STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Respondent-Public Employer,

Case No. C01 K-225

-and-

WAYNE COUNTY COMMUNITY COLLEGE FEDERATION OF TEACHERS, LOCAL 2000,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Floyd E. Allen & Associates, by Shaun P. Ayer, Esq., and Jacqulyn Schulte, Esq., for Respondent

Law Office of Mark H. Cousens, by John E. Eaton, Esq., and Gillian H. Talwar, Esq., for Charging Party

DECISION AND ORDER

On February 10, 2003, Administrative Law Judge David M. Peltz issued his 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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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 and 423.216, this case was heard at Detroit, Michigan on February 19, 2002, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings and the post-hearing briefs filed by the parties on or before April 9, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On November 7, 2001, the Wayne County Community College Federation of Teachers, Local 2000, filed an unfair labor practice charge with the Commission alleging that the Wayne County Community

College violated Section 10(1)(e) of PERA by having a court reporter transcribe an investigatory hearing on October 3, 2001, without giving the Union notice and an opportunity to request bargaining. The charge further alleged that Respondent unlawfully repudiated a prior agreement not to transcribe an investigatory meeting on October 15, 2001. Finally, the charge asserted that Respondent violated Section 10(1)(e) of PERA when it rejected the Union's demand to bargain the transcribing of the October 15th investigatory meeting. Respondent filed an answer to the charge on November 19, 2001, denying that the presence of a court reporter at an investigatory meeting constitutes a mandatory subject of bargaining.

Findings of Fact:

The Wayne County Community College Federation of Teachers, Local 2000 (the Union), is the exclusive bargaining representative for all full-time and regular part-time faculty members employed by Wayne County Community College (the Employer), including instructors, counselors, librarians and coaches. The most recent collective bargaining agreement between the Union and the Employer expired on December 31, 1999. However, the parties agreed to extend the terms and conditions of that contract while negotiating a successor agreement.

Article VI of the contract, "Employer's Rights," gives the college exclusive authority to "manage its affairs and direct its work force," including the right to "hire, suspend, or discharge for just cause. . . ." Article XXVII provides that a faculty member under investigation has the right to a hearing prior to termination, at which the employee may call witnesses and be represented by legal counsel. The faculty member also has the right to be represented by the Union. The parties stipulated that at termination hearings occurring prior to the events giving rise to this matter, representatives of the College and the Union took their own handwritten notes.

In the instant case, Respondent charged a faculty member with various acts of misconduct and scheduled a termination hearing to begin on October 1, 2001.1 In attendance on that day were the College's attorney Jacqulyn Schulte, director of human resources Mark Sanford, assistant dean Janet Dettloff and regional dean George Swan. Representing the Union were Michigan Federation of Teachers representative Elizabeth Duhn and James Jackson, the president of Local 2000. When the parties realized that the faculty member under investigation had not been notified of the hearing, they gathered in the conference room to discuss alternative dates. According to Schulte, a stenographer was set up in the conference room and prepared to transcribe the hearing for the Employer. However, neither Jackson nor Duhn recall seeing a court reporter, and it is undisputed that Charging Party did not object to the court reporter's presence on that date.

On October 3, 2001, the parties met once again, this time with the faculty member under

1 Although the parties refer to this proceeding various ways in their post-hearing briefs (e.g. investigatory hearing, pre-disciplinary hearing), there is apparently no dispute that the hearing was in fact a "termination hearing" as described in Article XXVII of the contract.

investigation in attendance. A court reporter was present for this meeting. When questioned about the court reporter by one of Charging Party's representatives, Schulte explained that the reporter was there simply to take notes for the College, and that she would not swear-in any witnesses. Prior to the start of the hearing, Charging Party protested the use of the court reporter, but the proceeding commenced and was transcribed over the Union's objection. The parties were unable to conclude the termination hearing on that date and arrangements were made to continue the proceeding on October 15, 2001.

On October 12, 2001, the Union's attorney, John Eaton, contacted Schulte to discuss the use of the court reporter at the termination hearing. Eaton requested that the College not use a court reporter for the remainder of the hearing or, in the alternative, that the parties bargain over the matter. Eaton contends that he and Schulte reached an agreement that there would be no court reporter present for the remainder of the hearing. On that same day, Eaton sent a letter to Schulte confirming the substance of their telephone conversation. In the letter, Eaton wrote that he and Schulte "agreed that the Malvern Crawford *Loudermill* hearing scheduled for Monday, October 15, 2001 would not be tape recorded or transcribed by a court reporter," but that the parties were "free to have note takers present."

