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,
Labor Organization-Charging Party,

-and-

AFSCME Local 1518[1],
Labor Organization-Interested Party.
_____/

APPEARANCES:

Michael K. Sly, Director of Operations, for Public Employer-Respondent; Tom Hill & Associates, by Thomas W. Hill, for Respondent on Remand; Kelly, Whipple, Zick, & Keyes, PLLC, by Ryann O'Boyle Bunch, for Respondent on Remand

L. Rodger Webb PC, by L. Rodger Webb for Charging Party, AFSCME Council 25

DECISION AND ORDER

On December 8, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition on Remand in the above matter recommending that we dismiss the unfair labor practice charge against Respondent, Blue Water Area Transportation Commission (Employer), because Charging Party, AFSCME Council 25 (AFSCME or Union), failed to state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The ALJ determined that the allegations in the Union's unfair labor practice charge stated no more than an ordinary breach of

[1] Inasmuch as there appears to be some debate as to whether AFSCME Local 1518 authorized the filing of the charge in this case, we have not listed them as a charging party, but have instead listed them here as an interested party. Since their status as a charging or interested party is not material to the disposition of this matter, we see no need to resolve the question of their status.

contract/wrongful termination claim affecting only one employee. The ALJ also reasoned that, because the parties had agreed to binding arbitration and the arbitrator found that the Employer did not implement or change a work rule, the charge was precluded from re-litigation before this Commission by collateral estoppel. The ALJ determined that Council 25 had not presented any issues that can be decided under PERA and, therefore, its charge is not reviewable by this Commission. The ALJ recommended that we dismiss the charge in its entirety.

The ALJ's Decision and Recommended Order on Summary Disposition on Remand was served on the interested parties in accordance with § 16 of PERA. On February 9, 2012, after requesting and receiving two extensions of time, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on Summary Disposition on Remand. Respondent did not file a response to Charging Party's exceptions.

In its exceptions, Charging Party alleges that the ALJ mischaracterized its charge as a breach of contract or wrongful termination claim affecting only one employee. Charging Party argues that its charge asserts that Respondent unilaterally implemented or changed a work rule and, therefore, alleges a violation of PERA, which is reviewable by this Commission. Charging Party also alleges that the ALJ drew the wrong conclusion from the arbitrator's decision. AFSCME argues that the arbitrator's decision was founded on the arbitrator's interpretation of the management rights provision in the parties' collective bargaining agreement rather than on the existence of a new work rule and, therefore, the issue was not previously litigated for the purposes of collateral estoppel.

We have considered each of the arguments made in Charging Party's exceptions, and find them to be without merit.

Factual Summary:

Since the 1970s, Respondent has required that each of their drivers have a U.S. Department of Transportation issued commercial driver's license (DOT card) in their possession. The requirements for a DOT card are contained in Federal Motor Carrier Safety Administration (FMCSA) regulations, which include the standards for fitness-for-work physicals that drivers must pass to obtain a DOT card.

Charging Party Michigan AFSCME Council 25 and its Local 1518 represent a bargaining unit of bus drivers employed by Respondent's public transportation service. Prior to her discharge, Audrey Roddy was a member of that bargaining unit. Roddy is a diabetic, whose medical condition requires her to take insulin by injection. She was discharged when the Respondent learned that she was ineligible for a DOT card as a result of her medical condition.

The charge filed on behalf of Michigan AFSCME Council 25, alleges that Respondent "without prior notice to the Union instituted a new work rule, or changed an

existing work rule, or enforced an otherwise moribund work rule to the effect that AFSCME unit bus drivers, *and specifically unit driver Audrey Roddy*, must qualify under Federal Motor Carrier Safety Administration regulations as a condition of continued employment." (Emphasis added.)

In answer to the charge, Respondent's Operations Manager sent a letter to the ALJ asking that the charge be dismissed and asserting that the Employer's work rule requiring bus drivers to have and maintain a DOT card has been in existence since 1976. Four members of Local 1518, including its past Chair and current President, signed the letter in affirmance of the accuracy of the assertions contained therein.[2] Subsequently, the ALJ directed Charging Party to respond to Respondent's answer to the charge and motion to dismiss, and instructed Charging Party to specifically address the applicability of the statute of limitations and the question of whether the matter involves a good faith contract dispute. In a November 25, 2009 order, the ALJ listed ten questions that Charging Party was specifically directed to address to supplement its earlier answers regarding the statute of limitations issue and the issue of whether the parties' dispute was merely a good faith question of contract interpretation. Charging Party submitted its supplemental response on March 4, 2011. One of the questions Charging Party was directed to answer was: "Regarding the statute of limitations, did the Employer promulgate a minimum qualification for drivers which required possession of a 'DOT card' in its employee handbook published more than six months prior to the filing of the charge? If yes, how is the matter not barred by the statute of limitations?" Charging Party responded to that question by stating:

> First, AFSCME's charges have nothing to do with possession of a "DOT card," which it acknowledges has been referenced in Blue Water's employee manual for some time, maybe since the early 1980s and certainly more than 6 months prior to the filing of the subject charges.
>
> Instead, the Union's charges relate to (i) Bluewater's promulgation - in September, 2007 - of a rule that unit drivers must qualify under federal Motor Carrier Safety administrative regulations as a condition of continued employment, and (ii) its promulgation of a rule, at the same time, that unit bus drivers may not, as a condition of employment, be insulin dependent.

Discussion and Conclusions of Law:

For the purpose of deciding Respondent's motion for summary disposition, we accept Charging Party's representation that it was unaware of the FMCSA regulation regarding insulin-dependent diabetics until Roddy was denied a DOT card. Charging Party complains that Respondent never notified Roddy or the Union of the regulation that disqualified Roddy from obtaining a DOT card. We hold that Respondent had no duty to provide such notice. Possession of a DOT card by the Employer's bus drivers has been a

[2] Following the remand of this matter to the ALJ, Respondent resubmitted the letter with the addition of a notary's stamp for each of the signatures.

long-standing requirement. By requiring drivers to have DOT cards, Respondent implicitly required drivers to qualify for DOT cards under FMCSA regulations. Because Charging Party knew of the long-standing Employer work rule requiring its bus drivers to possess DOT cards, it should have known that bus drivers' ability to obtain DOT cards was dependent on meeting the prerequisites for DOT cards. Charging Party cannot now complain that it was unaware of FMCSA regulations governing the issuance of such cards. The FMCSA regulations governing eligibility for a DOT card are published in the Code of Federal Regulations, a source that is equally accessible to the Employer and the Union.

