STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB TOWNSHIP,
Public Employer-Respondent in Case No. C06 A-010

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Respondent in Case No. CU06 A-002

-and-

THOMAS HABEL, WAYNE DINSDALE, MARK GRABOW, and KIM GRABOW,
Individuals-Charging Parties.
_____/

APPEARANCES:

Siebert & Dloski, PLLC, by Lawrence W. Dloski, Esq., for the Respondent Employer

Pierce, Duke, Farrell and Tafelski, PC, by M. Catherine Farrell, Esq., for the Respondent Union

Rex A. Burgess, Esq., for Charging Parties

DECISION AND ORDER

On November 19, 2007, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated:_____

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Rex A. Burgess, Esq., for the Charging Parties

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 18 and December 18, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by all three parties on or before March 5, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On January 19, 2006, Thomas Habel filed an unfair labor practice charge against Macomb Township (the Employer) on behalf of the Macomb Township Firefighters Association. On this same date, Habel, Mark Grabow, Kim Grabow, and Wayne Dinsdale filed an unfair labor practice charge against the Michigan Association of Firefighters (the Union). Habel, the Grabows, and

Dinsdale later replaced the Macomb Township Firefighters Association as a Charging Party in the charge against the Employer.

Habel, Dinsdale, Mark Grabow and Kim Grabow are employed as part-time "paid on-call" (POC) fire fighters in the Employer's fire department and are members of a bargaining unit of POCs represented by the Union. The charge filed by Habel, the Grabows and Dinsdale against the Union was amended on April 5, 2006 and again on May 2, 2006. The charge, as amended, alleges that the Union breached its duty of fair representation on or about August 25, 2005, when it entered into a letter of understanding (LOU) with the Employer that significantly modified the terms of the collective bargaining agreement dealing with POCs' obligations to respond to alarms. Habel also alleges that the Union violated its duty of fair representation by refusing to process grievances Habel filed in November 2005 and March 2006. The first grievance concerned discipline Habel received for failing to respond to a sufficient percentage of alarms. The second addressed the Employer's refusal to approve Habel's requests for time off.

The charge filed by Habel, Dinsdale and the Grabows against the Employer was amended on March 6 and again on May 2, 2006. The charge, as amended, alleges that the Employer unlawfully discriminated against Habel, the Grabows and Dinsdale in violation of Sections 10(1)(a) and (c) of PERA by disciplining them for asserting their right under the collective bargaining agreement not to respond to alarms while working for their primary employers. It also alleges that the Employer unlawfully discriminated against Habel for filing the instant unfair labor practice charge in violation of Sections 10(1) (a) and (d) of PERA by refusing to approve Habel's requests for time off in March 2006; taking away his mentoring position within the fire department; conducting an investigation of his employment with the Township; and using the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* , to obtain his work schedules from his other employer, Macomb County.

Findings of Fact:

The Macomb Township Fire Department employs approximately sixty POCs and seven full-time command officers. POCs are paged when alarms occur within the area to which they are assigned, or when emergencies in other areas require additional manpower, and are paid for the alarms to which they respond. The majority of POCs, including the four Charging Parties in this case, also work either full or part-time for other employers. Until 2005, POCS could mark themselves "off" on a calendar whenever they did not wish to be paged. In addition, there was no penalty for failing to respond when paged. In 2002, the Employer promulgated a policy requiring POCs to respond to at least fifty percent of all alarms in their primary district but this policy was never enforced.

After 2002, the Employer became increasingly concerned about its ability to continue to provide adequate service with its existing fire fighters. During negotiations for Respondents' 2004-2008 collective bargaining agreement, the Employer proposed to establish minimum performance requirements for responding to alarms, attending training meetings, and checking equipment and to use discipline to enforce these requirements. In November 2004, Respondents entered into a tentative agreement that contained an entirely new provision, Article 23:

ARTICLE XXIII
PERFORMANCE REQUIREMENTS

23.1 Fire fighters are required to meet and maintain minimum performance requirements in order to assure their ability to successfully respond to fire and rescue alarms and to support their fellow Fire Fighters in addressing the overall needs of the community at large.