On the morning of October 15, 2001, Schulte telephoned Eaton and told him that the College would insist on having the remainder of the termination hearing transcribed. Eaton restated the Union's objection to the use of the court reporter and renewed his request to bargain over the matter. Eaton asserts that he and Schulte then "agreed that simply we disagreed over the subject." Later in the day, the parties gathered for the scheduled hearing, at which the court reporter was again present. At the start of the hearing, the Union repeated its objection to the use of the court reporter and, once again, the College insisted that the hearing would be transcribed. The hearing then continued with the court reporter present. The parties have stipulated that at no point during any of the termination proceedings did the court reporter swear in witnesses.

Discussion and Conclusions of Law:

The question presented in this case is whether a party may lawfully insist upon the verbatim recording of a termination hearing over the objection of the other party to that proceeding. Charging Party argues that a termination hearing has a direct impact upon wages, hours and working conditions and, therefore, the College was obligated to bargain over the issue with the Union. Alternatively, the Union contends that the use of a court reporter at a termination hearing is a permissive subject of bargaining, and that the College violated PERA by insisting to impasse on the matter.

Respondent asserts that the court reporter was there only to take notes for the College, not to make an official record of the proceedings, and that the use of a stenographer in this manner was no different than the parties' usual practice of taking handwritten notes. Respondent contends that this method of transcription has no significant effect on wages, hours and other conditions of employment, and that the use of a court reporter was merely a change in the procedure for administrating a term of the collective bargaining agreement. Respondent also disputes the Union's assertion that the College insisted to the point

of impasse on the presence of the court reporter. According to Respondent, the parties simply "agreed to disagree" about the matter and no actual bargaining ever occurred.

Under PERA, a public employer has a duty to bargain in good faith with the union representative over "wages, hours, and other terms and conditions of employment . . . ." MCL 423.215(1). Such issues are referred to as mandatory subjects of bargaining. Either party may insist on bargaining over a mandatory subject, and neither party may take unilateral action on such an issue prior to reaching an impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Issues falling outside the scope of such classification are considered permissive or illegal subjects of bargaining. *Grand Rapids Comm College Faculty Ass'n v Grand Rapids Comm College*, 439 Mich 650, 656-657 (2000); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177-178 (1989). When a permissive subject of bargaining is involved, the parties may voluntarily bargain over the issue, but neither party can insist on bargaining to the point of impasse**.** *AFSCME, Local 1277 v Center Line*, 414 Mich 642, 652 (1982).

Although the instant case presents a question of first impression for this Commission, the parties cite number public and private sector cases pertaining to the issue of verbatim recording of collective bargaining negotiations. In *Kenowa Public Schools*, 1980 MERC Lab Op 967 (no exceptions) and *Carrollton Twp (Dep't of Public Works)*, 1983 MERC Lab Op 346 (no exceptions), the Commission followed precedent under the National Labor Relations Act (NLRA), 29 USC 150 *et seq*., and held that a party violates PERA by insisting to impasse on recording contract negotiation sessions. The rationale for finding a violation in this context is that tape recording of bargaining sessions is a "threshold matter" unrelated to the obligation to bargain in good faith regarding wages, hours, and other conditions of employment and, thus, constitutes a permissive, rather than a mandatory, subject of bargaining. The ALJ in *Carrollton Twp* also noted that permitting the use of a recording device in a negotiating session could have a chilling effect on the willingness of the parties to express themselves freely and "seriously impair smooth functioning of the collective bargaining process." 1983 MERC Lab Op at 351-352. See also *Bartlett-Collins Co*, 237 NLRB 770; 99 LRRM 1034 (1978); *Latrobe Steel Co*, 630 F2d 171; 105 LRRM 2393 (1980).

