STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C05 J-245

-and-

AFSCME LOCAL 207,
Labor Organization-Charging Party.
_____/

APPEARANCES:

City of Detroit Law Department, by Andrew Jarvis, Esq., for the Respondent

Scheff & Washington PC, by George B. Washington, Esq., for the Charging Party

DECISION AND ORDER

On November 15, 2006, Administrative Law Judge Doyle O'Connor (ALJ) issued his Decision and Recommended Order finding that Respondent, City of Detroit, violated Sections 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and (e), by unilaterally altering the method for calculating disciplinary suspensions. The ALJ held that Respondent made a unilateral change to a mandatory subject of bargaining without providing notice or an opportunity to bargain to Charging Party, the American Federation of State, County and Municipal Employees (AFSCME). The ALJ recommended that we order Respondent to cease and desist and to take additional affirmative action. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On December 8, 2006, Respondent filed exceptions to the ALJ's Decision and Recommended Order. In its exceptions, Respondent alleges that the ALJ erred in finding that it committed an unfair labor practice and contends that it merely clarified its practice of calculating disciplinary suspensions. Respondent asserts that the ALJ misidentified the issue and "used this case as a vehicle to advance his long-standing objection to Respondent's Disciplinary Guidelines." Respondent claims that had its counsel been aware of the reassignment to ALJ O'Connor, it would have objected and, therefore, ALJ O'Connor should be recused from this case. Respondent further asserts that the ALJ's

recommended remedy exceeded his authority and, thus, the authority of this Commission. We have reviewed Respondent's exceptions and find them to be without merit.

Factual Summary:

The essential facts are not in dispute. In 1984, Respondent adopted disciplinary guidelines applicable to members of Charging Party's bargaining unit working in its water and sewerage department. The guidelines provided for 3-day, 7-day, and 29-day disciplinary suspensions for various offenses. Until August 2005, the suspensions were served on a calendar day basis. Consequently, an employee scheduled to work Monday through Friday who was disciplined for a 3-day offense on a Friday would only lose one day's pay, on the following Monday. A similarly scheduled employee suspended for the same offense on a Monday would lose three day's pay, Tuesday through Thursday. Respondent's disciplinary forms recorded the length of suspensions in calendar days and separately recorded the number of work days lost.

In response to a complaint by an employee that the manner of calculating suspensions was unfair, Respondent issued a memorandum to management dated August 27, 2005. That memorandum directed that disciplinary suspensions should be served on workdays only, rather than on calendar days. This policy change had not been discussed with the Union, nor was the Union notified before the change was implemented. The Union discovered the change while investigating discipline imposed pursuant to the memo. At that time, it objected and sent the Employer a demand to bargain. The Union also filed an unfair labor practice charge alleging a violation of Sections 10(1)(a) and 10(1)(e) of PERA.

Discussion and Conclusions of Law:

The ALJ concluded that the August 27, 2005 memo embodied a substantive change of a practice that had been consistently followed for 21 years. In its exceptions, Respondent claims that the memo was a "clarification" of its disciplinary policy. We agree with the ALJ. Respondent's policy change increased, in many cases, the amount of pay forfeited during a disciplinary suspension, thereby adversely affecting bargaining unit employees.

Respondent argues that the issue before us is "whether the employer's use of working days versus calendar days constituted a violation of PERA." Respondent mischaracterizes the issue. We have not been asked to rule upon the appropriateness of the guidelines. Rather, we hold that the manner in which the guidelines were changed, without notice to the Union and without the opportunity to bargain, violated PERA.

After the retirement of the ALJ who presided at the hearing, the drafting of the Recommended Decision and Order was reassigned to ALJ O'Connor. Respondent accuses ALJ O'Connor of being biased based on his prior opposition, as an advocate, to Respondent's disciplinary guidelines. Respondent claims that it would have objected had it known of the reassignment of the case and ALJ O'Connor, therefore, should be

recused. However, the parties were notified in writing of the reassignment in October of 2006. It was not until after the Recommended Decision and Order was issued in November 2006 that Respondent raised an objection. Additionally, the facts essential to our determination are not in dispute. Consequently, we hold that the objection is untimely and without merit.

