STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BLOOMFIELD TOWNSHIP,
Respondent-Public Employer,

Case No. C99 K-203

-and-

BLOOMFIELD TOWNSHIP ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS, LOCAL 3045,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Brown, Schwartz & Patterson, P.C., by Malcolm D. Brown, Esq., for Respondent

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by Gordon A. Gregory, Esq., for Charging Party

DECISION AND ORDER

On June 28, 2001, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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APPEARANCES:

Malcolm D. Brown, Esq., Brown, Schwartz & Patterson, P.C., for the Employer

Gordon A. Gregory, Esq., Gregory, Moore, Jeakle, Heinen & Brooks, P.C., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Detroit, Michigan, on May 9, 2000, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on November 1, 1999, by the Bloomfield Township Association of Professional Fire Fighters, Local 3045, alleging that Bloomfield Township had violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before August 14, 2000, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that the Employer has violated PERA by the following conduct:

> On August 31, September 1, October 9 and October 19, 1999, the Fire Chief posted notices to employees in the bargaining unit regarding the status of contract negotiations and mediation. On

> October 21, 1999, the Chief caused a memorandum with attachments to be hand delivered to individual members of the bargaining unit. The October 21 communication contained substantial and material misrepresentations of the Union's bargaining position and the status of negotiations. The posted notices and other communications were designed and intended to affect the collective bargaining process, to bypass and undermine the status of the Charging Party as the exclusive bargaining representative, and to negotiate with individual employees.

The charge also alleges that the Employer unilaterally and arbitrarily reduced four employees in status and pay because the Charging Party would not approve and execute a Letter of Understanding amending the collective bargaining agreement.

Facts:

The Bloomfield Township Association of Professional Fire Fighters, Local 3045, represents a bargaining unit of all full time uniformed firefighters and command officers, excluding the fire chief, operations officer, and all other department employees. The department is headed by Fire Chief Leo Chartier; the operations officer is Robert Schwartz. The 1996-1999 collective bargaining agreement expired on March 31, 1999. Negotiations for a successor agreement began shortly thereafter. The chief spokesman for the Union was President Douglas Brown.

Communications with Employees:

In August of 1999, Chief Chartier began posting memorandums to employees regarding the Township's bargaining proposals. The chief testified that it was his practice to first deliver any data to be posted to a Union representative. The first of the postings was a memo dated August 31, 1999, with attachments, which indicated that it had been given to the Union Executive Board at the last negotiation session of July 22, 1999. When the document was hand delivered to Brown by Operations Officer Schwartz, Brown objected to the posting and told Schwartz that the Union would prefer that negotiations not be conducted on the bulletin board. According to Brown, it was not the same proposal communicated to the Union on July 22 and was missing several pages. The chief recognized this error and immediately faxed to Brown the additional pages and a new summary sheet. A corrected memo was posted on September 2, 1999.

After the Employer's initial posting, the Union posted a special notice, signed by Brown, addressing the Township's action. Brown indicated that the Employer's proposal was missing information and further stated: "We don't intend to do our negotiating on the bulletin board, or tolerate misinformation spread by management or its cheerleaders, we will do it with the facts at the table."

On October 9, 1999, the Township posted a copy of a document entitled Bloomfield Township Final Offer to Firefighters' Union along with a copy of a letter addressed to Brown

indicating that this was the Employer's final package proposal for a new labor contract and that the proposal contained wage and benefit increases of 17.785%. The Township posted another proposal on October 19, 1999, again with a copy of a letter to Brown indicating the changes made to the latest proposal of October 15.

On October 21, 1999, Chartier sent the following memo to all Township firefighters:

> Enclosed is your Union representatives' last package proposal to the Township. We have marked the proposals upon which agreement has been reached.
>
> Also included is a copy of the Township's last package proposal. We have also marked the proposals upon which agreement has been reached.
>
> There are only two issues upon which agreement was not reached. They are the promotional procedures for Lieutenant and the wage rate for Fire Inspector.

This document with attachments was hand delivered to all bargaining unit members. Chartier testified that on the Union's proposal, the Employer had marked "agreed" in red next to acceptable provisions; on its own proposal, the Employer had typed "same as Union proposal 5.5" for language agreed upon. According to Union President Brown, this document misrepresented that the parties had reached agreement on certain topics, or that their positions were the same. Brown testified that the disputed areas included provisions on the following: acting pay; non-duty related disability benefits; educational benefits; trade time; light duty grievances; time for Union activities; and retroactive wages.