The National Labor Relations Board (NLRB) has extended this line of analysis to meetings conducted pursuant to the parties' contractual grievance process. In *Pennsylvania Telephone Guild*, 277 NLRB 501; 120 LRRM 1257 (1985), enf'd 799 F2d 84; 123 LRRM 2214 (CA 3 1986), the NLRB held that grievance meetings are an integral part of the bargaining process and, therefore, subject to the same requirement of good-faith bargaining as contract negotiations. The Board further concluded that contract negotiations and grievance meetings are similar in character and methodology because both proceedings are informal mechanisms used to negotiate the settlement of dispute. *Id.* Recognizing that "disagreement over the threshold issue of whether a recording device can be used, which is preliminary and subordinate to substantive matters, may stifle bargaining from its inception" and make the goal of adjusting grievances subordinate to the preparation of a record for possible litigation, the Board concluded that a party fails to bargain in good faith under the NLRA by insisting to impasse on the use of a recording device during a grievance meeting. *Id.* at 502. See also *Water Association*, 290 NLRB 838; 129 LRRM 1064 (1988);

Hutchinson Fruit Co, 277 NLRB 497 (1985); 120 LRRM 1258.

I see no meaningful distinction between contract negotiation sessions, grievance meetings and termination hearings with respect to the mandatory/permissive dichotomy. Whether a termination hearing will be recorded does not, in and of itself, have any significant impact on wages, hours and other conditions of employment of bargaining unit members. As is the case with contract bargaining sessions and grievance meetings, verbatim recording of a termination hearing is simply a preliminary matter unrelated to any substantive subject of negotiations between the parties. This is especially true given my conclusion below that the termination hearing itself does not constitute a bargaining forum. However, even if I were to accept the notion that the termination hearing is somehow an extension of the collective bargaining process, it is clear that the instant case merely involves a dispute over the preconditions or "ground rules" of that process. As set forth in the above decisions, such threshold matters constitute permissive subjects of bargaining. See also *Taylor School District*, 1976 MERC Lab Op 1006 (parties may not condition bargaining upon concession of ground rules governing negotiations).

Having determined that the instant dispute involves a permissive subject of bargaining, the next question to address is whether the College violated PERA by insisting on making a verbatim record of the three termination hearing sessions which were held in October of 2001. As discussed above, it is a well-established principle of law that a party may not condition collective bargaining on the verbatim recording of a contract negotiating session or a grievance meeting. The Board's rationale in extending this principle to grievance meetings is that the grievance procedure is an integral part of the collective bargaining process, and that a disagreement over a threshold matter such as the presence of a court reporter would likewise have a detrimental effect on the abilities of the parties to fulfill their mandatory bargaining obligations. See e.g. *Pennsylvania Telephone Guild*, 277 NLRB 501; *Hutchinson Fruit Co*, 277 NLRB 497. In contrast, Respondent in this case did not hold any element of the collective bargaining process hostage when it insisted on recording the termination hearing. This is because the termination hearing is neither an inherent part, nor an extension, of that process.

The collective bargaining agreement between the College and the Union gives Respondent the authority to terminate a bargaining unit member for just cause. Article XXVII of the contract provides that a faculty member has the right to a hearing prior to termination, and that the employee under investigation may be represented by the Union at the hearing. However, there is nothing in the contract which suggests that the termination hearing is part of the grievance procedure, or that the College is under any affirmative obligation to bargain with the Union at the hearing. Rather, the contract indicates that the hearing is to occur after termination has already been recommend by the faculty member's supervisor and approved by the faculty member's dean, the vice president for educational affairs, and the president of the College. Following the termination hearing, the president either recommends termination or reinstatement, and if termination is recommended, the matter is forwarded to the board of trustees for further review. Thus, it would appear that the purpose of the hearing is to provide the president and the board with the complete facts and rationale for making a just cause determination, and to afford the employee under investigation with the opportunity to rebut the charge and/or present mitigating evidence.

The transcript of the October 15, 2001, meeting which was submitted as evidence in this matter provides further support for the proposition the termination hearing is not part of the collective bargaining process. At that meeting, the Union representative questioned the chairperson about the factual allegations upon which the termination recommendation was based, and he argued that the charges against the faculty member were overly vague. However, nothing even close to resembling negotiations occurred. Notably, both at that meeting and in his earlier letter to Jacqulyn Schulte, the Union representative referred to the termination proceeding as a *Loudermill* hearing, referring to the U.S. Supreme Court's decision in *Cleveland Bd of Ed v Loudermill*, 470 US 532; 105 S Ct 1487; 84 Led 2d 494 (1985). Yet, *Loudermill* did not arise in a collective bargaining context, and the Court's rationale in requiring a pre-termination hearing was not to afford the employee or his or her representative with an opportunity to negotiate over a discharge decision. Rather, the Court in *Loudermill* was concerned with protecting the procedural due process rights of tenured employees. In *Loudermill*, the Court held that a tenured employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

