request for extension of time in which to file exceptions, cross exceptions or briefs in support of the decision and recommended order shall be filed in writing and filed with the commission before expiration of the required time for filing. At

> originally due September 5, 2006. That date was calculated by counting ten days from the date of service pursuant to Rule 176(6), plus an additional three days under R423.183[30] because service was by mail. But for provisions of Rule 183 that preclude setting the filing deadline on a Saturday, Sunday, or legal holiday, the due date would have been September 3, 2006, the Sunday before the Labor Day holiday. Accordingly, the original deadline for filing the response to the exceptions was the next business day, September 5, 2006. Charging Party filed a timely request for a thirty day extension of time on August 31, 2006 [sic].[31] An extension of time is calculated by adding the amount of time requested to the original date, provided the requested extension is for thirty days or less. Thus, the Commission order, issued to all three parties on September 5, 2006, extended the time within which Charging Party could file its response to the exceptions until October 5, 2006. [Emphasis in original.]

The Treasurer does not dispute that the Union timely sought its 30-day extension. Instead, the Treasurer argues that MERC erred in calculating the extension. According to the Treasurer, the 30-day extension extended the Union's filing deadline to September 30, 2006—30 days after the Union filed its request for an extension on August 30, 2006—but because September 30, 2006, was a Saturday, the Union actually had until Monday, October 2, 2006, to file its brief.[32] And accordingly, the Treasurer argues, the Union's response to the exceptions was untimely when it was not filed until October 5, 2006. The Treasurer argues that MERC erred in concluding that the Union timely filed its response to the exceptions on October 5, thereby improperly allowing the Union 35 days in which to file its response to the exceptions.

> the same time, copies of the request for extension shall be served on each of the other parties. One extension of not longer than 30 days will be granted to the moving party upon the filing of the request. Subsequent extensions will be granted only upon a showing of good cause. Good cause does not include inexcusable neglect by a party or a representative thereof.

[30] MAACS R. 423.183 states:

> In computing any period of time prescribed or allowed by LMA, PERA, or these rules, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day, which is neither a Saturday, Sunday, nor legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. Whenever a party has the right or is required to do some act within a prescribed period after being served with a document or pleading by mail, 3 days shall be added to the prescribed period. However, 3 days shall not be added if any extension of time has been granted.

[31] As the Treasurer contends on appeal, the record reflects that the Union actually filed its request for extension on August 30, 2006. Regardless of this discrepancy, as stated, the Treasurer does not dispute that the Union timely sought its 30-day extension.

[32] MAACS R. 423.183.

More specifically, the Treasurer argues that MERC erred by adding a 3-day mailing grace period to the October 2, 2006 deadline because Rule 183 expressly states that the grace period does not apply to extensions of time.

However, it is the Treasurer who has erred in her calculations. Contrary to the Treasurer's contention, the 30-day extension is not calculated from the date of the filing of the request for an extension, it is calculated by adding the extension period to the original filing deadline.[33] And we find no error in MERC's calculations setting the original deadline as September 5, 2006. Thus, MERC did not error in concluding that the Union's October 5, 2006 response to the exceptions was timely and denying the Treasurer's motion to strike.

G. ORAL ARGUMENT

The Treasurer argues that MERC erred in denying oral argument before rendering its original and final decisions.

On May 15, 2008, MERC issued its original decision, upholding the hearing officer's recommended order. In that decision, MERC denied both the Treasurer's and the Union's requests for oral argument, based on its finding "that oral argument will not materially assist us in this matter[.]" And in its July 15, 2008 decision on reconsideration, MERC affirmed its prior decision, explaining as follows:

> In her motion, Respondent Treasurer contends that the Commission lacks the authority to deny a request for oral argument because Rule 178 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.178, does not expressly state that we may do so. Respondent Treasurer relies on *Bohannon v Sheraton-Cadillac Hotel*, 3 Mich App 81 (1966) in support of her contention that our denial of oral argument constitutes error. Respondent's reliance on *Bohannon* is misplaced as that case involved an appeal from a Worker's Compensation Appeal Board decision in which the appeal board inadvertently failed to grant a request for oral argument. In *Bohannon*, the applicable rule required the appeal board to schedule a hearing upon the filing of a request for oral argument. *The Rules governing proceedings on exceptions before this Commission do not require the granting of oral argument.* The Commission's General Rules contain three provisions regarding oral argument: Rule 178, which applies to oral argument before the Commission; Rule 173, which governs oral argument before an Administrative Law Judge (ALJ); and Rule 161(4), which addresses oral argument on motions. While Rule 173 expressly provides that, upon request, a party has a right to oral argument at the close of a hearing before an ALJ, no such right is provided in Rule 178 or Rule 161(4). Indeed, it is implicit in the language of Rules 178 and 161(4) that the request for oral argument may be granted or denied. Pursuant to Rule 178, the Commission has retained the discretion to grant or deny oral argument in matters

[33] See *City of Detroit*, 20 MPER 57 (July 2007).

on exceptions following an ALJ's Decision and Recommended Order. After reviewing the record in this matter, we concluded that oral argument was not likely to provide us with assistance in resolving this matter and exercised the discretion to deny both Charging Party's and Respondent Treasurer's requests for oral argument. [Emphasis added.]

Rule 178 states:

> If a party desires to argue orally before the commission, a written request shall accompany the exceptions, cross exceptions, or the brief in support of the decision and recommended order, and at the same time, the request shall be served on all other parties. The commission, on its own motion, may also direct oral argument. The commission shall notify the parties of the time and place of oral argument. The commission may limit the time for oral argument by each party.[34]

As she did in the proceedings below, the Treasurer argues that MERC was without authority to deny her request for oral argument because Rule 178 does not expressly set forth such authority or procedures for denial. However, we find not material error in MERC's conclusion that its discretion in granting or denying a *request* for oral argument is implicit in the rule. We further find no abuse of discretion in MERC's decision to deny the Treasurer's request where MERC determined that oral argument would not materially assist in its resolution of the matter.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ William C. Whitbeck

[34] MAACS R. 423.178.