STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

36TH DISTRICT COURT,
Public Employer-Respondent,

Case Nos. C08 H-170 & C10 F-155

-and-

AFSCME COUNCIL 25,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Kotz, Sangster, Wysocki and Berg, P.C., by Matthew S. Derby, for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr. and Robert Fetter, for Charging Party

DECISION AND ORDER

On January 17, 2012, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On June 20, 2014, the Commission received correspondence from Charging Party indicating that the dispute underlying the charge has been settled and requesting that the charge be withdrawn. Charging Party's request is hereby approved. This Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

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

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

Dated: July 11, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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Miller Cohen, by Richard G. Mack, Jr., for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

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 heard at Detroit, Michigan on November 15, 2010 and March 27, 2011 before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on April 29, 2011 and a reply brief filed by Respondent on May 20, 2011, I make the following findings of fact, conclusions of law, and recommended order.1

I. The Unfair Labor Practice Charges:

Case No. C08 H-170

The charge in Case No. C08 H-170 was filed by AFSCME Council 25 on August 22, 2008 alleging that the 36th District Court violated Sections 10(1)(a) and (e) of PERA. Paragraph one of the charge, as amended for purposes of clarification on February 12, 2010, asserts that on and after July, 2008, Respondent refused to arbitrate grievances in violation of its obligation under the parties'

1 Since Charging Party did not request permission to file a reply brief, the brief it filed on May 20, 2011 has not been considered.

collective bargaining agreement. Paragraph two of the charge, as amended, alleges that on or about August 1, 2008, Respondent ceased deducting union dues from employees' paychecks as it was required to do under the collective bargaining agreement. Charging Party alleges that these actions constituted an unlawful repudiation of the collective bargaining agreement and a violation of Respondent's duty to bargain in good faith.

Paragraph three of the charge, as amended on February 12, 2010, alleges that Respondent engaged in bad faith bargaining during the parties' negotiations for a successor collective bargaining agreement in 2008. The conduct alleged to constitute bad faith includes, but is not limited to, insisting as a condition of agreement on a new contract that Charging Party sign a letter of understanding agreeing to drop all pending grievances and other claims, including claims related to an unfair labor practice Respondent was found to have committed in 2005 (Case No. C05 G-139).

On February 18, 2010, I issued an order scheduling a hearing on the allegations in paragraphs one and two but holding the allegations in paragraph three in abeyance pending the parties' attempts to resolve these allegations as part of their ongoing contract negotiations. Charging Party has neither withdrawn the allegations in paragraph three nor asked that a hearing be scheduled. So that I can issue a decision on the issues that were heard and briefed in this case, I have assigned a separate case number, Case No. C08 H-170(A), to the allegations in paragraph three.2

With respect to the allegations in paragraph one and two, Respondent does not dispute that it refused after July (in fact, April) 2008 to arbitrate grievances or that it terminated dues deduction effective August 1, 2008. At the time the charge was filed, Respondent contended that it had no obligation to arbitrate or continue dues deduction because the collective bargaining agreement had been terminated on June 30, 2006. However, as discussed below, on June 24, 2010, the Court of Appeals, in a separate action, held that a letter Respondent sent Charging Party on March 1, 2006 did not serve to terminate the contract on June 30, 2006. Respondent concedes that if the Court's finding is binding on the Commission, as I found it to be in an interim order incorporated here, it committed an unfair labor practice by failing to deduct union dues and fees between August 1, 2008 and June 30, 2009. The latter date is the date on which, the parties agree, the contract did terminate. Respondent also concedes that if the Court's finding is binding, it committed an unfair labor practice by refusing to arbitrate grievances between April 2008 and June 30, 2009. However, the parties disagree over the scope of the violation and the appropriate remedy. Charging Party asserts that Respondent should be required to reimburse Charging Party for all dues that have not been collected since August 1, 2008, while Respondent maintains that its checkoff obligations terminated on June 30, 2009. The parties also disagree over whether an order requiring Respondent to arbitrate grievances filed between June 30, 2006 and June 30, 2009 would be adequate to remedy Respondent's repudiation of its contractual obligation to arbitrate. 3

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2 I note that at the time this decision was issued, there were three other unresolved unfair labor practice charges (Case No. C07 K-258, C08 D-071, and C10 B-048) involving these parties pending before the Commission. The parties had been attempting unsuccessfully to negotiate a new contract since 2006.

3 At the hearing held on March 17, 2011, Respondent stated that it was willing to reimburse Charging Party for dues Respondent failed to deduct from August 1, 2008 through June 30, 2009, subject to reduction or setoff for the amounts Council 25 and/or Local 3308 collected from members, upon receipt of supporting financial documentation from

Case No. C10 F-155

The charge in Case No. C10 F-155 was filed on June 18, 2010. It alleges that Respondent made a unilateral change in a mandatory subject of bargaining by ceasing, after June 30, 2006, to use the "just cause" standard in determining whether to discipline or discharge unit employees. The charge rests on statements made by Respondent's Interim Human Resources Director Constance Allen in a letter to Charging Party dated March 19, 2010. According to Charging Party, Allen admitted in this letter that Respondent stopped using the just cause standard after June 30, 2006. Respondent denies that it abandoned the just cause standard, and asserts that Charging Party failed to meet its burden to prove that Respondent did so. The charges in Case No. C08 H-170 and C10 F-155 were consolidated for hearing.