We reject Charging Party's argument that FMCSA regulations, including that which disqualifies diabetic drivers who must inject insulin, became new rules promulgated by the Employer when Charging Party gained awareness of their existence. A requirement incorporated in a long-standing work rule does not become a new work rule, in and of itself, by reason of its belated discovery.

We find no merit in Charging Party's claim that this matter involves a "moribund" rule. Charging Party does not claim that the Employer's work rule became "moribund" by reason of lack of enforcement against or application to others. Rather, it is claiming that the work rule became "moribund" because Charging Party was unaware of its prior enforcement or application. Charging Party has failed to provide any authority in support of this position. Further, Charging Party's argument does not change the fact that this matter is nothing more than a dispute over contract interpretation.

On exceptions, Charging Party notes that when Respondent filed its motion to dismiss following our remand order, Respondent did not submit the affidavits we indicated were necessary to resolve what then appeared to be a disputed question of fact; Respondent merely added notarized signatures to the same statements made prior to the remand. Those notarized signatures were offered in support of Respondent's assertion that the requirement that drivers have a DOT card had been in place since 1976. However, given Charging Party's acknowledgment that Respondent has required drivers to have a DOT card since as early as the 1980s, the existence of the work rule is not contested and Respondent's failure to provide affidavits is immaterial.

We agree with the ALJ that the charge does not state a claim under § 10(1)(e) of PERA. The dispute here is over whether Respondent can enforce its long-standing requirement that drivers possess DOT cards. In the absence of allegations of contract repudiation, an unfair labor practice proceeding is not the proper forum for the adjudication of a contract dispute. *Detroit Regional Convention Facility Authority*, 25 MPER 8 (2011); *Wayne Co*, 19 MPER 61 (2006); *Village of Romeo*, 2000 MERC Lab Op 296, 298.

For the foregoing reasons, we agree with the ALJ that the charge does not allege facts indicating that Respondent unilaterally changed terms or conditions of employment or otherwise breached its duty to bargain. At most, the charge asserts a disagreement over the application of an existing work rule to Roddy. As the ALJ found, this matter

involves a disagreement over contract interpretation which is more appropriately resolved through the grievance arbitration procedures established under the parties' collective bargaining agreement. We will not find a violation of PERA based on the duty to bargain when, as in this case, the parties have a bona fide dispute over the interpretation of their contract. *Eastern Michigan Univ*, 17 MPER 72 (2004); *Village of Romeo*, 2000 MERC Lab Op 296, 298. It is only where the parties have not agreed to a mandatory binding procedure for dispute resolution that the Commission would exercise jurisdiction over a bona fide dispute about contract interpretation. *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 898. In this case, the parties have already taken advantage of the grievance resolution procedures provided in their collective bargaining agreement and have arbitrated this matter.

We have carefully considered the Charging Party's remaining arguments and conclude that they do not warrant a change in the result.

ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

BLUE WATER AREA TRANSPORTATION COMMISSION,
Respondent-Public Employer,

-and- Case No. C08 C-051

MICHIGAN AFSCME COUNCIL 25 and AFSCME LOCAL 1518[3],
Charging Parties-Labor Organizations.
_____/

APPEARANCES:

L. Rodger Webb, for Charging Party-Labor Organization, AFSCME Council 25

Thomas Hill, for Respondent Public Employer

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

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 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 AFSCME Local 1518 asserting that the Blue Water Area Transportation Commission (Employer or Blue Water) violated the Act in terminating the employment of bargaining unit member Audrey Roddy[4] in improper reliance on an allegedly

[3] As more fully described herein, it does not appear that Local 1518 was a willing participant as a supposed Charging Party in this litigation, nor that Charging Party's putative counsel in fact acted with authorization from Local 1518. It appears that the real party in interest is Audrey Roddy.

[4] The Charge only asserted claims as to the 2007 termination of Roddy. Late in these proceedings, counsel for Charging Party attempted to obliquely assert claims on behalf of another employee, Rebecca Fishel,

newly implemented work rule. As further developments in the case would make apparent, the Charge was based on an otherwise unremarkable employee discharge case with the dispute over the existence of just cause obfuscated in an effort to secure Commission review of the merits of the termination decision, which was otherwise not within the Commission's ordinary jurisdiction. Roddy, a municipal bus driver, was fired after failing a fitness for work physical exam. Roddy and her coworkers had for many years undergone a biennial physical in order to establish their fitness to retain a Federal Department of Transportation (DOT) commercial driving card. As an insulin dependent diabetic, Roddy was found disqualified under DOT regulations from operating a regulated commercial motor vehicle (CMV). The Charge was pursued, in essence, on the theory that while the Employer had long required a DOT commercial drivers license, and biennial DOT physical exams, the Employer, as a municipal bus service, was never (under Charging Party's theory) obliged to do so by Federal law, and that requiring Roddy to actually pass the medical exam under the standards provided by the Federal Motor Carrier Safety Administration (FMCSA) was somehow a newly promulgated rule. The FMCSA regulations provide the underlying requirements for a DOT card, as well as the standards used for fitness for work physicals, which must be passed to be issued a DOT card.

Respondent filed an answer and request for dismissal which raised both the issue of whether the matter had been filed outside the statute of limitations, where the Employer asserted that the rule or practice of requiring DOT licensure had been in effect since at least 1976, and whether it was regardless a mere good faith contractual dispute. It was 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 by Webb on May 20, 2008, expressly on behalf of Charging Party Council 25, but not on behalf of Charging Party Local 1518. The response by Council 25 did not challenge the authenticity or accuracy of factual assertions made in the document signed by the President of Local 1518 and others, nor did it address the apparent opposition of Local 1518 to the

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who had never been mentioned in the Charge. No effort was made to amend the Charge and any claims as to other employees are not before me for purposes of this decision.

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 discerned from Webb's response, was that an employee was terminated in reliance on the Employer's finding that the employee was not physically fit for duty, which in turn was based on a health clinic report finding the employee unfit to be issued a DOT card. Webb asserted 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, Webb's response to the motion to dismiss also made clear that the Employer did not in fact assert that defense to the particular grievance, in writing or otherwise, as a new work rule to employees generally.

Webb's response to the Employer's initial motion was supported by an unsworn assertion that the AFSCME Council 25 field staff representative Arthur Wood was personally unaware of any formally promulgated work rule or contractual provision evidencing prior reliance by the Employer on Federal DOT fitness for duty standards for bus drivers, yet Wood nonetheless acknowledged being aware of Blue Water employees who, in the past, were not allowed to work because of failing their DOT fitness for work physicals. Webb's response to the motion did not challenge the acknowledgement by the Local Union officials that they were aware that the DOT card requirement, the issuance of which was premised on meeting the fitness for duty standards, had been in place and relied on since 1976. Webb's reply expressly acknowledged that the Employer's conduct did not rise to the level of a repudiation of the terms of the contract.

