STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEP'T OF TRANSPORTATION),
Public Employer-Respondent,

-and- Case No. C03 B-029

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES COUNCIL 25
AND ITS LOCAL 312,
Labor Organization-Charging Party.
_____/

APPEARANCES:

City of Detroit Law Department, by Bruce A. Campbell, Esq., for Respondent

Scheff & Washington, P.C., by George B. Washington, Esq., for Charging Party on Exceptions; L. Rodger Webb, P.C., by L. Rodger Webb, Esq., for Charging Party before the Administrative Law Judge

DECISION AND ORDER

On October 17, 2005, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order finding that Respondent City of Detroit Department of Transportation (DOT) did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, and recommending that the charge be dismissed. The ALJ held that Respondent did not commit an unfair labor practice by failing to respond to a demand by Charging Party American Federation of State, County and Municipal Employees Council 25 and its Local 312 (AFSCME) that it bargain over commercial driver's license (CDL) requirements. The ALJ also concluded that Respondent did not unilaterally alter the terms and conditions of employment for employees in Charging Party's bargaining unit when Respondent disciplined two unit members for failing to have CDLs.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On January 3, 2006, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order, after requesting and receiving three extensions of time. In its exceptions, Charging Party contends that the ALJ erred by failing to find that Respondent had created a new condition of employment and by failing to find that Respondent unilaterally altered the terms and conditions of employment. Charging Party also

takes exception to the ALJ's finding that possession of a CDL had been an existing condition of employment since 1992 and contends that this policy was suspended by agreement made between the parties in 1996 or 1997. Respondent did not file a response to Charging Party's exceptions. For the reasons stated below, we reverse the ALJ's Decision and Recommended Order and order Respondent to provide Charging Party with notice and an opportunity to bargain over the enforcement of the CDL requirement.

Factual Summary:

Charging Party claims that Respondent violated PERA by changing its job description for the position of general auto mechanic in its transportation department to require possession of a CDL as a condition of employment, and by disciplining employees who did not satisfy this requirement. The ALJ found that the CDL requirement was adopted as a condition of employment and that general auto mechanics in the transportation department were notified of this requirement in 1992. We adopt the ALJ's finding in this regard. We do so based upon exhibits admitted in evidence without objection and testimony from Charging Party's local union president concerning his discussions with Respondent's Human Resources representative in 1996 or 1997, which led to a verbal agreement that the requirement would not be enforced.

The record also establishes that following the verbal agreement, Respondent did not make an effort to enforce the CDL requirement until October 2002, when it suspended two bargaining unit members for failing to maintain a valid CDL. The record establishes that Respondent's 2002 decision to enforce the requirement through discipline was made without notice to the local union.

Discussion and Conclusions of Law:

In *Southeastern Michigan Transportation Authority*, 1987 MERC Lab Op 721, we held that the consistent application of a disciplinary policy renders the policy a term and condition of employment that may not be altered unilaterally. Affirming our decision, the Michigan Supreme Court observed:

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a 'term or condition of employment.'

Amalgamated Transit Union v SEMTA, 437 Mich 441, 450; 473 NW2d 249 (1991).

Here, Respondent has unilaterally altered a long-standing practice allowing general auto mechanics in its Department of Transportation to work without a CDL. Changes that significantly alter an employee's duties or hours of work constitute mandatory subjects of

bargaining over which the employer must provide the union notice and an opportunity to bargain. *Oak Park Public Schools*, 1995 MERC Lab Op 442, 446.

Although Respondent argues that the CDL requirement was discussed during the parties' negotiations for the 2001-05 collective bargaining agreement, that agreement only allocates part of the cost of obtaining a CDL to the Respondent. It does not address the disciplinary enforcement of the CDL requirement or the parties' agreement that the CDL requirement would not be enforced against general auto mechanics in Respondent's transportation department.

In *Southfield Public Schools*, 2002 MERC Lab Op 53, the Commission explained that the employer's failure to enforce rights provided to it under the collective bargaining agreement did not necessarily constitute a waiver of those rights. However, in *Southfield Public Schools*, unlike the case before us, the employer never made an express commitment to the union that it would refrain from enforcing its contractual rights. Here, the Employer's claim that it had the right to discipline the general auto mechanics for not having CDLs is based on its unilateral modification of the general auto mechanic job specifications. Although these job specifications became conditions of employment in 1992, the parties modified those conditions of employment when the Employer expressly promised the Union in 1996 or 1997 that it would not discipline general auto mechanics who did not have CDLs. The fact that the Employer took no action to discipline general auto mechanics without CDLs from the time of that agreement until October 2002 further indicates the Employer's intention to be bound by that promise modifying the conditions of employment. Accordingly, we find that the Employer's commitment to the Union that general auto mechanics would not be disciplined for failing to have CDLs, coupled with the Employer's long-standing practice of refraining from disciplining general auto mechanics without CDLs, was sufficient to create a past practice amending the parties' contract. See *Detroit Police Officers Ass'n* v *City of Detroit*, 452 Mich 339 (1996).

