STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHINGTON TOWNSHIP,
Public Employer-Respondent,

Case No. C07 I-205

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Seibert and Dloski, by Robert J. Seibert, Esq., for Respondent

M. Catherine Farrell, Esq., for Charging Party

DECISION AND ORDER

On September 23, 2008, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was 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

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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APPEARANCES:

Seibert and Dloski, by Robert J. Seibert, Esq., for Respondent

M. Catherine Farrell, 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 January 9, 2008 before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 22, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Michigan Association of Fire Fighters filed this charge against Washington Township on September 6, 2007, alleging that it violated Sections 10(1)(a) and (c) of PERA by unilaterally altering existing terms and conditions of employment while the parties were engaged in negotiating their first contract. On June 19, 2006, Charging Party was certified as the collective bargaining representative for a unit of Respondent's paid on-call and/or paid part-time fire fighters with the rank of assistant chief or below. At the time of Charging Party's certification, Respondent had a written disciplinary policy and a grievance procedure applicable to paid on-call fire fighters. The charge alleges that Respondent repudiated its disciplinary policy in discharging paid on-call fire fighter Ron Bauer in July 2007.

Findings of Fact:

Respondent's fire department consists of full-time fire fighters and paid on-call fire fighters. Prior to Charging Party's certification, the paid on-call fire fighters were not represented by a union. On April 3, 2002, Respondent's Township Board passed a resolution establishing certain terms and conditions of employment for its paid on-call fire fighters. Item nine of the resolution read as follows:

The Township Board hereby establishes the following disciplinary policy.

A. Discipline and/or discharge and /or demotion shall be for just cause. Nothing contained herein, however, shall deprive the paid on-call member of the grievance procedure.

B. The Employer shall provide the paid on-call member with charges and specifications, in writing, at the time of discipline or discharge.

C. Upon request, the Employer may discuss the discipline or discharge with the paid on-call member and a paid on-call designee, if so requested.

D. Should the disciplined or discharged paid on-call member consider the discipline or discharge improper, the matter may be referred to the grievance procedure at Step 2 provided, however, the discipline or discharge of a probationary paid on-call member is not subject to the grievance procedure.

E. In imposing any discipline on a current charge, the Employer will not take into account any prior infractions which occurred more than three (3) years previously, provided that like offenses were committed [sic] by the paid on-call member during those years.

F. Written reprimands for minor offenses, not resulting in disciplinary time off, and those resulting in disciplinary time off, shall be removed from the paid on-call personnel file one (1) year subsequent to the date of such reprimand for the former and four (4) years subsequent to the date of such reprimand for the latter, provided that the paid on-call member commits no like offense during that time.

*G. All charges shall be void unless filed within thirty (30) days of the occurrence of all alleged violations or within thirty (30) days after the Township reasonably should have known of the occurrence of the alleged violation.[*Emphasis added]

In addition to the above disciplinary policy, the Township Board hereby establishes a grievance policy which shall govern members of the paid on-call Fire Department.

The grievance policy consisted of three steps, including an oral complaint to the fire chief, a written complaint, and review and decision by a grievance committee consisting of the fire chief, township supervisor and a paid on-call fire fighter. The policy did not require Respondent to follow the decision of the committee, and provided that any proposed settlement of the grievance be submitted to the Township Board.

Respondent stipulated at the hearing that the above policy was in full force and effect on March 6, 2007, when Bauer was involved in the incident that led to his discharge, and on July 11, 2007, when Respondent terminated him.

As noted above, Charging Party was certified as the bargaining representative for Respondent's paid on-call fire fighters on June 19, 2006. In March 2007, they had not yet reached a collective bargaining agreement. On the evening of March 6, 2007, Bauer came to Respondent's fire station in his personal vehicle in response to a call out. As he turned onto the street next to the station, he almost collided with a department emergency vehicle leaving the station. The department vehicle was driven by Sergeant Darrell Blalock. According to written statements given by both Bauer and Blalock, when Blalock returned to the station, Bauer told him that he should be more careful pulling out into the intersection. The two men then argued over who was responsible for the near accident. Sometime later, Blalock told Respondent's fire chief, David Potorek, about the incident. According to Potorek, Blalock was concerned about being blamed and told Potorek that Bauer had been driving carelessly. Potorek told Blalock to prepare a written statement about the incident. Potorek also told Bauer to submit a written statement.

