**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

FLUSHING TOWNSHIP,
Public Employer - Respondent,

Case No. C11 D-083

- and -

BRIAN LEE FARLIN,
An Individual - Charging Party.
_____/

APPEARANCES:

Fahey Schultz Burzych Rhodes, P.L.C., by Stephen O. Schultz, for Respondent

Brian Lee Farlin, *In Propria Persona*

## DECISION AND ORDER

On May 24, 2012, Administrative Law Judge Doyle O'Connor issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charge and complaint.

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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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

**STATE OF MICHIGAN**
**MICHIGAN ADMINISTRATIVE HEARING SYSTEM**
**EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

FLUSHING TOWNSHIP,
Public Employer-Respondent,

-and- Case No. C11 D-083

BRIAN LEE FARLIN,
Individual-Charging Party.
_____/

APPEARANCES:

Brian Lee Farlin, Charging Party appearing on his own behalf

Stephen O. Schultz, for Respondent Public Employer

## DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, 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:

On May 6, 2011, the Charge was filed in this matter by individual charging party Brian Farlin against his former Employer, Flushing Township. The Charge alleged that Farlin's position as a police officer had been eliminated, resulting in his lay off in April 2011, in retaliation for Farlin having engaged in protected concerted activity in December 2010. The Charge additionally alleged that the Employer had bargained in bad faith by earlier securing financial concessions premised on the Union's belief that the concessions would avoid later layoffs, and despite that deal, the Employer imposed layoffs that were not the result of financial necessity.

On June 7, 2011, the Employer filed a motion to dismiss the Charge. The motion was denied as to the retaliation claim which had been properly pled. Judgment was reserved as to the bad faith bargaining Charge, to allow the exclusive bargaining agent Police Officers Labor Council (POLC) an opportunity to intervene if it chose to do so. The POLC expressly declined to intervene and the Employer renewed its motion to dismiss the bargaining Charge, on the assertion that Farlin lacked standing to pursue such a claim. On September 14, 2011, as more fully set forth below, the parties were notified that the Employer's motion to dismiss would be granted as to the bargaining charge.

The parties appeared on October 11, 2011, for trial on the remaining retaliation claim. After the offering and admission of a series of exhibits proposed by Charging Party, the Employer renewed its motion to dismiss the retaliation claim. At the conclusion of oral argument on that motion, I placed my bench opinion on the record, granting the motion and dismissing the retaliation claim, which is incorporated in my findings that follow.

Findings of Fact and Discussion and Conclusions of Law:

The Pre-Trial Motion to Dismiss

The Charge in essence amounted to two separate Counts, the first asserting a retaliatory motive in the elimination of Farlin's position and in his resulting layoff, with the second count asserting that the Township failed to bargain in good faith with the Union where it was alleged that the Employer negotiated concessions on the promise of avoiding layoffs and then implemented layoffs which were allegedly not financially motivated. I denied the Employer's pre-trial motion to dismiss as to the retaliation claim, which was competently and adequately asserted and regarding which there appeared to be material disputes of fact.

I initially reserved ruling as to the Employer's pre-trial motion to dismiss count two, which asserted a failure to bargain in good faith. It appeared from the pleadings that Farlin brought this charge in his individual capacity and it appeared that Farlin likely lacked standing to proceed. For that reason, I gave the exclusive bargaining agent an opportunity to intervene. In a letter of August 4, 2011, the POLC declined to intervene in this matter. On August 18, 2011, the

Employer again moved for summary disposition on count two, relating to the bargaining obligations. Farlin filed a timely response.

After review of that motion and response, I found it appropriate, on September 14, 2011, to advise the parties that the bargaining related aspects of the Charge would be dismissed for failure to state a claim. The duty to bargain runs between the employer and the recognized bargaining agent, such that an individual employee lacks standing to bring a charge against an employer related to the bargaining process. *United Steelworkers Local 14317 (Murray and Sturgeon)*, 2002 MERC Lab Op 167; *Coldwater Community Schools*, 1993 MERC Lab Op 94; *Detroit Public Schools*, 1985 MERC Lab Op 789. A charge asserting bad faith bargaining is, conceptually, indistinguishable from a refusal to bargain charge as both assert violations of Section 10(1)(e) of PERA.

The case remained set for an evidentiary hearing on October 11, 2011, and I advised the parties that I would not be taking proofs on the bargaining related charge. I advised the parties that the preliminary decision to dismiss the bargaining Charge would be incorporated in this final Decision and Recommended Order, and would thereupon be subject to exceptions.

## The Motion to Dismiss at Trial

The parties appeared for trial on the remaining allegation of the Charge, which was that the April 2011 layoff of Farlin was in retaliation for his December 2010 assertion of the right and intent to grieve any elimination of his position or any effort to lay him off. At the outset of the evidentiary hearing, the parties each proposed the admission of certain documentary evidence. After taking arguments, I accepted into evidence certain documents, including, in particular, Charging Party Exhibits 3 and 4, which are the official minutes of the July 8, 2010 and the July 29, 2010 Township Board meetings. Both parties conceded that the two sets of minutes were authentic and accurately represented what occurred at those meetings.

At the July 8, 2010, Board meeting, a power point presentation was made by the police chief in support of the proposed layoff of the two least senior Township police officers and a special meeting was called for July 28, 2010 to vote on that proposal. It was undisputed at trial that Farlin was one of the two least senior officers and that he was specifically referenced in the chief's presentation. At the July 28,

2010 meeting, the Board voted to implement the chief's proposed plan to layoff Farlin and the other low seniority officer.