A. Alarm Runs: Fire Fighters must respond to thirty percent (30%) of the runs in their assigned primary district and shift for which they are available excluding: *hours working at their primary occupation; vacation from their primary employer in excess of five (5) calendar days;* bona fide sick leave; and while attending Fire fighter training classes related to their Paid-on-Call Fire Fighters employment with the Township.

B. Business and Training Meetings: Fire Fighters must attend sixty-six percent (66%) of the monthly business and training meetings.

C. Truck Checks: Fire Fighters must perform nine (9) out of twelve (12) or seventy-five percent (75%) of the monthly truck checks.

23.2 Minimum performance requirements will be monitored on a quarterly basis beginning April 1, 2005. The Association and the Township will review performance requirements and the tracking thereof for April, May and June. Effective July 1, 2005, the minimum performance requirements will be enforced. Any Fire Fighter who fails to meet the minimum standards for alarm runs, business and training meeting attendance, and truck checks will be subject to progressive discipline.

23.3 A Fire Fighter who meets or exceeds minimum performance requirements for four (4) consecutive quarters will have any and all discipline received for minimum performance requirement infractions removed from their employment record.

23.4 Every employee will declare their shift availability for a consecutive twelve (12) hour shift, in writing, to the Fire Chief or his designee at the beginning of each calendar year. Changes may be made throughout the year as a result of significant events, e.g., job change, school, disability, death (immediate family), etc.

It is contingent upon an employee to make the Employer aware of any change in availability due to a significant event in writing. The Fire Chief or his designee will confirm the receipt and recording of such change to the employee within (15) calendar days. [Emphasis added]

The tentative agreement also included graduated bonuses up to $1,500 per year for POCs who responded to thirty percent or more of alarms.

In late November or early December, 2004, the Union held a meeting for its membership to vote on the tentative agreement. The four Charging Parties in this case were vocal opponents of the proposed Article 23. Habel explained at the ratification meeting that he worked odd hours at his primary employment, including, on occasion, double shifts that made it impossible for him to respond to alarms. According to Habel, local Union president Jeff Craig and Union labor relations representative Troy Scott told Habel and the other union members that they would be excused for the time they spent working for their primary employers, including overtime hours. Habel also testified that union members also asked what would happen if their regular working hours for their primary employer overlapped both fire department shifts. According to Habel, Scott and Craig said that there was a "gentleman's agreement" that employees would be allowed to pick whatever twelve-hour block that was most convenient for their full-time employment as their shift under Article 23.4. Scott, who was the only other witness to testify regarding this meeting, did not directly contradict Habel's testimony. However, Scott testified that he informed the membership that there were still issues regarding Article 23 to be settled, and that the Employer and Union would be entering into LOUs regarding Article 23. Scott also testified that the Employer had taken the position that it would be not be administratively feasible to excuse POCs from responding to alarms every time they worked overtime for their primary employer, and that he believed that this was made clear to the Union's membership at this meeting. The contract was ratified by a comfortable margin and was executed on or about December 10.

On December 20, 2004 the Employer distributed forms to POCs asking them to choose either 6:00 am to 6:00 pm or 6:00 pm to 6:00 am as their shift under Article 23.4 of the contract. The Employer told the POCs that until they filled out the shift designation form, they would not be paged for any alarms. A number of POCs were upset when they received the form, including Habel and Charging Party Wayne Dinsdale. Dinsdale's regular work hours at his primary employment at that time overlapped the fire department shifts. Habel works full-time as a deputy sheriff for Macomb County. His regular shift is 8:00 am to 4:00 pm, but he frequently works overtime past 6:00 pm in his assignment transporting prisoners around the State. Several POCs complained to local Union president Craig that they had thought they would be allowed to designate any consecutive twelve-hour period as their shift. Craig told the POCs that he would talk to Scott and to the fire chief and try to get the problem straightened out. Habel turned in a form designating 6:00 am to 6:00 pm as his shift.