On March 13, Blalock gave Potorek a written statement in which he claimed that Bauer had cut across lanes into his path. Fire fighter Gary Wehrwein, who had been in the department vehicle with Blalock, also gave a written statement. In addition to collecting statements and reviewing Bauer's personnel file, Potorek, who had been with Respondent's fire department only since July 2006, asked Respondent's former fire chief about Bauer. On March 20, Potorek had a meeting with Bauer and Charging Party local president Dave Staley. Potorek gave Bauer and Staley copies of Blalock's and Wehrwein's statements, and Bauer handed Potorek his statement. In his statement, Bauer maintained that Blalock was at fault because he had pulled into the intersection without all his emergency lights on and without using his siren. The three men discussed the March 6 incident and other incidents documented in Bauer's file. These included a driving incident for which Bauer had received a thirty-day suspension.

Later that day, Potorek gave Bauer and Staley the following memo:

> I have reviewed the information gathered regarding the incident that took place on 3/6/07 at the corner of Wicker Street and Van Dyke. I have also reviewed your personnel file and spoke to several people including Chief Alward regarding your past driving record.

> In your personnel file, along with this present incident, you have two other driving incidents, one with a 30 day work suspension. In addition, a letter was request [sic] from the Macomb County Sheriff who was involved in another one of your incidents. His letter states that he has pulled you over several times responding to runs while driving off duty.
>
> Per Chief Alward you have had a history of unsafe driving practices on and off duty throughout your career. This has been verified by several other Paid on Call and Full Time firefighters.
>
> Ron, I feel you have been given more than a fair chance to change your driving habits. In good conscious [sic] I can not possibly allow this trend to continue. You are jeopardizing not only your safety, but the safety of my men and the citizens of this township. I can not possibly justifying [sic] such a liability on this department.
>
> Ron, as of this date you are on administrative leave and this matter will be forwarded to the personnel committee with my suggestion for your termination from this department.

Potorek gave the Board's personnel committee a packet of materials, including the witness statements and a letter from the former fire chief. On March 30, 2007, the committee sent Potorek a memo stating that it supported his decision to terminate Bauer, and asked him to discuss the matter with Respondent's attorney. In about the first or second week of April 2007, Potorek met again with Bauer, Staley, and another Charging Party representative, Michael O'Lear. Potorek gave them copies of the personnel committee's March 30 memo and asked if they had any questions before the matter was submitted to the full Board at its next meeting on May 2. They did not have questions, and, according to Potorek's uncontradicted testimony, did not ask Potorek for an additional statement of the charges.

Charging Party labor representative Troy Scott attended the May 2 meeting along with Bauer, Staley and O'Lear. Charging Party requested that the Board go into closed session to discuss Bauer's termination, and the Board agreed. All members of the Board were present at this meeting, including R.J. Brainard, Respondent's township clerk, and township supervisor Gary Kirsch. Respondent's legal counsel was also at the meeting. Scott told the Board that Charging Party was not sure what issues to address because neither Bauer nor Charging Party had received a written statement of the charges against him as provided in Section B of the disciplinary policy. Scott also showed the Board a copy of the March 30 memo from the personnel committee to Potorek and said that Bauer had been denied his right to a pre-termination hearing because the Board had already made its decision to terminate him. Scott was told by both Brainard and Kirsch that he could not bring up procedural issues and could only speak to the merits of the case. Scott responded that he could not stick to the merits without knowing what the charges were. He also said that because Respondent had not complied with Section B, the discipline had to be considered null and void under Section G because Respondent had not filed charges within thirty days of the March 6 incident. Scott also questioned whether Potorek had done a thorough investigation of the incident.

