**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF DETROIT (FIRE DEPT),
Public Employer – Respondent,

Case No. C00 F-99

-and-

DETROIT FIRE FIGHTERS ASSOCIATION, IAFF,
LOCAL 344,
Labor Organization – Charging Party.

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APPEARANCES:

City of Detroit Law Department, Valerie Colbert-Osamuede, Esq., for the Public Employer

Helveston & Helveston, P.C., by Michael L. O'Hearon, Esq., for the Labor Organization

## DECISION AND ORDER

On September 21, 2001, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge (ALJ).

The Decision and Recommended Order of the ALJ was served on the interested parties in accordance with Section 16 of Act 336 of the Public Acts of 1947, as amended. Pursuant to Rule 66 of the General Rules of the Employment Relations Commission, 1979 AC R 423.466, exceptions to the Decision and Recommended Order were due on October 15, 2001. On that date, Respondent requested an extension of time in which to file its exceptions. We granted the request and issued an order extending the time for filing exceptions to the ALJ's decision to November 15, 2001. Our order granting the one-month extension explicitly stated that the exceptions "must be received at a Commission office by the close of business" on the specified date. No exceptions were filed by the close of business on November 15, 2001.

Instead, Respondent attempted to file its exceptions by facsimile at 5:04 p.m. on November 15, 2001, though Commission rules do not provide for the filing of exceptions by facsimile. See Commission Rule 66, 1979 AC R 423.66, which requires the filing of an original and four copies of exceptions to an ALJ's decision and recommended order.

In a letter dated November 16, 2001, we notified Respondent that its exceptions were not timely filed and were not filed in accordance with Commission rules. We provided Respondent ten days in which to file a motion for retroactive extension setting forth good cause for the delay and the failure to file in accordance with Commission rules. To this date, no such motion has been received.

Respondent subsequently mailed the exceptions with a cover letter dated November 16, 2001. The untimely exceptions were received November 19, 2001.

We will not consider late-filed exceptions absent a showing of good cause. See Commission Rule 67(3), 1979 AC R 423.467(3); Pontiac Public Schools, 1993 MERC Lab Op 667; Detroit Federation of Teachers, 1985 MERC Lab Op 1214. Accordingly, Respondent's exceptions will not be considered.

## ORDER

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

**MICHIGAN EMPLOYMENT RELATIONS COMMISSION**

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated:_____

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APPEARANCES:

Lynise Bryant-Weekes, Esq., City of Detroit Law Dept, for the Respondent

Helveston & Helveston, P.C., by Michael L. O'Hearon, Esq., for the Charging Party

## DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 & 423.216, this case was heard at Detroit, Michigan on November 21, 2000, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Charging Party on January 24, 2001, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Detroit Fire Fighters Association, IAFF, Local 344, filed this charge on June 1, 2000 against the City of Detroit. Charging Party represents a unit of fire fighters employed by the Respondent. The charge alleges that on or about February 10, 2000, Respondent unlawfully implemented a workplace violence policy by forming and deploying a workplace violence response team without affording Charging Party a meaningful opportunity to bargain. The charge also alleges that Respondent unlawfully circumvented the Charging Party by requiring members of its bargaining unit to sign statements acknowledging their agreement to Mayor's Executive Order #12, without giving notice to Charging Party or affording it a meaningful opportunity to bargain. A third allegation, involving the discipline of an employee, was withdrawn at the hearing.

Facts:

**Alleged Unilateral Deployment of the Workplace Violence Response Team**

Charging Party represents a bargaining unit of fire fighting employees in the City of Detroit Fire Department. The parties began negotiating a new agreement to replace their 1992-1998 contract in about May 1998. Among Respondent's contract proposals were two proposals dealing with the subject of workplace violence. One proposal described the responsibilities of different ranks within the department with respect to the prevention of workplace violence. The second set out the discipline to be imposed for specific violent or threatening behaviors. The parties were not able to reach agreement on a contract, and in December 1998 a petition for arbitration pursuant to 1969 PA 312 was filed. Respondent's proposals on workplace violence were before the arbitration panel until early November 2000, when the parties reached tentatively agreed to both proposals.

