STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C02 F-133

-and-

ASSOCIATION OF MUNICIPAL INSPECTORS,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Gwendolyn A. De Jongh, Esq., City of Detroit Law Department, for the Respondent

L. Roger Webb, Esq., for the Charging Party

DECISION AND ORDER

On October 31, 2003, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled 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.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry Bishop, Commission Member

_____
Maris Stella Swift, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the **City of Detroit** has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order:

WE HEREBY NOTIFY OUR EMPLOYEES THAT

WE WILL NOT state to representatives of the Association of Municipal Inspectors, the certified collective bargaining agent for certain of our employees, that we do not have to bargain with that labor organization over changes in working conditions because it does not have a collective bargaining agreement.

WE WILL NOT tell members of the unit represented by this labor organization that because the union has no contract, we do not recognize it and the employees have no representation.

WE WILL NOT change existing terms and conditions of employment without giving the union an opportunity to bargain.

WE WILL, upon demand, bargain with the Association of Municipal Inspectors over the following changes in working conditions implemented by promulgation of an employee handbook in July 2002:

1. Change in the policy allowing inspectors working in the office to schedule their own breaks and take breaks at their desks.

2. Alteration of existing policy to allow inspectors to be assigned temporarily to jobs in other divisions of the Building and Safety Engineering Department.

3. Elimination of seniority preference in vacation selection.

4. Imposition of a requirement that employees report and obtain approval for outside employment and outside business interests.

5. Imposition of financial liability on employees for damage to city property caused by negligence or carelessness.

6. Creation of new categories of disciplinary offenses.

WE WILL, upon the union's request, formally notify members of the unit represented by the Association of Municipal Engineers that those sections of the July 2002 handbook containing the changes listed above will not apply to them until we have satisfied our obligation to bargain over these changes.

WE WILL rescind any disciplinary action issued to a member of the bargaining unit for violation of the new rules, as listed above, promulgated in the July 2002 employee handbook.

CITY OF DETROIT

By: _____

Title: _____

Date: _____

STATE OF MICHIGAN
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APPEARANCES:

Gwendolyn A. De Jongh, Esq., City of Detroit Law Department, for the Respondent

L. Rodger Webb, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE
IN BIFURCATED PROCEEDING

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 November 27, 2002, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 10, 2003, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge and Background:

The Association of Municipal Inspectors (AMI), Charging Party in this case, represents a bargaining unit consisting of housing inspectors in the City of Detroit's Building and Safety Engineering Department, housing rehabilitation specialists in its Planning and Development Department, and improvement specialists employed by the City Housing Commission. The charge here involves only the Building and Safety Engineering Department and housing inspectors employed in this department. Charging Party was certified as bargaining representative for the above unit on October 16, 2001. Charging Party succeeded another union whose contract, an agreement between Respondent City of Detroit and the Detroit Building and

Construction Trades Council, expired on June 20, 2001. At the time of the hearing, Charging Party and Respondent had not yet entered into a collective bargaining agreement.

AMI filed its original charge on June 11, 2002. This charge asserted that on or about January 24, 2002, Respondent unlawfully reinstated a disciplinary action against a member of Charging Party's unit, Harold Stokes, because the parties had no collective bargaining agreement. The charge did not cite the section of PERA Respondent was alleged to have violated. A hearing was scheduled for October 2, 2002.

Charging Party amended the charge on August 5, 2002. The amended charge alleged that by reinstating the disciplinary action against Stokes, Respondent unlawfully discriminated against him in violation of Sections 10(1)(a) and (c) of PERA. The amended charge also alleged that remarks made by Steve Leggat, assistant chief of the housing division of the Building and Safety Engineering Department (hereinafter the department), violated Section 10(1)(a) of PERA. Leggat supervises housing inspectors in Charging Party's unit. According to the charge, after Charging Party was certified as their bargaining representative, Leggat repeatedly told Charging Party representatives and unit employees that the inspectors did not have a union, that they had no representation, and that, as result, Respondent could do what it wanted to do.

The first amended charge also alleged that Respondent violated its duty to bargain under Section 10(1)(e) of PERA as follows:

> 3. On or about July 2002, the City of Detroit unilaterally promulgated an employee manual which purportedly applies to the AMI unit. Said manual, among other provisions, purports to govern use of city property and to establish unit employees' liability for same, to define seniority, to govern vacation requests, to provide for disciplinary offenses, and associated penalties, to govern overtime, and to require verification of illness to obtain sick leave. Said issues are all mandatory subjects of collective bargaining. The unilateral promulgation of said manual, without notice to the Union and an opportunity to bargain, violates the Act as cited.
>
> 4. The City has attempted to unilaterally impose a change in the established procedures for out of class pay, purportedly requiring a minimum of 30 days. A supplement to the Trades Council collective bargaining agreement, whose terms and conditions of employment still apply to AMI unit employees, provides for a 2 day trigger. Said unilateral change violates the statute as cited.
>
> 5. The City of Detroit has reassigned inspectors irrespective of their seniority, in derogation of established practice. Said reassignments violate the Act as cited.
>
> 6. The City of Detroit unilaterally changed inspectors' duties to include in-depth mechanical inspections, with only superficial training. Said act violates the statute as cited.

