STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KALAMAZOO COUNTY ROAD COMMISSION,
Public Employer-Respondent,

-and-

Case No. C12 K-216
Docket No. 12-001800-MERC

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Smith Haughey Rice & Roegge, by Robert C. Stone, for Respondent

Pinsky, Smith, Fayette & Kennedy, LLP, by Michael L. Fayette, for Charging Party

DECISION AND ORDER

On March 27, 2014, Administrative Law Judge David M. Peltz 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 charges 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

_____/s/_____
Edward D. Callaghan, Commission Chair

_____/s/_____
Robert S. LaBrant, Commission Member

_____/s/_____
Natalie P. Yaw, Commission Member

Dated: May 16, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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Pinsky, Smith, Fayette & Kennedy, LLP, by Michael L. Fayette, for Charging Party

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) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC). Pursuant to Rule 174, R 423.174, of the Rules and Regulations of the Employment Relations Commission, the matter was reassigned to ALJ David M. Peltz following Judge O'Connor's retirement.

Background:

This case arises from an unfair labor practice charge filed on November 8, 2012 by Teamsters Local 214 against the Kalamazoo County Road Commission. The charge, as originally filed, alleged that Respondent violated PERA by (1) unilaterally switching from treating discipline on a case-by-case basis to an allegedly new policy of "pyramiding" each unrelated disciplinary incident; (2) implementing a new policy of disciplining employees for being unavailable to work overtime; and (3) refusing to mediate or engage in discussions regarding certain disciplinary cases. A hearing was originally scheduled for February 20, 2013. That date was adjourned by Judge O'Connor to provide the parties the opportunity for settlement discussions.

On January 28, 2013, Respondent filed a motion for summary disposition. In its motion, Respondent asserts that the charge fails to state a claim under PERA because the allegations set forth therein constitute nothing more than a dispute over the meaning and interpretation of the parties'

collective bargaining agreement. According to Respondent's motion, the contract contains a just cause disciplinary standard and a grievance procedure culminating in final and binding arbitration. With respect to the refusal to mediate allegation, the Employer asserts that the matter is covered by Article II, Section 5 of the contract, which provides that the mediation of disciplinary grievances may occur only upon mutual agreement of the parties.

Charging Party filed a response to the motion for summary disposition on August 5, 2013. In its response, the Union asserts that the Employer repudiated the just cause provision of the collective bargaining agreement by instituting a policy of combining rule violations for the purpose of progressive discipline. The Union concedes that the contract allows the Employer to establish reasonable rules and regulations and provides that any dispute over the reasonableness of a rule may be considered a grievance. However, Charging Party contends that a PERA claim has been stated because nothing in the contract requires that such disputes be resolved exclusively through the grievance process. In its response, the Union does not address the Employer's contention that the refusal to mediate allegation was covered by the contract. On August 7, 2013, Judge O'Connor issued an order denying Respondent's motion for summary disposition. Thereafter, the case was transferred to the undersigned.

I held a telephone conference call with the parties on December 3, 2013, during the course of which the Union confirmed that it was no longer pursuing the refusal to mediate claim. I indicated to the parties that the charge and other pleadings filed by the Union did not provide a clear and complete statement of the facts which allege a violation of PERA or adequately explain how the actions of the Employer were unlawful. The Union agreed to file a clarification of the charge and/or an amended charge which was to include the names of the employees who were allegedly disciplined by Respondent, the specific rules which each of those employees was alleged to have violated, information concerning any pending grievances filed or pending concerning the discipline, and clarification of which issues remained outstanding.

The clarification/amended charge was due in a Commission office by the close of business on December 13, 2013. No pleading was filed by that date, nor did my office receive a request for an extension of time in which to file such a response. Rather, the Union filed its amended charge on December 18, 2013. The 1 and 1/2 page document references three alleged changes in policy or procedure made by the Employer: (1) the elimination of oral warnings; (2) the refusal to consider extenuating circumstances; and (3) the combination of infractions for purposes of level of penalty. No specific details were provided with respect to any of these alleged changes. The amended charge also sets forth the names of five employees and indicates how much back pay each of those individuals is allegedly owed. However, the pleading does not indicate the basis for those back pay claims or provide any information regarding grievances related to those claims.

On January 9, 2014, Respondent filed a second motion for summary disposition. In its motion, the Employer asserts that dismissal of this matter is warranted on the basis that the amended charge was not timely filed and because the amended charge fails to comply with the agreement reached between the parties during the December 3, 2013 pretrial conference. The Employer characterized the Union's filing as containing "even less detail than the original charge." I agreed with Respondent that the amendment was deficient and, in an order issued on January 15, 2014, directed the Union to show cause why the charge should not be dismissed. I specified that in order

for this matter to proceed to hearing, Charging Party must set forth good cause for its failure to timely comply with the agreement reached during the pretrial conference.