Although not asserted in its exceptions to the ALJ's Recommended Decision and Order, Respondent argues in its brief to this Commission, "the record is devoid of any evidence that the Charging Parties [sic] made a demand to bargain over the Disciplinary Guidelines." On the contrary, Charging Party's Exhibit 5, admitted at the hearing without objection, is a letter written by the local union president to the director of Respondent's labor relations department claiming that the disciplinary policy is a mandatory subject of bargaining and requesting that the parties schedule a date to bargain the change.

In *Southeastern Michigan Transp Auth*, 1987 MERC Lab Op 721, we held that the consistent application of a disciplinary policy renders the policy a binding term and condition of employment that may not be altered unilaterally. Affirming our decision, the Michigan Supreme Court observed in *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 454-455 (1991):

> 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 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 expectation of the parties may justify its attaining the status of a 'term or condition of employment'.

We find that the 1984 disciplinary guidelines applicable to members of Charging Party's bargaining unit in Respondent's water and sewerage department establishing that disciplinary suspensions were to be calculated and served on a calendar basis were consistently applied for twenty-one years. We find that the duration and consistent application of those guidelines are evidence of a tacit agreement that they would continue. Consequently, we hold that the guidelines became terms and conditions of employment that may not be altered unilaterally.

Lastly, Respondent argues, without citation to authority, that this Commission is without jurisdiction to grant the relief recommended by the ALJ, including a *status quo ante* remedy. Restoration of the status quo is a standard remedy crafted to ensure meaningful collective bargaining. This remedy would typically require the employer to revoke its unlawful decision and to provide back pay to any employees affected by the decision. *City of Detroit (Dep't of Transp)*, 19 MPER 70 (2006); *St Clair Co Intermediate Sch Dist*, 17 MPER 77 (2004). For the reasons stated herein, we adopt the ALJ's Decision and Recommended Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
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In the Matter of:

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_____/

APPEARANCES:

Andrew Jarvis, for the Public Employer

George B. Washington, for the Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on March 21, 2006, before Roy L. Roulhac and briefed before Doyle O'Connor[1], Administrative Law Judges (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before May 19, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Positions of the Parties:

Charging Party AFSCME Local 207 filed the charge in this matter on October 7, 2005, asserting that the employer acted unlawfully in August of 2005 by unilaterally instituting a change in the existing disciplinary scheme. It is alleged that the Employer altered the existing practice of calculating disciplinary suspensions based on calendar days and shifted to a method which was based on scheduled workdays, and which disadvantaged employees. The Employer denies it acted unlawfully and asserts that its conduct was a mere clarification of the existing policy. The City asserts that it merely sought a consistent policy covering the various bargaining units in the Water and Sewerage Department, both those represented by AFSCME and those that

[1] Pursuant to Commission Rule 423.174 this matter was reassigned to Administrative Law Judge O'Connor following the retirement of Administrative Law Judge Roulhac.

were not. The City argues that the change did not have an impact on working conditions such that it would be subject to the duty to bargain.

Findings of Fact:

Charging Party Local 207 is one of seventeen local unions that are signatories to a master agreement between the City of Detroit and AFSCME Council 25. The master agreement recognizes that the various city departments have differing disciplinary schemes.

The president of Local 207, John Riehl, testified without contradiction that the water and sewerage department's disciplinary guidelines had been in effect, and relied upon by the City and the Union, since 1984. He estimated that that the specific disciplinary guidelines relating to suspension had been consistently utilized in over one hundred and fifty instances.

The guidelines address the issuance of typical 3-day, 7-day, and 29-day disciplinary suspensions. Riehl testified, again without contradiction, that the guidelines had, for over twenty years, been consistently construed to refer to calendar day, rather than work day, suspensions. For example, an employee assigned to a Monday to Friday workweek who received a three-day suspension on a Friday would only lose one day's pay, as opposed to a similar employee who received a suspension on a Monday and would lose three day's pay. Riehl testified that the only exceptions to this practice were errors, which were corrected in the grievance procedure when pointed out to management. The Employer witnesses acknowledged that they were not familiar with how the disciplinary guidelines had been applied at the Water and Sewerage Department.[2]

The documentary evidence confirmed the testimony of the Union's witnesses. Examples of prior suspensions were consistent with the claimed past practice. The City's own disciplinary forms were filled out consistent with the Union's assertion that for AFSCME members in the water and sewerage department, suspensions had always been calculated based on calendar days rather than on work days. The Master Agreement between the parties variously uses the terms "days", "calendar days", and "working days". Only the term 'working days" is defined in the contract, as including Monday through Friday, and excluding Saturdays, Sundays, and holidays. The terms "days" and "calendar days " are used interchangeably and as equivalents in the contract.