II. Findings of Fact:

Repudiation of the Arbitration and Dues Deduction Provisions

Charging Party and its affiliated Local 3308 represent a bargaining unit of Respondent's employees consisting of secretaries, court clerks, and other clerical employees. The parties' most recent collective bargaining agreement contained a clause providing for binding arbitration of grievances. It also contained a provision requiring employees covered by the agreement to become members of the union or pay a representation fee for the duration of the agreement, and a separate provision requiring Respondent to deduct "union membership dues, representation fees, and/or any other fee levied in accordance with the Constitution and By-laws of the Union and terms of this agreement" from the pay of employees who executed authorizations for Respondent to check off either union dues or representation fees.

The collective bargaining agreement covered the period 2001-2006. However, it contained the following duration clause:

> This Agreement shall continue in effect for consecutive yearly periods after June 30, 2006, unless notice is given, in writing by either of [sic] the Union or the Employer, to the other party at least ninety (90) days prior to June 30, 2006, or any anniversary date thereafter, of its desire to modify, amend or terminate this agreement.
>
> If such notice is given, this Agreement shall be open to modification, amendment or termination, as such notice may indicate, on June 30, 2006, or the subsequent anniversary date, as the case may be.

On March 1, 2006, Respondent sent Charging Party a letter stating that it was notifying it of its "intent to modify, amend or terminate all or part of the Labor Agreement." The letter also stated,

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Charging Party as to the amounts owed. In addition, according to a document entered into the record at the hearing on March 17, 2011, Respondent has agreed to arbitrate thirty-one specific disciplinary grievances filed by Charging Party between June 30, 2006 and June 30, 2009.

"This notice is given as described in Article 50, in writing, at least 90 days prior to June 30, 2006." The parties then commenced negotiations on a successor agreement.

After June 30, 2006, the parties continued to process and discuss grievances, including grievances filed over employee terminations and disciplinary actions. On June 4, 2007, Keith Carter and a number of other members of Charging Party's unit were scheduled to take an exam for a promotion. Carter was unable to report to work because of illness and missed the exam. When he returned to work the next day, he was told that he would not be allowed to take the exam. Charging Party filed a grievance and, on or about August 13, 2007, served Respondent with a written notice of intent to arbitrate. An arbitrator, William Daniel, was selected to hear the grievance. At the arbitration hearing held on April 8, 2008, Respondent argued that the grievance was not arbitrable because the contract had expired and/or been terminated effective June 30, 2006. On June 23, 2008, Daniel issued an opinion finding the grievance to be arbitrable and granting the grievance.

After April 8, 2008, Respondent contacted arbitrators who had been selected to hear five other pending grievances and notified them that it would not participate in the arbitrations. One of these grievances, challenging a two-day suspension issued to employee Michele Hembree, had been filed prior to June 30, 2006. Three of the other four grievances challenged the discharge of employees after June 30, 2006. When, after April 2008, Charging Party served Respondent with written notice of its intent to arbitrate a grievance, Respondent responded that it would not arbitrate any grievance that did not involve "matters that accrued or vested before the expiration of the 2001-2006 labor agreement." The parties stipulated that, except for the Carter grievance, Respondent refused to arbitrate any grievance filed between June 30, 2006 and June 30, 2009. These grievances included a number of grievances alleging that employees had been discharged without just cause. The record does not indicate how many disciplinary grievances filed between June 30, 2006 and June 30, 2009 Respondent refused to arbitrate, but in March 2011, Respondent agreed to arbitrate thirty-one grievances filed during this period.

On March 13, 2009, Respondent sent Charging Party a letter which the parties agree served to terminate the contract on June 30, 2009. The parties stipulated that since that date, there has been no collective bargaining agreement in effect for this bargaining unit. Respondent has rejected Charging Party's demands to arbitrate grievances filed after June 30, 2009.

On July 21, 2008, Respondent notified Charging Party that, effective August 1, 2008, it would no longer deduct union dues or fees from employees' paychecks. Prior to that date, Respondent had submitted these monies to Council 25, and Council 25 then sent Local 3308 the portion allocated to it. For a period after August 1, 2008, Council 25 send monthly letters to Local 3308 members asking them to submit their dues. It was unclear from the record how long Council 25 continued to send out these letters. At the hearing, Council 25 Staff Representative Danny Craig estimated that less than ten percent of the members paid dues or fees for any period after August 1, 2008.

Collateral Litigation

On July 11, 2008, Respondent filed a complaint in the Wayne County Circuit Court to vacate the Daniel arbitration award. On August 4, 2008, Charging Party filed a counterclaim in that lawsuit seeking enforcement of the Daniels award and an order to compel Respondent to arbitrate five other outstanding grievances. Respondent answered the counterclaim by asserting that it had no obligation to arbitrate because the collective bargaining agreement had expired.