On January 10, 2014, the Union filed a second clarification of, and amendment to, the unfair labor practice charge. This pleading was essentially identical to the first amended charge, except that it added the name of another employee alleged to have been improperly disciplined and specified the purported basis for the back pay claims. According to the second amendment, the individuals impacted by the alleged rule changes and who are currently entitled to back pay are:

David Blakely **64 Hours**
(2/20/12 3-day suspension for missing overtime call-out)
(2/23/12 3-day suspension for missing a call-in)

Nick Deryke **24 Hours**
(3/1/12 3-day suspension for missing overtime call-out)

Paul Erb **80 Hours**
(10-day suspension for an alleged violation for Article XX, rest breaks)

Jim Frederick **40 Hours**
(5-day suspension for an alleged violation of Article XX, rest breaks)

Rich McKlish **8 Hours**
(3/7/12 1-day suspension for missing an overtime call-out)

Alan McKay
(2/24/12 3-day suspension for Section 2(a) Late to Work)
(9/20/13 5-day suspension for Section 2(a) Late to Work)

On January 14, 2014, Respondent filed a renewed motion for summary disposition based upon the Union's second clarification of, and amendment to, the unfair labor practice charge. The Employer asserts that most of the allegations set forth by the Union in the second amendment are untimely, noting that virtually all of the disciplinary actions referenced in the second amended charge occurred more than six months prior to the filing of the original charge in this matter. With respect to the remaining allegations, the Employer contends that the charge fails to state a claim under PERA because the allegations asserted by the Union involve routine disciplinary actions which should have been pursued under the contractual grievance procedure. According to the Employer, both the standards of discipline and the application of work rules are covered by the collective bargaining agreement and there has been no factually supported claim of repudiation alleged by the Union.

The Union filed a response to the order to show cause on January 29, 2014. With respect to the substantive arguments set forth by the Employer in its renewed motion for summary disposition, the Union concedes that several of the allegations set forth in its second amended charge are untimely. However, Charging Party continues to assert that the Employer violated PERA as to the 5-day suspension issued to McKay for being late to work and the suspensions issued to Erb and

Frederick for taking too long of a rest break. According to the Union, the latter two suspensions were imposed on July 13, 2012 and October 22, 2012, respectively. In its response, the Union asserts that the Employer's actions were made for the purpose of punishing employees and with the goal of "ultimately discharging long-term employees." The Employer filed a reply to the Union's response to the order to show cause on January 30, 2014.

Attached to Charging Party's response to the order to show cause is a notice of suspension dated July 9, 2013, which lists three other alleged work rule violations for which Paul Erb was disciplined prior to the July 13, 2012 suspension at issue in the instant case. According to the document, Erb received a written reprimand on January 14, 2012 for being late to work without an excuse acceptable to management. He received a written reprimand and three-day suspension for violation of the same work rule on January 21, 2012. On June 20, 2012, Erb was given a written reprimand, a five-day suspension and a final warning for a minor violation of a safety or environmental rule. According to the pleadings and other documents provided by Charging Party in connection with this matter, Alan McKay received a three-day suspension for being late to work on February 24, 2012, and Jim Frederick was previously reprimanded for a minor violation of a safety rule.

The Collective Bargaining Agreement:

Charging Party and Respondent are parties to a collective bargaining agreement covering the period April 12, 2011 through April 11, 2014. The contract contains a grievance procedure, Article II, culminating in final and binding arbitration, as well as a discipline/discharge provision, Article III, which specifies that employees with seniority "shall not be disciplined or discharged without just cause." Pursuant to Article III, Section 1 of the agreement, an allegation that the Employer has brought an unfounded charge resulting in discharge or suspension shall be a "proper subject" for the grievance procedure provided that a written grievance is timely filed.

Work rules and standards are covered in Article XVI, Section 1, of the parties' contract. That section provides:

> The Rules regarding the conduct of employees established by the Employer prior to date [sic] of the execution of this Agreement are attached hereto as Appendix B. **The Employer shall have the right to make such reasonable rules and regulations not in conflict with this Agreement as it may from time to time deem best for the purpose of maintaining order, safety and/or efficient operations.** It is understood and agreed it shall be a condition of continued employment that an employee must meet any and all standards, regulations or license requirements of the State of Michigan. **Any complaint relative to the reasonableness of any rules established after the date hereof or the discriminatory application thereof may be considered as a grievance and subject to the Grievance Procedure contained in this Agreement.** [Emphasis supplied.]