Consequently, we hold that Respondent violated Section 10(1)(a) and (e) of PERA when it initiated enforcement of its CDL requirement more than a decade after adoption of the requirement and after its specific agreement to refrain from enforcing that requirement without providing Respondent with notice and an opportunity to demand bargaining. Accordingly, we issue the following order:

ORDER

The City of Detroit, its agents and representatives, shall:

A. Cease and desist from:

1. Disciplining general auto mechanics in the department of transportation for failing to have commercial driver's licenses until it has bargained over the enforcement of the commercial driver's license requirement with the American Federation of State, County and Municipal Employees Council 25 and its Local 312(AFSCME).

2. Refusing to bargain collectively with AFSCME regarding the enforcement of the requirement that general auto mechanics have commercial driver's licenses.

3. Failing to provide notice and an opportunity to bargain to AFSCME regarding the enforcement of the commercial driver's license requirement or any other changes in terms and conditions of employment.

4. In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 9 of PERA.

B. Take the following affirmative action to effectuate the policies of PERA:

1. Upon request, bargain collectively and in good faith with AFSCME concerning the enforcement of the requirement that general auto mechanics have commercial driver's licenses.

2. Upon request by AFSCME, restore the status quo ante with respect to any of its bargaining unit members who were disciplined in 2002 for failing to have commercial driver's licenses.

3. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted. Copies of the notice shall be duly signed by a representative of the City of Detroit and shall remain posted for a period of thirty consecutive days. One signed copy of the notice shall be returned to the Commission and reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced, or covered by any other material.

4. Notify the Michigan Employment Relations Commission within twenty days of receipt of this Order regarding the steps that the Employer has taken to comply herewith.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Christine A. Derdarian, Commission Chair

_____

Nino E. Green, Commission Member

_____

Eugene Lumberg, Commission Member

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION) has been found to have committed an unfair labor practice in violation of the Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's Order, we hereby notify our employees that:

WE WILL NOT discipline general auto mechanics in the department of transportation for failing to have commercial driver's licenses until we have bargained over the enforcement of the commercial driver's license requirement with the American Federation of State, County and Municipal Employees Council 25 and its Local 312(AFSCME).

WE WILL NOT refuse to bargain collectively with AFSCME regarding the enforcement of the requirement that general auto mechanics have commercial driver's licenses.

WE WILL NOT fail to provide notice and an opportunity to bargain to AFSCME regarding the enforcement of the commercial driver's license requirement or any other changes in terms and conditions of employment.

WE WILL NOT, in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 9 of PERA.

WE WILL, upon request, bargain collectively and in good faith with AFSCME concerning the enforcement of the requirement that general auto mechanics have commercial driver's licenses.

WE WILL, upon request by AFSCME, restore the status quo ante with respect to any of its bargaining unit members who were disciplined in 2002 for failing to have commercial driver's licenses.

CITY OF DETROIT

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 the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suit 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.

STATE OF MICHIGAN
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AMERICAN FEDERATION OF STATE, COUNTY
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AND ITS LOCAL 312,
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_____/

APPEARANCES:

Bruce A. Campbell, Esq., Senior Assistant Corporation Counsel, for Respondent

L. Rodger Webb, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on October 7 and 14, 2004, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including briefs submitted by the parties on or before September 21, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The American Federation of State, County and Municipal Employees (AFSCME) Council 25 and its Local 312 filed this charge against the City of Detroit on February 12, 2003. Charging Party represents a bargaining unit consisting of certain classifications in Respondent's department of transportation (DOT), including general auto mechanics (GAMs). Charging Party alleges that on or about October 2, 2002, Respondent unilaterally altered the GAMs' terms and conditions of employment when it disciplined two employees for failing to have valid commercial driver's licenses (CDLs). Charging Party also alleges that on and after October 12, 2002, Respondent unlawfully refused to bargain over this new condition of employment.

Facts:

Respondent employs GAMs in several of its departments, including the fire department, the water and sewerage department, the department of public works (DPW), and the DOT. The same job specifications, i.e. job description, cover GAMs in all departments.

