STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CLINTON-EATON-INGHAM COMMUNITY
MENTAL HEALTH AUTHORITY,
Respondent-Public Employer,

Case No. C04 E-142

-and-

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 459,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Foster, Swift, Collins & Smith, P.C., by Stephen O. Shultz, Esq., for the Public Employer

Miller Cohen, by Eric I. Frankie, Esq., for the Labor Organization

DECISION AND ORDER

On August 10, 2005, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On December 2, 2005, the Commission received a letter from Charging Party indicating that the dispute underlying the charge had been settled and requesting that the charge be withdrawn. Charging Party's request is hereby approved. This Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairperson

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated:_____

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Lansing, Michigan, on January 4, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and post-hearing briefs filed by February 23, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

On May 28, 2004, Charging Party Office and Professional Employees International Union, Local 459 filed an unfair labor practice charge alleging that Respondent Clinton-Eaton-Ingham Community Mental Health Authority violated Sections 101(a) and (e) of PERA by engaging in the following conduct:

> On or about January 2004, the Employer modified their solicitation policy. It now prohibits legally protected concerted union activity. On or about January 2004, the Employer unilaterally changed their employment standards which includes a list of behaviors that could result in discipline. The Employer refused to rescind these charges (sic) after the union requested to bargain over the changes. On or about January 2004, the Employer unilaterally imposed additional restrictions on how employees can take their breaks. The Employer refused to rescind these change (sic) after the union requested to bargain over the changes.

Findings of Fact:

Charging Party and Respondent are parties to collective bargaining agreements that govern the terms and conditions of employment for employees in the Residential, Large and RN bargaining units. Each agreement contains a management rights clause. Clauses in the RN and Large Units provide that Respondent has the "right to amend, supplement, or add to its official departmental rules and regulations during the term of [the] Agreement." They also provide that Respondent is to give 10 days written notice of any rule changes, and the Union has "the right to grieve any new or changed rules within such ten (10) day period only on the basis that the new rule or rule modification is capricious." The clauses also provide that "no grievance shall be considered if it is not submitted, in writing, within ten (10) days from the date of its occurrence, or knowledge of its occurrence." The management rights clause in the Residential Unit provides that the Employer retains the right to make rules and regulations not in conflict with the contract.

On April 6, 2002, three years after it began updating its 1986 employee handbook, Respondent sent an e-mail to employees and to Charging Party listing some revised and new policies and procedures that would be included in an updated handbook. Respondent noted that if any policy or procedure conflicted with provisions in the collective bargaining agreements, the agreements would prevail. In January 2004, the employee handbook revision project was completed. The revised handbook not only included the policies identified in Respondent's April 6, 2002 e-mail, but also included changes to policies and procedures in the 1986 employee handbook and in the collective bargaining agreements that were not identified in the 2002 e-mail.

The break policy in the 2004 handbook prohibited employees from using their breaks to extend their lunch period or shorten their workday. Language contained in the RN and Large Units' collective bargaining agreements provided for fifteen-minute breaks during the first and last four hours of the workday. Terri Singleton, Respondent's human resources director, testified that the break policy was revised to "put parameters around the time frame" and to standardize the policy within all departments. She noted that Respondent did not have a consistent practice regarding breaks and a few employees were using their fifteen-minute breaks to extend their lunch hour or shorten their workday.

The 2004 employee handbook also contains the following paragraph regarding solicitation:

> Solicitation from outside vendors for any purpose is not permitted on CMH premises without permission of the appropriate Program Director or Associate Director. Distribution of literature is prohibited during working time or in work areas. Solicitation by employees for personal items may be done via the allnews address on the agency's e-mail system.

Respondent's prior solicitation policy was set forth in the 1986 handbooks for the Residential and Large units. It reads:

> Selling Tickets or Soliciting Funds
>
> Solicitation for any purpose is not permitted on Board premises without permission of the appropriate Program director or Associate Director. Solicitations which are permitted must be on a voluntary basis.