The October 2 hearing was adjourned at the request of the parties. On October 7, 2002, Charging Party filed a second amended charge, adding the following paragraph:

> 8. The Department has recently unilaterally changed the established practice to approve vacation leave from 3 days lead-time to thirty days. Said unilateral change violates the statute as cited.

On November 13, 2002, Charging Party filed a third amended charge, alleging the Respondent violated Section 10(1)(e) by the following actions:

> 9. On or about October 28, 2002, the Building and Safety Engineering Department denied unit member Gerald Legge the $250 payment due him under established protocols in respect of an accident he had while using his personal vehicle on City business. Said refusal constitutes a unilateral change in an established term or condition of employment; as such it violates the Act as cited.
>
> 10. On or about July 2002, the Building and Safety Engineering Department reassigned unit code enforcement inspectors from court assignments to field assignments out of line of seniority, contrary to established practice. Said assignments constitute a unilateral change in an established term or condition of employment; as such they violate the Act as cited.

II. Bifurcation:

In a pre-hearing conference held on November 27, 2002, the parties unsuccessfully attempted to reach agreement on how to proceed, given the large number of separate allegations. I informed the parties on the record that I was bifurcating this proceeding. I stated that I would take testimony only on the Section 10(1)(a) and (c) allegations, and the Section 10(1)(e) allegation set forth in paragraph 3 of the amended charge, after which I would allow the parties to file briefs, close the record, and write a decision and recommended order on these allegations only. I informed the parties that I would schedule a separate hearing on the remaining Section 10(1)(e) allegations, i.e., paragraphs 4, 5,6,8,9, and 10 of the charge as amended. When Respondent objected to the bifurcation, I indicated that Respondent could brief this issue.

Commission Rule 172, R 423.172(2)(f), gives an administrative law judge the authority to regulate the course of a hearing. In its post-hearing brief, Respondent argues that bifurcation is not proper because (1) all the alleged unfair labor practices took place during the period between Charging Party's certification as bargaining representation in October 2001 and the finalization of the first collective bargaining agreement between the parties; (2) the issues are intertwined. After considering the arguments presented by Respondent, I reaffirm my decision to bifurcate. The charge as amended includes numerous allegations based on different facts. While these allegations are sufficiently related that they could be heard together, I find that they are not so intertwined that they cannot fairly be separated. To the extent there are common issues of law underlying the allegations, an expeditious ruling may facilitate settlement, or at least simplify

litigation, of the remaining issues. I conclude that bifurcation will best promote a just, economical, and expeditious determination of the issues presented.

III. Alleged Section 10(1)(c) Violation - Reinstatement of Stokes' Reprimand:

A. Findings of Fact:

On October 24, 2001, Respondent issued a written reprimand to Harold Stokes, a housing inspector. The reprimand was for two specific incidents of alleged misconduct. However, the reprimand also included references to past disciplinary actions taken against Stokes that were unrelated to the alleged misconduct. Stokes' supervisor wrote, "Though some of these instances are too old to be considered in this disciplinary action, I have included mention of them so that we are aware of your performance history." A few days later, Charging Party President Jerry Watson met with Michael Taylor, chief of the housing division of the Building and Safety Engineering Department, to complain about the references to past disciplinary actions. Taylor told Watson that he saw the problem, and that he would look into it. On October 30, Watson filed a grievance on Stokes' behalf. The grievance cited alleged violations of Respondent's civil service rules and of a provision in the expired contract between Respondent and the former bargaining agent limiting the use of past infractions in imposing discipline. On December 20, 2001, Taylor wrote to Watson stating that he was rescinding the reprimand "due to the manner it was given and not due to any invalidity." Taylor testified that he meant that he believed that Stokes' current misconduct justified the reprimand, but that Stokes' supervisor should not have mentioned the old disciplinary actions.

On January 24, 2002, Taylor wrote to Watson again:

> This is to rescind my letter of December 20, 2001, which addressed your grievance on the above referenced matter. It is now my understanding that your association does not have a contract with the City at this time. Therefore, it does not have the required status to file a grievance, rendering (the Stokes' grievance) invalid.
>
> Stokes' reprimand was not removed from his file.

B. Discussion and Conclusions of Law:

Charging Party argues that a grievance procedure survives the expiration of a collective bargaining agreement, as a term and condition of employment, citing *City of Dearborn*, 1987 MERC Lab Op 61. Therefore, according to Charging Party, Respondent was not entitled to repudiate the grievance process contained in its expired contract with the predecessor union, as it allegedly did when it reinstated Stokes' written reprimand. However, Charging Party did not allege in its charge, nor argue at the hearing, that Respondent violated its duty to bargain under

Section 10(1)(e) of PERA with respect to Stokes' reprimand. Charging Party's only claim was that by reinstating the reprimand, Respondent unlawfully discriminated against Stokes in violation of Section 10(1)(c) of PERA.