In its post-hearing brief, Charging Party repeatedly acknowledges that the termination hearing is not intended to bring about a negotiated settlement regarding the faculty member's employment status. In attempting to distinguish termination hearings from negotiating sessions and grievance proceedings, the Union refers to the termination hearing as "an investigatory meeting," and concedes that such a meeting "is unlike negotiations or grievance discussions where verbatim recording would interfere with the policy of engaging in frank, off the record discussions." Charging Party also asserts that "the investigation [meeting] is not a process of give and take, as negotiations are. The investigation [meeting] is meant to gather evidence for a disciplinary decision." Elsewhere in the brief, the Union describes the hearing by asserting that the parties "are not looking for a negotiated solution, but instead are [sic] present evidence." In fact, Charging Party titled one section of its brief "An Investigation is not Negotiations." Thus, it appears that the Union has, throughout these proceedings, operated with the understanding that the purpose of the termination hearing is to gather evidence and protect the due process rights of the faculty member under investigation, and not to reach a negotiated settlement to the dispute.2

The U.S. Supreme Court's decision in *NLRB v Weingarten, Inc*, 420 US 251; 95 S Ct 959; 43 L Ed 2d 171 (1975), is also instructive on this issue. In *Weingarten*, the Supreme Court agreed with the NLRB and concluded that an individual employee has the right to union representation at an investigatory meeting when that employee reasonably believes the investigation may lead to discipline, and this

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2 Curiously, it is Respondent which now asserts in its post-hearing brief that the purpose of the termination hearing process was intended to foster a negotiated settlement to the dispute. However, the College did not challenge the Union's characterization of the proceeding as a *Loudermill* hearing at any point prior to, or during the hearing in this matter, and as noted, there is no legal authority or factual support in the record which would support a finding that the termination hearing is part of the bargaining process.

Commission subsequently announced that it would follow *Weingarten* in cases arising under PERA. See *University of Michigan*, 1977 MERC Lab Op 496. See also *Wayne-Westland EA v Wayne Westland CS*, 1976 Mich App 361 (1989), aff'g 1987 MERC Lab Op 624. It is well-established, however, that no bargaining obligations vest during such investigatory meetings. Rather, the representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. *Weingarten*, 420 US at 259-260. See also *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 678 (2000) (employer not required to bargain collectively with *Weingarten* representative; *United States Postal Service v NLRB*, 969 F2d 1064 (CA DC 1992) (employer remains in command of the time, place, and manner of the *Weingarten* interview with no duty to bargain with the union). Thus, while Article XXVII acknowledges the right of the employee to have a Union representative present at the termination hearing, it does not necessarily follow that the College is under any affirmative obligation to negotiate with the Union at that meeting.

Because the termination hearing is neither an inherent part of the bargaining process, nor an extension thereof, I conclude that the College did not violate its duty to bargain under PERA by insisting on the presence of a court reporter throughout the proceedings. It should be noted that the same conclusion was reached in two cases arising under statutes analogous to PERA. In *In re City of Cincinnati*, SERB 93-010 (6-10-93), the contract contained a provision requiring that employees be afforded a pre-disciplinary hearing, which the employer insisted upon taping over the union's objections. The State Employment Relations Board of Ohio held that the taping of predisciplinary meetings is a permissive subject of bargaining, and that because such meetings are not part of the bargaining process, the employer could lawfully insist upon their being recorded. *Id.* at 5-8. In so holding, the Board found that pre-disciplinary hearings were not "*de jure* part of the bargaining process" merely because they were required by the contract. *Id.* at 6 (emphasis in original). Rather, the Court held that it was the "actual character of the proceeding" which is controlling. *Id.* Similarly, in *Illinois Nurses Association*, 3 PERI (LRP) P3013 (1987), the Illinois Local Labor Relations Board held that the Employer did not commit a bargaining violation by insisting on taping predisciplinary hearings since those sessions were not part of the contractual grievance procedure.

For the forgoing reasons, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: _____