From January to July 2005, POCs continued to let the Employer know when they did not want to be paged by signing themselves out on a calendar. Habel testified that he did not pursue the issue of the shift designation form with the Union because he thought the Employer was not yet using the forms for any purpose. However, in accord with Article 23.2, during April, May and June of 2005, the Employer kept records of individual POCs' responses to alarms in their primary district during their designated shift. Sometime during this period, the Employer eliminated districts and began to page POCs only for alarms at their assigned stations. As a result of this change, fewer POCs were paged for each routine alarm.

On June 20, 2005, the Union and Employer entered into a LOU that became part of the contract. The LOU included the following:

In an attempt to clarify Article XXIII, "Performance Requirements," the following shall be adhered to:

> A. An employee shall complete and submit a time-off request form to be excused from responding to alarm runs for hours working at their primary occupation and/or for vacation from their primary employer in excess of five calendar days and up to thirty (30) days. The employees shall also complete and submit a time-off request form for a bona fide sick leave which is supported by medical documentation and for any Macomb Township Fire Department function or training. *The time-off request form must be submitted for vacation, work or department function/training at least twenty-four hours in advance in order to allow for approval and manpower adjustments.*
>
> B. An employee shall normally be charged or credited based upon their assigned primary station and shift for which they are available. [Emphasis added].

The LOU went on to explain the circumstances under which POCs might be charged or credited when paged for alarms from other stations, and how business and training meetings or time spent on union business would be counted. Attached to the LOU was a sample time off request form. The form had separate boxes for requesting time off for "Vacation from Primary Employer," "Bona Fide Sick Leave" and "Working at Primary Occupation." Below the title in the box for "Working at Primary Occupation" was the following language: "From five days to 30 days. In excess of 30 days must follow Article XV: Leaves."

On August 24, 2005, Respondents entered into a second LOU setting out the discipline to be imposed on POCs for failing to comply with the performance requirements set out in Article 23 and the June 20, 2005 LOU. The August 24, 2005 LOU stated:

> As described in Article 23.2, the Township will monitor performance as it pertains to Alarm Runs on a quarterly basis. If actual performance is below the minimum level, then the Township will proceed in administering progressive discipline as follows:
>
> | | |
> |---|---|
> | A. First Offense | Written Warning |
> | Second Offense | One Week Suspension |
> | Third Offense | Two Week Suspension |
> | Fourth Offense | Discharge |
>
> B. If a fire fighter who has been issued discipline meets or exceeds the alarm run performance requirement for the next quarter or more, but less than four consecutive quarters as described in Article 23.3 and then fails to meet the performance requirement, the Township will repeat the previous level of disciplined rendered.

Sometime between June 20 and the end of the summer, Scott and Craig held a meeting with the POCs to explain the June 20 LOU. It was not clear from the record whether this meeting occurred before or after Respondents entered into the August 24 LOU. Scott and Craig said that under the LOUs, POCs would not be automatically excused from responding to alarms while working at their primary place of employment, even if their hours ran over into their fire department shift. Scott and Craig told the POCs that if they wanted time off from the fire department for hours worked for their primary employer, it had to be for a minimum of five days. They said that if a POC needed time off to work at his primary job or was going out of town for that primary job for five days or more, he had to fill out a time off request form. In response to an employee's question, Scott and Craig said that POCs could not request time off for one day only.

As noted above, Habel frequently worked overtime as a sheriff's deputy that ran past 6:00 pm. Some of this overtime was voluntary and some was mandatory. Habel rarely worked overtime five days in row, and he did not usually know in advance whether he would be working overtime that day. Habel requested and was approved for time off for vacation from his primary employer in July and August 2005. In early September, Habel was approved for nine days off because of working at his primary employer. Like other POCs who requested time off during this period, Habel was not asked to explain why he needed the nine days off.

On November 14, 2005, seven POCs, including Charging Parties Habel, Dinsdale, and Kim Grabow, received written warnings from the Employer stating that they had failed to meet minimum performance requirements for the previous quarter (July 1, 2005 through September 30, 2005) by responding to less than thirty percent of the alarms runs in their assigned primary districts and shifts. Habel's warning letter stated that he had responded to 20.8% of alarm runs. After Habel received his written warning, he checked the list of runs in the Employer's log book and determined that there were some alarms charged against him that he could not have responded to because he was working as a sheriff's deputy at the time, even though he had not requested time off for those days. Habel then spoke to Scott about filing a grievance over this warning. Habel tried to convince Scott that under the language of the contract and the LOU he should not be charged for runs occurring when he was at work as a sheriff's deputy. Scott told him that he would not sign the grievance since the discipline was in accord with Respondents' agreement. None of the other six POCs who were disciplined asked to file a grievance.