Farlin was seriously injured in an off-duty accident on July 4, 2010, as a result of which he went off on what was anticipated to be a long-term sick leave. The minutes of the July 28 meeting reflect that the Township Board expressly addressed a concern with laying Farlin off while he was on sick leave, and it was decided that Farlin's layoff would not be implemented until he returned from sick leave. It is undisputed that the layoff of Farlin in April 2011 was immediately occasioned by his presenting himself to return to work from the sick leave, which began in July of 2010.

After the admission of the exhibits, the Employer renewed its motion to dismiss the retaliation Charge, asserting that the documents introduced by Farlin established that the decision to lay him off and eliminate his position had been made, and announced, in July of 2010 and could therefore not have been in retaliation for Farlin's December 2010 assertion that he would pursue a grievance if he was in fact laid off upon his eventual return from sick leave. After considering the arguments of both parties and admissions of fact made on the record by Farlin, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools,* 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc,* 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party had failed to state a valid claim under PERA upon which relief could be granted.

The substantive portion of my findings of fact and conclusions of law from my bench opinion are set forth below:[1]

JUDGE O'CONNOR:

> After the opening statements, the employer moved to dismiss the charge, and I questioned both the charging party and the employer's counsel, and they both argued at length what I should do.

[1] The transcript excerpt reproduced herein contains typographical corrections and other non-substantive edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

I am prepared to rule on the employer's motion on the record today, and to do that, I have to make certain findings of fact. And my findings of fact are: That the charge asserts that in December of 2010, Charging Party Farlin made it known that he intended to file a grievance if he was improperly laid off. That in January of 2011, that threat to pursue a grievance was discussed with management and that members of management are alleged to have asserted that they would never allow him to return to work, they would never allow Farlin to return to work; and that in April of 2011, Farlin, who had been on sick leave since June of 2010, was medically cleared to return to work, and upon presenting his clearance to return to work, was given a layoff notice.

Now, the charge asserts that this decision of April 19, 2011, to lay Farlin off was discriminatory and, therefore, unlawful under the Public Employment Relations Act because it was in retaliation for his December 2010 assertion of an intent to pursue grievances. The employer brought a pretrial motion to dismiss that charge, which I denied, because that charge states a claim.

If an employer makes a decision to act in a way which disadvantages an employee in retaliation for the employee's actual or attempted pursuit of rights under the Public Employment Relations Act, that conduct would be unlawful. The problem is that the parties have introduced a partial record today, and I am making findings of fact based on that partial record, and part of the record is Charging Party's Exhibit 4, which was proposed by Charging Party and admitted into the record.

And it establishes that on July 28, 2010, the decision was made by the board to lay Farlin off for what are asserted in those minutes to be financial reasons. The key is not whether the financial reasons were a wise or unwise use of resources, the key for purposes of my decision making here is that that occurred in July of 2010, the board voted to lay off two officers. The question then arose, and it's reflected in the board minutes which have been introduced into the record, that discussion was held on what to do about Farlin's status because he was then on sick leave, and the decision that's reflected in the July 28 minutes was

that he would stay in employment status until his sick leave was over, and that he would then receive his layoff notice, all of which occurred well before December 2010.

And I find that to be an insurmountable hurdle for the proofs that Farlin would have to put in to prevail.

The July 2010 board minutes are preceded in time and in exhibits by Charging Party Exhibit 2, which is the printout of a PowerPoint presentation that was made to the board at its July 8, 2010, meeting, and the minutes of that July 8, 2010, meeting are Charging Party Exhibit 3, which include the discussion of the likely need to lay off police officers because of a shortfall in the township's budget.

Where the charge rests entirely on the assertion that protected activity that occurred in December of 2010 precipitated the adverse employment action, that is the layoff, but where the proofs introduced show that [the] decision was in fact made in July of 2010, not just a general decision that layoffs would be necessary, but a very specific decision that Officer Farlin and another less senior officer would be laid off, and that Farlin's layoff would be deferred until his return from sick leave and that he would then be laid off, I find as a practical matter, as a question of proof, makes it impossible for charging party to prevail on the charge that he filed.

Part of the argument by Charging Party in response to the employer's motion to dismiss is that charging party asserts that he would present proof that the employer has made a decision that it will not recall him to work ever, and that that discriminatory intent has already been asserted or telegraphed or acknowledged by some employer representative, not to Officer Farlin, but to his union representative and to a coworker. The key to the charging party's argument on that question is that it was his understanding, as he asserts, that when he was laid off, he would be recalled upon the retirement of an officer who apparently everyone anticipates retiring shortly, however, that officer has not retired; and that the assertion that there is an intent to not recall Farlin when and if that officer actually retires is not

part of the charge, the charge wasn't amended to include that, and regardless, I find that that assertion is not ripe, and won't become ripe until and unless the officer retires, and then the township takes action adverse to Farlin.

Now, the officer may not retire immediately, people do change their minds, the officer may retire, the township may recall Farlin, in which case there's not a claim because in fact you [Farlin] would have been recalled, or the employer may not recall Farlin and instead give the job to someone else, in which case there [might] be a new claim, and that claim would be that they failed to recall him because of a retaliatory intent. But that would be a new claim, and that claim is not before me and can't be before me because it hasn't happened yet.

Based on the analysis I've just given you, I'm going to grant the employer's motion to dismiss. A written order will be issued.

## Conclusion

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

## 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
Michigan Administrative Hearing System

Dated: May 24, 2012