In support of that claim, Charging Party argues that Stokes engaged in union activity when he filed (or Watson filed on his behalf) a grievance over his reprimand. However, whether Stokes' filing of the grievance was protected concerted activity under the Act is irrelevant. There is no evidence that Stokes was reprimanded for filing a grievance, or for any other conduct protected by the Act. Nor did the filing of the grievance cause Taylor to change his mind about rescinding the reprimand. In fact, the opposite may be true; Taylor did not announce that he was rescinding the reprimand until after the grievance was filed. Charging Party also contends that were Stokes not a member of Charging Party's bargaining unit, his reprimand would have been rescinded. I find absolutely no evidence to support this contention. I conclude that Charging Party did not establish that Respondent violated Section 10(1)(a) or (c) of PERA by reinstating the reprimand it issued to Harold Stokes on October 24, 2001.

IV. Alleged Section 10(1)(a) Violations - Leggat's Statements:

A. Findings of Fact:

Watson testified that on several occasions between January and June 2002, he attempted to speak to Building and Engineering Department Housing Division Assistant Chief Steve Leggat about changes in policies or other issues involving the housing inspectors in the division. According to Watson, Leggat told him that "[Charging Party] has no contract, and the City is not recognizing you guys." Watson testified that Leggat also said, "the City's position is that it can do anything it wants and make any changes it wants because you do not have a contract." Leggat admitted that he did once tell Watson that the City did not recognize Charging Party. However, according to Leggat, this was before Charging Party was certified.

In about May 2002, Leggat held a meeting of housing inspectors at which he announced that, because of a shortage of inspectors and heavy workload, housing inspectors could no longer take vacation days on short notice. Many of the housing inspectors were upset over this change. Several inspectors told Leggat that they were going to file a grievance. According to Gerald Legge, a housing inspector present at the meeting, Leggat responded that the inspectors had no representation and no union, and that management could do whatever it wanted to do as far as changing the rules. Samuel Flemings, a housing inspector and Charging Party steward, testified that Leggat said, "you do not have a contract with the City, the City does not recognize your association, the City can change the rules if they see fit, and management can manage as they see fit." Flemings and Legge agree that several inspectors then shouted out that if they did not have a union, they were not going to pay dues. Leggat did not recall specifically what the inspectors said at this meeting. Leggat testified that he told the inspectors that they did not have a contract. He denied saying that they did not have a union. Leggat admitted, however, that he might have told the inspectors that they did not have any "representation," because, Leggat testified, "it is true." Leggat testified that he has often told employees that management has the right to manage,

but he denied telling the inspectors on this or any other occasion that the City could "do whatever it wanted to do."[1]

According to Leggat's testimony, Watson approached him to discuss working conditions before Charging Party was certified, and Leggat told him at that time that Respondent did not recognize Charging Party. Although Watson admitted that he was not an experienced union representative, I find it unlikely that he would have expected Leggat to deal with him before Charging Party was certified. Watson testified, in substance, that Leggat told him after Charging Party was certified that Respondent did not have to deal with the union over changes in working conditions because Charging Party did not have a contract. I find Watson to be a credible witness, based on his demeanor. Moreover, I note that Leggat, testifying about the vacation scheduling meeting, admitted that he might have said that the inspectors did not have "representation," because "it is true." It was not true, either at the time of the meeting or at the time of the hearing, that the inspectors did not have a bargaining representative. It was true, at both times, that Respondent did not have a contract with that bargaining representative. I find that Leggat's response suggests that he did not understand that Respondent had an obligation to bargain with Charging Party over changes in working conditions while the parties were bargaining their first contract. I find that this statement supports Watson's version of his conversations with Leggat between January and June 2002. For the same reasons, I credit the testimony of Legge and Fleming that, during his meeting with the housing inspectors in May 2002, Leggat told them that since Charging Party did not have a contract with Respondent, Respondent did not "recognize the Association," Respondent did not have to bargain, and Respondent "could manage as it saw fit."

B. Discussion and Conclusions of Law:

Charging Party asserts that Leggat's statements violated Section 10(1)(a) of PERA because they coerced Watson and unit employees in the exercise of their rights under Section 9 of PERA. Charging Party draws an analogy between Leggat's statement that the Respondent did not recognize Charging Party and did not have to bargain over changes in working conditions and statements made by employers during union election campaigns which imply that voting for a union will be futile because the employer will not bargain in good faith. See *Bellevue Community Schools*, 1987 MERC Lab Op 535, 544. Respondent maintains, however, that Leggat's statements did not violate PERA because they did not contain threats of reprisal or force. Respondent argues that Leggat had the right to express his views as long as he did not threaten employees.