On May 12, 1999, the Mayor of Detroit issued Executive Order #12, adopting a policy of zero tolerance for acts or threats of violence by or against persons who work for the City or against customers or visitors. Executive Order #12 specified that all managers and supervisors would be required to receive training on the causes of workplace violence, methods of reducing the possibility of workplace violence, and actions to be taken when acts of violence occur or are threatened. Executive Order #12 also directed Respondent's Human Resources Department to issue guidelines which (1) defined conduct constituting workplace violence, (2) clarified disciplinary standards for workplace violence, and (3) described measures for attempting to prevent the occurrence of workplace violence. The order further directed that emergency response plans be established in each department and agency within the City. Finally, the order provided that department directors and agency heads notify their employees of the zero-tolerance policy and post notices of this policy in the workplace. Copies of Executive Order #12 were distributed to employees throughout the Fire Department at the time it was issued. Charging Party did not object to, or demand to bargain over, Executive Order #12.

Beginning in September 1999, Respondent's Human Resources Department began conducting a series of workshops on workplace violence specifically for union officers. Charging Party's president attended the first workshop, which focused on identifying workplace situations with a potential for violence. During the course of this workshop, the union representatives present, including Charging Party's president, were given copies of an organizational chart of departmental "response teams." The chart stated that a response team would be composed of six employees from a department, and indicated that the Fire Department would have one response team. Respondent's representative did not explain how the response team members would be chosen, or how the teams would operate. The union representatives were also told that that the Human Resources Department was in the process of drafting up guidelines, but that copies of these guidelines were not yet available.

The Human Resources Department held a second workshop for union representatives sometime in October 1999. One of Charging Party's stewards attended this workshop as Charging Party's representative. At this meeting, the union representatives were told that the response teams were supposed to talk to employees and attempt to diffuse situations with a potential for violence.

There was no mention of the response teams having any role in recommending or implementing discipline. The guidelines mentioned at the earlier meeting were not yet available for distribution.

The Human Resources Department held several more workplace violence workshops for union representatives during the fall of 1999. According to the testimony of a representative from the Human Resources Department, copies of the Department's workplace violence prevention policy, discussed below, were supposed to have been distributed to the various unions at these workshops. However, she could not personally say whether this occurred. Charging Party representatives did not attend these later workshops because of scheduling conflicts between these meetings and the Act 312 arbitration hearings. Charging Party's president denied receiving a copy of the policy. He also testified that he did not know of its existence until late March or early April 2000.

Respondent's workplace violence policy is titled "Draft - Violence Prevention Policy – Investigation Protocols." The policy is a 44-page, multi-part document bearing the date September 26, 1999. According to the record, the Human Resources Department first distributed this document to departmental human resources officers sometime between August and December 1999. The document provides for the creation of workplace violence response teams. It states that the directors of certain departments, including the Fire Department, will be asked to identify six individuals to function as a response team. The document also describes the duties of the response teams: (1) conduct investigations, (2) confirm facts, (3) collect information/statements, (4) report findings/recommendations, (5) identify policy administration issues, (6) monitor situation (circumstances), (7) conduct follow-up as needed.

Other sections of the September 26 policy define workplace violence, set out possible actions to prevent it, and detail steps to be followed by supervisors in emergency situations. The document includes a section on how reported incidents should be investigated, guidelines for conducting investigations, and procedures for supervisors to follow when disciplining an employee. The policy states that any action to discipline an employee represented by a union will be taken in accord with procedures provided for in the applicable collective bargaining agreement.