On October 31, 2008, Keith Carter was terminated by Respondent for alleged misconduct. Respondent then decided to dismiss its complaint to vacate the Daniels award, reasoning that it was moot. In January 2009, Charging Party filed a motion for summary disposition of its counterclaim in the Circuit Court action. On February 25, 2009, the Circuit Court issued an order dismissing the complaint to vacate the arbitrator's award. At the same time, the parties entered into stipulated order granting summary disposition to Charging Party on its claim to enforce the Daniels award. The second count of the counterclaim, in which Charging Party sought arbitration of the five other grievances, remained pending.

On March 26, 2009, after a hearing, the Circuit Court granted Charging Party's motion for summary disposition. The Court found that the 2001-2006 collective bargaining agreement had not been terminated, and ordered Respondent to arbitrate the five grievances named in the counterclaim. In May 2009, Respondent filed a delayed application for leave to appeal with the Court of Appeals. On August 24, 2009, the Court of Appeals issued an order peremptorily reversing the Circuit Court's order to arbitrate on the basis that the contract had expired at the time the grievances arose. Charging Party filed a motion for reconsideration. On September 23, 2009, the Court of Appeals granted reconsideration, vacated its August 2009 order, and granted Respondent's leave to appeal.

On June 24, 2010, the Court of Appeals issued a per curium decision in which it held that the parties' collective bargaining agreement unambiguously required Respondent to give notice of intent to terminate the agreement. The Court also held that Respondent's March 1, 2006 letter indicating an intent to "modify amend or terminate all of parts of the labor agreement," was too ambiguous to be effective as a notice to terminate. It rejected Respondent's argument that the Court should find the agreement to have terminated based on letters from Charging Party after June 30, 2006 referring to the contract as expired. The Court held that this was irrelevant, and that the agreement must be enforced according to its terms. Because it concluded that the contract was in effect at the time the grievances arose, the Court affirmed the Circuit Court's March 26, 2009 order granting Charging Party's motion for summary disposition of its counterclaim and directing Respondent to arbitrate these grievances. Respondent filed an application for leave to appeal the June 24, 2010 order with the Michigan Supreme Court. This application was denied on December 20, 2010.

Respondent's March 19, 2010 Letter and Case No. C10 F-155

Article 12(1)(A) of the 2001-2006 collective bargaining agreement stated, "Disciplinary action may be imposed upon an employee for failure to fulfill the employee's job responsibilities or for improper conduct on the job. . . Disciplinary action shall be imposed only for just cause."

On February 18, 2010, Charging Party staff representative Craig sent the following letter to Respondent Interim Human Resources Director Allen:

> I understand that the 36th District Court's position is that it terminated the parties' collective bargaining agreement back in 2006. Based on that position, it has canceled the arbitration and dues deduction provisions of the contract. In the alternative, your position is that you terminated the contract as of July 1, 2009.
>
> I have some issues that I need clarified. Pursuant to your position, if I understand it, you cancelled the arbitration clause on or about July 1, 2006. However, you did not give AFSCME any indication of this cancellation until April of 2008. I would like to avoid any similar surprises.
>
> As the bargaining representative of the members of Local 3308, AFSCME has a duty to police the agreement, or the terms and conditions of employment in the agreement that are subject to the employer's obligation to maintain the status quo until impasse.
>
> I understand that it is the employer's position that the dues deduction and arbitration clauses are cancelled. I also understand that no other provision of the agreement has been cancelled, modified or terminated. I hereby request that 36th District Court provide a list of all other provisions, if any, that have been cancelled, are not subject to the status quo, or are not operative. For each cancelled clause indicate the proposed date of its cancellation.
>
> I am sure that you understand the critical importance for AFSCME and its members to know the terms and conditions of employment that govern their employment. Consistent with your obligation to provide timely information upon request, I demand that you respond to this letter within seven days. If this timeline is an issue due to some unforeseen circumstance, please notify me to avoid the necessity of filing an unfair labor practice charge.

On March 19, 2010, Allen replied as follows:

> I acknowledge receipt of your correspondence dated February 18, 2010. Please be advised that the Court has consistently maintained that the Local 3308 bargaining agreement was effectively terminated as of June 30, 2006. Consistent with decisions of both the Michigan courts and the Michigan Employment Relations Commission (MERC), termination of a collective bargaining agreement also terminates, with certain exceptions, a public employer's obligation to submit disputes to binding arbitration under the provisions of a terminated collective bargaining agreement. Also, consistent with Michigan law, the court has continued to accept, process, and meet on grievances, but without submission of the grievances to arbitration. At the same time, the Court will continue to review all grievances as they arise to determine

if they are of a type that arose or accrued under the expired collective bargaining agreement and are potentially arbitrable.

Based on the Court's stated position on termination of the obligation to arbitrate, it is equally clear that contract expiration/termination also terminates the right not to be disciplined or discharged except for just cause, since this is not the kind of right that accrues or vests during the term of a contract. Ottawa County v Jaklinski, 423 Mich 1, 25 (1985); Lake County, Case No. C07 A-011 (MERC, 2009). Therefore, the right to employee discipline or discharge only for just cause expired, under Michigan law, at the time of the expiration of the Local 3308 bargaining agreement. As to any remaining terms and conditions, the Court will observe its obligation under the Public Employment Relations Act to maintain those terms and conditions of the expired agreement as required under the decisions of the MERC. [Emphasis added]

On June 18, 2010, Charging Party filed the charge in Case No. C10 F-155 alleging that after June 30, 2006, Respondent had unilaterally ceased to honor the provision in the contract requiring just cause for discipline and discharge.