Kirsch tried to get Scott to confine himself to the facts of the March 6 incident, and threatened to terminate the meeting if Scott did not do so. At some point during the meeting, Brainard told Scott that since Respondent was in contract negotiations, the disciplinary policy did not have to be followed. After several tense exchanges between Scott and Board members, Bauer was asked to give his version of what occurred on March 6. Bauer showed the Board photos of the scene, argued that he was not at fault, and asked the Board to consider his character and reputation within the department. At the conclusion of the meeting, the Board voted to table action until its next meeting.

After the May 2 meeting, Scott told O'Lear to tell Bauer that the Board was not going to listen to Charging Party's arguments and that there was no point in Charging Party being present simply to hear the Board's vote. At the next Board meeting on June 2, 2007, Bauer appeared without a Charging Party representative but asked the Board to table action again to give him an opportunity to consult with his union representatives again. The Board agreed. At the Board's meeting on July 11, 2007, Bauer appeared again without a Charging Party representative. Bauer made another presentation to the Board, and called a witness to testify to his character. At the conclusion of the July 11 meeting, the Board voted four to three to terminate Bauer's employment.

Discussion and Conclusions of Law:

Policies and procedures governing discipline and discharge are mandatory subjects of bargaining under PERA. *Amalgamated Transit Union, Local 1564 v SEMTA,* 437 Mich 441 (1991); *Pontiac Police Officers Ass'n v Pontiac*, 397 Mich 674 (1976). It is well established that under PERA, a public employer cannot make unilateral changes in mandatory subjects of bargaining without providing its employees' bargaining representative with an opportunity to bargain. *Police Officers Ass'n v City of Detroit*, 391 Mich 44 (1974). One of the fundamental principles of labor law is that, after certification of a labor organization as bargaining representative of its employees, an employer is obligated to maintain existing conditions of employment, otherwise known as the status quo, until a collective bargaining agreement negotiated or impasse is reached. *NLRB v Katz*, 369 US 736 (1962). As the US Supreme Court noted many years ago in *Katz,* at 743, a unilateral change in the conditions of employment under negotiation is a circumvention of the duty to negotiate which frustrates the objectives of collective bargaining as much as does a flat refusal to bargain.

Respondent township clerk Brainard clearly misstated the law under PERA when he stated at the May 2, 2007 Board meeting that since Respondent was in contract negotiations, the disciplinary policy set out the Board's 2002 resolution did not have to be followed. No other Respondent representative, however, expressed this view. Moreover, Respondent never actually told Charging Party that the policy had been rescinded, and Respondent stipulated at the hearing that the policy was in effect at the time of Bauer's termination. Charging Party argues that Respondent did not provide Bauer with a timely statement of charges as required by Sections B and G of the policy, and that its failure to do so constituted a repudiation of the disciplinary policy. However, Chief Potorek testified that he considered his March 20, 2007 memo to Bauer to be a statement of charges. While the March 20 memo did not state what specific departmental rule(s) Bauer was alleged to have violated, it did, in general terms, communicate that Bauer was charged with unsafe driving. It was also given to Bauer within the thirty days that Section G of the policy required. As noted above,

Respondent's obligation in this case was to maintain the status quo pending satisfaction of its obligation to bargain. There is no evidence in the record that employees disciplined under the policy before Charging Party's certification had received statements of charges that were any more formal than the one given to Bauer. There is also no evidence that in terminating Bauer, Respondent repudiated "just cause" as a standard for discipline or termination.1 I find that the evidence does not support a finding that Respondent repudiated or unilaterally altered its existing disciplinary policy or grievance procedure between March and July 2007. I conclude, therefore, that Respondent did not violate its duty to bargain under Section 15 of PERA, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

1 See *Wayne Co Cmty College*, 16 MPER 33 (2003), in which the Commission held that the termination of a single employee after the expiration of a collective bargaining agreement containing a just cause for discipline provision did not constitute a unilateral change in terms and conditions of employment, no matter how strong the union's argument that the employer lacked just cause for its action.