In *The Becker Group, Inc.*, 329 NLRB 103 (1999), the National Labor Relations Board (NLRB), found that a supervisor's statement to a union representative and an employee

[1] Legge also testified that Leggat told him that "the employees had no representation" when he went to Leggat on another occasion with the inspectors' complaints about increases in their workload. Likewise, Fleming testified that he attempted to speak to Leggat after several inspectors complained to him that they had been given inspection schedules that they could not complete within the normal workday, but Leggat told him that he did not have to talk to him because "the City was not recognizing [Charging Party]." However, there was nothing in the record to indicate when Leggat allegedly made these statements.

approximately two months after the union had been certified that they did not have a union violated Section 8(a)(1) of the National Labor Relations Act, 29 USC 150, et seq., a provision substantially identical to Section 10(1)(a) of PERA. In *Becker*, the newly certified union had notified the employer that an employee, Cooper, had been designated a member of its bargaining committee. When another employee, Jennings, was called into the office of his supervisor, Smith, Jennings attempted to bring Cooper to serve as his union representative. When Cooper and Jennings entered Smith's office, Smith yelled at Cooper to leave. When Cooper said that she was there to represent Jennings, Smith responded that there was no union representation, and to get out of the office. Cooper replied that there was a union, and that it had been certified. Smith stated that the union did not have a contract. Cooper agreed, but told him that since the union had been certified the employee had the right to union representation. Smith then dropped his demand that she leave.

The administrative law judge in *Becker* held that Jennings had no right to union representation under *NLRB v Weingarten, Inc.*, 420 US 251 (1975), because the purpose of the meeting was simply to give him a copy of a disciplinary warning. The administrative law judge concluded, however, that Smith's remarks violated Section 8(a)(1) of the NLRA:

> I believe Smith's statement to Cooper and Jennings that there was no union representation at Respondent's facility constitutes a Section 8(a)(1) violation. . . An employer, or its agents, cannot arbitrarily decide that a union does not have a presence in the employer's facility. The certification by the NLRB provides a one year presumption that the union represents the employees for purposes of collective bargaining. . . The union should represent the employees within the unit without employer interference or refusal to recognize the certified union for a minimum period of one year following certification. Had Smith merely informed Cooper that under the circumstances of the meeting, Jennings had no legal right to union representation, I would not find a violation. However, his statement went much further. Considering that the statement made by Smith occurred as Cooper was attempting to engage in union representation, there was a coercive nature to the statement. Such a statement has a chilling effect on a unit representative's ability to represent, and on the employee's right to be represented, and thus constitutes a Section 10(1)(a) violation.

The Board affirmed the judge's finding that Smith's statement was unlawful.

I find the reasoning in *Becker* applies to the statements made by Steve Leggat in this case. Leggat did not simply tell Watson, or the assembled inspectors, that Respondent did not have an obligation to bargain with Charging Party over the specific issues they were attempting to raise. Rather, he told Watson, as Watson was attempting to perform his function as Charging Party's representative, that Respondent did not recognize an obligation to bargain with Charging Party over any changes in existing working conditions since Charging Party did not yet have a contract. In May 2002, Leggat said much the same thing to a gathering of inspectors irate over announced changes in vacation scheduling. These statements clearly had a chilling effect on Watson's right to perform his representative duties, and on the inspectors' rights to receive the

benefit of Charging Party's representation. I conclude that Leggat violated Section 10(1)(a) of PERA by telling Watson, between January and June of 2002, that he did not have to bargain with him over changes in working conditions because Charging Party did not have a contract. I also conclude that Leggat violated Section 10(1)(a) by telling the housing inspectors in May 2002 that because Charging Party had no contract, Respondent did not recognize Charging Party, or the housing inspectors had no representation, and that Respondent could act unilaterally.

V. Alleged Section 10(1)(e) Violations - Unilateral Changes by Promulgation of Employee Handbook

A. Findings of Fact:

As noted above, until June 20, 2001, the employees in Charging Party's unit were covered by a collective bargaining agreement negotiated between Respondent and Charging Party's predecessor. The department also had a manual of operating procedures for housing inspectors (hereinafter the manual), last revised in July 1998. Up to July 2002, the manual was issued to all housing inspectors upon their employment with the department's housing division. The manual included copies of policies applicable to all employees in the department, including an attendance policy, and provisions dealing with probationary periods, hours of work, vacations, funeral and jury duty leave, car mileage and liability, and the reporting of accidents occurring during working time. The remainder of the manual consisted of inspection procedures, training materials for inspectors, forms, and housing rules and regulations that inspectors needed to know.

In the latter of part of 2000, the department decided to prepare an employee handbook (hereinafter the handbook), setting out policies applicable to all department employees. Jimmy Roberts, the department's general manager, was responsible for this project. According to Roberts, the department's intent was to incorporate into the handbook existing rules and policies applicable to department employees. These included written directives that the department had distributed to employees sometime in the past, written policies followed by supervisors that had never been given to employees, and practices that had been followed but not written down. Roberts testified that he gathered written policies for inclusion in the handbook, and that where there was no written policy or rule he wrote one. According to Roberts, however, the handbook did not alter any existing policy or practice applicable to members of Charging Party's unit.

In early 2002, after Roberts had completed a draft of the handbook, he scheduled meetings with all unions and associations representing employees in the department, except Charging Party. Roberts told the unions that the department wanted their input, but that the department felt it had the authority to promulgate this handbook because it incorporated existing policies and practices, and that the department was not asking for their approval. At the request of one of the unions, Roberts met with its representatives once every two weeks between March and June of 2002, going over the handbook line by line and discussing whether the handbook conflicted in any way with the union's collective bargaining agreement. Roberts agreed to certain changes suggested by this union, but rejected others.