On June 2, 2008, I issued a Decision and Recommended Order proposing the dismissal of the Charge, finding that the allegations, read in the light most favorable to Charging Party, only stated an ordinary breach of contract claim related to the discharge of an employee and that:

> 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.

On August 17, 2009, the Commission issued its Decision rejecting my earlier proposed order and remanding for further proceedings. The Commission found error in the granting of summary disposition in reliance on the unsworn statements made in support of the Employer's motion, even though the statements were signed by the current and former officers of the putative Charging Party AFSCME Local 1518 and were not disavowed by Charging Party AFSCME Council 25.

On September 29, 2009, in keeping with the remand Order, I wrote to the parties indicating that:

> The earlier Decision and Recommended Order proposing the dismissal of this matter on motion was reversed by the Commission on August 17 2009. In its Decision, the Commission notes that the Employer's motion to dismiss was merely supported by letters signed by the Local Union current and former officers, and not by proper affidavit. The response filed by AFSCME Council 25 was also supported by similarly unsworn statements.
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> The Charge asserts a recent unilateral change in work rules. The Employer's earlier Answer and Motion asserted that the rules in question have been in effect and followed since 1976, which would have been well outside the statute of limitations governing such matters. Significantly, the Employer's factual assertions appear to have been supported by, and signed by, the current President and the current Chapter chair of Charging Party Local 1518.
>
> If the Employer wishes to again pursue a motion to dismiss the Charge without a trial, that motion must be supported by proper affidavits. . . .
>
> If no motion is filed, I will set the matter for trial. If a motion is filed, and supported by facially valid affidavits, then the Union will have twenty-one (21) days from service of the motion in which to file a proper response, which is to be likewise supported by competent affidavits of fact which fairly meet the factual allegations made in support of the motion.

> Both parties should address in particular the statute of limitations issue raised by the earlier motion, as well as the question of whether or not this is a mere good faith contract dispute such that the details and enforceability of the disputed work rules should be left to arbitration.

On October 13, 2009, the Employer renewed its motion to dismiss, attaching the now sworn statement by the current and former Local Union officers that the DOT card requirement had been in effect since 1976. The Employer also submitted and relied on the November 10, 2008, arbitration Award of Elliott Beitner arising from the same disputed separation of Roddy's employment.[5] The Award affirmed the suspension and ultimate discharge of Roddy as proper under the terms of the collective bargaining agreement. The Employer also submitted copies of its employee handbook for 1981 and 1983, each of which contained the requirement that drivers have a current DOT card in their possession in order to work. On October 28, and again on November 6, 2009, Webb sought and was granted extensions of time to file its response to the dispositive motion.

Webb filed a letter in response to the motion to dismiss on November 9, 2009. On November 25, 2009, I wrote to Webb regarding the response filed on behalf of Council 25, indicating that:

> Despite the specific directions of the September letter, and despite several extensions of time being granted, the Union's response does not address either the statute of limitations issue or the question of why this matter is not a mere good faith contract dispute. I note that those very same questions were put to the Union in my letter of April 15, 2008. The Union must supplement it's response and substantively address the questions which were earlier put to it to aid me in determining if there is a good faith and material dispute of fact warranting the holding of an evidentiary hearing in this matter.

[5] Of some significance, the Arbitration Award recounted the assertion by Robert Carroll, President of Local 1518, that: 1) he had not authorized attorney Rodger Webb to represent his Local or to bring the Roddy grievance to arbitration; 2) not only had the Local not authorized the pursuit of an unfair labor practice charge by Webb, Carroll had not even been informed of its filing; and 3) Carroll had not authorized Webb to file an apparently related claim with the Federal Equal Employment Opportunity Commission (EEOC). Carroll further asserted in the arbitration proceeding that he had been aware of the DOT card requirement and the need to pass a DOT physical examination to obtain and retain such a card as an employment requirement for over seventeen years and that those requirements had been applied to preclude the return to work of other Blue Water employees prior to the Roddy suspension, with the actual knowledge of, and without opposition by, AFSCME Council 25 representative Arthur Wood.

I note in particular that the Union's core claim in the Charge appears to be that adherence to the minimum qualification of possession of a valid 'DOT card' is a recent and improperly imposed change in conditions of employment. That claim seemingly runs contrary to the notarized statement by current and former Local Union officers who assert that the 'DOT card' requirement is one of long standing.

To aid me in attempting to ascertain the claims being made by the Union, the Union must submit a proper brief which substantively addressees with specificity the following issues, *in numbered paragraphs corresponding to those set forth below*.

1. Did Audrey Roddy possess a valid 'DOT card' at the point of her separation from employment in September of 2007?

2. Regarding the statute of limitations, did the Employer promulgate a minimum qualification for drivers which required possession of a 'DOT card' in its employee handbook published more than six-months prior to the filing of the Charge? If yes, how is the matter not barred by the statute of limitations?

3. The Employer has submitted a copy of what appears to a be a portion of an employer handbook seemingly effective in 1981 and apparently referenced in the Beitner Award, as well as a similar notice dated 1983, which seemingly direct that all bus drivers must possess a 'DOT card'. Does the Union dispute the existence or authenticity of that handbook, and if not, how is this matter not barred by the statute of limitations?

4. The Employer has submitted notarized statements by various current or former Union officials asserting that they were aware of the 'DOT card' requirement for drivers for years, and even decades, prior to its application coming into dispute regarding former employee Roddy. These officials or former officials purportedly include Michael Sly, former Chapter Chair; Mark Sheldon, former Chapter Chair; Bob Carroll, former Chapter Chair and current Local President. Additionally, the Employer asserts that Art Wood, AFSCME Staff Representative acknowledged, regarding Roddy, that the Employer could do little as it had long required compliance with DOT as a minimum standard. I do not take any of those assertions as proven, but rather as an offer of proof, although particular weight must be

given to Carroll who is assertedly the President of one of the two Charging Parties. I understand that Council 25's position is that some of its staff, and some individual Blue Water employees, were not aware of the existence of a 'DOT card' as a minimum driving requirement rule at this workplace. The Beitner Award seemingly held as a matter of fact that the Employer Handbook did require possession of a DOT card as a minimum qualification. In light of the Employer's offer of proof, and the Arbitrator's factual findings, what proofs does AFSCME propose to rely on in establishing a good faith basis for asserting that the requirement of possession of a 'DOT card' as a minimum qualification for working was a recent and unilateral rule change imposed within six months of the filing of the charge?