Brown testified as to what the Union considered substantial misrepresentations in the Employer's October 21 document. On the topic of acting pay, Brown testified that the verbiage of the proposals was different; he acknowledged that the content of both the Union and Employer proposal was the same. According to Brown, the provisions on non-duty disability differed. The Union's provision on non-duty related disability benefits stated: "130 weeks from 104 for separation and health care benefits continuation for employee and dependents;" the Employer's proposal simply stated: "Add twenty-six (26) weeks before separation." In both instances the total number of weeks was 130.

Another topic in the proposals disputed by the Union concerned educational benefits. The previous contract provided that those hired before 1983 would have one half of their tuition and books paid for when pursuing a fire science certificate. The Union wished to extend this to all firefighters. Although the parties eventually agreed to maintain the status quo with regard to this benefit, Brown testified that he interpreted the Employer's proposal as eliminating this benefit since he didn't think the dates in the contract would change. The

Union's proposal under educational benefits stated: "Amend all dates to reflect new contract term" and the Employer had marked "agreed" next to this provision.

With respect to trade time, the previous contract contained a trade time proposal which allowed firefighters, lieutenants, and captains to trade time if they needed time off and did not wish to use vacation or personal time. There was an unwritten department policy that trade time did not cause the payment of acting pay. The parties agreed on this concept and the Employer marked "agreed" next to the Union proposal. Brown asserted that the Township made a misrepresentation because the Employer's proposal did not contain the following language which appeared in the Union proposal: "trade time will not cause the payment of acting pay, union officers may use additional 24 hours." The Employer's proposal contained language under the heading "Union Activities" that trade time could be used by Union executive board members.

The parties stipulated during negotiations that if they could reach agreement on a provision for light duty assignments the Union would withdraw grievances on the subject. The Union's proposal included language that the Union would withdraw three pending light duty grievances; the Employer's proposal stated that the Union would withdraw all light duty grievances. According to Brown, while it was true that there were only three light duty grievances pending, there was another grievance which could be construed as relating to light duty, therefore the Employer's language was not clear. Brown also testified that there were differences in the provisions covering Union activities. The Union's proposal covered time off for Union board members to attend "State/IAFF conventions, district meetings and seminars." The Employer proposal did not use the word "State." The Employer marked "agreed" next to the Union proposal on this subject.

Finally, with respect to pay retroactivity, Brown testified that the proposals were different because the Union's wage proposal stated "retroactive to 4/1/99;" the Employer's did not. The Employer had marked "agreed" next to the Union proposal on wages which included retroactivity. According to Chartier, retroactivity had never been an issue; the Township had previously indicated that pay would be retroactive if agreement was reached.

The Union filed a petition for Act 312 compulsory arbitration with the Commission on October 1, 1999. The parties reached agreement on a new contract in March of 2000, prior to an Act 312 arbitrator being appointed.

Reduction in Status/Pay:

This allegation relates to the Employer's alteration of wages paid to employees who had not fulfilled the requirements for the classification of Class A firefighter. According to Article II, Section 6 of the contract, in order to qualify as a Class A firefighter and receive Class A pay, an individual must have a BEMT license, a fire science certificate, and four years of continuous service to the department. A BEMT, or Basic Medical Technician license, allows an individual to perform specific, pre-hospital, procedures on a patient. There is also an advanced license, AEMT or Advanced Emergency Medical Technician, which permits an

individual to practice a higher level of pre-hospital care. Section 6 also provides that those individuals who obtain an AEMT certification within the four years of service are allowed an additional eighteen months to get a fire science certificate, during which time they are paid as a probationary Class A firefighter.

The language of Article II has been the same for several years. Both former Township Supervisor Korzon and Chief Chartier testified regarding negotiations for the 1984-87 contract with respect to this article. At that time Chartier served as Union vice-president and was on the Union's negotiating team. In draft form, Article II of the contract provided that Class A firefighter status was required "in order to continue in the employ of the Township." It also provided that failure to maintain BEMT certification was cause for termination. When the Union expressed its concern that discharge was too harsh a penalty for failure to achieve Class A status, the parties agreed to remove that language in the 1984-87 contract. In addition, a grace period to complete the BEMT recertification process was added, although the termination language was continued for failure to maintain that licensure.

