STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

FRENCHTOWN CHARTER TOWNSHIP,
Respondent-Public Employer,

Case No. C95 L-251
-and- (Compliance Hearing)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Logan, Huchla & Wycoff, P.C., by Charles E. Wycoff, Esq. for the Public Employer

Georgie-Ann Bargamian, Esq., Associate General Counsel, for the Labor Organization

DECISION AND ORDER ON COMPLIANCE

On July 20, 2000, Administrative Law Judge (hereafter AALJ@) Roy L. Roulhac issued his Decision and Recommended Order following a compliance hearing held on March 15, 2000, pursuant to the provisions of Michigan Administrative Code R423.468, Rule 68(3), of the Michigan Employment Relations Commission. The Decision and Recommended Order of the Administrative Law Judge was served upon the interested parties in accordance with Section 16 of the Act. On August 14, 2000, Respondent Frenchtown Charter Township filed timely exceptions to the Recommended Order of the ALJ. Charging Party International Union, United Automobile Aerospace and Agricultural Implement Workers of America (hereafter AUAW@) filed a brief in support of the ALJ=s Recommended Order on August 25, 2000.

These proceedings are based upon the request of Charging Party to compel Respondent to comply with this Commission=s March 23, 1998, order in *Frenchtown Charter Township*, 1998 MERC Lab Op 106,129, affirmed *UAW v Frenchtown Charter Township*, unpublished opinion per curiam of the Court of Appeals, issued November 2, 1999 (Docket No. 211639). In that case, ALJ Roulhac concluded that William Guenther, a level 3 assessor for Frenchtown Charter Township, was unlawfully discharged for his involvement in a union organizing campaign which resulted in the January 13, 1996, certification of the UAW as the exclusive bargaining agent for Respondent=s employees. As a remedy, the ALJ ordered the Employer to reinstate Guenther to Ahis former or substantially equivalent position@ with full back pay and benefits, plus interest at the statutory rate,

minus interim earnings. Neither party filed timely exceptions to that decision and we adopted the ALJ=s recommended order as our order in the case.

The parties now disagree on the amount of back pay to which Guenther is owed. This dispute is based primarily on a personnel policy dated January 1, 1990, which states that all employees of the Township, other than department heads, will automatically be terminated on November 30 of each year, unless the employee is terminated for cause prior to that date. The policy further provides that an employee Amay be rehired on December 1" at the sole discretion of the Employer. Based upon this provision, Respondent contends that Guenther was either an Aat-will@ employee of the Township and entitled only to nominal damages or, in the alternative, that he was an employee hired in one year increments and, thus, entitled to damages for a period of not longer than one year from November 30, 1995, the date of his discharge. Charging Party asserts that the personnel policy is inapplicable to this case and that the Employer is required to pay Guenther a Amake whole@ remedy from December 1, 1995, until it makes him a bona fide reinstatement offer.

Following a stipulation by the parties to resolve this matter by the filing of briefs, the ALJ issued a Decision and Recommended Order directing that Guenther=s back pay extends from December 1, 1995, until the Employer offers him reinstatement to his former or a substantially equivalent position, without prejudice to seniority or other rights or privileges previously enjoyed, plus interest, less interim earnings. In so holding, the ALJ rejected the Employer=s contention that Guenther was an at-will employee with no reasonable expectation of continued employment after November 30, 1995. According to the ALJ, this argument ignored the fact that Guenther was laid off because of his protected, concerted activities and, therefore, he was entitled to reinstatement as a matter of law. The ALJ concluded that had Respondent in fact reinstated Guenther in accordance with our March 23, 1998, order, his employment with the Township would have continued absent termination for good cause. We agree with the ALJ=s conclusion in this regard and adopt his reasoning as our own.

We also agree with the ALJ that the Employer=s reliance on *Kocenda v Archdiocese of Detroit*, 204 Mich App 659 (1994) is misplaced. In *Kocenda*, the plaintiffs had been employed by the school system under a series of eleven-month contracts which were terminable by either party upon thirty days= notice. *Id.* at 663-664. Both plaintiffs were discharged before the end of the term of their most recent contracts. *Id.* at 660-661. They filed suit against the school, alleging several causes of action, including wrongful discharge and promissory estoppel. *Id.* at 661. The trial court granted the defendant=s motion to limit the damages that the plaintiff=s could recover, finding that future damages could not be determined with a reasonable degree of certainty, and that the contract was for a definite period of time and was not automatically renewable. *Id.* at 661. On appeal, the Court agreed that the plaintiffs= employment was Aat will@ and that they were not entitled to damages beyond the term of their current contracts. *Id.* at 665, 666.