Article X, Section 1, of the contract governs hours of work for bargaining unit members and defines the normal work day as consisting of eight hours and the normal work week as consisting of forty hours. Pursuant to Section 3, employees are required to be ready to start work at the beginning of their shift and to remain at work until the end of their shift. The agreement specifies the normal shift start and end times. Article X, Section 3 entitles bargaining unit members to two paid rest or break periods per eight-hour shift, neither of which may exceed ten minutes in duration, as well as an unpaid lunch period. Pursuant to the contract, an additional half-hour paid break may be taken when an employee works twelve consecutive hours in any workday.

Appendix B of the collective bargaining agreement sets forth the rules of conduct for members of the bargaining unit. Section 1 of Appendix B contains a list of offenses for which an employee "shall be subject to disciplinary time off without pay up to an [sic] including termination for a first offense." Section 2 of Appendix B provides, in pertinent part:

> Employees who violate the rules contained in this section **generally** will receive a written reprimand for a first offense **and then disciplinary time off without pay for any subsequent violation**. Three or more violations of the work rules contained in sections 1 and 2 within a period of twenty-four (24) consecutive months will subject the employee to discharge.
>
> a. Late to work without an excuse acceptable to Management.
>
> b. Inattentiveness to work, failing to start work at the designated start time, quitting work before the proper time, or leaving the job site any time after reporting for work but before clocking out at the end of the shift or work period without permission of supervision.
>
> * * *
>
> d. Minor violation of a safety or environmental rule, safety practice.
>
> * * *
>
> n. ANY OFFENSE OF EQUAL MAGNITUDE TO THE ABOVE. [Emphasis supplied.]

Discussion and Conclusions of Law:

Charging Party contends that Respondent violated PERA by substantially changing the manner in which it applies its disciplinary rules. In support of this contention, the Union asserts that the Employer eliminated oral warnings, refused to consider extenuating circumstances and has begun discharging employees for minor rule violations. According to the Union, these changes were made for the purpose of punishing employees and with the goal of "ultimately discharging long-term employees."

Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. In the instant case, the only specific incidents referenced by the Union occurring within six months of the filing of the unfair labor practice charge were the 5-day suspension issued to McKay for being late to work in September of 2013 and the suspensions issued to Erb and Frederick for violating the contract's rest break provisions in July and October of 2012, respectively.[1] Regarding those incidents, I find that the Union has failed to plead facts which, if proven, would establish that this dispute is anything other than an ordinary disagreement over the meaning and interpretation of the parties' collective bargaining agreement over which the Commission lacks jurisdiction.

Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317; *Detroit Bd of Education*, 2000 MERC Lab Op 375, 377. A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement. *Port Huron* at 318; *St Clair Cnty ISD*, 2005 MERC Lab Op 55, 61-62. As the Michigan Supreme Court stated in *Port Huron, supra* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed, supra*. See also *Wayne Cnty Comm Coll*, 20 MPER 59 (2007).

The Commission's role in disputes involving alleged contract breaches is limited. *Genesee Twp*, 23 MPER 90 (2010) (no exceptions). Where there is a collective bargaining agreement 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

[1] In its response to the order to show cause, the Union references the subsequent discharge of Paul Erb for allegedly being eight minutes late to work. However, the Union specifically indicates that the Erb discharge is not part of the charge in this case.

contract controls and no PERA issue is present. Under such circumstances, the details and enforceability of the contract provisions covering the term or condition in dispute are left to arbitration. *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65 (2013); *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996). An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated. See e.g. *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. A finding of repudiation cannot be based on an insubstantial or isolated breach of contract. *Oakland Cnty Sheriff*, 1983 MERC Lab Op 538, 542. Repudiation exists when 1) the contract breach is substantial, and 2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

In the instant case, Respondent has articulated a facially credible explanation in support of its claim of a contractual right to suspend McKay, Erb and Frederick. The parties' collective bargaining agreement contains a grievance procedure culminating in final and binding arbitration, as well as a just cause provision which provides that suspensions and discharges of employees with seniority are subject to challenge via the grievance process. Article X of the agreement governs hours of work for bargaining unit members and sets forth the rules pertaining to rest breaks. With respect to work rules and discipline specifically, Article XVI, Section 1 of the contract gives Respondent the right to adopt reasonable rules and regulations for the purpose of "maintaining order, safety and/or efficient operations" and provides that any complaint over the reasonableness of such rules may be considered a grievance and subject to the grievance procedure. Appendix B of the parties' contract lists various offenses for which an employee may be disciplined, including failure to start work at the designated start of a shift. Based upon this contractual language, Respondent asserts that it has met its bargaining obligation regarding the issues raised in the unfair labor practice charge and that the Union is improperly attempting to convert disputes over routine disciplinary matters into a PERA claim.