After Roberts finished meeting with the other unions, he realized that he had not discussed the handbook with Charging Party representatives. Accordingly, on June 24, 2002, Roberts met with Watson and Charging Party representative Larry DeForrest.[2] According to Roberts, he gave Watson and DeForrest a copy of the handbook, asked them for their input, and went through the manual with them page by page. Roberts testified that Watson and DeForrest told him that they could not agree or disagree with anything right then, but that they wanted to talk to their members. According to both Watson and DeForrest, Watson told Roberts, "These things need to be negotiated." Both Watson and DeForrest testified that Roberts replied that that was a matter for labor relations, and that he had nothing to do with those matters. According to Watson and DeForrest, Roberts said that "these were just departmental policies." When Watson and DeForrest left the meeting, they told Roberts that they would get back to him. After his meeting with Watson and DeForrest, Roberts circulated the handbook among managers in the department for comment. A week passed, and Roberts did not hear anything from Watson or DeForrest. Sometime during the first week of July 2002, Roberts distributed copies of the handbook to all department employees.

1. Compensatory Time

The handbook includes a provision entitled "hours of operation." This provision states that normal business hours are from 8:00 to 4:00, that schedules can be varied to comport with operating needs, and that "employees may be required to work a full eight hour day or additional hours resulting in a full forty-hour week without additional compensation."

Housing inspectors normally work a 35-hour week, Monday through Friday. The expired contract required Respondent to pay overtime for all hours worked over eight in one service day. The manual stated that employees would not be paid overtime until they worked forty hours in a week, but that employees asked to work on a weekend would be given a compensatory day off during that same work week. Both Watson and Roberts testified that the department's practice has been to give housing inspectors assigned to work between one and five hours on a weekend one and one-half hours in compensatory time for each hour worked. That is, an inspector directed to work five hours on a weekend would receive seven hours in compensatory time. Roberts testified that this practice has not changed, even though inspectors are not entitled to "additional compensation" for this time. There was no evidence that after July 2002, any housing inspector was required to work more than 35 hours per week without receiving either overtime or compensatory time.

2. Scheduling and Location of Breaks

The handbook states that supervisors will normally schedule breaks, and that employees at their desks will always be presumed to be at work. The manual gave the periods during which employees could take their morning and afternoon breaks, and stated that employees were to inform their immediate supervisors when taking a designated break. Watson testified that before

[2] According to Roberts, Elaine Tower, the department's labor relations representative, was also present at this meeting. However, Tower did not testify at the hearing.

July 2002, housing inspectors were allowed to schedule their own breaks whether they were working in the field or in the office. They were also allowed to take breaks at their desks. Roberts testified that the break provisions were not intended to apply to field employees. Roberts maintained that inspectors assigned to the office had never been allowed to take breaks at their desks.

3. Temporary Assignments

The handbook states, "Employees in any division may be reassigned to work in the same classification in any of the other divisions." The expired contract included a memorandum of understanding prohibiting the temporary assignment of employees "into other duties and departments," without the union's agreement, and prohibiting employees from being required to perform work out of their classification. According to Roberts, the handbook did not change the policy as set forth in the expired contract, since the latter applies only to reassignments between departments, and the handbook addresses only reassignments within the department.

4. Outside Employment

The handbook requires employees to notify the department director of any outside employment or ownership or managerial interest in a business and to obtain the department director's approval to engage in these activities. It also states that employees currently engaged in outside employment who have not notified the department must immediately do so by submitting a form included in the handbook. Neither the expired contract nor the manual references mentions outside employment. Watson testified that before July 2002, inspectors had never been required or asked to report outside employment or ownership interests. Respondent produced evidence that it has had a policy regarding outside employment since about 1977, that this policy is supposed to apply to all its employees, and that the policy and form in the handbook is the current policy and form applicable to all city employees. Roberts testified that he believed that this policy had been distributed to all employees in the department sometime between 1994 and 1996. Roberts also testified that the inspectors' supervisors should have discussed the policy with new employees. However, Roberts did not know if inspectors had actually been required to report their outside employment before July 2002.

5. Discipline for Failing to Report or Remedy Unsafe Conditions

The handbook states that employees who violate safety standards, cause hazardous situations, or fail to report or remedy such situations may be subject to discipline up to and including termination of employment. Watson testified that before the promulgation of the revised manual, the department had no policy subjecting employees to discipline for failure to report or remedy an unsafe condition. According to Roberts, several years before Charging Party was certified, Respondent entered into an agreement with all unions, presumably including Charging Party's predecessor, to establish safety committees and promulgate safety rules. Roberts testified that he took the language in the handbook from this agreement. Nevertheless,

Roberts admitted that employees in Charging Party's bargaining unit were not subject to discipline for failing to report a safety hazard until the department issued the handbook in 2002.