Based on *Kocenda*, the Employer continues to assert that Guenther was only entitled to back pay through December 1, 1996, since he would have been terminated on that day pursuant to the personnel policy. We disagree. In an unfair labor practice matter such as this, an employee who has been terminated for engaging in protected concerted activity is generally entitled to a remedy that restores that employee to the status quo which would have existed absent the unlawful act by the employer. *Needell and McGlone, PC*, 311 NLRB 455, n 1; 145 LRRM 1062 (1993), *enf=d without opinion, review den* 22 F3d 303; 146 LRRM 2256 (CA 3, 1994); *Dean General Contractors*, 285 NLRB 573; 126 LRRM 1057 (1987). The back pay period is tolled when the employer makes an unconditional employment offer to the discriminatee. *Hoffman Plastic Compounds*, 326 NLRB 1060; 159 LRRM 1322 (1998). Although an employer may relieve its remedial obligations by showing that the employee would have been discharged for other, nondiscriminatory reasons, this is an affirmative defense which the employer has the burden of establishing. See e.g. *Black Magic Resources*, 317 NLRB 721; 149 LRRM 1204 (1995); *Randolph Children=s Home*, 309 NLRB 341, n 3; 143 LRRM 1010 (1992).

In the instant case, there is no dispute that Respondent failed to make an unconditional offer of reinstatement to Guenther, either before or after the issuance of our March 23, 1998, order requiring that it take such action. Moreover, there is nothing in the record to establish that Guenther would not have been rehired each and every year since he was unlawfully terminated by the Township. To the contrary, the record suggests that since the Employer=s personnel policy first went into effect in 1990, the Employer has had a consistent practice of rehiring all of the employees which it previously Alaid off@ pursuant to that policy. Thus, it cannot be said that the Employer=s remedial obligations have yet been tolled. Finally, we note, as did the ALJ, that the personnel policy is not, by its own terms, an enforceable contract. The document expressly states that it is Anot intended and should not be construed as creating any contractual rights or obligations.@ Accordingly, we conclude that Respondent=s reliance on *Kocenda* and other employment law/breach of contract cases is misplaced.

For the reasons stated above, we hereby adopt the recommended order of the ALJ as our order in this case.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry H. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated:

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
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APPEARANCES:

Logan, Wycoff, & Salomone, P.C., by Charles E. Wycoff, Esq. for the Public Employer

Georgi-Ann Bargamian, Esq., Associate General Counsel, for the Labor Organization

RECOMMENDED ORDER AFTER COMPLIANCE PROCEEDING

Pursuant to the provisions of Michigan Administrative Code R423.468 (Rule 68(3)) of the Michigan Employment Relations Commission, this matter was heard in Detroit, Michigan on March 15, 2000 by Administrative Law Judge Roy L. Roulhac. The proceedings were based on a January 4, 2000 request by the Charging Party, the UAW, to compel the Employer to comply with the Commission=s March 23, 1998 order which adopted, without exceptions, my December 15, 1997 order granting William Guenther reinstatement to Ahis former or substantially equivalent position@ with full back pay and benefits, plus interest at the statutory rate, minus interim earnings.[1] *Frenchtown Charter Township,* 1998 MERC Lab Op 106, 129, affd., unpublished opinion per curiam of the Court of Appeals, issued November 2, 1999 (Docket No. 211639).

[1]My December 15, 1997 recommended order mistakenly indicated that Guenther=s reinstatement was Awith,@ rather than Awithout,@ prejudice to seniority or other rights and privileges previously enjoyed.

The parties disagree on the amount of back pay Guenther is owed. Charging Party asserts that he is entitled to back pay from the date of his discharge to the present. Respondent argues that he is entitled to back pay for a nominal period, one year or less. Since the facts are undisputed, the parties agreed to resolve this matter by filing briefs by May 15, 2000.

Facts:

William Guenther was employed by Respondent as a level 3 assessor when he was discharged, in violation of PERA, on November 30, 1995, for his involvement in spear-heading a union organizing campaign which resulted in Charging Party=s January 13, 1996 certification as the exclusive bargaining agent for Respondent=s employees.[2] When Guenther was terminated on November 30, 1995, the employment of all full-time employees of Frenchtown was governed by a personnel policy dated January 1, 1990. Pertinent provisions read:

> Purpose
>
> The purpose of this handbook is to provide information about your employment with Frenchtown Charter Township. This handbook is not intended and should not be construed as creating any contractual rights or obligations.
>
> * * *
>
> Employment Status
>
> . . . all employees of the township, other than department heads, will automatically be terminated on November 30 of each year, unless the employee is terminated for cause prior to November 30. An employee may be rehired on December 1. . . Each year, the decision whether to rehire an employee shall be solely within the discretion of the employee=s department head. Notwithstanding anything to the contrary in this paragraph, all employees may be terminated at any time, for cause . . .
>
> Nothing in any policy, plan, rule, employment application, employee handbook or communication of any type is intended to create, nor should it be construed to constitute a contract between the Township and any one or all of its employees which is inconsistent with the terms of this Employment Status Statement.
>
> * * *
>
> Disciplinary Rules and Procedures
>
> Note: Nothing in this discipline policy is intended to change the At-Will Employment Status of each employee.

Since 1990 when the policy was implemented, all employees, with the exception of Guenther, Alaid off@ on November 30 were rehired on December 1. The Employer has not complied with the Commission=s order to reinstate Guenther with back pay and benefits, effective December 1, 1995.

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[2] A year and a half later, on July 2, 1997,Charging Party was decertified. See Commission Case No.R97 C-53.