The Hearing and Interim Order

On July 12, 2010, Charging Party filed a motion for "partial summary disposition" in Case No. C08 H-170 based on the Court of Appeals decision. Charging Party asserted that the Commission was bound by the Court of Appeals finding that the agreement remained in effect after June 30, 2006 and that the only issues requiring an evidentiary hearing related to the appropriate remedy for Respondent's repudiation of the agreement.

At the hearing on November 10, 2010, Respondent presented evidence that Charging Party had acknowledged, after June 30, 2006, that the parties' contract had been terminated. Respondent argued that the Court of Appeals' finding that the agreement remained in effect after June 30, 2006 was not binding on the Commission under the doctrine of collateral estoppel because it was based on an incomplete record. I permitted Respondent to put some of this evidence into the record. However, after Charging Party objected, I directed Respondent, before the next day of hearing, to file a memorandum of law summarizing its collateral estoppel arguments. Respondent filed its memorandum of law on November 29, 2010, and Charging Party filed a response on January 20, 2011. On January 21, 2011, I issued an interim order in which I concluded that the Court's finding that the contract remained in effect after June 30, 2006 was binding on the Commission under the doctrine of collateral estoppel. The order stated that my decision and recommended order, when issued, would incorporate this conclusion.

At the hearing on November 10, Charging Party presented evidence to support its claim that simply ordering Respondent to arbitrate their grievances would not make employees terminated between June 30, 2006 and June 30, 2009 whole for the losses they suffered as a result of Respondent's repudiation of the arbitration clause. Charging Party Representative Craig testified that one employee committed suicide in 2009 after being terminated in 2008. He also testified that in

2009 Respondent, improperly in Craig's opinion, claimed that another employee had resigned. This employee later became homeless after having mental health problems. Craig also testified that, as an advocate experienced in handling arbitrations, he knew of employees who had suffered a range of personal problems, including the breakup of their marriages, as a result of losing their jobs without cause and remaining unemployed for a long period. According to Craig, even reinstatement by an arbitrator with back pay could not fully compensate employees for these losses. Craig also testified that long delay has an impact on a union's ability to put the facts before an arbitrator because relevant information gets lost and witnesses' memories fade. Another witness, Jaunice Flowers, was terminated by Respondent in May 2007 after it refused her request for a medical leave of absence. Flowers testified that while waiting for her grievance to be arbitrated she lost her car, exhausted her retirement savings, and was unable to pay college tuition for her two children.

III. Discussion and Conclusions of Law

Collateral Estoppel

Collateral estoppel precludes relitigating an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Leahy v Orion Twp,* 269 Mich App 527, 530 (2006); *Porter v Royal Oak,* 214 Mich App 478, 485 (1995). The issues of fact in the first and subsequent case must be identical, not merely similar, and the previous litigation must have presented a full and fair opportunity to litigate the issues presented in the subsequent case. *Keywell & Rosenfeld v Bithell,* 254 Mich App 300, 340 (2003).

In *Senior Accountants v Detroit,* 399 Mich 449 (1976), collateral estoppel was applied to prevent the relitigation in a contract action of facts already determined by the Commission in an unfair labor practice proceeding. In *Amalgamated Transit Union, Local 1564 v Southeastern Michigan Transportation Authority,* 437 Mich 441, 451, an employer argued that the Commission was collaterally estopped from finding that the employer's "miss out" policy had become an established term or condition of employment for probationary employees by a circuit court finding, in an action by the employer to overturn an arbitrator's decision, that the "miss out" language in the parties' contract did not apply to probationary employees. The Court concluded that collateral estoppel did not apply because the issue decided by the Commission was different from the issue decided by the circuit court. It also held that the circuit court finding had no preclusive effect because the final judgment in that action by the Court of Appeals affirmed the circuit court on different grounds, i.e., the Court of Appeals held that the contract precluded the union from arbitrating any grievances on behalf of probationary employees. Although the Supreme Court found in that case that the Commission was not collaterally estopped by the circuit court's finding, it did so by applying well established collateral estoppel principles.