5. To the extent that AFSCME relies on an assertion that notice to *some* AFSCME Local officers does not constitute proper notice by the Employer to AFSCME Council 25 itself, how is that assertion not made irrelevant by the 'knew or should have known' standard set forth in *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983), particularly given that the Commission has consistently refused to delve into the internal structure and affairs of labor organizations or the relationship between a local affiliate and its parent body as being beyond its statutory mandate. See *Jackson County Medical Care Facility*, 1967 MERC Lab Op 455, 457; *Catholic Social Services*, 1967 MERC Lab Op 48, 51; *City of Pontiac*, 1966 MERC Lab Op 200, 203; *Schoolcraft Community College*, 1996 MERC Lab Op 492?

6. To the extent that AFSCME relies on an assertion that notice to *some* AFSCME Local officers does not constitute proper notice by the Employer to AFSCME Council 25, how does that assertion raise anything more than a mere contractual dispute over the propriety of the Employer's implementation of the 'DOT card' rule or the application of the rule?

7. Why does the finding by Arbitrator Beitner that the Employer in fact had and was entitled to apply the 'DOT card' as a minimum qualification not preclude this dispute from being anything more than a mere contract dispute over the application of an existing rule?

8. Why is the Arbitrator's factual finding, that there was a pre-existing rule requiring possession of a 'DOT card', not collateral estoppel in this proceeding as to that single factual finding?

> 9. The Arbitrator ordered Roddy placed on an extended medical leave and to be then reinstated to employment if she were able to secure an exemption regarding the 'DOT card' within one year of the Arbitrator's November 10, 2008 Award. A year having transpired, what is the employment and DOT status of Roddy? Has she secured a DOT exemption or otherwise secured a DOT card and, if so, has she returned to work or sought to return to work, or has she failed to secure an exemption and DOT card and been terminated? How does Roddy's present employment status or eligibility affect the viability of the Charge or the extent of the relief sought?
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> 10. What specific relief does the Union seek if it prevails in this Charge case?
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> The Union's brief must provide a clear and complete statement of the facts and law upon which it relies and it must reply fully and without merely incorporating by reference assertions made in other documents. See R 423.151; R 423.173; R 423.184. To the extent that material disputes of fact are claimed, they must be supported by affidavit. I also request that the Union's supplemental brief be in normal sentence and paragraph structure, rather than in clips of partial sentences and phrases the meaning of which proves difficult to decipher, and that it rely on plain language with minimal unnecessary legalese. See, Using Microsoft Word's Readability Program, Norman O. Stockmeyer, Michigan Bar Journal (January 2009); Do You Know Your Reader? M. Cooney & J. Clement, Michigan Bar Journal (June 2007); enclosed.

Webb was cautioned that a response was due December 19, 2009. On December 14, 2009, Webb sought, and was granted, an extension to January 11, 2010 to file its responsive brief.

On January 11, 2010, Webb, despite the instruction to file a proper brief, again filed a letter in response to the dispositive motion. Attached to the letter-response was a purported "supplement affidavit of Arthur Wood", the AFSCME Council 25 staff person then responsible for the Council's relationship with Blue Water Transportation. The document does not attest that Wood had personal knowledge supporting the claims made and, in fact, the "affidavit" openly acknowledges that Woods' assertions of fact are based on subsequent investigation and hearsay. Webb did not request oral argument on the dispositive motion.

On March 9, 2010, a letter was sent to the parties, addressing the deficiencies in Webb's filing and noting that:

> On November 25, 2009, I ordered AFSCME to file a supplemental brief in this matter. As I noted at the time:
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> > I have received and reviewed AFSCME's letter in response to my letters of September 29 and October 19, 2009. Despite the specific directions of the September letter, and despite several extensions of time being granted, the Union's response does not address either the statute of limitations issue or the question of why this matter is not a mere good faith contract dispute. I note that those very same questions were put to the Union in my letter of April 15, 2008.
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> In that order of November 25, 2009, I specifically directed that AFSCME's counsel file a proper brief which substantively addressed a series of specifically enumerated questions, and that AFSCME's brief provide its responses numbered in the same fashion as my questions. That direction was given because I found the Union's earlier responses to be evasive and almost entirely uninformative. I further requested that:
>
> > . . .the Union's supplemental brief be in normal sentence and paragraph structure, rather than in clips of partial sentences and phrases the meaning of which proves difficult to decipher, and that it rely on plain language with minimal unnecessary legalese.
>
> The later request was made because I found the Union's prior filings of little utility as they were so tortured in structure and laden with legalese as to be nearly incomprehensible.[6] To aid the

[6] See the following *verbatim* single sentence excerpted, in its entirety, from Webb's May 20, 2008 filing in response to the motion to dismiss the Charge as an example of the obfuscation and incomprehensibility of Webb's submissions: "Council 25's position is that there is no such work rule, on grounds same was neither ever promulgated or (to AFSCME's knowledge) implemented with regard to any unit employee, the relied upon casual conversations notwithstanding (it is unclear whether any of these persons, any more than Council 25 representative Art Wood, knew what was intended or required by the term "DOT physical", or that any particular were identified, let alone explained in that regard), that the reference on employees' cards does not constitute effectual notice, that no publication were ever made to the membership (no such purported rules- which are still not identified, let alone presented- are set forth in any written rule or in the Company's employee manual), or negotiated, or even proposed under auspices of

Union in responding, I offered to freely grant extensions of time, but cautioned that a failure to file a timely and substantive brief would result in a decision on the motion to dismiss without a hearing or other proceedings.

On December 16, 2009, in granting the Union's request for additional time to respond, I reiterated that:

> The brief needs to indicate which party(ies) are responding. The brief must conform to the directions given in the letter of November 25, 2009; that is, the brief must in separately numbered paragraphs, in plain and understandable language, substantively address the factual and legal questions put to the Union. I note that I have tried since my original letter of April, 2008 to secure from the Union the sort of articulation of a claim that we expect when a claim is first filed and that despite multiple filings by the Union, and despite the granting of multiple extensions of time, I have yet to succeed at securing that basic disclosure.