In August of 1999, Operations Officer Schwartz checked on two firefighters who were approaching the end of four years of service to see if they had obtained their fire science certificates. When Schwartz determined that they did not have the certificate, he also checked on several others who had completed their four years of service. Some of these individuals had the certificates but had not turned them in, others did not have the certificates. Those without certificates were firefighters who had an AEMT license and had been advanced to probationary Class A status, but had failed to obtain their certificate during the additional eighteen month period allowed. These employees had been paid at the Class A rate for a considerable time, between two and eight years, without the Employer verifying their fire science certificates.

On September 9, 1999, Chief Chartier wrote to Union President Brown informing him that four firefighters had been advanced to Class A without obtaining a fire science certificate. He indicated that under the contract a fire science certificate was a requirement to be classified as a Class A firefighter; otherwise the employee could choose to remain classified as a firefighter and be paid at the third year pay level. In this letter Chartier stated that the department intended to reduce those individuals to third year firefigher status and pay effective with the pay period beginning on October 2, 1999. Chartier also stated the following:

> Alternatively, if we can reach agreement, we will allow the…firefighters a period of two years (until September 1, 2001) to provide us with their Fire Science Certificate. During this time period we will allow them to continue to be classified and paid as Class A Firefighters. . . . If any of the named Firefighters do not have their Fire Science Certificate by September 1, 2001, they will be reclassified as third year Firefighters and we will freeze their pay rate as of September 1, 2001. Their rate of pay will remain frozen until the rate of pay of a third year Firefighter reaches their rate of pay and

> then they will receive the pay increases at the third year Firefighter rate.

The chief indicated that their status would be changed for the pay period beginning October 2, 1999 and for payroll purposes it was necessary to reach agreement by October 18, 1999. He indicated that the Union should contact him to schedule a meeting. The chief also sent letters to the firefighters affected.

On September 15, 1999, Local 3045 responded to the chief's letter of September 9, indicating that the Union agreed with the Employer's proposal to extend the time for the firefighters to obtain their fire science certificate while continuing to be classified and paid as Class A. The Employer then drafted a Letter of Understanding extending the time limits for certain firefighters to obtain their fire science certificate which included the following language:

> A Firefighter need not obtain his Fire Science Certificate should he choose to remain classified as and paid as a third year Firefighter. However, if a Firefighter desires the increased pay and advancement associated with Class A Firefighter status, he must have a Fire Science Certificate and meet the other criterion for Class A Firefighter status.

According to the chief, the Employer wished to have this language in the Letter of Understanding to clarify the actual practice of the parties as well as to resolve grievances involving compensation for time spent attending fire science certificate classes. The contract provided at Article II, Section 6, B (1) that the fire science certificate was to be achieved at no cost, including tuition fees and books, to the Township. The Union had filed grievances requesting compensation for time spent to attend such classes on the basis that the fire science certificate was required by the Employer and therefore under the Fair Labor Standards Act, class attendance time was time worked.

In a letter dated October 8, 1999, the chief reminded Brown that the Township had not received a response to its proposed Letter of Agreement and the deadline was approaching. Union Secretary/Treasurer Crouch telephoned the chief on October 18 and requested that he delete the portion of the Letter of Understanding which indicated that fire science certificates were not mandatory. The chief indicated that the provision was necessary to clarify the practice of the parties. When the chief heard nothing further from the Union, he submitted the pay reductions to payroll and sent letters to the firefighters involved, indicating that since no agreement had been reached with the Union, their pay would be reduced to the third year level. The chief testified that there have been other instances of firefighters being overpaid; when the error was discovered, their pay was reduced and they were required to pay back the monies owed.

On October 20, 1999, Crouch wrote to the chief, stating that the contract did not provide that Class A status was an option to the employee, and the Union objected to amending the labor agreement to "address this newly raised issue." Crouch also asked for an extension of time before

reclassification and pay reduction was established. On October 28, 1999, the chief responded to Crouch. He indicated that since the parties had not reached agreement within the time specified in his September 9 letter, the Employer had proceeded to inform payroll to reduce the pay of those firefighters not meeting the Class A requirements to third year level.

