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

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE,
Public Employer-Respondent,

-and-

PROFESSIONAL AND ADMINISTRATIVE ASSOCIATION, AFL-CIO,
Labor Organization-Charging Party in Case No. C01 A-3,
-and-

GERALD PAYNE,
An Individual Charging Party in Case No. C00 K-197.

_____/

APPEARANCES:

Floyd Allen & Associates, by Floyd E. Allen, Esq., and Shaun P. Ayer, Esq., for the Respondent

Law Office of Mark H. Cousens, by Mark H. Cousens, Esq., and Gillian H. Talwar, Esq., for both Charging Parties

## DECISION AND ORDER

On April 03, 2002, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent Wayne County Community College (Employer) did not violate its duty to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), when it discharged Charging Party Gerald Payne. The ALJ also found that Respondent did not violate Section 10(1)(a) of PERA, MCL 423.210(1)(a) and recommended that the charges be dismissed.

The ALJ's Decision and Recommended Order were served on the interested parties in accord with Section 16 of PERA. On May 24, 2002, Charging Parties Professional and Administrative Association, AFL-CIO (Union) and Gerald Payne filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support. Respondent filed a timely brief in support of the ALJ's Decision and Recommended Order on June 28, 2002.

Background:

The facts of this case were set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Briefly, the Union represents a unit of full-time administrators and professional employees of Respondent. Charging Party Gerald Payne was a senior application programmer at Wayne County Community College and a member of the bargaining unit represented by the Union. The most recent collective bargaining agreement between Respondent and the Union expired on June 30, 1998. Article XII of the agreement provides that an employee may be discharged only for just cause.

On August 22, 2000, while preparing to leave for the day, Payne received a phone call from Dr. Curtis Ivery, Respondent's chancellor. Ivery instructed Payne to attend a meeting at his office immediately. Payne went to Ivery's office from which he was escorted to a meeting room in which Ivery and others were present. Upon arrival at the meeting room, Payne stood in the doorway. After being invited into the room, Payne stood behind a chair. Ivery asked Payne to take a seat, but he responded that he would rather stand. Ivery immediately became angry, jumped out of his seat, and shouted at Payne to take his belongings and get off the campus. Ivery followed Payne to his office while shouting that he was to leave immediately. Ivery then instructed security to escort Payne off the campus within ten minutes.

On August 24, Payne was placed on administrative leave pending an investigation of the August 22 incident. After a September 15 fact-finding meeting and an October 5 pre-termination hearing, Payne was discharged effective October 13, 2000. The Union filed a grievance on behalf of Payne, followed by a demand for arbitration. Respondent notified the American Arbitration Association and the Union that it would not arbitrate the grievance because there was no contract in effect between the parties at that time.

Payne filed an unfair labor practice charge on November 20, 2000, against Respondent, alleging that the Employer violated Section 10(1)(a) of PERA by discharging him. Payne's charge was consolidated with the charge filed by the Union on January 4, 2001. The Union alleged that Respondent unilaterally altered an existing condition of employment and violated its duty to bargain in good faith, by discharging Payne without cause.

Discussion and Conclusions of Law:

In deciding the charge that Respondent had breached its duty to bargain under Section 10(1)(e), the ALJ found that Payne's discharge was an isolated incident, and that there was no evidence to support the contention that Respondent unilaterally altered wages, hours and working conditions when it terminated Payne. Charging Parties except to the ALJ's ruling that a unilateral change in a condition of employment cannot be based on a single incident and to her finding that the facts in the record do not establish that there was a unilateral change in a condition of employment. We find no merit in Charging Parties' arguments.

Charging Parties contend that Payne's October 11, 2000 discharge was a unilateral change in a mandatory subject of bargaining. They assert that the just cause discharge provision contained in the expired collective bargaining agreement is a mandatory subject of bargaining, which survives the expiration of the contract by operation of law. An employer may not unilaterally alter a mandatory subject of bargaining absent bargaining to impasse with its employees' collective bargaining representatives unless there is a clear and unmistakable waiver by the union. *Central Michigan Univ Faculty Ass'n* v *Central Michigan Univ*, 404 Mich 268, 277, (1978); *Wayne County Government Bar Ass'n* v *Wayne County*, 169 Mich App 480, 426 NW 2d 750 (1988).