Litigation Over CDL Requirements In The DPW

AFSCME Local 299 represents GAMs in the DPW. GAMS in the DPW repair heavy equipment. Job specifications for GAMs issued in 1983 required them to have a valid driver's license. In 1989, the DPW decided that recent amendments to the Michigan Motor Vehicle Code mandated that all its mechanics, including but not limited to those in the GAM classification, have CDLs. On December 13, 1989, the DPW notified its mechanics that they would have to obtain a CDL. AFSCME Local 299 filed a grievance, but the arbitrator refused to decide the statutory issue. On May 17, 1993, Respondent adopted new job specifications for the GAM classification that required GAMs to acquire and maintain a CDL.

On June 28, 1993, AFSCME Council 25 and Local 299 filed a lawsuit in the Wayne Circuit Court seeking a determination that state law did not require mechanics in the DPW to have CDLs. Charging Party was not a party to this lawsuit. The circuit court initially granted Respondent's motion for summary disposition. However, on March 5, 1996, the Court of Appeals reversed and remanded for findings of fact on the issue of whether job classifications in Local 299's unit drove DPW vehicles as regularly employed drivers. On May 27, 1997, the circuit court issued a decision concluding that, with the exception of wrecker drivers, mechanics represented by Local 299 were not regularly employed as drivers and therefore were not required by state law to possess a CDL. The litigation concluded with the entry of a stipulated order on November 15, 2001. This order stated, in part, "AFSCME Council 25, Local 229 unit members, except automotive service attendants (i.e., wrecker drivers) are not and may not be required to obtain or maintain a commercial driver's license as a condition of employment, except as mutually agreed between the parties." After this stipulated order, Respondent made no further attempt to require GAMs in the DPW to have CDLs despite the fact that their job specifications required them.

CDL Requirements In The DOT

GAMs in the DOT are represented by Charging Party AFSCME Local 312. GAMS in the DOT repair buses. Some GAMs in the DOT regularly drive wreckers or service trucks. Other GAMs road test buses, drive them to repair sites, or otherwise move them from place to place. As indicated above, the 1983 GAM job specifications required employees in this classification to have a valid driver's license. At some point not specified in the record, the DOT concluded that federal department of transportation regulations required all GAMs in its department to also have CDLs. On April 15, 1992, Robert VanderVoort, the superintendent of the vehicle maintenance division in the DOT, issued a memo notifying all GAMs that if they did not have a CDL with at least a "BP" endorsement by May 4, 1992, they would be suspended for thirty days pending discharge. The DOT suspended a few GAMs, but all took steps to obtain their CDLs after being suspended and no one was discharged.

Although Respondent typically sends new job specifications to the unions representing employees in that classification, Charging Party President Leamon Wilson denied receiving a copy of the GAM job specifications adopted by Respondent on May 17, 1993. There is no evidence that Respondent sent them to either AFSCME Council 25 or Charging Party.

In 1996 or 1997, Wilson had a conversation with DOT Human Resources Director Gail Oxendine about Local 229's then-pending lawsuit. Wilson told Oxendine that his unit members were no more subject to CDL requirements than the GAMs represented by Local 229. After consulting with Respondent's law department, Oxendine informed Wilson that she had been instructed "not to do anything" with DOT GAMs who did not have CDLs. Wilson and Oxendine agreed that a GAM would have to possess a CDL to be assigned to work as a wrecker driver, but that all pending disciplinary actions against DOT GAMs for failure to have a CDL would be dropped.

There is no evidence that the DOT attempted to discipline any GAM for failing to have a CDL between date of Oxendine and Wilson's conversation in 1996 or 1997 and October 2002. After 2000, the DOT stopped requesting the Michigan Secretary of State to supply driver's license information for all its GAMs on a periodic basis.

On July 19, 2002, Respondent adopted new job specifications for the GAM classification. The new job specifications carried over without change the requirement that GAMs have a CDL. Respondent sent a copy of the new job specifications to AFSCME Council 25. There is no indication that Charging Party received a copy.

On October 2, 2002, Kevin Quinn, a GAM in Charging Party's unit, was suspended with a recommendation for discharge for failure to maintain a valid CDL after Quinn's supervisor mentioned to VanderVoort that Quinn did not have a CDL. Around this time, another DOT GAM, John Blunt, was also suspended for this reason. On October 10, Charging Party filed a grievance on behalf of Quinn, Blunt, and any other GAM who might subsequently be disciplined for failing to possess a CDL. On the same day, Charging Party and Respondent held a special conference to discuss the CDL issue. Respondent told Wilson that the GAMs' current job specifications clearly stated that they were required to have a CDL. Wilson insisted that he had never seen or received a copy of any GAM job specifications with this requirement. Respondent agreed that "pending final resolution of this dispute," it would withdraw Quinn's and Blunt's suspensions and would not discipline any other GAM for not having a valid CDL.