It is undisputed that in August 2005, a memorandum was distributed amongst members of management instituting a change in that practice. The memo indicated that "effective immediately" disciplinary suspensions were to be calculated based on workdays, rather than calendar days. The author of that memo, Terri Tabor Conerway, acknowledged in her testimony that she had not discussed the matter with the Union prior to the issuance of the memo and had not notified the Union of the memo or of the change in practice. Conerway explained the memo and change in policy as a response to a complaint by an employee who perceived the application of the existing discipline rules as unfair.

[2] Emily Kunze, president of AFSCME Local 2920, which also represents Water Department employees, testified consistent with Riehl's testimony.

The Union discovered the issuance of the memo only while investigating subsequent discipline imposed on its members pursuant to that memo. Suspensions issued after the change in policy were all calculated based on work days and were therefore frequently longer than if they had been issued under the prior practice. The Union objected to the change in disciplinary guidelines and the resulting longer suspensions and sent the employer a demand to bargain. No response was made, and the Union pursued this Charge.

Discussion and Conclusions of Law:

It is beyond dispute that the imposition of discipline and the parameters of a progressive discipline scheme are mandatory subjects of bargaining. *Pontiac Police Association v Pontiac*, 397 Mich 674, 677 (1976). In *Southeastern Michigan Transportation Authority*, 1987 MERC Lab Op 721, the Commission held that the consistent application of a disciplinary policy renders the policy a binding term and condition of employment that may not be altered unilaterally. Affirming that 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 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 expectation 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 (1991).

There is no evidence contradicting the Union's testimony and exhibits which establish that the consistent practice of the parties for several decades was to treat a three-day suspension as being one for the next three consecutive calendar days, rather than for three working days as implemented under the new policy. The same method of calculation was applied to suspensions of longer duration. The use of the 1984 Disciplinary Guidelines was, therefore, an established condition of employment.

It is undisputed that the August 2005 policy change resulted in greater loss of pay thereby adversely affecting bargaining unit employees, and that the change occurred without the Union even being notified of the issuance of a new policy.

I conclude that the record, taken as a whole, establishes that the Employer violated Section 10(1)(a) and (e) of the Act when it unilaterally, and without notice to the Union, substantively and adversely altered the disciplinary guidelines which are a mandatory subject of bargaining. In accord with this conclusion and the findings of fact and discussion above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

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

1. Cease and desist from
    a. Refusing to bargain collectively with AFSCME Local 207 which is the chosen representative of its employees
    b. Unilaterally changing conditions of employment, including disciplinary procedures.

2. Take the following affirmative action necessary to effectuate the purposes of the Act
    a. Rescind the Detroit Water and Sewerage Department August 27, 2005 document titled Employee Discipline Directive
    b. Reinstate the pre-existing Detroit Water and Sewerage Department 1984 Disciplinary Guidelines
    c. Make whole each Water and Sewerage Department employee who lost pay as a result of a suspension issued based on the change in guidelines implemented in August 2005
    d. Return to the practice of calculating disciplinary suspensions based on calendar days, rather than based on assigned work days.

3. Posted the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor

Administrative Law Judge

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the CITY OF DETROIT, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Refuse to bargain collectively with AFSCME Local 207 which is the chosen representative of our employees
b. Unilaterally change conditions of employment, including discipline guidelines

WE WILL

a. Rescind the Detroit Water and Sewerage Department August 27, 2005 document titled Employee Discipline Directive
b. Reinstate the pre-existing Detroit Water and Sewerage Department 1984 Disciplinary Guidelines
c. Make whole each Water and Sewerage Department employee who lost additional pay as a result of a suspension issued based on the change in guidelines implemented in August 2005
d. Return to the practice of calculating disciplinary suspensions based on calendar days, rather than based on assigned work days.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CITY OF DETROIT

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (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, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.