Sometime between the late fall of 1999 and the spring of 2000, response teams were formed in various departments from employee volunteers. Sometime within that time period, notices were distributed to employees in the Fire Department soliciting their participation in a response team. About ten employees from the Fire Department, including members of Charging Party's bargaining unit, volunteered. Employees who volunteered to be on the response team were given copies of the September 26 policy. The record does not indicate when specifically the notices were distributed or when the Fire Department team was first deployed.

Charging Party's president first learned that a Fire Department response team was functioning in late March or early April 2000. The president received a call to represent an employee at what he believed was to be an investigatory interview. When the president arrived, a Human Resources Department representative told him that two members of the Fire Department's workplace violence response team would conduct the interview. Both individuals were members of Charging Party's bargaining unit. The president was not aware of the existence of the September 26 document until one of the response team members, during the interview, showed him a copy. Shortly

thereafter Respondent gave Charging Party a list of the names of the individuals on the Fire Department response team.

A representative from the Human Resources Department explained at the hearing how the response team in the Fire Department functions. When an alleged incident of workplace violence occurs, the response team takes statements from employees involved, their supervisors, and witnesses. The response team obtains the police report of the incident, if one exists. The team then prepares a report. This report sets out the facts, but it also includes a recommendation. The team may recommend that the employee go to an employee assistance program. It may recommend that employees not be assigned to work together. The team may recommend that disciplinary action be taken, although not what that action should be.1 A representative of the Human Resources Department and the general manager of the Fire Department review the response team's report. Based on the facts in the report, they determine whether a departmental rule has been violated which justifies discipline and, if so, what discipline should imposed under the collective bargaining agreement. They then forward the response team's report and their own recommendation to the Fire Commissioner for approval.

**Alleged Circumvention of the Bargaining Agent:**

Beginning in early February 2000, the Fire Department began holding a series of meetings to give employees an overview of Respondent's violence prevention policy. At each meeting, copies of Executive Order #12 were handed out. Employees were not given or shown copies of the September 26, 1999 document. At the end of the meeting, employees were given the following document to sign:

> Executive Order #12 – Violence in the Workplace
> EMPLOYEE ACKNOWLEDGMENT OF RECEIPT
>
> I acknowledge that the City of Detroit's policy on Violence in the Workplace has been explained to me and that I have received and read a copy of the Executive Order. I understand the policy and agree to all the requirements listed in the policy. I understand that compliance with this policy is a condition of my employment with the City of Detroit. I understand that if I am found to be in violation of this policy, disciplinary action will be taken. Questions about my department's application of this policy will be answered by my Human Resources Office/Provider.

In some of the earlier meetings, the managers conducting the meeting told employees that they might be disciplined if they refused to sign the document. After Charging Party's president learned of this, he complained to the Human Resources Department that employees should not be forced to sign a statement acknowledging that compliance with the workplace violence policy was a condition of their employment. The Human Resources Department told him that employees were not

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1 The September 26 policy includes sample scenarios and explains how the response teams should handle them. In Scenario A, the policy states that after their investigation, the response team is to "review the findings and provide recommendations in a summary report that documents the type of follow-up needed with the employee, i.e. counseling, coaching, warning, discipline, etc."

required to sign. However, when the president attended one of these meetings after his conversation with the Human Resources Department, the manager again told employees that they had to sign the statement.

There was no evidence that any employee was disciplined for refusing to sign the statement, or that Respondent has ever attempted to use an employee's signed statement to support its decision to discipline him or her.

Discussion and Conclusions of Law:

Charging Party asserts that Respondent was required to bargain over the use of response teams made up of bargaining unit members to investigate allegations of workplace violence and make recommendations for disciplinary action. According to Charging Party, this part of the September 26 policy is a disciplinary procedure, and disciplinary procedures are a mandatory subject of bargaining, citing *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 452 at n. 7; *Pontiac Police Officers Ass'n v Pontiac (After Remand)*, 397 Mich 674, 681 (1976).