After the special conference, Respondent's labor relations director, Roger Cheek, gave Wilson a copy of the July 19, 2002 GAM job description. On October 12, 2002, Wilson wrote the director of the DOT stating that Charging Party had just learned that the DOT was purporting to make a change in the conditions of employment of Charging Party's members by requiring them to have a CDL and demanding to bargain over this change. Wilson did not receive a response to his letter.

On October 23 and 26, Charging Party filed additional grievances over the CDL issue. At the time of the unfair labor practice hearing, the three grievances were pending arbitration but no arbitration date had yet been set.

Memorandum of Understanding

On March 8, 2000, AFSCME Council 25 and Respondent entered into a memorandum of agreement (MOU) that subsequently became part of their 1998-2001 master agreement.[1] The MOU stated, in pertinent part:

> A. Commercial Driver's License:
>
> 1. For employees who are required by the City (as outlined in their job specifications) to have a Commercial Drivers' License (CDL), the City will pay fifty percent (50%) of the renewal fee for their CDL and one hundred percent (100%) of the cost of any required endorsements.

Discussion and Conclusions of Law:

It is well established that discipline in general, and work rules setting out disciplinary policies in particular, are mandatory subjects of bargaining under PERA. *Amalgamated Transit Union v SEMTA*, 437 Mich 441,452, fn 7, (1991); *Pontiac Police Officers Assn v Pontiac (After Remand)*, 397 Mich 674, 681 (1976); *City of Garden City*, 1986 MERC Lab Op 901, 902; *Oakland Co Rd Comm*, 1983 MERC Lab Op 1, 7. Employers have a duty to bargain over driving eligibility standards (e.g., a valid driver's license or a clean driving record) if employees are subject to discipline for failure to meet these standards. *City of Detroit (Dep't of Public Works)*, 1985 MERC Lab Op 189; *City of Ecorse*, 1979 MERC Lab Op 371. I find that a rule requiring employees to possess a valid CDL or face discipline is a mandatory subject of bargaining under PERA, and that the imposition of such a new rule constitutes a change in terms and conditions of employment.

I find, however, that the possession of a valid CDL has been an existing condition of employment for GAMs in the DOT since at least 1992. In April 1992, the DOT informed its GAMs in a memo that they were required to obtain a CDL or be subject to discipline. GAMs were suspended pursuant to this memo, although none were discharged. The DOT was still enforcing this rule in 1996 or 1997 when Wilson had his conversation with Oxendine about the Local 299 litigation. Oxendine agreed, on the advice of Respondent's law department, to drop discipline then pending against DOT GAMs because of the ongoing Local 299 lawsuit.

[1] The so-called master agreement between Council 25 and Respondent covers all employees represented by Council 25 and seventeen affiliated locals. The 1998-2001 master agreement remained in effect until July 2003, when the parties executed a new agreement for the term 2001-2005. The March 8, 2000 MOU was incorporated without change into the 2001-2005 master agreement. Charging Party and the DOT negotiate separate supplemental agreements covering members of Local 312. At the time of the hearing, they had not yet begun negotiations on their 2001-2005 supplemental agreement.

However, there is no indication that the DOT ever rescinded its CDL policy. Rather, Respondent decided that enforcement of the DOT's policy should be suspended pending the outcome of the Local 299 litigation that terminated in November 2001.[2] I conclude that since possession of a CDL was still a requirement for GAMs in the DOT in October 2002, Respondent did not commit a unilateral change when it enforced this policy and suspended two GAMs for failing to have valid CDLs. I also conclude that while the CDL policy might be an appropriate subject for negotiation in their supplemental agreement, the DOT had no duty to bargain with Charging Party in October 2002 over a policy that had been in existence for over a dozen years.

Since I find that Respondent did not alter existing terms of employment for GAMs in the DOT when it disciplined GAMs for failing to have CDLs in 2002, I need not address Respondent's argument that the March 8, 2000 MOU gave it the right to unilaterally impose new CDL requirements through the adoption of new job specifications.

In accord with the above findings of fact, discussion, and conclusions of law, I find that Respondent did not unilaterally alter terms and conditions of employment for employees in Charging Party's bargaining unit when it disciplined two unit members for failing to have CDLs in October 2002. I also find that Respondent had no obligation to bargain with Charging Party over the CDL issue in October 2002, and that, therefore, Respondent did not violate its obligations under PERA by failing to respond to Charging Party's October 12, 2002 demand to bargain. For these reasons, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

[2] The decision in that case ultimately turned on a factual determination by the circuit court that the duties actually performed by GAMs and other mechanics in the DPW did not make them regular drivers under the state statute. The court's decision, therefore, had no impact on the validity of the DOT's CDL policy.