According to Brown, it was the Union's assumption that the fire science certificate was required under the contract and he understood that the contract mentioned termination for those without the certificate under certain criteria; the Union therefore believed that the Employer was attempting to amend the contract in its proposed Letter of Understanding. He acknowledged that there was no explicit contract provision providing for discharge in those circumstances as there was for failure to maintain a BEMT certificate. Brown also acknowledged that the four firefighters at issue did not have Class A certification and were not entitled to be paid at that level because they lacked that certification.

Discussion and Conclusions:

The Charging Party alleges that the Township violated PERA by undermining the Union's status as exclusive bargaining representative when it posted Township proposals and hand delivered to employees documents containing supposedly agreed to terms. The Charging Party relies on *Macomb County Road Comm*, 1993 MERC Lab Op 842. In that case, the employer mailed revised proposals directly to employees before the union had the opportunity to review them or respond; it also mailed individually tailored wage information to certain employees before providing this information to the union. This was found to constitute direct bargaining with employees and a circumvention of the bargaining process. The situation in the instant case is far different. Here the Employer was posting and circulating information already given to the Union, in an attempt to keep employees updated with respect to the status of bargaining. As the Commission has found in numerous cases, it is not an unfair labor practice for an employer to factually report on the progress of bargaining directly to employees as long as the proposals have been previously discussed with the bargaining agent. *AFSCME Council 25 (Genesee County Rd Comm),* 1995 MERC Lab Op 193, 195; *Huron School Dist*, 1990 MERC Lab Op 628, 634; *Grand Haven Bd of Ed*, 1973 MERC Lab Op 1. The Union's claim that the information disseminated by the Township was misleading or erroneous is not supported by the record. The differences in the language of the proposals as testified to by the Union president were minor and insignificant. In each instance singled out by the Union, there was no difference in the substance of the proposals and the Employer had indicated its agreement with the Union proposal. I find no support for the Union's allegation that the Employer was attempting to misinform or mislead employees in the posting and distribution of bargaining proposals.

The Charging Party also alleges that the Employer violated PERA by reducing the status and pay of four firefighters when the Union declined to execute a Letter of Understanding regarding their situation. According to the Union, no firefighter had previously been terminated or disciplined for failing to obtain a fire science certificate. The only reason the Township inquired into the status of the firefighters was because grievances had been filed regarding Article II, Section 6 of the contract; its action in reducing the firefighters' pay was therefore retaliatory.

I find no violation of PERA by the Employer's action. The record reveals that when the Employer discovered that it was inadvertently paying firefighters without a fire science certificate at

the Class A rate, it contacted the Union. Prior to reducing the firefighters' wage rates, the Employer offered to bargain over the matter and indicated that it would agree to extend the deadline to achieve the certificate if the Union was willing to sign the clarification of contract language reflected in the Letter of Understanding. When the Union refused, the Employer proceeded to act in conformance with its interpretation of the agreement, which was that firefighters would not be paid the Class A rate unless they met the requirements. The fact that the Letter of Understanding may have settled other grievances does not demonstrate an improper motive or retaliation by the Employer. At best the record reflects a good faith contract dispute which is not properly before the Commission but is a matter for the contractual grievance procedure. *Houghton Lake Comm Schools,* 1997 MERC Lab Op 42; *Oakland County Sheriff,* 1983 MERC Lab Op 538. Although the parties may have disagreed as to whether or not a fire science certificate was required for continued employment, even the Union president agreed that those without a fire science certificate were not entitled to be paid at the Class A rate. There is therefore no "mutually accepted" term or condition of employment which would establish a binding past practice in this regard. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 325-326; *Gogebic Comm College*, ___Mich App ___, (6/8/01), *affg* 1999 MERC Lab Op 28.

Finally, the Charging Party asserts that pursuant to Section 13 of Act 312, the Township had a clear duty to maintain the status quo and desist from any unilateral change in terms and conditions of employment during the pendency of Act 312 proceedings. The Commission has consistently held that the power to enforce section 13 of Act 312 lies with the Act 312 arbitrator or court system, and not the Commission. *City of Flint,* 1993 MERC Lab Op 181,182; *City of Highland Pk*, 1991 MERC Lab Op 32, 36.

Based on the above discussion, it is recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch
Administrative Law Judge

Dated: _____