In its post hearing brief, Respondent has conceded that were we to rule on the issue, we would most likely find that the just cause discharge provision is a mandatory subject of bargaining. Respondent also admits that they did not bargain over this provision to impasse. However, Respondent denies making a unilateral change with respect to the just cause discharge provision. We find, as did the ALJ, that the record does not establish that Respondent made a unilateral change.

The Commission has distinguished between unilateral changes in working conditions that have a continuing impact on the bargaining unit and mere departures from the contract's terms. See *Grass Lake Community Schs*, 1978 MERC Lab Op, 1186, 1190. See also *Linden Community Schs*, 1993 MERC Lab Op 763 (no exceptions); and *Oakland County Sheriff Dep't*, 1983 MERC Lab Op 538.

In *Grass Lake Community Schs*, the Commission refused to find an improper unilateral change based on a single incident without some indication that the employer had changed its policies. In that case, the charging party alleged that the employer unilaterally changed working conditions by involuntarily transferring one teacher's work assignment in violation of a contract that had expired when the transfer was made. The Commission found that the change that occurred was, at worst, a breach of the agreement. The Commission further found that even assuming that teacher re-assignments were mandatory subjects of bargaining, the charging party's argument would fail because " the conduct complained of was not a general refusal to bargain on the subject but an isolated instance of unilateral action." *Id.* In finding that the unilateral re-assignment was not an unfair labor practice, the Commission held that: "What was actionable as an individual grievance under the contract cannot be elevated by the expiration of the contract to a general repudiation of the bargaining obligation." *Id.*

This case is analogous to the facts in *Grass Lake Community Schs.* There, as here, the failure to bargain charge was based on a single incident involving one individual employee. In neither that case nor the one before us was there evidence that the employer intended to renounce the policy in question or implement a change that would affect the bargaining unit as a whole. Although Payne's discharge may be a violation of the just cause discharge provision, that is not sufficient to constitute repudiation.

Repudiation exists only when 1) the contract breach is substantial and has a significant impact on the bargaining unit and 2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Community Sch*, 1984 MERC Lab Op 894, 897. The Commission will not find repudiation based on an insubstantial or isolated breach. *Crawford County Bd of Comm'rs*, 1998 MERC Lab Op 17, 21; *Linden Community Schools* 1993 MERC Lab Op 763, 772 (no exceptions).

The conduct in question, Payne's discharge, affected only one employee. This was an isolated incident that resulted from Ivery's loss of his temper. Ivery's actions, taken in the heat of the moment, do not indicate a wholesale repudiation of the just cause requirement of the collective bargaining agreement, nor does Respondent's subsequent ratification of that action. Respondent's conduct towards Charging Party did not significantly impact the collective bargaining unit as a whole. The facts do not indicate that Respondent attempted to alter its policy concerning the entire collective bargaining unit. Therefore, we find that Charging Party's discharge was not sufficiently substantial or material to constitute a repudiation of the collective bargaining agreement in violation of Section 10(1)(e) of PERA.

Charging Party also excepts to the ALJ's finding that Respondent did not violate Section 10(1)(a) when it discharged him. Section 10(1)(a) prevents public employers from interfering with their employees' right to "engage in lawful concerted activities for the purposes of collective negotiation or bargaining or other mutual aid or protection." We agree with the ALJ and find that Charging Party did not engage in protected concerted activity by declining to sit on April 22, 2000.

Generally, activities furthering a group interest are concerted whereas activities furthering an individual interest are not. *See University of Michigan*, 1990 MERC Lab Op 272, 295; *See also MERC* v. *Reeths-Puffer Sch Dist*, 391 Mich 253, 259-263; 215 NW2d 672 (1974). In addition, the National Labor Relations Board has found that concerted activities within the meaning of the National Labor Relations Act (NLRA) are either those that are engaged in with the object of initiating, inducing, or preparing for group action or those that have some relation to group action in the interest of all union members. *Mushroom Transp. Co* v. *NLRB*, 330 F.2d 683 (1964)[1] In this case, Charging Party's refusal to sit cannot be reasonably construed as concerted action advocating for the mutual aid and protection of his fellow union members.