On about December 1, Habel filed his own grievance. In the grievance, he stated that the warning was "unfair, unjust and uncalled for and that he should have been excused for the runs while at his permanent full time job." Habel also requested that the Employer provide him with a list of all the alarms during this period to which he could have responded. The Employer denied the grievance. On December 16, Habel asked Scott, in writing, to proceed to the next step with the grievance. He complained to Scott that the thirty percent rule was unfair, that the union members had agreed to it only on the basis that an employee would be excused for the time he was at his primary employment, and that employees had never been allowed to vote on the LOUs. Scott responded with a letter stating that whether or not Habel was able to respond to thirty percent of the runs in his assigned district and shift, the contract mandated that he do so and set out the discipline for failure.

Habel, Dinsdale, Mark Grabow and Kim Grabow filed the instant unfair labor practice charges on January 19, 2006. On January 24, Habel received a one week suspension for failing to

meet minimum performance requirements for the period October 1, 2005 through December 31, 2005. Habel was the only POC who failed to meet the thirty percent requirement in both that quarter and the previous one.

Habel did not file a grievance over his suspension because he assumed that the Union would refuse to proceed with it as it had with his November grievance. However, he continued to believe that charging him for failing to respond to alarms that occurred when he was working overtime as a sheriff's deputy was both unfair and contrary to the language of Article 23. As he admitted later, after being disciplined the second time Habel decided to submit requests for time off from the fire department covering days that he might be working overtime as a sheriff's deputy, whether or not he actually worked overtime on those dates. On January 24, 2006, Habel submitted a request for time off for working at his primary occupation from January 25 through February 5. Habel's supervisor, Captain Richard Koss, returned this to Habel with a note stating that he was suspended between January 26 and February 1, but that his request for time off from February 2 through February 5 was approved. On Monday, February 6, Habel submitted a request for time off for vacation from his primary employer from Tuesday, February 7 through Sunday, February 11. This request was also approved. On Tuesday, February 13, Habel submitted a request for time off for working at his primary occupation from Wednesday, February 14 through Monday, February 19. This request was also approved.

Between July 1, 2005 and February 19, 2006, the Employer received approximately 124 requests from POCs for time off. It approved all but one of these requests. The overwhelming majority were requests for time off for sick leave or vacation from a primary Employer. Only four POCS, including Habel and Dinsdale, submitted more than one request for time off for working at their primary employer during this period. Until Habel's February 13, 2006 request, no POC had submitted more than one request in the same month for time off for working at a primary employer.1

On Tuesday, February 20, Habel submitted a request for time off for working at his primary occupation from Wednesday, February 21 through Sunday, February 26. After receiving Habel's February 20 request, Koss sent him a memo asking him to submit a work schedule from his primary employment for his POC shift covering the period of the request. He also told Habel that the probationary fire fighter who had been assigned to him for training was being reassigned to someone else.2 Habel responded with a memo stating that neither Article 23 nor the LOUs, as he read them, required him to provide the requested information in order to be granted time off for working at his primary employment. Koss then denied Habel's February 20 request, giving as the reason Habel's "failure to provide proof to substantiate repetitive requests for time off." On Saturday, February 25, Habel submitted another request for time off for working at his primary occupation from Tuesday,

[1] Another POC, Don Harris, repeatedly filed consecutive requests for time off for vacation from his primary employer beginning in the summer of 2005. His requests were approved by Captain Koss, who believed that Harris was on layoff from his primary employer during this period. After Koss came to him with Habel's multiple requests for time off, Employer's director of human resources, John Brogowicz, noticed that Koss had approved multiple requests for Harris. Brogowicz told Koss that the contract did not allow an employee to receive time off because he was laid off from his primary employer. In early March, the Employer contacted Harris and learned that, in fact, he had retired from his primary employer. Harris was then informed that he would receive no more time off.