6. Discipline for Misconduct Outside of Work, Failing to Provide Medical Documentation, and "Attitudes" That Harass or Intimidate

The expired collective bargaining agreement contained no provisions setting out specific disciplinary offenses. The only disciplinary offenses listed in the manual concerned absenteeism and tardiness. The handbook contains an extensive section on discipline, including lists of disciplinary offenses and their penalties. Watson admitted that many of these had been recognized by practice or policy as offenses subject to discipline. However, he testified that the handbook established several new disciplinary offenses. According to Watson, these were: (1) conduct outside of work which "significantly impairs the ability of the employee to perform his/her work, adversely affects the operations of the department, or brings City service into public disrepute;" (2) the failure to provide medical documentation whenever requested by a supervisor; (3) the possession of an "attitude," as distinct from an action, that harasses or intimidates other employees. Roberts testified that he wrote the disciplinary policies in the handbook in 1991, and that he personally began applying these guidelines in about 1995. Roberts acknowledged that these policies were not distributed to employees. However, according to Roberts, he was the only one who needed to know these guidelines since he approved all discipline in the department.

7. Employee Liability for Damaging City Property

The handbook states:

> In any instance where an employee's negligence or careless disregard for City property results in the loss of or damage to equipment, the department will proceed to recover the costs of repairing or replacing the equipment from the employee. In addition, cases of negligence or careless disregard may be accompanied by disciplinary action.

This policy was not included in the manual. Watson testified that before July 2002, there was no policy that made employees liable for negligently damaging city property. Roberts testified that this was an existing policy, but did not explain its source. Roberts admitted that it had never been distributed to inspectors before the handbook was issued.

8. E-Mail Use Policy

The handbook contains a copy of a directive entitled "Use of Electronic Communications System," dated April 6, 1998, from Respondent's director of information technology to all "department directors, agency heads, members of board and commission, city council members and the city clerk." Included in this directive are provisions on acceptable use of Respondent's

e-mail and appropriate content. The handbook also contains a form to be signed by employees acknowledging receipt of this directive. The form states that employees are responsible for using Respondent's electronic communications systems in accord with the directive. The 1998 manual does not contain a copy of this directive. However, Roberts testified without contradiction that this directive was distributed to all department employees with access to computer technology in 1998.

9. Seniority Preference in Granting Vacation Leave

The handbook states that approval of vacation leave is not automatic, but depends upon workload, staffing levels and other factors. It contains no reference to seniority preference in the granting of vacation leave. The manual states that vacations will, insofar as possible, be granted at the time most desired by the employees according to their seniority. Roberts testified that he took the language on vacation leave from a human resources department policy in existence since about 1930, and from collective bargaining agreements between other unions and Respondent.

10. Definition of Seniority

The handbook defines seniority as "the length of continuous service beginning on the date of legal certification to a position in the classified service of the City of Detroit." The expired contract defined seniority as the length of continuous service after initial date of legal certification to a position for layoff and recall purposes. The expired contract expressly stated that the union and individual departments could agree to use departmental or classification seniority for other purposes. However, there was no evidence that Charging Party's predecessor and the department ever agreed to use departmental or classification seniority for any purpose.

B. Discussion and Conclusions of Law:

An employer may not make unilateral changes in wages, hours or terms or conditions of employment while it is engaged in negotiating a first contract with a newly certified labor organization. *NLRB v Katz,* 369 U.S. 736 **(**1962). As the Supreme Court noted in *Katz,* such actions seriously undermine the union and are equivalent to an outright refusal to bargain. Nor may an employer lawfully make unilateral changes in mandatory bargaining subjects after expiration of a collective bargaining agreement. *Local 1467, Int'l Ass'n of Firefighters, AFL-CIO v. Portage,* 134 Mich App 466 (1984); *Michigan Council 25, AFSCME v Wayne County,* 140 Mich App 361(1984). In *Gibraltar School District v MESPA,* 443 Mich 326 (1993), the Michigan Supreme Court held that the an arbitration agreement is a creature of contract and therefore does not survive the expiration of the contract statutorily as a term or condition of employment under PERA. However, it affirmed the general principle that an employer has a duty to refrain from changing terms and conditions of employment while negotiating a first contract with a newly certified union.

A union may waive its rights if it fails to make a timely demand to bargain when it has adequate notice of a proposed change in working conditions. *Local 586, Service Employees*

International Union v Village of Union City, 135 Mich App 553 (1984); *Holland Public Schools*, 1989 MERC Lab Op 346; *Leelanau County*, 1988 MERC Lab Op 590. In this case, there was no evidence that Charging Party was aware that Respondent was preparing the new handbook until Roberts met with Watson and DeForrest on June 24, 2002. Although Roberts' recollection of what was said at that meeting differs from that of Watson and DeForrest, Roberts admits that he knew that Watson and DeForrest wanted time to look over the handbook and discuss it with their members. Roberts did not give Watson and DeForrest a deadline, and did not tell them that he was going to distribute the handbook the following week. I find that Roberts promulgated the handbook before giving Charging Party a reasonable time to review the handbook and make a specific demand to bargain over changes in terms and conditions of employment contained in the document. I conclude, therefore, that Charging Party did not waive its right to bargain by failing to make a timely demand.