As the ALJ pointed out, the "Interboro doctrine"[2] does not apply here as Charging Party did not invoke a contractual right by declining to sit on April 22, 2000. The expired contract did not explicitly grant Charging Party the right to decide to sit or stand when asked by his employer. Moreover, the facts do not indicate that Charging Party's

1 Although not controlling, we look towards federal precedent developed under the NLRA for guidance in interpreting PERA. *Oakland County*, 2001 MERC Lab Op 385, 389. See also *Gibraltar Sch Dist* v *Gibraltar MESPA-Transp*, 443 Mich 326, 335; 505 NW2d 214 (1993); *St. Clair Intermediate Sch Dist* v *Intermediate Educ Ass'n*, 458 Mich 540, 559; 581 NW2d 707 (1998).

2 See *Interboro Contractors, Inc*, 157 NLRB 1295 (1966) *enf'd* 388 F2d 495 (2nd. 1967).

refusal to sit was related to the interests of the members of his union as a whole. The facts establish that Charging Party declined to sit down for his own personal reasons.

Accordingly, we find that Charging Party has failed to establish that Respondent unilaterally altered a condition of employment in violation of its duty to bargain under Section 10(1)(e). We also find that Respondent did not violate Section 10(1)(a) by discharging Charging Party.

## ORDER

We hereby adopt the Administrative Law Judge's Decision and Recommended Order as our final order in this case and dismiss the charges in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

_____
C. Barry Ott, Commission Member

## DISSENT

Commissioner Bishop, dissenting in part:

I agree that the evidence simply does not support Charging Party's contention that Payne was engaging in protected concerted activity when he was discharged. Consequently, I agree with my colleagues that Payne's discharge did not violate Section 10(1)(a) of PERA for the reasons stated in their decision.

However, I respectfully disagree with the majority's dismissal of the Section 10(1)(e) charge. It is my opinion that Respondent violated its duty to bargain when it discharged Payne without just cause.

When a collective bargaining agreement has expired, the parties are required to bargain in good faith in an effort to reach a new agreement. The terms of the expired contract regarding mandatory subjects of bargaining survive the expired contract by operation of law. Under PERA, unilateral action over mandatory subjects of bargaining may not be taken by either party absent an impasse in negotiations, or a clear and unmistakable waiver. An employer who takes unilateral action on a mandatory subject of bargaining prior to reaching impasse in negotiations commits an unfair labor practice.

*Wayne Co Gov't Bar Ass'n* v *Wayne Co*, 169 Mich App 480, 485-486 (1988); and *Wayne County Community College District*, 2002 MERC Lab Op _____.

The expired contract limited Respondent's right to discipline or discharge to infractions giving rise to just cause. Discipline and discharge are mandatory subjects of bargaining. See *Amalgamated Transit Union, Local 1564*, v *SEMTA*, 437 Mich. 441 (1991); *St Clair Prosecutor* v *AFSCME Local #1518*, 425 Mich. 204 (1986); and *Pontiac Police Officers Ass'n* v *Pontiac*, 397 Mich. 674 (1976). Thus, the Employer is obligated to bargain over changes from the just cause standard, and in the absence of a waiver by the Union, may not unilaterally change that standard without first bargaining to impasse. The record reflects that there was no bargaining over the standard to be applied by the Employer in issuing discipline or in discharging employees, and therefore, no impasse. Nor was there a waiver by the Union of its right to bargain over changes to the standard for discharge. Accordingly, the question before us is whether Respondent implemented a unilateral change in the just cause standard.