Having been granted the one extension of time that was requested, the Union's counsel filed a non-complying response on January 11, 2010. The Union refused to file a proper brief, responding by letter instead; refused to indicate whether it was filed on behalf of AFSCME Council 25, or Local 1518, or both; refused to answer the numbered questions in separate paragraphs as expressly directed, thereby diminishing any utility that the responses might have provided; refused to directly respond to many of the questions including the question of whether the affected employee, Audrey Roddy, had a valid DOT card at the point of her separation from employment; and refused to utilize normal sentence and paragraph structure, rendering significant portions of the filing as incomprehensible as the prior filings.

It remains unclear in this case whether the failure of the Union's counsel, despite repeated cautioning, to comply with directives

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negotiations, that any such purported rule (specifically concerning insulin dependence) has been disregarded for unit employees, including respecting those purportedly made subject in September 2007, hence is legally unenforceable as a condition of employment, and that its putative invocation in the premises herein is materially compromised by the intervention and advocacy of the Company Operations Manager (in the complete ignorance of the Union)."

and the failure to articulate claims on behalf of the Union is due to an inability to do so or rather is a deliberate effort at obfuscation. In prior cases, the same counsel's refusal to comply with agency rules and directives resulted in the dismissal of substantive claims that were being pursued by his client. See, *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009), lv den'd 482 Mich Sup 1133 (2009).

Because I am uncertain of the basis of the Union's failure to date to articulate its claims, I am scheduling the matter for oral argument on the question of whether the matter should be dismissed for failure to state a claim and as barred by the statute of limitations. It still appears as if this is merely a dispute over application of existing contract language, which has been submitted to and resolved by an arbitrator, and that the challenged rule requiring possession of a valid DOT card has been in existence for many years. It remains my understanding that Roddy did not possess a valid DOT card by the deadline set by the Arbitrator and was consequently terminated in keeping with the Arbitrator's interpretation of the collective bargaining agreement. It is my hope that perhaps at oral argument, I will be able to pry out of the Union just what it is claiming the Employer did that was unlawful under PERA.

The core issue to be addressed at oral argument, as near as I can tell from the documents I have received to date, is whether the Employer in fact instituted a requirement that its drivers possess a valid DOT card and whether that requirement was instituted more than six months before the Charge was filed. It appears that a related issue is the Union's seeming suggestion that the Employer's alleged insistence that individual drivers comply with the Federal Motor Carrier Safety Regulations is somehow substantively different than the requirement of possession of a valid DOT card.

The parties should appear through their representatives. Individuals with authority to resolve the dispute should be present from AFSCME Council #25, Blue Water Transportation, and AFSCME Local 1518. It is not necessary to bring all of the possible witnesses; however, it would be helpful if the parties could have on hand individuals with personal and substantive knowledge regarding the core dispute over when the DOT card/FMCSR compliance requirement(s) was instituted.

By an order of March 9, 2010, the matter was noticed for oral argument on May 25, 2010; however, on May 20, 2010, Webb submitted a seven page letter asserting that oral argument on the matter would be "*redundant and therefore presumptively futile*", with the letter concluding with the assertion that "*In the premises presented herein, AFSCME has determined not to attend the argument, so as not to waste either the ALJ's time or the parties*"". In response to Webb's letter refusing to attend oral argument, I placed the matter on the "ready to write" docket for issuance of a decision.

On August 26, 2010, Webb wrote to inquire as to the status of the case, asserting that he had "*heard nothing . . . since the order entered on March 9, 2010"* which set the matter for oral argument, which Webb had refused to attend. On September 9, 2010, I replied to the parties that:

> I have received Mr. Webb's letter of August 26, 2010, in which he purports to seek notice of the status of the case and in which he inaccurately suggests that the last action in this matter was an order entered on March 9, 2010.
>
> To the contrary, and as Mr. Webb is aware, the last action in this matter was his own unilateral announcement that AFSCME was refusing to attend the hearing scheduled for May 25, 2010, thereby effectively abandoning the claim. See MERC Rule 423.165 (2) (g). Absent a voluntary withdrawal, a formal order will be issued recommending the dismissal of the Charge as abandoned.

In response, Webb objected that the suggestion that AFSCME had abandoned the claim merely by refusing to appear for a scheduled hearing, was "patent nonsense" and, purportedly on behalf of AFSCME Council 25, demanded that I recuse myself. On September 24, 2010, I responded to the informal demand for recusal as follows:

> I have reviewed your letter of September 20, 2010 in which you seek my recusal following your failure to appear for the scheduled oral argument in this case on May 25, 2010. This relief cannot be sought with such informality. Under Executive Order No. 2005-1, which is controlling in this matter, a request for recusal may only be considered by SOAHR on the "filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification". Further, MERC Rule R 423.161, which is also

> controlling where SOAHR hears cases on behalf of MERC, provides that any request for relief other than by a ULP charge must be by motion, which must be in writing, and if an issue of law is involved, shall be accompanied by a brief citing the authority on which it is based.
>
> Your request asserts that my handling of the case to date "*is based upon either [my] ignorance of the applicable law or unwillingness to apply it, in circumstances that implicate [my] capability to impartially hear the case"* and that I should recuse myself as AFSCME Council 25 "*seeks a fair hearing before an impartial administrative law judge, one who is educated in applicable law and the relative responsibilities of parties appearing before the Commission"*. Further, you assert that *"Council 25 considers that you have so utterly defaulted in those regards in this case as to require your withdrawal".* Such grounds, if established, would warrant my recusal not only from this case, but seemingly also from all other cases involving AFSCME Council 25 or its affiliated Locals.
>
> To properly place the matter before me, you will need to file a motion, supported by affidavit, and supported by a brief citing relevant authority. If filed, your motion will need to specifically indicate whether you are acting on behalf of only AFSCME Council 25 or also on behalf of AFSCME Local 1518, an issue about which I had earlier sought clarification, given the Local Union's apparent alignment with the Employer in the underlying dispute. Additionally, if filed, your motion must, with specificity, indicate whether you seek my recusal in just this case, or in all cases involving AFSCME, and must affirmatively assert that you have authority to make such a request on behalf of AFSCME Council 25 and/or its affiliated Locals. Upon receipt of proper pleadings, I will set a briefing schedule for the other party/ies, including, depending on the nature of your filing, counsel in all other pending AFSCME related cases.