Finally, the revised handbook contains an extensive list of "behaviors which are unacceptable to [sic] the workplace" that could lead to discipline or discharge. Although Singleton testified that the new handbook was simply a rewriting and clarification of the list that was contained in 1986 handbook, approximately eighteen unacceptable behaviors in the revised handbook are new. Also included in the 2004 handbook is a statement that policies or procedures that conflict with collective bargaining agreements are preempted by the agreements.[1]

Between February 2004 and May 2004, Charging Party's president, Jeffrey Fleming, sent a number of letters to Respondent expressing the Union's concern that the revised handbook was issued without providing it with notice and an opportunity to bargain. In his February 2004 letter, Fleming complained that the solicitation policy was overbroad and prohibited some legally protected union activity; the employment standards included new behaviors that could lead to discipline; and the break policy imposed new restrictions on when employees could take their breaks. Fleming requested that Respondent restore the prior rules until bargaining was completed because, among other things, the revised employment standards and break policies involved mandatory bargaining subjects. In a May 18, 2004, e-mail, Charging Party renewed its request to bargain.

Conclusions of Law:

Charging Party argues that the Employer violated PERA by unilateral implementing work rule changes in the January 2004 handbook regarding solicitations, breaks and employees standards of conduct, without notice to and bargaining with the Union. Respondent asserts that it had no duty to bargain over the revised policies in the handbook because the management rights clauses in the collective bargaining agreement reserve to it the right to amend official department policies and procedures. Relying on *Montcalm Co*, 1989 MERC Lab Op 132, Respondent also claims that the revised handbook simply codifies its established practices and does not make any changes to existing terms or conditions of employment. Therefore, according to Respondent, by acquainting its employees with policies and procedures, it exercised a fundamental right basic to the direction of its corporate enterprise. Respondent also contends that Charging Party failed to timely grieve amendment to the employee handbook.

I find no merit to any of Respondent's arguments. The management rights clauses in the collective bargaining agreements do not constitute waivers of Respondent's bargaining obligation. The Commission has consistently found that neither a zipper clause nor a broadly worded management rights clause will serve as a waiver of bargaining rights unless it is clear, explicit and unmistakable. See e.g. *Ingham Co* 2001 MERC Lab Op 96; *Oakland Co*, 1983 MERC Lab Op 1; *City of Roseville*, 1982 MERC Lab Op 1372; *City of Rochester*, 1982 MERC Lab Op 324; *City of River Rouge*, 1981 MERC Lab Op 663. In this case, the management rights clauses do not make specific reference to the subject matters at issue, i.e., breaks, solicitation and standards of conduct. Rather, they merely give Respondent the "right to amend, supplement, or add to its official departmental rules and regulations" or "make rules and regulations not in conflict with the contract." I find, therefore, that these management rights clauses are not clear, explicit and unmistakable waivers.

[1]The collective bargaining agreements provide that employees may only be disciplined or discharged for just cause.

Here, unlike in *Montcalm*, *supra,* Respondent's revision of the break, solicitation and standards of conduct portions of its handbook did not simply codify established practices. In *Montcalm*, the Commission concluded that the employer did not unlawfully unilaterally change its sick leave policy by adding a provision that sick leave would be frozen, rather than cashed out upon an employee's appointment or election to a department director position because it was simply codifying its actual prior practice. The employer's prior policy provided that one-half of an employee's sick leave could be converted to cash upon "voluntary termination, retiring, or death." Before the policy was revised, two county employees were not allowed to cash out their sick leave when they became appointed or elected department directors. The Commission observed that a past practice was not established when a deputy clerk was allowed to cash out his sick leave when he was appointed county clerk because the payment was not authorized and the employee was eventually required to refund the money.

In this case, two collective bargaining agreements provided that employees could take fifteen-minute breaks during the first and last four hours of the workday. Respondent's own witness, Terri Singleton, Respondent's director of human services, testified that the Employer did not have a consistent practice regarding breaks because some employees had been allowed to use their breaks to extend their lunch hour or shorten the work day. She related that the break policy was changed to "put parameters around the time frame" and to standardize it within all departments. Contrary to Respondent's assertion, I find that Respondent's revision of its break policy constituted an unlawful unilateral change of an existing term or condition of employment and not simply a codification of an established practice.

