STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAK PARK PUBLIC SAFETY OFFICERS ASSOCIATION AND POLICE OFFICERS ASSOCIATION OF MICHIGAN (POAM),
Respondent-Labor Organization,

Case No. CU00 H-28

-and-

CITY OF OAK PARK,
Charging Party-Public Employer.
_____/

APPEARANCES:

Police Officers Association of Michigan, by Peter Cravens Esq., for Respondent

Shifman & Carlson, P.C., by Burton R. Shifman, Esq., and Laurence A. Berg, Esq., for Charging Party

DECISION AND ORDER

On August 31, 2001, Administrative Law Judge Nora Lynch 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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated:

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAK PARK PUBLIC SAFETY OFFICERS
ASSOCIATION AND POLICE OFFICERS
ASSOCIATION OF MICHIGAN (POAM),
Respondent-Labor Organization

- and – Case No. CU00 H-28

CITY OF OAK PARK
Charging Party-Public Employer
_____/

APPEARANCES:

Peter Cravens, Esq., Police Officers Association of Michigan, for the Respondent

Burton R. Shifman, Esq., and Laurence A. Berg, Esq., Shifman & Carlson, P.C., for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Detroit, Michigan, on October 24, 2000, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on August 4, 2000, by the City of Oak Park, alleging that the Oak Park Public Safety Officers Association and Police Officers Association of Michigan, had violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before December 20, 2000, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that by its action in circulating a flyer to residents of Oak Park, and sending a letter to City of Berkley council members, the Union bypassed and refused to utilize the mandatory contractual grievance procedure to resolve the dispute between the parties, and thereby violated PERA by repudiating the collective bargaining agreement.

Facts:

The Oak Park Police Officers Association, POAM, represents a bargaining unit of all sworn officers of the Oak Park Public Safety Department, excluding command officers and the director of public safety. At the time of hearing, the latest collective bargaining agreement between the parties covered the period 7/1/97 to 6/30/2001. Article XXVII of this agreement contains a grievance procedure which terminates in binding arbitration.

The contract contains provisions regarding hours of work and manning at Article VIII. On April 7, 2000, the Association filed a grievance alleging that the department had allowed B platoon to work without the required minimum amount of firefighters on duty. According to Union President Kevin Loftis, the department had previously maintained at least six certified firefighters on duty. The department then began to maintain five firefighters at a fire scene. They also started to count light duty officers as part of manpower, and commanders responding to the scene as firefighters, which had not been done in the past. In addition, the City had taken the position that they did not need an engineer on the fire apparatus. According to Loftis, the department did not wish to pay overtime in order to maintain the proper number of firefighters on duty.

On April 20, 2000, Deputy Director Robert Bauer responded to the grievance stating that there had been no instance of fewer than five firefighter II certified officers responding to every fire run, although one of the responding firefighters may have been a supervisor. Bauer stated that this conformed with the standards set by OSHA, which required a minimum of four firefighters. Bauer also stated that his office had been advised that the Association had reached agreement with Personnel Director James Hock that the department would continue to operate in conformance with OSHA requirements, which he stated would be a minimum of three certified firefighter II public safety officers and two certified firefighter II supervisors or four certified PSO's and one supervisor responding to every fire run. Based on this agreement, Bauer stated that he believed the grievance was settled.

On May 12, 2000, POAM Business Agent Kenneth Grabowski wrote to Hock stating that he believed a dangerous situation was developing within the public safety department putting officers at great risk. Grabowski objected to the department policy of using only three firefighters from the nonsupervisory bargaining unit with two commanders, since the commanders did not actually work the fire scene. He also objected to the fact that the department was counting on using one officer from the Berkley Public Safety Department to respond, and that the department no longer required an engineer at the fire truck. Grabowski indicated that the Association was seeking input from the city council in an attempt to resolve the situation because the previous agreement reached with Hock had been rejected by police administrators.

