STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

THORNAPPLE MANOR MEDICAL CARE FACILITY (BARRY COUNTY),
Public Employer-Respondent,

Case No. C08 E-085

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 2742,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Nantz, Litowich, Smith, Girard & Hamilton, by Steven K. Girard, Esq., for Respondent

Aina N. Watkins, Esq., Staff Attorney, Michigan AFSCME Council 25, for Charging Party

DECISION AND ORDER

On September 12, 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

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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

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On May 9, 2008, AFSCME Council 25 and its affiliated Local 2742 filed the above unfair labor practice charge against Thornapple Manor Medical Care Facility alleging that Respondent violated Sections 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10) by refusing to bargain with Charging Party over a policy prohibiting employees from smoking at any time during their workday, and by unilaterally implementing this policy on February 1, 2008. The charge was assigned for hearing to Julia C. Stern, Administrative Law Judge for the State Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission.

On June 3, 2008, Respondent filed a motion for summary disposition asserting that it had no duty to bargain over the change because the issue was covered by the parties' collective bargaining agreement and the parties were in the process of arbitrating a grievance challenging Respondent's right to make the change. Charging Party filed a timely response to this motion on September 12, 2008. Based on the undisputed facts as set forth in the parties' pleadings, and on arguments made in the motion and response, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Facts:

Thornapple Manor Medical Care Facility (the Facility) is a nursing care facility operated by Barry County. Charging Party represents a bargaining unit of full-time and part-time nurses aides, restorative aides, housekeeping employees, laundry employees, central supply aides, and maintenance and kitchen employees employed at the facility. At the time of the alleged unilateral change, a collective bargaining agreement covering this unit was in effect through March 31, 2010. The collective bargaining agreement contained a grievance procedure ending in binding arbitration. It also included the following provisions:

Article II
Management Rights

Section 1. The Union recognizes that the management and the operation of the Facility is the sole responsibility of the Employer, and nothing in this Agreement can restrict, interfere with, or abridge any rights, powers, authority, duties or responsibilities conferred upon or vested in the Employer.

In addition to these rights, the Employer reserves the right to manage and control the Facility in all of its operations and activities, including, but not by way of limitation, the work to be performed within the bargaining unit; the nature and amount of supervision needed; the methods and means of operation; to determine schedules of work, including starting and quitting times for employees; the number of hours in each work schedule for each classification and job; the discontinuance of any service or operation; the number of facilities and departments to be operated and their location; to determine the number of personnel required; to eliminate, establish or combine classifications; the right to direct the working force, including the right to hire, discipline, suspend, discharge for cause, promote, demote, assign, transfer or lay off and recall employees; to direct the work force; to establish change, combine or discontinue job classifications and prescribe and assign job duties; to make judgments as to the skill and ability of employees; to determine work loads; *to adopt, revise and enforce work and safety rules and regulations and regulations;* to utilize volunteers; to study and introduce new, improved or different methods; to use outside assistance either in or outside the Employer's facility, including subcontracting and any other form of contracting assistance to perform any or all aspects of its services; and the right to make technological or labor-saving changes. The foregoing enumeration of rights is not intended to be all inclusive, but indicates the type of matters arising which belong to and are inherent to management and shall not be deemed to exclude other rights of the Employer not specifically set forth. However, the Employer acknowledges that such management rights have been limited by the provisions of this Agreement, and therefore agrees to exercise such rights in such a fashion so as to not violate the specific terms and provisions of this Agreement.

Section 2. Rules. *The Employer shall have the right to make such reasonable rules and regulations not in conflict with this Agreement as it may from time-to-time deem best for the purpose of maintaining order, safety and/or effective operations and put*

> *such into effect after advance notice to the Union and employees. Any complaint relative to the application of any rule may be considered as a grievance and subject to the grievance procedure contained in the Agreement.* [Emphasis added]

The Facility had implemented policies and rules governing smoking by employees before 2008 without objection from Charging Party. Prior to February 2008, the Facility provided an indoor lounge on its premises in which employees were allowed to smoke.

The November 2007 issue of the "Thornapple Tribune," a newsletter published by the Facility for its staff, contained the following news item:

> Thornapple Manor is Going Smoke Free
>
> Thornapple Manor's governing board, the Barry County Department of Human Services Board, recently decreed that as of February 1, 2008, Thornapple Manor will become a smoke-free campus. At the same time, and following Pennock Health Services' lead, we will be instituting the smoke-free work day policy, meaning that staff will be required to refrain from using tobacco throughout their assigned shifts. Yes, that means no smoking at breaks or lunch. The goal is to improve the quality of life for both staff and residents while here at Thornapple Manor. I realize this will be a huge change for all our employees who smoke, and I am sympathetic to your upcoming ordeal, but with us being not only a healthcare institution but owned by Barry County, who has a smoke-free policy in all their other buildings, this shouldn't be too much of a shock. It was just a matter of time, and that time has come. I guess since we're moving into a brand new building that this particular time makes sense. Thornapple Manor will be offering resources to help employees in their efforts to quit smoking, should they so desire. I will give you more information regarding those resources in next month's issue, but in the meantime, Pennock Hospital is offering classes as outlined below.