[2] At the hearing, the Employer explained that it reassigned the probationary fire fighter to someone else for training because Habel had not worked much for a month and had requested more time off.

February 28 through Sunday, March 5. Koss denied this request, citing Habel's refusal to provide proof to substantiate his requests for time off.

On March 2, 2006, Habel asked Scott to file a grievance over the Employer's refusal to approve his requests for time off. Habel argued to Scott that there was nothing in the contract that allowed the Employer to demand that he substantiate his requests. After looking over the request for time off filed by other POCs, Scott decided that the Employer was not treating Habel differently, and refused to file the grievance. On March 3, Habel filed a grievance himself stating that he was unfairly being refused time off while working at his primary employer. The Employer denied the grievance, asserting that Habel should have requested a leave of absence instead of submitting consecutive requests for time off. The Union refused to take Habel's grievance to the next step of the grievance procedure. Scott told Habel that the Union agreed that the Employer had the right under the contract to demand proof that the employee was actually working for, or on vacation from, his other employer during the period he was requesting time off from the fire department.

On Sunday, March 5, Habel submitted yet another request for time off, this time for vacation from his primary Employer from March 7 through March 12. On March 6, the Employer told Habel that it was "requesting verification of time off from your primary employer for the above requested period of time" before approving his request. On March 14, Koss told Habel that he would not consider any further requests for time off without documentation from Habel's primary employer that he had been unable to respond to fire alarms within his shift due to working and/or vacation for his primary employer since January 24. Shortly thereafter, the Employer requested that Macomb County supply it with copies of Habel's time records for the periods covered by his time off requests pursuant to the FOIA. The County supplied the documents the Employer had requested.

Around this time, Habel was called to a meeting with the Employer and Union in which the Employer accused him of making misrepresentations in his time off requests. The Employer showed Habel and the Union the time records it had received from Macomb County. These records indicated that Habel worked overtime as a deputy on some, but not all, of the days he had requested time off from the fire department. Habel told the Employer and Union that he had filed these requests because he worked overtime sporadically and needed to protect himself from further discipline. On April 24, 2006, the Employer gave Habel a two-week disciplinary suspension without pay for: (1) intentionally submitting false time off requests in order to be excused from responding to alarms; and (2) refusing to provide verification from his primary employer regarding his work and vacation schedule when requested to do so. On May 12, 2006, the Union filed a grievance on Habel's behalf. The grievance was arbitrated on August 30, 2006. The Employer presented the arbitrator with the time records it had received from Macomb County. Although these records showed that Habel sometimes worked as many as eight hours of overtime in a single day, they also established that Habel was not working for his primary employer past 6:00 pm, or on vacation from that employer, on some of the days he requested time off from the Employer.3 Habel admitted to the arbitrator that he had filled out time off request forms that did not reflect his actual work schedule at Macomb County. The arbitrator concluded that Habel was guilty of falsifying time off requests. He also concluded that the Employer had the right to demand that Habel substantiate his time off requests

[3] For example, Habel submitted a request for time off for five days of vacation from his primary employer when he wanted to go out of town on his two regular days off.

and that Habel was guilty of insubordination by refusing to provide the Employer with proof that he was working or on vacation from Macomb County during the periods covered by his time off requests.

Discussion and Conclusions of Law:

The duty of fair representation is primarily a judicially created doctrine, founded on the principle that a union's status as exclusive bargaining representative carries with it the obligation and duty to fairly represent all employees in the bargaining unit, members and nonmembers. *Vaca v Sipes,* 386 US 171 (1967); *Goolsby v Detroit,* 419 Mich 651 (1984). The elements of a union's duty of fair representation include: (1) serving the interests of all members without hostility or discrimination; (2) exercising its discretion with complete good faith and honesty; and (3) avoiding arbitrary conduct. This standard applies to the union's negotiation of a collective bargaining agreement as well as to its administration of that agreement. *Air Line Pilots Ass'n, International Union* v *O'Neill,* 499 US 65, 77, (1991); *West Branch-Rose City Ed Ass'n (On Remand),* 17 MPER 25 (2004). See also *Lansing Sch Dist (On Remand),* 1989 MERC Lab Op 210. However, as the Supreme Court cautioned in *Air Line Pilots Ass'n,* courts or administrative agencies are not to substitute their own views of a proper bargain for that of the union. As the Court held in that case, the final product of the union's bargaining process is "arbitrary" only if it is so far outside of a wide range of reasonableness as to be totally irrational. *Air Line Pilots Ass'n,* at 78.