Respondent argues that the Commission should not exercise jurisdiction over this matter absent a showing that its discharge of Payne amounts to a repudiation of the just cause standard and contends that this is merely a good faith dispute over the interpretation of the contract. I see no evidence of a good faith dispute. Although Respondent asserts that Payne was discharged for insubordination, Respondent has failed to provide any support for this assertion. Respondent has not explained how Payne's actions could be interpreted as insubordinate, nor has Respondent provided any other basis for finding just cause for the discharge. I cannot find that there is merely a bona fide dispute over the interpretation of the collective bargaining agreement when the party asserting that such a dispute exists fails to explain its interpretation of the contract, fails to provide any support for that interpretation, and fails to indicate how the facts might fit its interpretation.

Charging Parties cite various arbitration decisions holding that insubordination consists of a refusal to comply with a direct order after being warned of the consequences of said refusal. Respondent, on the other hand, has failed to offer any authority that might disagree with the definitions of insubordination offered by Charging Parties and has failed to argue that Payne's actions meet any authoritative definition of insubordination.

A review of the facts indicates the reason that Respondent has failed to attempt to show how Payne's actions could be considered insubordinate. Respondent's own witness confirms that upon Payne's arrival at the meeting room, he stood in the doorway until Ivery beckoned him in. At that point, Payne moved into the room and stood behind a chair. Ivery asked Payne to sit down and Payne responded that he would rather stand. Ivery did not instruct or order Payne to sit, nor did he warn Payne that there could be adverse consequences to refusing to sit. Indeed, Payne did not express a refusal to sit; he expressed a preference for standing. Although he continued to stand, that cannot be construed as a refusal to sit in the absence of a direct order to do so. It is inconceivable that a failure to sit after merely being invited to do so could be considered just cause for discharge. Nevertheless, Payne was fired without being warned that his actions would be

considered unacceptable. There is neither evidence of insubordination, nor just cause for discharge based on these facts.

It is evident that Respondent chose to discharge Payne without regard to its obligations under the collective bargaining agreement or PERA. The Commission has defined repudiation as an attempt to rewrite the contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Village of Romeo*, 2000 MERC Lab Op 296; *Crawford County Bd of Comm'rs*, 1998 MERC Lab Op 17, 21; *Central Michigan Univ*, 1997 MERC Lab Op 501; *Twp of Redford Police Dep't*, 1992 MERC Lab Op 49, 56 (no exceptions); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891. In this case, Respondent has acted with a complete disregard for the contract as written. Not only did Respondent discharge Payne without just cause, Respondent treated Payne as though he was a mere at-will employee without the protections of a just cause discharge standard. Charging Parties argue "the discharge was so arbitrary that it provides clear evidence of a unilateral change and a violation of the Respondent's duty to bargain under PERA." I agree.

The Commission has found repudiation when the contract breach is substantial, has a substantial impact on the bargaining unit and no bona fide dispute over contract interpretation is involved *Glen Lake Community Schs* 1986 MERC Lab Op 803, 806; *Plymouth Canton Community Schs*, 1984 MERC Lab Op 894. Although Payne was the only bargaining unit member to be immediately and directly affected by Respondent's breach of the contract, I find that breach to be substantial.

Just cause disciplinary provisions are included in collective bargaining agreements to protect employees from arbitrary and capricious action by employers. Here, Respondent acted arbitrarily when it ratified Ivery's capricious decision to discharge Payne, and blatantly disregarded its obligations under the collective bargaining agreement and PERA. The point made by Chief Judge Lay, in arguing that the right to arbitration of a discharge should survive the expiration of the collective bargaining agreement, in his dissent in *Chauffeurs, Teamsters & Helpers, Local Union 238* v *CRST, Inc*, 795 F2d 1400, is equally applicable here:

> The expiration date of a bargaining contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact one of the very incentives to union representation is job security.
>
> . . . .
>
> The dispute involved here, whether an employee may be discharged without "just cause," raises a continuing right vested under the contract as was the right to severance pay in *Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 51 L. Ed. 2d 300, 97 S. Ct. 1067 (1977). To hold otherwise, as the majority does, relegates all employees upon termination of the collective bargaining agreement to a status of mere employment at will.