Conclusions of Law:

The Union claims that the Employer is required to pay Guenther a Amake whole@ remedy from December 1, 1995 until the date it makes him a bona fide reinstatement offer. The Employer acknowledges that when an employee=s discharge is attributed to anti-union animus, there is a presumption that some back pay is owed. It submits that because the Union never made a bargaining demand and was decertified, its personnel policy and reorganization plan continued to be in effect and could have been implemented at any time after Guenther=s initial discharge. Thus, the Employer contends there is no presumption that any subsequent decision to terminate or lay-off Guenther would be the result of anti-union animus. Although its personnel policy remained in effect, the Employer has not demonstrated that the assessor=s office was reorganized before or after Guenther=s November 30, 1995, unlawful discharge. In rejecting the Employer=s reorganization argument in my original decision, I noted:

> . . . Respondent=s principal argument that Guenther=s employment was impacted by the assessor=s office reorganization ignores the fact that the assessor=s office has not been reorganized. Ashley=s partial privatization proposal called for the elimination of Guenther=s *and* Bitz=s positions, increasing Ashley=s contract from $25,000 to $60,000 per year, and reducing overtime among remaining staff. Spas admitted that there was no difference in Ashley=s contract or the amount of time Ashley or his employees spent at the Township before and after Guenther=s layoff; Bitz was not laid off; Sommer=s and Salenbien worked Ainordinate@ amounts of overtime after Guenther=s layoff; the assessing department employees= jobs did not change after Guenther was laid off; and Ashley=s proposed agreement to partially reorganize the department, effective November 1, 1995, was not executed. If the assessor=s office had in fact been reorganized, the reasons advanced by Respondent for selecting Guenther as the person to be laid off may be more credible. I therefore conclude that in the absence of Guenther=s protected activity, he would not have been laid off on November 30.

No new evidence has been presented to show that the assessor=s office had been privatized by increasing Ashley=s contract; overtime had been reduced; Bitz has been laid off; nor that employees= jobs have changed. The Employer=s mere assertion that the assessor=s office has been reorganized is insufficient to support its reorganization claim.

The Employer next argues that because its personnel policy provides that all employees will automatically be terminated on November 30 of each year, Guenther was an employee at-will with no reasonable expectation of continued employment. It submits that if Guenther had not been discriminatory discharged, he would have been terminated on November 30, 1995 because his termination was automatic under the policy and the decision to rehire him rested within the sole discretion of the Employer. According to the Employer, with no obligation to rehire Guenther, it would seem proper to claim that he would not have earned a salary after November 30, 1995. This argument ignores the conclusion that Guenther was laid off on November 30, 1995, because of his protected, concerted union activities and should be reinstated. Thus, if Guenther had been reinstated in accordance with the reinstatement order, he would have earned a salary absent good cause to terminate his employment.

Finally, the Employer, assumes, for purposes of argument and not by way of concession, that if

Guenther, an at-will employee, were entitled to be re-employed on December 1, 1995, he would only have been entitled to continued employment until November 30, 1996, when all employees would have been terminated pursuant to the personnel policy. To support this contention, the Employer relies on *Kocenda* v *Archdiocese of Detroit*, 204 Mich App 659, 516 NW2d 132 (1994), where the Court concluded that in cases involving a breach of an employment contract for a definite duration, a wrongfully discharged employee is generally entitled to damages consisting of the agreed-upon compensation for the unexpired term of employment, less interim earnings.

Kocenda has no application to this case. First, this case does not involve a breach of an employment contract. The Employer=s personnel policy expressly states that it is Anot intended and should not be construed as creating any contractual rights or obligations.@ Rather, the policy provides that all employees are Alaid off@ on November 30 of each year, and may be rehired on December 1. The record establishes, however, that since 1990 when the policy was created, the Employer has had a consistent past practice of rehiring, on December 1, all employees Alaid off@ on November 30. Although the Employer offers that the position held by Guenther has never been filled and there Atruly was a reorganization,@ it offered no evidence of a reorganized assessor=s department or a showing it would not have followed its past practice on December 1, 1996, by rehiring Guenther and all other Alaid off@ employees. I find, therefore, that evidence of the Employer=s past practice is sufficient to establish that Guenther would have been rehired on December 1, 1996, and each December 1 thereafter. Compare *Centerline School District*, 1988 MERC Lab Op 318, 326.

I conclude that Guenther=s back pay runs from December 1, 1995, until the Employer offers him reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, plus interest, less interim earnings. See *Dore Chiropractic Life Center, P.C.*, 1989 MERC Lab Op 996, 999; *Center Line Sch. Dist.*, 1988 MERC lab Op 318, 320-326, enfd., unpublished opinion per curiam of the Court of Appeals, issued August 2, 1988 (Docket No. 108247). I have carefully considered all other arguments raised by the parties and conclude that they do not warrant a change in the result. I, therefore, recommend that the Commission issue the order set forth below:

Order

It is hereby ordered that Charging Party=s back pay extends from December 1, 1995, until the Employer offers him reinstatement to his former or a substantially equivalent position without prejudice to seniority or other rights or privileges previously enjoyed, plus interest, less interim earnings.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated:___________