Here, the prior proceeding was an action by Charging Party to compel Respondent to arbitrate five grievances. Respondent argues that, for multiple reasons, the Commission should not adopt/defer to the arbitrator's findings. However, the validity of the Daniels award was no longer before the Circuit Court after February 24, 2009, and neither the March 26, 2009 Circuit Court order

nor the June 24, 2010 Court of Appeals decision referenced it. What was before the Circuit Court was whether Respondent should be ordered to arbitrate certain other grievances arising after June 30, 2006. Whether the parties' collective bargaining agreement was in effect after that date was an issue necessary to the decision in the action to compel arbitration, and both the Circuit Court and the Court of Appeals decided that issue. The Circuit Court simply found that the agreement had not been terminated, but the Court of Appeals discussed the basis for its conclusions in some detail. The Court of Appeals held that the collective bargaining agreement was still in effect because Respondent did not give proper notice to terminate it. Although Respondent argues that the Court of Appeals did not consider all the facts, it does not question the validity of the Court's judgment or argue that it was not given a full and fair opportunity to litigate these issues in that proceeding. The Michigan Supreme Court refused to grant leave to appeal, leaving the June 24, 2010 Court of Appeals decision as the final judgment in this action. 4

Charging Party's unfair labor practice charge involves a different cause of action. The charge asserts not simply that Respondent breached its contract, but that it violated its duty to bargain by repudiating its contractual obligations. The Commission has exclusive jurisdiction to determine whether Respondent's actions violated PERA. The issue of whether the parties' 2001-2006 contract was in effect after June 30, 2006, however, has already been litigated by the parties in a different forum and a judgment rendered. As I did in my interim order issued on January 21, 2011, I conclude that under principles of collateral estoppel, Respondent is precluded from relitigating this issue and that the Commission is bound by the Court of Appeals' finding.

Midterm Modification of Contract
and Unilateral Change in Case No. C08 H-170

Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required under PERA to bargain concerning the subject if it has been proposed by either party, and neither party may take unilateral action on the subject absent an impasse in the negotiations. *Detroit Police Officers Ass'n v City of Detroit,* 391 Mich. 44, 54-55 (1974).

When the parties to a collective bargaining agreement negotiate contract provisions that "fix the parties' rights" with respect to mandatory subjects of bargaining, they satisfy their obligations under PERA to bargain over those subjects for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dis.*, 452 Mich 309, 318 (1996). Once agreement is reached, both parties have a right to rely on the language of the agreement as the statement of their obligations on topics "covered by" the agreement. A midterm modification of the contract by either party, without the consent of the other, violates that party's duty to bargain in good faith. *St. Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 565 (1998); *36th Dist Court,* 21 MPER 19 (2008).

After the expiration of a labor contract, a public employer is required to bargain in good faith with respect to wages, hours, and other terms and conditions of employment in a new contract.

4 I note that in Michigan and in the federal courts, the rule is that a final judgment retains all of its preclusive effects pending appeal. *Erebia v Chrysler Corp,* 891 F2d 1212, 1215 (CA 6, 1989); *Tempel v Kelel Distributing Co, Inc.,* 183 Mich App 326, 328 (1990);

Wayne Co Government Bar Ass'n v Wayne Co., 169 Mich App 480, 485, (1988). Absent an impasse, neither party may take unilateral action with respect to a mandatory subject of bargaining while negotiating a new agreement. *Local 1467, Int'l Ass'n of Firefighters v Portage*, 134 Mich App 466, 472, (1984); *Central Michigan Univ Faculty Ass'n v Central Michigan Univ.*, 404 Mich 268, 277, (1978); *Wayne Co Government Bar Ass'n*, at 486. An employer who unilaterally alters a mandatory subject of bargaining commits an unfair labor practice. *Int'l Ass'n of Firefighters*, at 473; *United Auto Workers, Local 6888 v Central Michigan Univ*, 217 Mich App 136, 138 (1996).

Arbitration to resolve contract interpretation disputes is a mandatory subject of bargaining under PERA. However, arbitration is a well recognized exception, under both PERA and the National Labor Relations Act (NLRA), 29 USC 150, et seq, to the rule that an employer must maintain the status quo with respect to mandatory subjects after the contract expires. In *Gibraltar School Dist* v *Gibraltar MESPA-Transportation*, 443 Mich 326 (1993), the Michigan Supreme Court, following well established precedent under the NLRA, held that PERA does not create a statutory duty to arbitrate grievances arising after the expiration of a collective bargaining agreement. This precedent rests on the premise that arbitration differs from other terms and conditions of employment because it involves a consensual surrender by the parties of their fundamental right to exercise their economic (or, in the public sector, political) power to resolve individual labor disputes. Arbitration, therefore, is fundamentally a contractual and not a statutory right. *Gibraltar*, at 337. The Court in *Gibraltar* held that grievances filed after the expiration of the agreement can be said to arise under the contract only where they involve facts and occurrences that arose before expiration, where the actions taken after expiration infringe upon rights that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. *Gibraltar*, at 348; *Ottawa County v Jaklinski*, 423 Mich 1, 22, (1985). As the Court held in *Jaklinski*, the right to not to be discharged (or disciplined) except for just cause is not the kind of right which can accrue or vest during the contract's term. Therefore, a union cannot compel an employer to arbitrate a grievance alleging that an employee was terminated without just cause after its collective bargaining agreement has expired or been terminated. *Jaklinski*, at 7.

