STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT (POLICE DEPT),
Public Employer-Respondent,

Case No. C04 E-119

-and-

FLINT POLICE OFFICERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Steve Stratton, Labor Relations Director, for the Respondent

Leonard Kruse, P.C., by Norbert B. Leonard, Esq. and Kelly A. Kruse, Esq., for the Charging Party

DECISION AND ORDER

On January 31, 2005, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated: _____

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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 July 7, 2004, 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 August 25, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Flint Police Officers Association filed this charge against the City of Flint on April 23, 2004. Charging Party represents a bargaining unit of nonsupervisory police officers employed by the Respondent. Charging Party alleges that since about September 2003, Respondent has violated Section 10(1)(e) of PERA by unreasonably delaying grievance arbitration hearings. [1]

[1] Charging Party also alleged that Respondent violated PERA by disciplining members of Charging Party's unit for infractions committed more than ninety days before the imposed discipline. The parties agreed to hold this allegation in abeyance. On August 30, 2004, Respondent filed a motion to dismiss, attaching a copy of an August 18, 2004 grievance settlement requiring Respondent remove certain disciplinary actions from employees' personnel files.

Motion to Strike/Motion to Reopen the Record:

Charging Party's post-hearing brief included an affidavit from its co-counsel, Norbert Leonard, dated August 19, 2004. On August 30, Respondent filed a motion to strike the affidavit. On September 3, Charging Party filed a response to the motion requesting that the record be reopened to consider the new evidence set forth in the affidavit.

Under Commission Rule 166, 2002 AC, R 423.166, a party may move to reopen a record to admit new evidence after the close of a hearing. The rule provides that the motion will be granted only if: (1) the additional evidence could not have been discovered and produced at the hearing; (2) the evidence itself, and not merely its materiality, is newly discovered; and (3) the evidence, if adduced and credited, would require a different result.

At the hearing, Leonard testified that on June 16, 2004 he sent a letter to Respondent demanding the arbitration of fourteen grievances. He also testified that as of the date of the hearing, July 7, 2004, he had not received a response to his letter. In his August 19 affidavit, Leonard stated that Respondent had still not responded to his June 16 arbitration demand.

The evidence in Leonard's affidavit meets the first two requirements of Rule 166. However, this evidence would not change my conclusion, discussed below, that Respondent did not repudiate the parties' grievance procedure. Charging Party's motion to reopen the record is therefore denied.

Facts:

As indicated above, Charging Party represents Respondent's nonsupervisory police officers. Respondent has labor agreements with five other unions.

The parties' current collective bargaining agreement contains a six-step grievance procedure culminating in binding arbitration. The grievance procedure includes time limits on when Charging Party may submit a demand to arbitrate. It provides that if the parties are unable to agree to an arbitrator within 10 working days of the receipt of the demand, the parties will use the services of the American Arbitration Association (AAA). It also includes provisions dealing with the jurisdiction of the arbitrator, the distribution of arbitration costs, and procedures for conducting the hearing. There is no contract provision covering the scheduling of arbitration hearings.

In March 2003, Steve Stratton, human resources director for Genesee County, began serving as Respondent's director of labor relations and human resources. That same month, Charging Party elected a new president, Keith Speer. Charging Party also hired a new labor

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Charging Party did not respond to the motion. On September 16, I sent the parties a letter stating that I assumed that this part of the charge had been resolved. Charging Party did not respond to my letter. I consider this allegation to have been abandoned.

counsel, Norbert Leonard. Between March 2003 and July 2004, Charging Party filed approximately sixty grievances.

Respondent sometimes hires outside counsel to handle labor relations matters. However, Stratton decided that arbitrations should be handled in-house when possible. He also decided that the lawyers in Respondent's legal department were not qualified to handle arbitrations and should not be given this responsibility. In July 2004, employees of Respondent's labor relations department were handling all its labor arbitrations. Stratton was personally handling all arbitrations involving Charging Party's unit.

Under the grievance procedure, Charging Party initiates arbitration by submitting an arbitration demand. Stratton then contacts Leonard and they mutually agree to an arbitrator. Despite the contract language, they usually select an arbitrator without AAA's services, even if the selection takes longer than ten days. The parties generally use well-respected and well-known arbitrators with busy schedules. After Respondent and Charging Party agree on an arbitrator, Stratton's secretary, Minerva Strong, usually contacts the arbitrator's office for available dates. Strong then looks at Stratton's calendar, checks with Respondent's witnesses to make sure they are available on the offered dates, and finds out when Leonard is available. After the parties have agreed on a date, Strong is usually responsible for notifying the arbitrator of the date the parties have selected.

According to Charging Party, the following events demonstrate that Respondent is responsible for unreasonable delays in the scheduling of arbitration hearings. On September 24, 2003, Leonard demanded to arbitrate two grievances. Sometime in late 2003, the parties agreed to arbitration dates for these grievances. Using the process described above, the parties scheduled the arbitrations for September 24 and October 1, 2004. On April 16, 2004, at Charging Party's request, the hearing on one of the grievances was moved up from October 1 to August 25, 2004.

On or about December 24, 2003, Respondent requested that the arbitration of a grievance involving bargaining unit member William Surface be postponed. The record does not indicate why this request was made. The arbitration was rescheduled from May 28 to June 25, 2004.