Respondent does not agree that any aspect of its workplace violence policy is a mandatory subject of bargaining. Respondent asserts that the September 26 document contains only work rules, and that by practice and contract Respondent has the right to unilaterally establish work rules. Respondent concedes that it has the duty to bargain over the discipline to be imposed for the violation of these rules, but it points out that the parties have bargained and reached agreement on this subject. Respondent maintains that it has no duty to bargain over the use of response teams because: (1) the response teams are made up of volunteers; (2) the response teams do not recommend or institute discipline.

I agree with Charging Party that the use of workplace violence response teams in this case is a mandatory subject of bargaining. In *Pontiac Police Officers Ass'n*, *supra,* the employer's city charter provided for a civilian trial board to review charges of police misconduct and, where necessary, impose discipline. The issue before the Court was whether the employer had an obligation to bargain with the police officers' bargaining representative over the existence of this board. The Court held that "disciplinary procedures" are a mandatory subject of bargaining since they affect the "other terms and conditions of employment" of employees covered by PERA, and it found that the employer had an obligation to bargain over the use of the trial board to determine discipline. See also *Plainwell SD*, 1989 MERC Lab Op 464, 466. Moreover, "disciplinary procedures" include procedures for investigating alleged employee misconduct, as well as those for determining whether discipline will be imposed. As the National Labor Relations Board (NLRB) held in *Medicenter, Mid-South Hospital*, 221 NLRB 670,675 (1975), an employer has a duty to bargain over "the method by which (the employer) investigate(s) suspected employee misconduct." Based on this reasoning, the NLRB held in *Medicenter* that the employer had an obligation to bargain over the institution of polygraph testing. Later, in *Johnson-Bateman Co.,* 295 NLRB 180 (1989), the NLRB relied on its *Medicenter* reasoning in holding that an employer has a duty to bargain over drug and alcohol testing of current employees. This reasoning also formed the basis for the Commission's holding, in C*ity of Detroit,* 1990 MERC Lab Op 67, that drug and alcohol testing of employees is a mandatory subject of bargaining under PERA.

The record indicates that in this case the response team is responsible for investigating incidents of alleged workplace violence, and for making findings of fact based on its investigation. The use of an employee's peers to perform these functions could affect whether an employee is ultimately disciplined. Moreover, although Respondent maintains that the response team does not make the decision whether to discipline, the record establishes that the response team is required to make a recommendation regarding the disposition of each case it investigates. I find that Respondent's workplace violence response teams are part of Respondent's disciplinary procedure. I conclude that the composition and functioning of the workplace violence response team in the Fire Department is a mandatory subject of bargaining under PERA.

However, an employer's duty to bargain under PERA is triggered by the union's demand. *Local 586 SEIU v Village of Union City*, 135 Mich App 553 (1984). In *Charter Twp of Meridian,* 1990 MERC Lab Op 153,160, the Commission stated as follows:

> When considering a change in terms or conditions of employment not covered by a collective bargaining agreement, the employer's first obligation is to ensure that the union has adequate notice of the proposed change to allow for meaningful bargaining. If the employer receives a timely demand to bargain from the union, the employer is prohibited from implementing a change until impasse or agreement is reached. *Plymouth Firefighters v Plymouth*, 156 Mich App 220 (1986); *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268.

A union waives its right to bargain when, after receiving adequate notice of the proposed change in working conditions, it fails to make a timely demand to bargain. See, e.g., *Holland PS,* 1989 MERC Lab Op 346. Here, Charging Party did not demand to bargain over the workplace violence response team or its responsibilities.