Webb withdrew the informal recusal request on October 5, 2010. On October 19, 2010, in an effort to move the litigation forward, I wrote to Webb, indicating:

> I received your letter dated October 5, 2010, withdrawing your earlier recusal request, but not withdrawing the factual allegations underlying that request. In that most recent letter, you did not seek any action regarding this matter; however, in

> your earlier letter of September 20, 2010, you obliquely suggest that AFSCME wants a hearing in this matter, notwithstanding your refusal to appear for the last scheduled hearing. I am willing to treat that letter as a request to reopen the matter, which I am conditionally granting. A notice rescheduling the earlier ordered oral argument is enclosed.
>
> A proper brief must be filed by AFSCME which directly, factually, and forthrightly addresses the issues identified in my Order of November 25, 2009 and the deficiencies identified in my letter of March 9, 2010. That brief must be drafted in an ordinary format with normal sentence and paragraph structure; it must recite and then answer each numbered question from the November 25, 2009, Order; and it is to be filed and served no later than thirty (30) days prior to the scheduled hearing date so that the Employer has an opportunity to respond. Any non-complying documents will be returned.
>
> . . . I am also enclosing the recent Michigan Court of Appeals decision in *Ponte v Ponte*, CA # 292081(October 12, 2010), as well as a copy of the decision in *MSU (Morales)*, 23 MPER 62 (2010), which may be of interest.[7]
>
> A failure by AFSCME to file a timely and proper brief, or to appear for the re-scheduled hearing, will result in the immediate dismissal of the matter as abandoned.

With that letter, a notice of hearing was issued, setting the matter for oral argument on March 30, 2011. On February 24, 2011, based on a request by Webb, an additional copy of the October 19 briefing schedule, requiring the filing of a brief by March 1, 2011, was provided to him. Webb's brief was filed three days late on March 4, 2011, having been mailed, according to the proof of service, one day after the filing deadline. It was nonetheless accepted and relied upon. In that brief, Webb finally acknowledged that the Employer had, since at least the early 1980s, required its bus drivers to have in their possession a valid DOT commercial driver's license when reporting for work.

The parties mutually requested an adjournment of the scheduled March 30, 2011, hearing date and the matter was re-set for oral argument on August 8, 2011. On August 2, 2011, Webb filed a supplemental pleading

[7] Those two decisions address the issuance of sanctions based on frivolous or abusive filings.

with attached excerpts from depositions taken in some unspecified and purportedly unrelated matter. That pleading was accepted for filing, even though it was not authorized by the applicable Rules or by any briefing order and leave to file it was not sought.

The representatives of the parties appeared for oral argument on August 8, 2011. Despite the earlier order that the parties should appear through their representatives and that "Individuals with authority to resolve the dispute should be present from AFSCME Council #25, Blue Water Transportation, and AFSCME Local 1518", AFSCME Council 25 appeared solely through Webb, who continued in his refusal to clarify whether or not he was appearing on behalf of AFSCME Local 1518. Blue Water appeared through its labor relations consultant and through counsel, with its operations manager, Michael Sly, present as a client representative. AFSCME Local 1518 did not take part in the hearing.

At oral argument, AFSCME Council 25, through Webb, admitted most of the salient facts. Webb admitted that: 1) the Blue Water requirement that each of its drivers have a DOT card in their possession before going on a run each day had been in place since the 1970s; 2) Roddy personally had a DOT card and while employed at Blue Water went to the biennial physical exams to secure a renewal of her DOT card; 3) Roddy was found by the arbitrator to have been not qualified to drive at the point that she was removed from employment, precisely because, as an insulin dependant diabetic, Roddy could not meet the standards for a DOT physical exam; 4) the Arbitrator's award had not been challenged in the circuit court and was therefore final; 5) the Arbitrator granted Roddy an additional year after issuance of the Award to secure a renewal of her DOT authorization to drive and that Roddy did not secure such a renewal or waiver and, as a consequence, Roddy was terminated from employment; and 6) subsequent to the Beitner Award, the Union and the Employer negotiated a new three year agreement which left intact both the requirement to have a DOT commercial driver's license as a condition of employment and the outcome of the Beitner Award.

At oral argument, I granted Webb's request, over the Employer's objections, to introduce into evidence excerpts from deposition transcripts of Barry Gilmore, Union steward for Roddy, Michael Sly current operations manager and former Local Union official, and Mark Sheldon, Local Union officer. I granted that request even though it was inherently irregular to

introduce evidence at oral argument and despite the fact that the exhibits were mere partial excerpts from much longer depositions.

Union steward Gilmore's deposition testimony excerpt included his assertion that all drivers were aware that they had to have a DOT commercial license; that they all had to take pre-employment and periodic physicals; that all drivers knew that they had to "comply with the federal medical examination"; that at the physical exams, the doctors took the drivers through the federal regulations to see if the driver could comply; and that Gilmore himself had been forced off work for a period of time because an episode of high blood pressure rendered him unable to meet the medical examination standards.

Michael Sly's deposition testimony excerpt reflected that he had immediately removed Roddy from driving when it was reported to him that Roddy was injecting insulin, as he understood that to be unsafe for a driver and a violation of the minimum safety related qualifications set under Federal regulations. Sly immediately contacted the clinic and demanded that they re-examine Roddy, who then failed the physical. As with Gilmore, Sly testified that when he was hired in approximately 1997, he and all drivers were required to have and maintain a DOT issued commercial driver's license and were required to take periodic medical exams to keep it.

Mark Sheldon's deposition excerpt shed little light on the relevant issues. He was hired by Blue Water in 2001, by which time the workforce was represented by AFSCME; he was given a copy of Blue Water's employee manual which it is conceded included the requirement that drivers possess a DOT card; he was not given the specific DOT standards, but believed he was generally familiar with them from his prior employment as a truck driver; and he had served as a union steward and as a higher ranked chapter chair in Local 1518.

At the conclusion of oral argument, I placed my bench opinion on the record, which is incorporated in my findings that follow.

Discussion and Conclusions of Law:

It remains that Council 25's allegations[8], read in the light most favorable to that Charging Party, state no more than an ordinary breach of contract/wrongful termination claim affecting one employee. 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.

As the Commission held in *Royal Oak Police*, 23 MPER 107 (2010), no breach of a bargaining duty occurs where the general topic of the disputed action was "covered by the CBA". The Commission's analysis of whether a topic is "covered by" terms of the contract has always been general, not specific, and the immediate topic need not be mentioned in the contract. Here, the dispute is over whether Roddy was fired for just cause, which is certainly covered by the contract and was authoritatively addressed in an arbitration award. The authority of the Employer to set minimum qualifications for bus drivers was expressly addressed in the contract. Even the question of whether a DOT card was required as a prerequisite for working was covered by the express terms of the long-existant employee handbook, as acknowledged by the Local Union officers. The precise issue seized on by AFSCME as not "covered by" the contract, because it was not explicitly mentioned, is the fact that to obtain and retain a DOT card an

[8] I make no findings as to AFSCME Local 1518, which does not appear to have ever authorized the bringing of claims purportedly on its behalf in this matter or consented to representation by Roddy's counsel in this matter.

individual must pass a physical exam which meets the standards set by the FMCSA regulations.