Charging Party never received individual notice of the new policy. On about January 31, 2008, Charging Party filed a grievance asserting that the new policy constituted an unreasonable work rule, and requesting that employees be allowed to punch out and leave the Facility's property on breaks and at lunch in order to smoke. The Facility refused, maintaining that its policy was a reasonable safety rule as residents of the Facility had the right to be cared for by employees who did not smell of smoke. At meetings on this grievance held on February 20, March 13 and April 16, Charging Party orally demanded to bargain over the change. The Facility refused. Charging Party then filed a demand for arbitration under the contract. At the time the motion for summary disposition was filed, the parties had selected an arbitrator and scheduled a date to arbitrate the grievance.

Discussion and Conclusions of Law;

Policies governing smoking in the workplace, like other rules governing the personal conduct of employees while on their employer's premises, are mandatory subjects of bargaining under

PERA. *Holland Pub Schs,* 1989 MERC Lab Op 346, 350-352. The issue raised by Respondent's motion is whether Respondent satisfied its obligation to bargain over the new smoking policy by negotiating contract language giving it the right to unilaterally adopt, revise and enforce reasonable safety and work rules and allowing Charging Party to challenge the reasonableness of these rules through the grievance procedure.

In *Port Huron Educ Ass'n, MEA/NEA* v *Port Huron Area School Dist,* 452 Mich 309, 318(1996), the Michigan Supreme Court stated:

> An employer may defend against a charge that it has unilaterally altered working conditions by arguing that it has fulfilled its duty to bargain or that the union has waived its right to demand bargaining. The statutory duty to bargain may be fulfilled by "negotiating for a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining...." *Local Union No. 47, Int'l Brotherhood of Electrical Workers v NLRB,* 927 F2d 635 (CA DC, 1991). Alternatively, the employer may be freed from its duty to bargain if the union has waived its right to demand bargaining. The procedure for determining whether an employer must bargain before altering a mandatory subject of bargaining involves a two-step analysis: is the issue the union seeks to negotiate ... "covered by" or "contained in" the collective bargaining agreement; and, if not, [did] the union ... somehow relinquish[ ] its right to bargain[?] *Dep't of Navy v Federal Labor Relations Authority,* 962 F2d 48 (CA DC, 1992)
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> At 321-322, it stated:
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> In cases in which statutory and contractual issues overlap, the MERC, like the NLRB, must often review the contract to determine whether there is a statutory violation. The MERC does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration. *Sanilac Co. Bd of Comm'rs v Sanilac Co Employees,* 1993 MERC Lab Op 750, 755; *Police Officers Ass'n of Michigan v Romulus,* 1992 MERC Lab Op 170. . . . In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.
>
> Where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented. *St Clair Co Rd Comm v Local 516M Service Employees Int'l Union,* 1992 MERC Lab Op 533, 538.

As I discussed in *Interurban Transit Partnership,* 20 MPER 74 (2007), I believe that the Commission has not fully resolved whether it should apply a "covered by" or a "waiver" analysis when an employer's defense to a charge that it unlawfully altered working conditions is that it negotiated a contract provision allowing it to unilaterally promulgate work rules. In the instant case,

however, the parties' contract not only allows the Facility to promulgate both safety and work rules, it allows Charging Party to challenge the reasonableness of these rules. I find that in this case, the parties agreed in their contract to allow the Facility, after proper notice, to promulgate work and safety rules subject to a challenge to their reasonableness. I conclude that this article constituted the entire agreement of the parties with respect to the promulgation of work and safety rules, and that by agreeing to this provision, Charging Party clearly and explicitly waived its right to further bargaining over the promulgation of rules.

In its response to the motion, although not in the original charge, Charging Party asserts that Respondent's conduct constituted a repudiation of the parties' contract, citing Article II, Section 2 as set out above. I find this argument to be without merit. As Charging Party notes, in order for the Commission to find a repudiation of contract, there must be no bona fide dispute over the interpretation of its terms. *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897. Here, the parties clearly have a bona fide dispute over whether the Facility's new smoking policy was reasonable as Article II, Section 2 requires.

Based on the discussion and conclusions of law set forth above, I find that there are no genuine issues of material fact in this case, and that summary dismissal of the charge is appropriate under Rules 165(1) and 2(f) of the Commission's General Rules, 2002 AACS, R 423.165. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____