Respondent's principal argument is that the handbook did not alter existing working condition.[3] I agree that Charging Party did not establish that Respondent altered its existing compensatory leave policy or its definition of seniority for inspectors, or that Respondent implemented a new e-mail policy in 2002. Charging Party asserts that by stating that inspectors will receive "no additional compensation" for hours worked between 35 and 40 per week, the handbook "obviously" modified Respondent's existing compensatory leave policy. However, it is not clear that the phrase "additional compensation" in the handbook includes compensatory leave. Roberts testified that the handbook did not alter Respondent's policy of giving inspectors one and one-half hours compensatory time for every hour (up to five) that they work on a weekend, and there was no evidence to the contrary. I conclude that the record did not establish that Respondent unilaterally altered its existing compensatory leave policy. I also find that Respondent did not unilaterally alter or institute a new working condition by including the 1998 e-mail policy in the handbook. I credit Roberts' testimony that this directive, although addressed only to department directors and elected officials, was distributed to employees in 1998. As for the alleged alteration in the method of computing seniority, both the handbook and the expired collective bargaining agreement define seniority as the length of continuous service after initial appointment to a position. Insofar as the record discloses, this was the definition of seniority for inspectors for all purposes before July 2002. I conclude that Respondent did not unilaterally alter or promulgate a new definition of seniority in the handbook.

However, as discussed below, I conclude that Respondent unilaterally altered or instituted new terms or conditions of employment, as follows.

Watson testified that before the promulgation of the handbook, inspectors working in the office were allowed to decide when they would take their designated breaks, within designated times. He also testified that they were permitted to take breaks at their desks. Although Roberts testified to the contrary, I am not convinced that Roberts, who did not directly supervise inspectors, knew what restrictions had been placed on inspectors' breaks when they were working in the office. I credit Watson, and I find that Respondent changed its break policy for inspectors working in the office. Respondent argues that its has the inherent managerial right to

[3] Respondent argues that an arbitrator should make this determination. However, this is not a dispute over the interpretation of a collective bargaining agreement.

institute policies to keep track of where its employees are during the workday, citing *40th Judicial Circuit Court,* 2000 MERC Lab Op____, and *Hurley Hospital,* 1973 MERC Lab Op 74. However, Charging Party did not argue that the handbook's requirement that inspectors notify their supervisors when they go on break was a new working condition.

Insofar as the record indicates, the established policy regarding the temporary assignment of inspectors to other jobs was that set out in the expired contract. The contract stated that Respondent would not unilaterally assign inspectors temporarily to other departments or "other duties." According to the handbook, inspectors can now be assigned to perform other duties in other divisions of the department, as long as the work is within their classification. Nothing in the record indicates that this policy does not now apply to inspectors, as well as other employees in the department. I find that Respondent, in fact, changed its policy regarding the temporary assignment of inspectors to other jobs within the department.

Sick leave, vacation time, and procedures for using this leave are mandatory subjects of bargaining. *Detroit Police Officers Assn v Detroit,* 391 Mich 44, 55 (1974); *Ingham County and Sheriff,* 2001 MERC Lab Op 96. The established policy for the granting of vacation leave to inspectors was set out in the operating manual. The manual stated that, insofar as possible, vacation leave would be granted in accord with seniority. The July 2002 handbook does not contain any reference to seniority preference in the granting of vacation leave. Roberts admitted that the policy in the handbook came from old department policies and provisions in collective bargaining agreements covering other units, not from the manual. However, insofar as the record discloses, the vacation leave policy applies to inspectors as well as other department employees. I find that Respondent changed its policy of giving preference to seniority in scheduling vacation leave for inspectors.

The record indicates that since about 1977, Respondent has had a city-wide policy requiring employees to report outside employment or ownership interests, and to obtain the approval of their department head using a form developed by Respondent's human resources department. However, there is no evidence that before July 2002 the department ever required inspectors to comply with this policy or fill out the form. I find that even if employees in other departments or job classifications had been required to comply with the outside employment policy, this rule was a new term and condition of employment for inspectors in July 2002.

Watson testified that before July 2002, there was no policy that made inspectors financially liable for damage to city property caused by their negligence or careless disregard. Neither the expired contract nor the manual covered this issue, and Roberts admitted that the department policy had never been distributed to inspectors. I find that Respondent unilaterally promulgated a new rule making inspectors financially liable for damage to city property.

It is well established that discipline in general is a mandatory subject of bargaining, and that work rules setting forth disciplinary policies are mandatory subjects of bargaining. *Amalgamated Transit Union v SEMTA,* 437 Mich 441,452, fn 7, (1991); *Pontiac Police officer Assn v Pontiac (After Remand),* 397 Mich 674, 681 (1976). See also *Oakland County Road Commission, 1983* MERC Lab Op 1, 7, and cases discussed therein. Moreover, Charging Party

did not contractually waive its right to bargain over new disciplinary rules, since it had no contract. Although neither the expired contract nor manual contained specific disciplinary rules, except attendance rules, Charging Party admitted that some of the disciplinary rules and guidelines in the handbook were not new. With respect to the rules that were alleged to be new, Roberts admitted that unit employees were not subject to discipline for failure to report an unsafe condition or hazard until the handbook was promulgated. Roberts asserted that the other challenged rules existed before July 2002, and that employees had been disciplined for violations of these rules, although he acknowledged that unit employees may not have received copies of these rules and might not have been aware of them. Roberts did not produce copies of the policies or give specific examples of disciplinary actions involving the challenged rules. I credit Watson's testimony that before July 2002, unit employees had not been disciplined for conduct outside of working hours, or for possessing an "attitude" that harassed or intimidated other employees, and were not required to provide medical documentation whenever requested to do so by a supervisor. I find that Respondent unilaterally established these new rules when it distributed the handbook to unit employees.

