STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BLUE WATER AREA TRANSPORTATION COMMISSION,
Public Employer - Respondent,

Case No. C08 C-051

-and-

MICHIGAN AFSCME COUNCIL 25 and AFSCME LOCAL 1518,
Labor Organizations - Charging Parties.
_____/

APPEARANCES:

Michael Sly, for Respondent

Webb, Engelhardt & Fernandes, PLLC, by L. Rodger Webb, Esq., for Charging Parties

DECISION AND ORDER

On June 2, 2008, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above case recommending that we dismiss the charge against Respondent, Blue Water Area Transportation Commission (the Employer). The ALJ held that Charging Parties, Michigan AFSCME Council 25 (Council 25 or the Union) and AFSCME Local 1518 (Local 1518), failed to state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ reasoned that the allegations stated no more than a breach of contract/wrongful termination claim, which should be resolved through the parties' agreed-upon contractual grievance arbitration procedure. The Decision and Recommended Order on Summary Disposition was served on the interested parties in accordance with Section 16 of PERA. Following three requests for extensions of time to file exceptions to the Decision and Recommended Order, Council 25 filed timely exceptions on July 30, 2008.[1]

In its exceptions, Council 25 alleges that the ALJ "prejudicially mischaracterizes" its unfair labor practice charge by finding that the charge asserts a breach of contract claim rather than an allegation that the Employer breached its duty to bargain by making unilateral changes to work rules. Council 25 argues that its charge clearly alleges a PERA violation that is reviewable by the Commission and makes no claim whatsoever regarding a just cause discharge. We have reviewed Charging Party's exceptions and

[1] It appears that Council 25 alone (without its local union) filed the exceptions. No response to the exceptions was filed by the Employer.

conclude that they have merit and that summary disposition was not warranted on the record before us.

Factual Summary:

The charge filed in this matter by Council 25 and its Local 1518 asserts that the Employer "without prior notice to the Union, instituted a new work rule, or changed an existing rule, or enforced an otherwise moribund work rule." The charge further alleges that the Employer, without prior notice, also declared that bus drivers in the bargaining unit cannot be insulin dependent. The Union asserts that such changes materially affect terms and conditions of employment of unit personnel and were taken without prior notice to the Union and, hence, violate the Act. The Employer filed an answer denying the charge and also filed a request for summary dismissal, arguing that the claim was barred by the statute of limitations set forth in PERA. The Employer argued further that the dispute involved merely a good faith contractual dispute that should be properly resolved via the parties' binding arbitration procedures. In support of its statute of limitations argument, the Employer submitted a separate letter to the ALJ in which it claimed that the rule at issue had been in effect since 1976, rendering the Union's claim untimely and, thus, removing this dispute from Commission jurisdiction. At the bottom of the Employer's letter, the current President of Local 1518 and others endorsed the Employer's factual assertions in support of its summary dismissal motion.[2]

Discussion and Conclusions:

We agree with the ALJ that the Commission is not the proper forum for litigating a challenge to a termination allegedly for just cause where the parties have agreed to a contractual grievance procedure. *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480; 506 NW2d 878 (1993); *Utica Cmty Sch*, 2000 MERC Lab Ops 268. However, a claim that an employer has unilaterally adopted a disciplinary rule without notice to the union and without bargaining may be cognizable by this Commission under Section 10(1)(e) of PERA. See *City of Detroit*, 20 MPER 68 (2007). We find that the ALJ should have considered this issue and made a recommendation of whether a bargaining violation under PERA indeed occurred. We further find that the ALJ erred in ruling on the summary dismissal motion when he considered the factual assertions set forth in the Employer's letter to him. It is well settled that a report or memorandum that is neither sworn nor accompanied by a sworn affidavit is hearsay, and may not be considered on a motion for summary disposition. *Jones v Shek*, Mich App 530, 533; 210 NW2d 808 (1973); See *Goldman v Loubella Extendables*, 91 Mich App 212; 283 NW2d 695 (1979); See *Vance v Wade*, 546 F3d 774, 770-780 (CA 6, 2008). Reversal of a decision to grant a motion for summary disposition is warranted when that decision is based on improperly considered hearsay evidence. See *Sigler v American Honda Motor Co*, 532 F3d 469 (CA 6, 2008). Therefore, we remand this matter to the ALJ for a hearing on the merits of the Union's claim of unilateral change or for another disposition based upon a properly supported motion.