Dues deduction is another well established exception, under both PERA and the NLRA, to the rule that an employer must maintain the status quo with respect to mandatory subjects of bargaining after contract expiration. In *Bethlehem Steel Co*, 136 NLRB 1500 (1962), the National Labor Relations Board (NLRB) held that union security and dues checkoff were mandatory subjects of bargaining. However, it also held that because the checkoff provisions in the collective bargaining agreement implemented union security provisions which could not remain in effect after the agreement expired, the union's right to checkoff was a contractual and not a statutory right which continued to exist only so long as the contract remained in force. See also *Hacienda Resort Hotel & Casino (Hacienda I)*, 331 NLRB 665, 666 (2000). The Commission has repeatedly held that under PERA, an employer may discontinue dues deduction after contract expiration regardless of whether the parties have reached impasse in their contract negotiations. *City of Dearborn*, 1987 MERC Lab Op 61; *City of Detroit*, 22 MPER 41 (2009); *Waldron Area Schs*, 1997 MERC Lab Op 256; *Warren Con Schs*, 1975 MERC Lab Op 129.

Applying these well established principles to the facts here, I find that Respondent unlawfully modified the terms of the collective bargaining agreement without the consent of Charging Party and repudiated this agreement when, in and after April 2008, it refused to arbitrate or participate in arbitration hearings involving grievances arising under this agreement. I also find that Respondent unlawfully modified the terms of the agreement and repudiated this agreement when, effective August 1, 2008, it ceased deducting union dues and representation and other union fees from employee paychecks.

I find that after the contract was terminated on June 30, 2009, Respondent had no obligation under PERA to deduct union dues or fees or to arbitrate, except as to those grievances which arose prior to the contract's termination date. Contrary to Charging Party's argument, I find that Respondent had no obligation to restate or reaffirm its intention not to arbitrate or check off union dues after June 30, 2009. I find that Respondent's failure to check off union dues or fees or arbitrate newly filed grievances after June 30, 2009 did not violate the Act.

Midterm Modification of Contract
and Unilateral Change in Case No. C10 F-155

As stated above, an attempt by either party to a collective bargaining agreement to "rewrite" that agreement during its term, without the agreement of the other, constitutes an improper midterm modification of that agreement and violates that party's duty to bargain in good faith. Standards and procedures for discipline and discharge are mandatory subjects of bargaining under PERA. *Amalgamated Transit Union, Local 1564 v SEMTA,* 437 Mich 441 (1991; *St Clair Prosecutor v AFSCME Local 1518,* 425 Mich 204 (1986); *Pontiac Police Officers Ass'n v Pontiac,* 397 Mich 674 (1976). An employer's repudiation of a contract clause requiring just cause for discipline, like its repudiation of any other significant clause in a collective bargaining agreement, constitutes an unlawful midterm modification of that agreement and violates its duty to bargain in good faith.

As far as I am aware, the Commission has never been called upon to address an allegation that an employer violated its duty to bargain by announcing, either during the term of a contract or after its expiration, that it had ceased using a just cause standard to make disciplinary decisions.[5] However, in *Wayne Co Cmty College,* 16 MPER 33 (2003), a union argued that an employer unilaterally altered terms and conditions of employment by discharging an employee without cause after the expiration of the collective bargaining agreement. The Commission dismissed the charge, finding the discharge to be an isolated incident. The decision, however, implicitly recognized that an employer's "wholesale repudiation" of the just cause requirement of the expired contract, or a unilateral alteration in this disciplinary policy affecting the entire unit, would violate its duty to bargain.

In her March 19, 2010 letter, Allen told Charging Party that the "the right to employee discipline or discharge only for just cause expired, under Michigan law, at the time of the expiration

5 Since unions cannot compel employers to arbitrate, some employers may cease using the just cause standard after their contracts expire without this being detected. However, I can find no other case where an employer announced this fact to the union.

of the Local 3308 bargaining agreement." The case Allen cited to support this proposition, *Ottawa Co v Jaklinski,* deals only with the right to compel arbitration of a grievance and provides no support for Allen's claim. This is also true of the cases cited by Respondent in its brief, *Cincinnati Typographical Union No 3 v Gannett Satellite Information Network,* 17 F3d 906 (CA 6, 1993); *Chauffeurs, Teamsters and Helpers v CRST, Inc,* 795 F2d 1400 (CA 8, 1986); and *International Brotherhood of Teamsters v Pepsi-Cola General Bottlers, Inc.,* 958 F2d 1331 (CA 6, 1992). In fact, as discussed above, arbitration has long been recognized to be a solely contractual, rather than a statutory, obligation and an exception to the rule that an employer must maintain the status quo after contract expiration. The exception, however, does not extend to use of the just cause standard to make disciplinary decisions. Although enforcement of the just cause standard may be difficult in the absence of arbitration, this difficulty does not negate the right of employees to the maintenance of this standard as a term or condition of their employment. I conclude that the use of a just cause standard to make disciplinary decisions, like most terms and conditions of employment, survives the expiration of the contract under PERA and that an employer cannot unilaterally abandon this standard absent impasse.