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 Webb's responses to the Employer's renewed motion to dismiss, remains that an employee was improperly terminated without just cause based on the Employer's misinterpretation or misapplication of 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.

It is now apparent that from the outset no viable, non-frivolous, basis existed for this Charge alleging that the Employer had unilaterally instituted a change in working conditions in 2007. Stripped of the obfuscating verbiage, all that happened, and all that in good faith could have been alleged, was that a long standing policy which was well known to employees had an adverse affect on a particular employee. All bus drivers had, for at least three decades, been required to have a Federal DOT license. To obtain and retain that license, each driver had to pass a physical and be retested every two years. The individual on whose behalf this Charge was pursued herself regularly took the biennial physical. The events which led to her termination began with the Employer receiving information which led it to believe that she was a diabetic dependent on injected insulin. The Employer further understood that to be an unsafe and disqualifying condition under the DOT standards. The Employer contacted the clinic which had earlier cleared Roddy, advised the clinic that the Employer believed Roddy was an injectable-insulin dependent diabetic, and the clinic concurred that the condition was disqualifying under applicable DOT regulations.

Regardless of whether the Employer or clinic acted properly in interpreting the facts or the DOT regulations, this case never involved a change in conditions of employment; rather it involved a disputed application of a long-existing policy that required the drivers to pass a DOT physical in order to keep their jobs. In order to pass that physical any individual taking it must meet the standards set by FMCSA regulations, which control who can drive a commercial motor vehicle. An Arbitrator reviewed the Employer's handling of the dispute, and, after granting the

employee an additional year to attempt to secure a waiver or exemption from the DOT, which she failed to accomplish, the Arbitrator's award determined that the employee had been properly terminated as unfit to work. The Arbitrator held that there was no new work rule; that the Employer acted properly under a contract article which expressly gave it the right to set minimum qualifications for drivers; that the medical restriction was not arbitrary or capricious and that it was predicated on a reasonable concern for the safety of the driver and passengers.

The Arbitrator's findings constitute a separate ground on which to find that the Charge fails to state a claim, where it assets an unlawful unilateral change in conditions of employment. The doctrine of collateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a final judgment and the issue in question was actually necessarily determined in the prior proceeding. See, for example, *People v. Gates*, 434 Mich 146 (1990). The doctrine is intended to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. See *Detroit v. Qualls*, 434 Mich 340 (1990).

Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in the earlier action. *Arim v. General Motors Corp*, 206 Mich App 178 (1994). The courts have held that the decision of an arbitrator can have collateral estoppel effect on subsequent administrative or judicial tribunals and decisions, and has held with respect to the identity of the parties that individual employees are substantially identical to the labor organizations which represented them both in terms of arbitration and as charging parties before MERC. See, for example, *Senior Accountants, Analysts and Appraisers Association v. City of Detroi*t, 60 Mich App 606 (1975), *aff'd,* 399 Mich 449 (1976). For a general discussion of the collateral estoppel interplay where an arbitration proceeding and an administrative agency proceeding are involved, see also the *Dearborn Heights School District #7 v. Wayne County MEA and Sherrie Adis*, 233 Mich App 120 (1998). Here, the parties agreed to final and binding arbitration of disputes arising under the collective bargaining agreement. They arbitrated their disputes over the termination of Roddy's employment. The Arbitrator found, as a factual matter, that the Employer had, in keeping with its expressly reserved contractual rights, set compliance with DOT medical examination standards as a minimum qualification for bus drivers.

The Arbitrator gave Roddy an additional year in which to secure an individual waiver and a valid DOT commercial driver's license and held that, under his final and binding interpretation of the contract, the termination of Roddy's employment would be proper and final if she could not meet that one year deadline. The above facts are no longer legitimately open to good faith dispute.

Oral argument on the Employer's renewed motion for summary disposition was held on August 8, 2011. After considering the arguments and admissions of fact made on the record, 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 timely and valid claim under PERA.

The substantive portion of my findings of fact and conclusions of law from my bench opinion are set forth below:[9]

> JUDGE O'CONNOR:
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> > I'm prepared to issue a bench decision. This matter has been in litigation for quite some period of time. It asserts an unfair labor practice by the Employer by purportedly promulgating a new work rule without bargaining with the union. I find notable that the Local Union is not only not participating in this case, but seemingly quite vehemently disagrees with the prosecution of this case. What is factually undisputed in all of the pleadings, the affidavits and the deposition transcripts that were proposed today, which . . . . I'm going to admit the deposition transcripts [offered by Charging Party at oral argument] over the Employer's objections. They're partial, they're late, they're incomplete, but nonetheless I've relied on them in my questioning of counsel today and I will admit them for that limited purpose, and so the Commission has them for review since my decision is subject to review.
>
> > What is not in dispute here, there is no legitimate, material, good faith disputed fact that the Employer has for decades required employees to have a DOT card as a condition of employment [and] that every witness who testified in deposition transcripts that were proposed today confirmed

[9] 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.

that. Charging Party's counsel has confirmed on the record today that Roddy, the employee in question, was subject to a DOT physical every two years in compliance with the rule that you have to have and maintain a DOT card. I understand fully that federal law would allow Blue Water to not require its employees to have a DOT card. Some municipal bus systems require it, some don't.

For very much the same reason that we're well familiar with the fact that many public sector employers adopt by reference the DOT drug testing regimen, the use of DOT certified labs to do drug testing, the use of the protocols and the cut-off levels, not that they're mandatory for public employers, some public employers. For most of them they're not mandatory. They don't even apply. But the parties adopt them by reference because they're readily, easily understandable. I should take back the easily understandable. Nobody understands them, but they're easy to reference, the source of the obligations, and to seek guidance and case law and agency interpretive bulletins on how to apply those rules. The [Blue Water] rule requiring a DOT card has been in existence for decades. The obligation to comply with it by getting a physical every two years was well-known to all of the employees, including in particular the employee who ran afoul of it in this instance.