*Chauffeurs, Teamsters & Helpers*, at 1405 (citations omitted).

To find Payne's discharge to be an isolated incident without a substantial effect on the bargaining unit is to ignore the overriding importance of job security and just cause discharge provisions in collective bargaining. To do so would indeed relegate the members of the bargaining unit to at-will employees. Just cause provisions are of such importance in the collective bargaining that their elimination can render seniority provisions and all other "work protection" clauses of the collective bargaining agreement meaningless. For that reason, arbitrators will often imply a just cause limitation into a collective bargaining agreement.[3] Accordingly, a discharge in clear violation of a just cause discharge provision is substantial and is distinguishable from the mere transfer of a single teacher's work assignment, as in *Grass Lake Community Schs*, the case relied on by the majority.

In *County of Allegan*, 1992 MERC Lab Op 134, 137, the Commission found that the employer violated PERA when it required a single employee to submit to psychological counseling without first bargaining over the requirement. There, we pointed out that there was no evidence in the record that the incident with the employee in question was truly an isolated incident rather than the beginning of a policy. The same is true in the case before us. I question here as I did in *County of Allegan*, "How many 'isolated incidents' must occur". . . before a blatant disregard of bargaining obligations is recognized as a repudiation?

Given the clear absence of a bona fide dispute over the interpretation of the collective bargaining agreement, the vital significance of the contract provision to the bargaining unit as a whole, and the Employer's disregard of its obligations under that provision, I find that that the Employer has made a unilateral change in a mandatory subject of bargaining. It is, therefore, my opinion that the Employer has repudiated the just cause provision of the contract without first bargaining to impasse and, by so doing, has violated Section 10(1)(e) of PERA.

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Harry W. Bishop, Commission Member

Dated:_____

3 Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works*, (Marlin M. Volz and Edward P. Goggin eds., 5th ed 1997), p 896.

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GERALD PAYNE,
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PROFESSIONAL AND ADMINISTRATIVE ASSOCIATION, AFL-CIO
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APPEARANCES:

Floyd Allen & Associates, by Floyd E. Allen, Esq., and Shaun P. Ayer, Esq., for the Respondent

Law Office of Mark H. Cousens, by Mark H. Cousens, Esq., and Gillian H. Talwar, Esq., for both Charging Parties

## 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 August 15, 2001, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before October 17, 2001, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On November 20, 2000, Gerald Payne, an individual, filed the charge in Case No. C00 K-197 against his former employer, Wayne County Community College. Payne alleges that Respondent violated Section 10(1)(a) of PERA by discharging him on October 13, 2000 for engaging in activity protected by the Act. Payne's charge was consolidated with the charge in Case No. C01 A-3. This charge was filed by Payne's labor organization, the Professional and

Administrative Association (hereinafter the Union), on January 4, 2001. The Union alleged that by discharging Payne without just cause, Respondent unilaterally altered an existing condition of employment and violated its duty to bargain in good faith under Section 10(1)(e) of the Act. On May 11, 2001, Respondent filed a motion to dismiss on the grounds that the charge involved only a good faith dispute over the interpretation of the contract. I concluded that Respondent's motion should be held in abeyance pending an evidentiary hearing because the charges raised legal issues that were intertwined with disputed issues of fact.

Facts:

The Union represents a bargaining unit consisting of all full-time administrators and professional employees of Respondent. The most recent collective bargaining agreement covering this unit expired on June 30, 1998. Article XII (A) of this agreement stated that an employee could be disciplined only for adequate and just cause. Article XII (D) of this agreement provided that, except for certain stated exceptions, an employee would be subject to termination only for just cause. Article VIII contained a grievance procedure culminating in binding arbitration.