At the workplace violence workshop for union representatives in September 1999, Charging Party's president learned that Respondent planned to set up response teams composed of six employees from each department. At the October workshop, Charging Party's steward was told that the response teams were supposed to talk to employees and attempt to diffuse situations of potential violence. After these two meetings, Charging Party knew that Respondent's plan for dealing with workplace violence issues included response teams. However, the information Charging Party was given at the second meeting suggested that the response teams would not have any role in determining or recommending discipline; it was also lead to expect that it would be given a copy of the guidelines being prepared by the Human Resources Department. I find that Charging Party did not have enough information about the response teams to impose upon it a duty to demand bargaining after the October 1999 workshop. The September 26 guidelines may have been distributed to other union representatives at one of the later workshops that Charging Party did not attend. However, there is no indication that Charging Party was told the guidelines would be distributed at one of these workshops, as opposed to being mailed. There is also no evidence in this record that Charging Party representatives knew that members of its bargaining unit had volunteered for the Fire Department response team, or that these members had been given copies of the September 26 guidelines. I am unable to conclude on this record that Charging Party had enough information about the response team before it was deployed to impose upon it the obligation to demand bargaining. I find, therefore, that Respondent violated its duty to bargain in good faith when

it formed and deployed a workplace violence response team in the Fire Department sometime between the fall of 1999 and the spring of 2000, without first giving Charging Party the opportunity to demand bargaining.

Charging Party's second allegation is that that Respondent unlawfully circumvented the union and/or engaged in unlawful direct dealing with employees. Charging Party alleges that by requiring employees to sign statements acknowledging that Respondent's workplace violence policy was a condition of their employment, Respondent was, in effect, forcing employees to enter into individual agreements with it.

The record indicates that approximately nine months after the Mayor issued Executive Order #12, Respondent distributed copies of that order to employees and ordered them to sign a statement acknowledging that this was a "condition of my employment." Employees were not shown Respondent's September 26, 1999 policy, and the statement employees were told to sign mentioned only Executive Order #12. An employer violates its duty to bargain in good faith when it bypasses the designated representative and attempt to negotiate directly with employees. The violation is premised on the theory that direct bargaining between an employer and its employees seriously undermines the authority of the union. *City of Dearborn*, 1986 MERC Lab Op 538, 541. I find, first, that Respondent was not attempting to negotiate with employees over its workplace violence policy when it ordered them to sign the statement. I also find that Respondent did not "circumvent" its duty to bargain with Charging Party over Executive Order #12. This order was issued in May 1999. Charging Party never demanded to bargain over the executive order, and by February 2000 it had waived any right it might have had to bargain over the general policies contained in that document. Thus, at the time the Department began requiring employees to sign statements acknowledging that Executive Order #12 was a condition of their employment, Respondent did not have a duty to bargain with Charging Party over that document.

In sum, I conclude that Respondent did not engage in unlawful direct bargaining with members of Charging Party's bargaining unit over Respondent's workplace violence policies or attempt to circumvent Charging Party as the exclusive bargaining agent. However, I conclude that Respondent had a duty to bargain over the use of a response team made up of bargaining unit members to investigate and make recommendations concerning alleged incidents of workplace violence. I also conclude that Respondent violated this duty to bargain by forming and deploying a response team in the Fire Department without giving Charging Party an opportunity for meaningful bargaining. In accord with these conclusions, and the discussion and findings of fact above, I recommend that the Commission issue the following order.

## RECOMMENDED ORDER

Respondent City of Detroit, its officers and agents, is hereby ordered to:

1. Cease and desist from implementing changes in the terms and conditions of employment of employees represented by Charging Party Detroit Fire Fighters Association, IAFF, Local 344, including the utilization of a workplace violence response team to investigate and make recommendations regarding incidents of alleged workplace violence, without giving that labor organization notice and an opportunity to bargain over these changes.

2. Upon demand, bargain with the Charging Party over the composition and use of the workplace violence response team in the Fire Department.

3. Refrain from using the workplace violence response team to investigate or make recommendations regarding alleged incidents of workplace violence in the Fire Department until Respondent has satisfied its obligation to bargain.

4. Post the attached Notice to Employees in conspicuous places throughout the Fire Department, including places where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____