On December 30, 2003, the arbitrator selected by the parties to arbitrate a grievance involving health benefits allegedly owed to Kathleen Robinson offered them February 18, 2004 as a possible hearing date. Respondent was not available because it had an arbitration scheduled with another union the following day. The arbitration was eventually scheduled for July 23, 2004.

On or about June 4, 2004, Leonard contacted Strong to obtain dates for an arbitration hearing on a grievance involving Adina Thrower. Strong informed Leonard that Stratton's first available date was December 15, 2004. The arbitration was eventually scheduled for that day.

On June 16, 2004, Leonard sent a letter to Strong demanding the arbitration of 14 grievances. One of these grievances involved a discharge. Leonard and Strong had already discussed dates for this case, and shortly thereafter the parties scheduled the arbitration for October 8, 2004. Leonard testified that as of the date of the hearing he had not received any

other response to his June 16 demand. Stratton could not explain this, although he testified that he had not seen Leonard's June 16 letter.

The parties arbitrated the William Surface grievance on June 25. According to Respondent's records, Respondent and Charging Party were scheduled to arbitrate eight separate cases, including the discharge grievance, between July 23 and December 15, 2004.

Discussion and Conclusions of Law:

Charging Party offers two theories for why Respondent's conduct violated PERA. First, Charging Party maintains that the collective bargaining agreement contains an implied promise of fair dealing, According to Charging Party, Respondent violated PERA by avoiding its obligation under the contract to cooperate in the scheduling of arbitration dates within a reasonable time after the demand for arbitration was made. Second, it maintains that Respondent violated PERA by violating the due process rights of discharged employees to a meaningful, i.e. reasonably speedy, hearing.

An alleged breach of a collective bargaining agreement is not an unfair labor practice under PERA unless a party has "repudiated" the agreement.[2] *City of Detroit,* 17 MPER ¶44 (2004); *Gibraltar Custodial-Maintenance Ass'n,* 16 MPER ¶ 36 (2003). 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 Schools,* 1984 MERC Lab Op 894, 897. Repudiation has been described as a rewriting of the contract, or a complete disregard for the contract as written. *Gibraltar, supra; Central Michigan Univ*, 1997 MERC Lab Op 501, 507.

In *Gibraltar,* the employer asserted that the union repudiated the contractual grievance procedure by filing demands to arbitrate grievances after they had been either settled or withdrawn. The Commission reiterated that, absent conduct that "substantially frustrates" the processing of grievances, it will not get involved in procedural disputes relating to the grievance process. Compare *Electrical Workers, Local 498,* 1986 MERC Lab Op 169 (refusing to meet or discuss employee's grievance, and suggesting that union proceed directly to arbitration, constituted repudiation of grievance procedure) with *City of Pontiac,* 1991 MERC Lab Op 419 (repeatedly failing to comply with grievance procedure time limits did not constitute repudiation when the employer but made efforts to settle grievances outside of the formal procedure.)

The contract in this case does not impose time limits on the scheduling of arbitration hearings, and Respondent does not agree that it has a contractual obligation to schedule arbitrations within any particular time frame. I find that there is a bona fide dispute between the parties over whether the contract imposes any obligations on Respondent with respect to the

[2] Charging Party cites *Crider v State of Michigan,* 110 Mich App 702 (1981) for the proposition that a public employer's breach of its collective bargaining agreement is an unfair labor practice. However, *Crider* is not a PERA case. Plaintiffs in that case were state classified employees. As discussed in that case, Const 1963, art 11, § 5 gives the Civil Service Commission (CSC) plenary power to regulate conditions of employment for state classified employees. State classified employees are excluded from PERA, and the CSC has promulgated its own rules governing collective bargaining for state classified employees.

scheduling of arbitration hearings. I also find no evidence that Respondent's conduct substantially frustrated the grievance process. Grievances filed by Charging Party have been discussed and are being arbitrated. Charging Party sserts that the fact that some arbitration hearings have been scheduled more than a year after the arbitration demand stems from Respondent's failure to assign more personnel. However, other factors, including the number of grievances and arbitration demands and the fact that the parties choose busy arbitrators, also seem to have contributed to the delay. I agree with Charging Party, of course, that lengthy delays can cause problems; witnesses may disappear or their memories may fade, and delays work hardships on grievants who have been discharged and are out of work. Speedier justice, however, has costs and tradeoffs. The fact that Respondent has refused to hire outside counsel or train lawyers in its legal department to handle arbitrations does not demonstrate that Respondent has deliberately undertaken to derail the grievance process. I find nothing else in the record to support a conclusion that this has been Respondent's intent. I conclude, therefore, that Respondent has not repudiated either its contractual obligations or its obligation to discuss and process grievances.

Charging Party also argues that Respondent violated PERA because the delays in scheduling arbitration hearings violate discharged employees' due process rights. The rights and privileges of public employees protected by PERA are set out in Section 9 of the Act. The Commission does not and cannot pass on constitutional claims, including due process claims. *Michigan State Univ,* 16 MPER ¶ 52 (2003); *Muskegon Heights Public Schools,* 1993 MERC Lab Op 654.

For reasons set forth above, I conclude that Charging Party has failed to demonstrate that Respondent violated PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____