Prior to his termination, Payne was a senior application programmer and a member of the Union's bargaining unit. At about 3:45 p.m. on August 22, 2000, Payne was in his work area and preparing to leave for the day when he received a telephone call from Dr. Curtis Ivery, Respondent's chancellor. Ivery told Payne he wanted him to come to his office. Payne said that he was getting ready to leave, and asked if they could meet tomorrow. Ivery replied:

> Gerald, you don't want to play with me today. I'm not in the mood to be played with today. I have been rammed [sic] over with several meeting. I have a lot of responsibilities. And you do not want to play with me today. Now I want you to come up to my office right now. If you feel that you need someone to come up to my office, then you get that person and come up to the office. But I want you to come to my office right now. Do you understand me?

Ivery was, at that moment, in an emergency meeting. The topic of this meeting was the fact that Respondent had not yet sent out letters to students notifying them that they had been awarded financial aid. The deadline for students to register for the next semester was fast approaching, and Respondent was concerned that students might not enroll without confirmation that they would receive financial aid. If the letters did not get out in time, Respondent's financial aid reimbursement from the U.S. Department of Education might also be delayed. Since the financial aid letters are generated by Respondent's computer system, Ivery needed Payne's input as senior programmer to address the problem. However, when Ivery called Payne he did not explain why he wanted to see him.

Payne told Ivery he would come and went up two floors to Ivery's office. Ivery's secretary escorted Payne to the conference room where the meeting was being held. Payne stood for a minute either in the doorway or immediately behind an empty chair. Ivery said, "Gerald, have a seat." Payne replied, "I prefer to stand." Ivery immediately became very angry. He jumped out of his seat, approached Payne, and told him to take his belongings and get off the

campus immediately. Ivery then followed Payne all the way to Payne's office, where he informed a security guard that Payne was to be off campus with all his belongings within 10 minutes.

On August 24, Payne was placed on administrative leave with pay, pending investigation of the incident. A meeting was held on September 15 to review the incident, with Payne and a Union representative present. After that meeting, Respondent decided that Payne should be terminated for insubordination. Payne was given a pre-termination hearing by Respondent's Department of Human Resources on October 5, 2000. On October 11, Payne was sent a letter informing him of his termination. The Union filed a grievance on Payne's behalf on October 16, alleging that Payne had been terminated without just cause. When the Union and the Respondent met to discuss the grievance, Respondent asserted again that Payne had been insubordinate. The Union filed a demand for arbitration. On November 16, Respondent notified the American Arbitration Association and the Union that it would not arbitrate the grievance because there was no contract currently in effect between the parties.

Discussion and Conclusions of Law:

Respondent discharged Payne for "gross insubordination." Respondent maintains that it had just cause for terminating Payne. The Union asserts that it did not. According to the Union, arbitrators generally recognize that, to be guilty of insubordination, an employee must (a) refuse to obey a directive; (b) that is clear and unequivocal; and (c) that is accompanied by an explanation of the consequences that may follow a refusal. Here, the Union argues, Ivery did not give Payne a clear and unequivocal directive to sit down, and he did not warn Payne of the consequences if Payne did not do so. According to the Union, Payne was not insubordinate, and in fact committed no offense at all, simply by stating that he "prefer(ed) to stand." However, since the parties' contract expired long before the alleged insubordination, the Union cannot compel Respondent to arbitrate this matter. *Gibraltar School District v MESPA*, 443 Mich 326 (1993).

The Union argues that by discharging Payne without just cause, Respondent violated its duty to bargain under Section 10(1)(e). The Union points out that absent a good faith impasse, PERA prohibits an employer from making unilateral changes in mandatory subjects of bargaining after the expiration of a contract, citing *Gibraltar School District, supra*, at 336-337, and *Fire Fighters v Portage*, 134 Mich App 466, 473 (1984). The Union further notes that disciplinary standards and procedures have been held to be mandatory subjects of bargaining, since they have a significant impact on "other conditions of employment" within the meaning of Section 11 of the Act. *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 452 at n. 7 (1991); *Pontiac Police Officers Ass'n v Pontiac*, 397 Mich 674, 681 (1976). It follows, according to the Union, that Respondent could not unilaterally repudiate the "just cause" standard for discipline after the parties' collective bargaining agreement expired.