While Charging Party contests the Employer's interpretation of the collective bargaining agreement, the dispute, as framed by the Union in the charge and other pleadings filed in this matter, constitutes an ordinary question of contract interpretation that can only be properly resolved by a grievance arbitrator. There are no factually supported allegations set forth by the Union in this case which, if proven, would support a finding of a repudiation of the collective bargaining agreement. Rather, the record establishes that the parties have bargained over the topics in dispute, specifically the Employer's authority to adopt work rules and discipline employees and the Union's right to challenge the reasonableness and application of the rules via the grievance procedure. In other words, the Union has a contractual remedy for its contention that the suspensions of McKay, Erb and Frederick were improper. As noted, the Commission does not take jurisdiction over bona fide disputes over the interpretation of contract language when the parties have agreed to final and binding arbitration to resolve such disputes. *Lapeer Cnty (40th Judicial Circuit Court)*, 2000 MERC Lab Op 350.

Charging Party appears to claim that, notwithstanding the existence of a collective bargaining agreement that covers the matter in dispute, the parties' course of conduct created new

obligations which exist independently from the contract. For example, although the contract explicitly gives Respondent the authority to suspend an employee for committing two or more of the offenses set forth in Appendix B, Section 2 within a 24-month period, the Union asserts that the Employer has unlawfully changed its application of the rules by considering multiple offenses for purposes of level of penalty. Unambiguous language in a collective bargaining agreement dictates the parties' rights and obligations even in the face of a conflicting past practice "unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract." *Port Huro*n, at 329. The party that seeks to overcome unambiguous contract language "must show the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract." *Id.* at 312. Recently, the Supreme Court emphasized that this is an "exceedingly high burden to meet." *Macomb County, supra* at 235. According to the Court:

> Any lesser standard would defeat the finality in collective bargaining agreements and would blur the line between statutory unfair labor practice claims and arbitrable disagreements over the interpretation of collective bargaining agreements. As a result, the party that seeks to overcome an unambiguous collective bargaining agreement must present evidence establishing the parties' affirmative intent to revise the collective bargaining agreement and establish new terms or conditions of employment. Moreover, because "arbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations," doubt about whether a sub-ject matter is covered should be resolved in favor of having the parties arbitrate the dispute. The arbitrator, not the MERC, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment.

Id. at 235-236 [Footnotes omitted.] In the instant case, Charging Party has failed to assert any facts which would suggest that there was a meeting of the minds or otherwise substantiate a claim of repudiation based upon past practice or course of conduct.

Conclusion:

The pleadings filed by Charging Party in this matter are replete with conclusory allegations concerning unilateral modifications to the contract's just cause provision and changes in established practices and procedures relating to employee discipline, including references to a "recent flurry" of discipline, the discharge of employees for minor offenses, the "pyramiding" of discipline, and the discipline of bargaining unit members who are unavailable to work overtime. Yet, in the face of multiple motions for summary disposition, as well as an order to show cause issued by the undersigned, the only factually specific and timely assertion set forth by the Union to support its repudiation claim is the allegation that three bargaining unit members were suspended for committing offenses identified as punishable in Appendix B of the parties' contract. Charging Party and its members may indeed have legitimate concerns regarding whether the discipline of McKay, Erb and Frederick was warranted, whether the level of penalties were appropriate and whether extenuating circumstances should have been considered by the Employer. However, these are all issues which fall squarely within the purview of the contract's just cause and grievance arbitration provisions. The determination of just cause inherently involves a consideration of factors such as

whether the discipline was appropriate to the circumstances and whether it was consistent with the discipline imposed on other employees in similar circumstances. See e.g. Carroll R. Daugherty's "Seven Tests of Just Cause" as set forth in *Enterprise Wire Co and Enterprise Independent Union* (46 LA 359) (1996), which is generally recognized as the standard with respect to the criteria for establishing just cause. Absent a factually supported allegation that the Employer's actions constitute a wholesale disregard for the contract as written, the Union is essentially seeking to have the Commission do precisely that which it is not permitted to do: substitute its judgment for that of a grievance arbitrator.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. Despite having been given ample opportunity to do so, Charging Party has failed to set forth any facts which, if proven, would establish that Respondent violated PERA. With respect to the allegation, raised for the first time by the Union in its response to the order to show cause, that the Employer's actions were discriminatory or retaliatory in nature, I note that the mere addition of a conclusory allegation of union animus and discrimination is insufficient to transform an otherwise deficient charge into a valid PERA claim. See e.g. *Washtenaw Cnty*, 22 MPER 18 (2009) (no exceptions). For the above reasons, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by Teamsters Local 214 against the Kalamazoo County Road Commission in Case No. C12 K-216; Docket No. 12-001800-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 27, 2014