Charging Parties allege that the Union violated its duty of fair representation by "arbitrarily" negotiating a LOU that took away unit members' rights without any corresponding benefit to the members. In 2004, Respondents added a provision to their new collective bargaining agreement that, for the first time, required POCs to respond to a certain number of alarms. Article 23.2(A) of that agreement provided that POCS would be excused from responding to alarms for "hours working at their primary occupation; vacation from their primary employer in excess of five (5) calendar days." Since the first and second clauses were separated by a semi-colon, the provision, on its face, appeared to place no restrictions on the number of hours a POC could be excused for working at his primary job. Pursuant to Article 23.4, POCs were required to declare their availability for a twelve-hour shift. The contract did not specify whether POCs were to be allowed to select any consecutive twelve hour shift or whether shift times were to be set by the Employer. On June 24, 2005, before Article 23 went into effect, the Respondents entered into a LOU that changed the language of 23.2 (2) to read as follows, "An employee shall complete and submit a time-off request form to be excused from responding to alarm runs for hours working at their primary occupation and/or for vacation from their primary employer in excess of five calendar days and up to thirty (30) days." They also agreed to a time off request form that made it clear that the bar on requesting time off for less than five days applied both to vacation and to working at one's primary job.

Pursuant to Section 16(a) of PERA, MCL 423.216(a), an unfair labor practice charge must be filed within six months of the alleged violation. The statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Communities Schs,* 1994 MERC Lab Op 582. A claim accrues under PERA when the charging party knows, or should have known, of the alleged unfair labor practice. *Huntington Woods* v *Wines,* 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836. When the claim is for a breach of the union's duty of fair representation, the statute of limitations begins to run when the charging party knows or should know that the union is not representing him. *Detroit Pub*

Schs, 20 MPER 42 (2007).The LOU that contained the changes about which Charging Parties complain was entered into on June 24, 2005, more than six months before the unfair labor practice charge was filed on January 19, 2006. However, the record does not establish that Charging Parties learned how the LOU was to be interpreted until the Union met with the POCs to explain the June 24 LOU sometime during the summer of 2005. I find that the evidence is not sufficient to establish that Charging Parties knew or should have known of the alleged unfair labor practice before the end of August 2005. The allegation that the Union breached its duty of fair representation by entering into a LOU that modified the terms of the collective bargaining agreement was, therefore, not untimely under Section 16(a).

I find, however, that Charging Parties failed to establish that the Union breached its duty of fair representation by entering into the June 24, 2005 LOU. A collective bargaining agreement is an agreement between an employer and a union, and a union does not breach its duty of fair representation simply by agreeing to modify that agreement. Therefore, whether the June 24, 2005 LOU modified the original contract or merely clarified its language to reflect Respondents' actual intent is irrelevant. Whether paragraph A of the June 24 LOU could be read as continuing to give POCs the right to unlimited time off for hours spent working at their primary employer is also of no significance. The Commission has held that where an employer and union agree on the meaning of contract language, it is that construction which governs. *Saginaw Valley State Univ*, 19 MPER 36 (2006); *City of Detroit*, 17 MPER 47 (2004); *City of Detroit (Wastewater Treatment Plant),* 1993 MERC Lab Op 716. In order to establish that the Union breached its duty of fair representation, Charging Parties must show that the Union negotiated the June LOU in bad faith or with the intent to discriminate against the Charging Parties, or that the LOU was arbitrary. Charging Parties have not asserted that the Union acted in bad faith. I find that they have also not shown that the June 24, 2005 LOU was arbitrary, i.e. so far outside the range of reasonableness that it was totally irrational. That POCs would be required to respond to more alarms and be subject to discipline for failure to do so was part of the bargain reached by Respondents in their 2004-2008 collective bargaining agreement. It was not arbitrary for the Union to agree in the June LOU that POCs not be excused from responding to alarms whenever they were working for their primary employer, even though this had a greater impact on some POCs than others.