I rejected the argument the Union makes here in a recent case, *City of Petoskey*, 2002 MERC Lab Op ____ (Case No. C01 H-151, issued January 7, 2002). The Commission adopted my decision and recommended order when no exceptions were filed. Like the Union here, the Charging Party in *Petoskey* argued that the Respondent violated its statutory duty to continue

existing terms and conditions of employment after contract expiration when it discharged a single employee without just cause. I held in that case that even if the employee had been terminated without just cause, it did not follow that Respondent had unilaterally altered an existing condition of employment. I noted that the Commission has refused to find unilateral changes based on a single incident without some indication that the Employer has altered its policies. For example, in *Grass Lake* CS, 1978 MERC Lab Op 1186, 1190, the Commission held that the transfer of one individual teacher was not a unilateral change, even though that transfer might have constituted a breach of the expired contract, since the transfer "did not have a continuing impact on the bargaining unit." See also *City of Westland*, 1988 MERC Lab Op 853 (there was no evidence that the Respondent had altered its policies regarding union release time, and two reprimands issued to union officers for alleged misuse of this time were isolated incidents).

Here, Respondent contends that it had good cause for terminating Payne. No matter how strong the Union's argument that Respondent lacked just cause in this case, Payne's discharge was an isolated incident. There is no evidence that Respondent has repudiated the "just cause" as the standard for determining whether members of Charging Party's bargaining unit should be disciplined and/or discharged. I conclude that the record does not support a finding that Respondent unilaterally altered wages, hours or working conditions when it terminated Payne.

In his charge, Payne asserts that he was engaged in activity protected by Section 10(1)(a) of PERA when he failed to take a seat because he acted in reliance on the provisions in the expired contract protecting him from arbitrary discipline. Payne cites *NLRB v City Disposal Systems, Inc.*, 465 US 822 (1984). In *City Disposal Systems, Inc.*, the existing collective bargaining agreement provided that employees were not required to operate vehicles not in safe operation condition, and that "it shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified." A truck driver refused to drive a truck because he believed it had faulty brakes, and was discharged as a result. After the union refused to proceed with his grievance, the driver filed a charge under the National Labor Relations Act, (NLRA), 29 U.S.C.§ 157. The National Labor Relations Board (NLRB or Board) applied its so-called "Interboro doctrine," under which an individual's assertion of a right grounded in a collective bargaining agreement is recognized as "concerted" activity that can be protected by that Act, even when the individual acts alone. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enf'd*, 388 F2d 495 (2nd Cir, 1967). The NLRB found that even though the driver did not refer to the contract when he refused to drive, the employer nevertheless knew that he was asserting a right under that agreement. The NLRB held that the driver's refusal to drive the truck was protected concerted activity under the NLRA because he honestly and reasonably asserted a right grounded in the collective bargaining agreement. The Supreme Court affirmed. It agreed with the Board that the assertion of a right contained in a collective bargaining agreement is an extension of the concerted action that produced the agreement. See *Bunney Bros Construction*, 139 NLRB 1516 (1962). It also found that the assertion of a right protected by a collective bargaining agreement affects the rights of all employees covered by that agreement. *Interboro Contractors, supra.*

Payne argues that when he declined to sit down, he engaged in concerted activity protected by PERA because in doing so he relied on his right, established by the expired

contract, to be protected from unjust discipline. However, the expired contract does not explicitly give Payne the right to decline to sit when told, or even asked, to do so by his employer. Nor was Payne discharged because he complained that his contract rights had been violated. I can find no authority, and Payne cites none, which would support a finding that Payne was asserting or invoking a contract right when he declined to sit at the conference table on April 22, 2000. Whatever Respondent's actual reason for terminating Payne, I am unable to conclude that he was discharged because he engaged in concerted activity protected by PERA.

In accord with the findings of fact, discussion, and conclusions of law set forth above, I find that in Respondent did not violate its duty to bargain under Section 10(1)(e) of PERA when it discharged Charging Party Gerald Payne. I also find that in discharging Payne Respondent did not violate Section 10(1)(a) of the Act. I therefore recommend that the Commission issue the following order.

## RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____