[2] It is apparent that there is a discrepancy between AFSCME Council 25 and its local concerning the veracity of the allegation; this, too, is an issue that requires resolution by the ALJ.

ORDER

The recommended order granting Respondent's Motion for Summary Dismissal is reversed and this matter is remanded to the ALJ for further proceedings consistent with this Decision.

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

In the Matter of:

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MICHIGAN AFSCME COUNCIL 25 and AFSCME LOCAL 1518,
Charging Parties-Labor Organizations.
_____/

APPEARANCES:

L. Rodger Webb, for Charging Parties-Labor Organizations

Michael Sly, for Respondent Public Employer

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

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 assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). Based upon the entire record, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Findings of Fact:

On March 3, 2008, a charge was filed in this matter purportedly on behalf of Michigan AFSCME Council 25 (Council 25) and its Local 1518 asserting that the Bluewater Area Transportation Commission (Employer or Bluewater) violated the Act in terminating the employment of bargaining unit member Audrey Roddy, in improper reliance on an allegedly newly implemented work rule. Respondent filed an answer and request for dismissal which raised both the issue of whether the matter had been filed outside the statue of limitations, where the Employer asserts that the rule or practice at issue has been in effect since at least 1976, and whether it was regardless a mere good faith contractual dispute. It is notable that the current President, as well as other current or former officers, of AFSCME Local 1518, a putative Charging Party in this case, signed a statement supporting the factual allegations submitted by the Employer as the basis for dismissal of the charge.

After being granted several extensions of time, a timely response was filed expressly on behalf of Charging Party Council 25, but not on behalf of Charging Party Local 1518. The response by Council 25 does not challenge the authenticity of the filing signed by the President of Local 1518, nor does it address the apparent opposition of Local 1518 to the pursuit of this matter or the factual admission by Local 1518 that the claims made are barred by the statute of limitations.

The basis of the charge, as explained in Council 25's response, is that an employee was terminated in reliance on the Employer's finding that the employee was not physically fit for duty. Council 25 asserts that for the Employer to defend against the discharge grievance by claiming the right to terminate employees it found to be physically unfit for bus driver work constituted the *de facto* creation of a new work rule. However, Council 25's response to the motion to dismiss also makes clear that the Employer did not in fact promulgate that defense to the particular grievance, in writing or otherwise, as a new work rule to employees generally.

The Council 25 response to the Employer's motion was supported by an assertion that the AFSCME Council 25 field staff representative was unaware of any formally promulgated work rule or contractual provision evidencing prior reliance by the Employer on Federal Department of Transportation (DOT) fitness for duty standards for bus drivers, yet he nonetheless acknowledged being aware of Bluewater employees who in the past were not allowed to work because of failing their DOT return to work physicals. Council 25's response to the motion does not challenge the acknowledgement by the Local Union officials that they were aware that the fitness for duty standards had been in place and relied on since 1976. Council 25's reply expressly acknowledges that the Employer's conduct does not rise to the level of a repudiation of the terms of the contract.

Discussion and Conclusions of Law:

While Charging Party Council 25's reply seeks to raise a question of fact regarding the statute of limitations defense, notwithstanding the apparently opposing factual stance by Charging Party Local 1518, it remains that Council 25's allegations, read in the light most favorable to that Charging Party, state no more than an ordinary breach of contract/wrongful termination claim affecting one, or perhaps two, employees. As Council 25's reply to the motion recognizes, the Commission has the authority to interpret the terms of a collective bargaining agreement only where necessary to determine whether a party has breached its collective bargaining obligations. *University of Michigan,* 1978 MERC Lab Op 994, 996, citing *NLRB v C & C Plywood Corp,* 385 US 421 (1967). However, if the term or condition in dispute is "covered by" a provision in the collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich. 309, 317-321 (1996). As the Commission stated in *St Clair Co Road Comm,* 1992 MERC Lab Op 533 at 538:

> Where there is a contract covering the subject matter of the 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 present.

The Commission will not provide a forum for the litigation of an ordinary just cause for discharge dispute where the parties, as here, have agreed to binding arbitration. Council 25's assertion, stripped of the convoluted language of Council 25's response to the motion to dismiss, is that an employee was improperly terminated without just cause based on the Employer's misinterpretation or misapplication of unwritten workplace rules or prior practices. Such allegations, even if proved, do not state a claim of a violation of the statutory duty to bargain, and are, therefore, subject to dismissal, under R 423.165 (2)(d), for failure to state a claim upon which relief could be granted.

RECOMMENDED ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated:_____