VI. Summary of Findings and Conclusions:

I conclude that Charging Party did not establish that Respondent violated Section 10(1)(a) or (c) of PERA by reinstating the reprimand it issued to Harold Stokes on October 24, 2001 because there is no evidence that Respondent was motivated either by Stokes' union activity or by his status as a member of Charging Party's unit.

I find that Respondent violated Section 10(1)(a) of PERA when Steve Leggat, assistant chief of the housing division of the Department of Building and Safety Engineering, told Charging Party President Jerry Watson, between January and June of 2002, that Respondent did not have to bargain with him over changes in working conditions because Charging Party did not have a contract. I also conclude that Leggat violated Section 10(1)(a) in May 2002 by telling housing inspectors in Charging Party's unit that because AMI had no contract, Respondent did not recognize Charging Party or the housing inspectors had no representation, and that Respondent could, therefore, act unilaterally. I conclude that under the circumstances these remarks were coercive in nature and had a chilling effect on employees' exercise of their protected rights.

I find that Respondent did not unilaterally alter its existing compensatory leave policy or its definition of seniority for inspectors when it promulgated a new employee handbook in July 2002, and I find that that the e-mail policy contained in that handbook was an existing policy which had been previously distributed to unit employees. However, I find that when Respondent promulgated the employee handbook, it altered certain existing terms and conditions of employment for members of Charging Party's unit. Specifically, I find that the handbook altered Respondent's policy of allowing inspectors working in the office to schedule their own breaks, and to take breaks at their desks. I find that the handbook changed Respondent's existing policy with respect to the temporary assignment of inspectors to other jobs within the department, and eliminated seniority preference in the granting of vacation leave. I find that the handbook created a new requirement that unit employees report their outside employment or business ownership

interests and obtain approval to continue this employment or business. I find that the handbook contained a new policy imposing financial liability on employees for damage to city property. I find that the handbook created new categories of conduct for which unit employees would be subject to discipline. This conduct was: (1) the failure to report an unsafe or hazardous working condition; (2) conduct outside of working hours which impaired the ability of employees to do their work, affected the operations of the department, or brought City service into public disrepute; (3) the failure to provide medical documentation whenever requested to do so by a supervisor; (4) possession of an "attitude" that harassed or intimidated other employees. I find that Respondent did not give Charging Party adequate opportunity to demand bargaining over these changes in existing working conditions before Respondent promulgated the employee handbook. For these reasons, I conclude that Respondent violated its duty to bargain under PERA by unilaterally changing the above terms and conditions of employment for members of Charging Party's bargaining unit when it distributed the employee handbook in July 2002. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

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

1. Cease and desist from:

    a. Stating to representatives of the Association of Municipal Inspectors and members of this organization's bargaining unit that Respondent does not have to bargain with that labor organization over changes in working conditions because it does not have a collective bargaining agreement, and telling unit members of the unit that because this union had no contract Respondent does not recognize it, and the employees have no representation.

    b. Changing its policy of allowing inspectors to schedule their own breaks and take breaks at their desks without giving the union adequate notice and an opportunity to demand bargaining.

    c. Altering its existing policy to allow inspectors to be assigned temporarily to jobs in other divisions of the department without giving the union an opportunity to demand bargaining.

    d. Eliminating seniority preference in vacation selection without giving the union an opportunity to demand bargaining.

    e. Requiring inspectors to report and obtain approval from the department director of all outside employment and outside business ownership interests without giving the union an opportunity to demand bargaining.

f. Imposing financial liability on employees for damage to city property caused by their negligence or carelessness without giving the union an opportunity to demand bargaining.

g. Creating new categories of conduct subject to discipline without giving the union an opportunity to demand bargaining.

2. Take the following affirmative action to effectuate the policies of the Act:

a. Upon demand, bargain with the Association of Municipal Engineers over changes in existing terms and conditions of employment, including those listed in sections (b) through (g) above.

b. Upon the union's request, formally notify members of the unit that those sections of the July 2002 employee handbook containing the changes listed above will not apply to them until Respondent has satisfied its duty to bargain.

c. Rescind any disciplinary action issued to a member of the unit for violation of new rules promulgated in the July 2002 handbook.

d. Post the attached notice to employees in conspicuous places on the Respondent's premises, including all places where notices to unit employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd., Suite 2-750, PO Box 02988, Detroit, Michigan 48202-2988. Telephone: (313) 456-3510.