[Webb] has argued quite vociferously that somehow the Employer's suggestion, insistence, [or] request to the medical examining facility that it take into account the insulin dependent diabetic question was improper and that it went further than the rule required. That may be, and it may not be, but it is not a new rule. The fact is that no one could be expected to know the entire parameters of what physical exam would be given in 1976 under DOT regs, 1980 under DOT regs, 1988 under DOT regs, 1995 under DOT regs. Those weren't just random dates. Drug testing came into the middle of those or [was] added to the DOT regimen for testing. In 2020 we can anticipate that those regs will change and that the physical exams that are given may well change, that the requirements may change. Medicine changes. Law sometimes follows rationally behind it, sometimes not. But the requirement has been in place for years . . . . The questions I asked of Charging Party's counsel were focused on why this case isn't moot, where it was arbitrated and an arbitrator interpreted the contract, found that it applied, found that it allowed the employer to require as a minimum qualification that you have this DOT card, found that the employee did not have such a card and gave the employee an additional year grace period to get such a card,[10] and it's factually

[10] According to the Arbitration Award, at the point in November of 2007 that Roddy was placed on involuntary medical leave/suspension from work, the Employer encouraged her to seek a waiver from the Federal DOT, and promised to reinstate her if she received it. The Local Union representative even went by scheduled appointment to Roddy's home to assist her, but she refused to see the Union representative, claiming she was too busy. In November of 2008 the arbitrator gave Roddy a year in which to seek and

undisputed that she didn't get a DOT card and, therefore, was terminated in compliance with the arbitrator's award. The Arbitrator's award has not been challenged.

Further, subsequent to the Arbitrator's award, the Union and the Employer negotiated a new Collective Bargaining Agreement in which no change to this DOT card requirement was sought or secured and this charge underlying all of the smoke and mirrors, frankly, is a refusal to bargain charge. That's what a unilateral change charge is about. It is factually undisputed that no effort was made by the Union to negotiate any different outcome, and Charging Party has presented testimony by the multiple current or former Union officials who all agreed that the DOT card has always been a requirement. I find that the Charging Party is collaterally estopped as to the factual findings by the Arbitrator, which are not inconsistent with the Act. The Arbitrator did not rule on whether or not the Act was violated. The Arbitrator did make a factual finding as to what the parties had agreed to and I do find that that's an appropriate factual finding for collateral estoppel purposes and should not require the re-litigation of this dispute.[11]

I further find that at most the charge presented no more than a dispute as to the meaning of the Collective Bargaining Agreement, which should properly not have been brought before MERC. [I]t is not MERC's province to sort out who's right about a disputed contract term. It is an arbitrator's role to do that, and the Union took the proper course of taking it to an arbitrator and an arbitrator ruled. Whether I agree with the arbitrator or don't agree is completely irrelevant. It's irrelevant to the statute. It is the remedy the parties agreed to accept. As the Commission held in *Royal Oak Police* at 23 MPER 107 (2010), there is no breach of the bargaining duty where an employer takes action on an issue that is covered by the Collective Bargaining Agreement where the employer has some colorable claim of entitlement under the contract. Even if we think the employer's claim is weak, it still doesn't state a claim to say they're stretching the terms of the Collective Bargaining Agreement. Simple answer is you tell it to an arbitrator and an arbitrator determines who's right under the contract. That's not a refusal to bargain.

The inability of the Charging Party to articulate a claim was a factor in the Commission's decision in *City of Detroit (AME)*, 23 MPER 30 (2009), and I think it applicable here where I frankly went to

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secure a waiver or exemption from the Federal DOT. According to Webb, Roddy did not even apply for the waiver until July of 2009 and did not receive it prior to the expiration of the additional year granted her by the arbitrator.

[11] The arbitrator held that there was no new work rule; that the Employer acted properly under a broad contract article which gave it the right to set minimum qualifications for drivers; that the medical restriction was not arbitrary or capricious and that it was predicated on a reasonable concern for the safety of the driver and passengers.

considerable effort to try to get Webb to articulate what [the] claim was and I am making the finding that what I received in response was seemingly deliberate obfuscation designed for the sole purpose of keeping the case alive for the purpose of harassing the Employer or for the improper purpose of attempting to secure relief which was not warranted by the facts, where there was no material dispute of fact. It is not fair or proper to drag people into a courtroom on a frivolous claim. It is fair or proper to fight it out, no holds barred, in an appropriate forum where there is a legitimate dispute. Somebody's always going to be held to be right or wrong, and that's not what I'm talking about.

This is not a case like the *City of Detroit (Department of Transportation)* [19 MPER 70 (2006)] where the City of Detroit had a work force that had a requirement to have DOT cards in order to move vehicles. They were mechanics who as part of their work had to test-drive vehicles. As the Commission found, at some point and following that point for a period of years, the employer waived the requirement for DOT cards, expressly, consciously, by agreement of the parties. The employer then attempted to re-assert the obligation to have DOT cards. The Commission held that to be improper. That is obviously improper. It's also obviously not what's at play here.

Most work rules, in fact, all work rules are by their nature perfunctory. They put people on notice of their general obligations. They don't attempt to be encyclopedic. Collective Bargaining Agreements typically are not encyclopedic. They're not 800 pages long. They're 40 pages or 50 pages. They do not cover in express detail every single event or change in circumstance that can occur, which is why in *Royal Oak Police* the Commission reiterated its long-standing rule that if an issue is covered by the Collective Bargaining Agreement, even if the particular dispute or permutation of the dispute is not expressly mentioned, it is left to an arbitrator to decide. The purpose of the Public Employment Relations Act is to encourage public employers and unions to reach Collective Bargaining Agreements voluntarily and peacefully, to live under those agreements and to utilize whatever dispute resolution mechanism they agreed to under those agreements, which in this case is binding arbitration.

You've been there [to arbitration], you've done that, and it is . . . an abuse of the process to continue to pursue the claims in this forum where they don't belong, where there are no [legitimate] material disputes of fact. There is no dispute that the rule's been in place since the seventies or eighties, that you have to have a DOT card, and that you have to take a physical every two years to renew the card. I am recommending the

Commission dismiss the charge in its entirety, and I may recommend that the Commission award sanctions.[12]

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: December 8, 2011

[12] In *City of Detroit*, Case No. C09 I-166, issued June 2, 2011, I distinguished the decision in *Goolsby v Detroit*, 211 Mich App 214, 224 (1995) and proposed that the Commission assess sanctions against the charging parties for engaging in conduct abusive to the process. That decision is currently pending on exception before the Commission. If the Commission adopts the recommended remedy in *City of Detroit*, I would recommend that it consider similar remedies in this matter as to AFSCME Council #25 and/or Webb, given the patently frivolous nature of the underlying claim in this matter and the willful prolongation of the otherwise meritless litigation, including by ignoring the issuance of a controlling and adverse arbitration award, all while bringing claims against the Employer in multiple forums.