In her March 19, 2010 letter, Allen misstated the law under PERA. However, whether Allen's statements amounted to an announcement that Respondent had actually abandoned the just cause standard when making disciplinary decisions after June 30, 2006 is a disputed question. Based on the evidence before me, I conclude that Allen's statement did constitute an announcement and/or admission that Respondent had ceased to use just cause as the standard for assessing whether an employee should be disciplined or discharged. I note, first, that Allen was responding to an explicit request from Charging Party to "provide a list of all other provisions, if any, that have been cancelled, are not subject to the status quo, or are not operative." Moreover, the last sentence of Allen's letter states that "as to any remaining terms and conditions" Respondent would continue to maintain the terms and conditions of the expired contract. The implication of this sentence is that Respondent was not continuing to maintain the just cause standard which was a term and condition of employment in the now-terminated contract. Second, I find it significant that Respondent never attempted to disavow the statements in Allen's letter, even after a charge was filed indicating that Charging Party understood Allen to be announcing that Respondent had abandoned the just cause standard. Third, Respondent failed to present any evidence - in the form of grievance answers, internal memos or testimony – to indicate that, despite Allen's statements, Respondent continued to use the just cause standard to make individual disciplinary decisions. Based on the evidence before me, I conclude that Allen's March 19, 2010 letter constituted an announcement that Respondent had unilaterally changed an existing term and conditions of employment, the use of the just cause standard to make disciplinary decisions, effective July 1, 2006, and that this unilateral change violated Respondent's duty to bargain in good faith.

Remedy

Failure to Remit Union Dues

In *Ogle Protection Service, Inc,* 183 NLRB 682 (1987), the NLRB held that the appropriate remedy for an employer's unlawful failure to withhold and transmit union dues in accord with the

checkoff provisions of an existing contract was an order requiring the employer to reimburse the union for dues the employer should have collected on its behalf. It held that the reimbursement was limited to employees who had signed dues deduction authorizations. The employer in that case was also found to have unlawfully withheld wages and benefits from employees. The NLRB held that the employer was entitled to offset the amount it paid to the union in dues for each individual employee against the sums due the employee for lost wages and benefits, presumably in recognition of the fact that the employee's underlying obligation to pay dues was not affected by the employer's failure to honor the checkoff provision. The NLRB held that employer had no obligation to reimburse the union for dues paid voluntarily to the union by any employee during any or all of the pertinent period, and that to require it to do so would constitute a "windfall" to the union. In subsequent decisions, the NLRB added the requirement that the employer pay interest on the sums owed to the union. See *Paris Mode Handbags Corp,* 266 NLRB No. 163(1983); *McAllister Bros,* 278 NLRB 601, 603 (1986); *Central Washington Hosp,* 303 NLRB 404, 416 (1991); *Whitesell Corp,* 352 NLRB 1196, 1199 (2008), reaffirmed in *Whitesell Corp,* 355 NLRB No. 134 (2010); *Art's Way Vessels, Inc*, 355 NLRB No. 192 (2010).

As discussed above, Respondent unlawfully failed to withhold and transmit to Charging Party union dues and representation and other union fees that should have been deducted from employees' paychecks between August 1, 2008 and July 1, 2009. An argument can be made that Respondent should be compelled to reimburse Charging Party for the dues and fees that should have been paid by all members of the unit, not just those who executed checkoff authorizations, since all unit members were required by the terms of the collective bargaining agreement to pay either dues or representation fees. However, the NLRB, as indicated above, limits its remedy for an unlawful refusal to check off dues and fees to employees who executed checkoff authorizations, and I recommend that the Commission follow its lead.

I conclude that the appropriate remedy for this violation is an order requiring Respondent to reimburse Charging Party for the dues and fees Charging Party failed to collect from unit employees who executed valid checkoff authorizations, plus interest at the statutory rate of six percent (6%) computed quarterly, but minus any dues or fees Charging Party's members paid the union directly during this period. I recommend that Charging Party be ordered to provide Respondent with any records it has reflecting receipt of these payments within fourteen (14) days of the date of the Commission's order.

Refusal to Arbitrate and Abandonment of Just Cause Standard

As noted above, parties disagree about whether an order to Respondent to arbitrate grievances arising under the contract terminating on June 30, 2009 would be adequate to remedy Respondent's repudiation of its contractual obligation to arbitrate. Charging Party argues that because the delay caused by Respondent's refusal to arbitrate impacted Charging Party's ability to present an effective arbitration case, and because discharged employees suffered hardships because their cases were not arbitrated in a timely fashion, the appropriate remedy includes an order requiring Respondent to reinstate all employees discharged after June 30, 2006 and make them whole.

I agree with Respondent that this is not the appropriate remedy for Respondent's repudiation of its obligation to arbitrate. Section 16(a) of PERA explicitly prohibits the Commission from requiring the reinstatement of any individual who has been suspended or discharged for cause or the payment to him of any back pay. I find that the Commission cannot presume that Respondent discharged members of Charging Party's unit without cause between June 30, 2006 and June 30, 2009 from the fact that Respondent refused to arbitrate their grievances. Charging Party's alternative remedy, that Respondent be ordered to arbitrate all grievances filed after June 30, 2006, is also not appropriate, since the Commission cannot order Respondent to arbitrate grievances arising after the contract terminated on June 30, 2009.