Respondent also claims that it did not change any term or condition of employment in the rewritten solicitation policy. According to Respondent, it only codified established practices and even clarified a slightly expanded policy for the employees' benefit. Respondent considers the revised policy as being more lenient than the 1986 version. The record, however, does not support these assertions. The solicitation sections in the 1986 handbooks for the Residential and Large Units dealt with selling tickets and soliciting funds. Solicitation for any purpose was not permitted on Respondent's premises without permission and those that were permitted had to be performed voluntarily. The revised policy, on the other hand, does not involve selling tickets and soliciting funds, but with outside vendor solicitation and literature distribution by employees. Because the revised policy concerns different subject matter, I find that it is not a clarification of an established policy, but rather a new policy that Respondent implemented without providing Charging Party with notice and an opportunity to demand bargaining.

Respondent argues that although some of the standards of conduct included in the 2004 handbook were not included in the 1986 handbook, they are only illustrations that are not meant to be binding terms and conditions of employment. Respondent reasons that if an employee believes that Respondent did not have just cause to impose discipline for violating the revised standards of conduct, he or she may file a grievance. Respondent notes that the collective bargaining agreements preempts the revised handbook and only allows Respondent to discharge and discipline employees for just cause. I am not persuaded by Respondent's arguments. Respondent admits that some of the standards of conduct listed in the 2004 handbook are new. As such, they do not codify an established practice. Moreover, an employee's ability to file a grievance under the collective bargaining agreements' just cause provisions does not diminish the fact that Respondent unilaterally changed the standards of conduct that could lead to discipline or discharge without providing notice and an opportunity for Charging Party to demand bargaining. Compare *City of Detroit*, 17 MPER 2.

I have carefully considered all other arguments advanced by Respondent, including its claim that Charging Party failed to timely file a grievance protesting amendment to the employee handbook, and conclude that they do not warrant a change in the result. I, therefore, find that Respondent violated its duty to bargain under Sections 10(1)(a) and (e) of PERA by unilaterally changing terms and conditions of employment. I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

Respondent Clinton-Eaton-Ingham Community Mental Health, its officers and agents, are hereby ordered to:

1. Cease and desist from:

    a. Changing terms and conditions of employment regarding breaks, solicitation and standards of conduct that could lead to discipline and/or discharge without providing the Office and Professional Employees International Union, Local 459 with notice and an opportunity to demand bargaining.

    b. In any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them in Section 9 of PERA.

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

    a. Upon demand, bargain with the Office and Professional Employees International Union, Local 459 over changes in terms and conditions of employment regarding breaks, solicitation and conduct that could lead to discipline and/or discharge.

    b. Upon request by the Office and Professional Employees International Union, Local 459, notify employees in the Residential, RN and Large bargaining units that changes in the January 2004 handbook regarding breaks, solicitation and conduct that could lead to discipline and/or discharge will be rescinded until Respondent has satisfied its bargaining obligation.

    c. Post the attached notice to employees in conspicuous places on its premises, including all places where notices to employees are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated:

NOTICE TO EMPLOYEES

After a public hearing before an Administrative Law Judge of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, CLINTON-EATON-INGHAM COMMUNITY MENTAL HEALTH AUTHORITY was found to have committed unfair labor practices in violation of the MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). Based upon an ORDER of the COMMISSION, WE HEREBY NOTIFY OUR EMPLOYEES that:

WE WILL NOT refuse to bargain collectively and in good faith with the Office and Professional Employees International Union, Local 459 concerning breaks, solicitation and standards of conduct that could lead to discipline and/or discharge.

WE WILL, upon request of the Office and Professional Employees International Union, Local 459's request, notify employees in the Residential, RN and Large bargaining units that changes in the January 2004 handbook regarding breaks, solicitation and standards of conduct that could lead to discipline and/or discharge will be rescinded until we have satisfied our bargaining obligation.

All of our employees are free to engage in lawful, concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid or protection as provided by Section 9 of the Public Employment Relations Act.

CLINTON-EATON-INGHAM COMMUNITY MENTAL HEALTH AUTHORITY

BY: _____

Title: _____

DATE: _____

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 Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P. O. Box 02988, Detroit, Michigan 48202, Telephone: (313) 456-3510.