I also find that the Habel did not establish that the Union breached its duty of fair representation by refusing to proceed to the next step of the grievance procedure with his November 2005 or March 2006 grievances. In contesting his November 14, 2005 written warning, Habel did not dispute that he failed to respond to thirty percent of the alarms charged to him between July 1, 2005 and September 1, 2005. In his November 2005 grievance, Habel argued that he should not have been charged for alarms occurring when he was working overtime at this primary employer, even though he had not requested time off for those dates. However, as Habel had been informed during the previous summer, the Union and Employer had agreed in their June 24 LOU that POCs would have to request time off for time spent working at their primary employer. The November 2005 grievance was based on an interpretation of the June 2004 LOU that was contrary to Respondents' agreement. The Union did not act arbitrarily by adhering to this agreement. In March 2006, Habel filed a grievance asserting that the Employer had no right to demand that he provide proof that he was actually working for his primary employer before approving his time off requests for that purpose. After comparing Habel's time off requests in February and March with other time off requests approved by the Employer, the Union concluded that the Employer was not unreasonably

singling Habel out, but had reason to suspect that Habel was requesting time off to which he was not entitled under the contract. The evidence indicates that after doing an investigation, the Union made a reasoned decision that Habel's grievance lacked merit. I conclude that the Union's decision not to take Habel's November 2005 and March 2006 grievances to the next step of the grievance procedure was not arbitrary, discriminatory, or made in bad faith. I find that Charging Parties did not demonstrate that the Union violated its duty of fair representation toward them in this case.

Charging Parties Habel, Kim Grabow, Mark Grabow and Wayne Dinsdale allege that the Employer retaliated against them for asserting their rights under the collective bargaining agreement not to respond to alarms while working at their primary employers. Charging Parties Habel, Dinsdale and Kim Grabow, along with four other POCs, received written warnings in November 2005 for failing to respond to thirty percent of alarms between July 1 and September 30, 2005. However, the record indicates that these warnings were issued pursuant to the LOUs entered into by the Employer and Union in June and August, 2005. There is no indication that Charging Parties were singled out for discipline because they complained about Article 23 of the contract or Respondents' interpretation of that agreement as set out in the LOUs. I find no evidence to support their retaliation claim.

Habel also alleges that the Employer retaliated against him for filing this unfair labor practice charge by refusing to approve his requests for time off in March 2006, taking away his mentoring position within the fire department, conducting an investigation of his employment with the Township4, and using the Freedom of Information Act (FOIA) to obtain his work schedules from Macomb County. Habel filed his charge on January 19, 2006, and the Employer actions that constitute the alleged retaliation followed shortly thereafter. However, there is no evidence in this record of hostility on the part of the Employer toward Habel's charge or evidence that Habel's subsequent problems resulted from his filing a charge. Rather, Habel attracted the Employer's attention by filing five time off requests within the same month and requesting time off for all but a few scattered days within that month. These unusual actions, coupled with Habel's expressed opposition to June 2005 LOU, led the Employer to suspect that Habel's time off requests might not be legitimate. In fact, as Habel eventually admitted, he had requested time off to which he knew he was not entitled under the Respondents' interpretation of the June 2005 LOU. After Habel refused to provide work schedules to substantiate his requests, the Employer conducted an investigation that subsequently led to Habel's discipline. I conclude that Habel failed to establish that his filing of the unfair labor practice charge played any role in the Employer's decision to investigate Habel's time off requests or in its decision to remove him as a mentor to a probationary fire fighter, and that his claim of unlawful retaliation in violation of Section 10(1)(d) lacks merit.

In accord with the findings of fact and discussion and conclusions of law set out above, I conclude that Charging Parties did not establish that either the Union or the Employer committed unfair labor practices under Section 10 of PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

[4] This apparently refers to the meeting held with Habel and his Union representative at which the Employer initially accused him of making deliberate misrepresentations in his time off requests.

The charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____