However, in March 2010 Respondent admitted that after June 30, 2006, it ceased using a just cause standard to determine whether to discipline or discharge employees. This is not the same as an admission that the employees were disciplined or discharged without cause. However, I conclude that it shifts the burden to Respondent to establish that the employees would have been disciplined or discharged under a just cause standard. This is consistent with the NLRB's approach when it finds an employer guilty of violating its duty to bargain by unilaterally implementing new work rules or policies. If the employer has used the new work rules or policies to discharge employees, the NLRB orders the employer to reinstate and make these employees whole, but gives the employer the opportunity to avoid reinstatement and back pay by demonstrating, at the compliance stage of the NLRB proceeding, that it would have discharged the employees under its preexisting rules or policies. *Great Western Produce,* 299 NLRB 1004, 1006 (1990); *Windstream Corp,* 352 NLRB 44 (2008); *Boland Marine & Mfg Co,* 280 NLRB 454 (1986).

One way that Respondent can demonstrate this, of course, is through an arbitration decision upholding its disciplinary action under the just cause standard in the expired contract. Since Respondent is obligated and has agreed to arbitrate grievances filed over discharge and other disciplinary decisions it made prior to June 30, 2009, I conclude that an order requiring Respondent to arbitrate these grievances is sufficient to remedy Respondent's repudiation of the just cause standard during the period while the contract remained in effect. However, I conclude that because Respondent admitted that it was not using the just cause standard to make disciplinary decisions between June 30, 2006 and June 30, 2009, Respondent should also be ordered to reimburse Charging Party for the cost of arbitrating all disciplinary grievances Charging Party filed during this period, including Charging Party's portion of the arbitrators' fees and reasonable compensation for the time spent by Charging Party staff employees and/or its legal counsel in preparing and presenting cases to the arbitrators.

As to disciplinary decisions made after June 30, 2009, I recommend to the Commission that it issue an order requiring Respondent to rescind all disciplinary actions, including discharges, issued after that date, reinstate all bargaining unit employees discharged after that date, and make all unit employees disciplined or discharged after June 30, 2009 whole, with interest, for wages and benefits lost as a result of their discipline or discharge. This order shall have the proviso that Respondent may avoid the obligations of this portion of the order by demonstrating, in a proceeding under Commission Rule 177, R 423.177 or by any other method mutually agreed to by the parties, including voluntary arbitration or grievance settlement, that Respondent had just cause to discipline

or discharge each employee. Respondent shall not be required to reimburse Charging Party for costs incurred by it in contesting Respondent's claims under this paragraph.

RECOMMENDED ORDER

The 36th District Court, its officers and agents, are hereby ordered to:

1. Cease and desist from:

a. Repudiating its obligations under its collective bargaining agreement with Charging Party AFSCME Council 25 and its affiliated Local 3308 and unilaterally modifying the provisions of this agreement during its term by:

1. Refusing to arbitrate grievances arising under the collective bargaining agreement,

2. Ceasing, during the term of the agreement, to deduct union dues and representation and other union fees from the paychecks of bargaining unit members who had authorized these deductions,

3. Refusing to discipline and discharge employees only for just cause.

b. After the termination of the above collective bargaining agreement, unilaterally abandoning its obligation to maintain existing terms and conditions of employment by ceasing to use the just cause standard to make decisions about the discipline and discharge of unit employees.

2. Take the following affirmative action to effectuate the purposes of the Act:

a. Upon receipt of notice from Charging Party of intent to arbitrate, arbitrate grievances arising under the above collective bargaining agreement, including the five grievances that had been scheduled for arbitration in April 2008, other grievances that were pending in April 2008 but had not yet reached the arbitration stage, and grievances filed between April 1, 2008 and June 30, 2009.

b. For all grievances arbitrated under paragraph 2(a), reimburse Charging Party for its portion of the arbitrator's fee and for time reasonably spent by Charging Party's employees in preparing and presenting the case to the arbitrator.

c. Rescind all disciplinary actions, including discharges, issued to members of Charging Party's bargaining unit between June 30, 2009 and the date that it resumes utilizing the just cause standard to make disciplinary decisions; remove the above disciplinary actions from employees' files; offer unconditional reinstatement to all unit members discharged after June 30, 2009; and make employees disciplined or

discharged after June 30, 2009 whole for wages and benefits lost as a result of their discipline or discharge, including interest at the statutory rate of five per cent (5%) per annum, computed quarterly. Respondent may avoid the obligations set forth in this paragraph by demonstrating, in a proceeding under Commission Rule 177, R 423.177 or by any other method mutually agreed to by the parties including voluntary arbitration or grievance settlement, that it had just cause to discipline or discharge each employee. Respondent shall not be required to reimburse Charging Party for costs incurred by it in contesting Respondent's claims under this paragraph.

d. Reimburse Charging Party for the dues and representation and union fees Charging Party failed to collect between August 1, 2008 and June 30, 2009 from unit employees who had executed valid checkoff authorizations, plus interest at the statutory rate of five percent (5%) per annum, computed quarterly, but minus any dues or fees Charging Party's members paid the Charging Party directly during this period. Charging Party shall provide Respondent with any records it has reflecting receipt of these payments for individual members within fourteen (14) days of the date of this order.

e. Post the attached notice to employees in conspicuous places on its premises, including all places where notices to unit employees are customarily posted, for a period of thirty (30) consecutive days or, at its option, provide all unit employees with a copy of this notice by electronic mail.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____