The City of Oak Park has a contractual mutual aid agreement with the City of Berkley. Each city will respond to police and fire incidents for the other when requested. Oak Park has a larger department and generally provides more aid to the City of Berkley than Berkley provides to Oak Park. On May 15, 2000, Grabowski wrote the following letter to Berkley council member Holly Martin:

> Please be advised that, as the certified bargaining agent for the Public Safety Officers in the City of Oak Park, we believe a situation has developed within Oak Park that directly affects the safety of Berkley public safety officers.
>
> The City of Oak Park has now changed their manning requirements, reducing the level of manning. This reduction may now require the assistance of the City of Berkley Public Safety Department more frequently than has been in the past. Should the City of Oak Park call for assistance from your city under the guise of mutual aid, please be advised that, in our opinion, the situation is not one of mutual aid, but a failure of the City of Oak Park to adequately fund and staff their manpower requirements. Quite possibly, the taxpayers and officers in the City of Berkley will now be providing services to the City of Oak Park.
>
> Your attention to this matter would be appreciated.

In the meantime, Hock responded to Grabowski on May 18, 2000. Hock explained that the City intended to make every attempt to minimize the employees' exposure to dangerous situations. He stated further:

> It is the position of the City that if there are only 3 additional fire certified PSO's working, the department may assign the Sergeant to be a firefighter, in full gear ready to fight the fire and meet the OSHA standard of "2 in, 2 out." If this occurs, that Sergeant will not be the scene commander or safety officer, there will always be another Command Officer at any fire scene to serve as the scene commander/safety officer. It is important to note that at no time has the staffing level of this platoon fallen to this level of only three fire certified Public Safety Officers to fight a fire. There has always been at least five!
>
> On those occasions when the staffing level was at this level, Berkley was notified and they sent a car to the scene to evaluate whether they may be needed as back-up in accordance with mutual aid. The decision to request mutual aid from another community is up to Oak Park and Berkley is no longer being notified unless we need their assistance.
>
> This staffing situation only lasted approximately four weeks long and at no time did Public Safety Officers fight a fire with less than five fire certified personnel.

The Association notified the City in June that they intended to take the grievance to arbitration although at the time of hearing they had not formally done so. In late June of 2000, the Union mailed the following document to all registered voters of Oak Park:

*** IMPORTANT NOTICE ***
YOUR PUBLIC SAFETY DEPARTMENT AND YOU

Your Public Safety Officers Union wants to make you aware of drastic changes that will affect your family's health and safety as well as that of responding firefighters.

Your city administration has reduced the number of responding on duty firefighters by up to 50%. This drastic reduction comes after a tragic fire in a neighboring community in which five children died.

THIS CAN HAPPEN IN OAK PARK!!!

During the month of April, there were 2 fire bombings of occupied homes in Oak Park. Miraculously, no one was injured, even though a child was doused with gasoline in one of the fire bombings.

This drastic numbers reduction of on-duty firefighters is well known to Mayor Naftaly and the city council.

The city of Oak Park has reduced the number of on duty firefighters just to save a few dollars, even though the Oak Park Public Safety Officers Union has agreed to changes that have saved the city over $300,000 dollars annually.

In a recent case, the understaffing of firefighters led to officers being called off from helping a woman having a heart attack and being re-routed to a reported fire because not enough firefighters were on duty.

ISN'T THE SAFETY OF YOU AND YOUR FAMILY WORTH A FEW DOLLARS?

In our opinion, this is the same city administration that requires ticket and arrest quotas for the sole purpose of generating revenue and places a bounty on the citizens who live, work, and travel in Oak Park.

The Oak Park Public Safety Officers Union has brought serious issues to the city's attention. The issues have fallen on deaf ears because the city's administration has refused to act or respond to these dangerous conditions. In our opinion, your city officials must believe the risks to your family is worth the money allegedly saved.

WE NEED YOUR HELP

Help restore the proper number of on-duty firefighters! Please notify your mayor and your entire city council. Remember, these elected officials work for you!

The notice went on to list the telephone numbers of the mayor and council members.

Union President Loftis testified that although he did not author the flyer, in his opinion the events described in it were accurate. For example, with respect to the statement that a child was "doused with gasoline" Loftis testified that when the fire bombing occurred, a child was sleeping on a couch and the cushions became covered with gasoline, it was therefore reasonable to assume that the child was covered with the gasoline. In the incident involving the heart attack victim, Loftis testified that although an ambulance did eventually arrive at the scene to assist the woman, officers had to leave the victim because they were called to a fire scene which he felt would not have been necessary had the City provided adequate staffing. Loftis also testified that the figure of $300,000 savings was a minimum figure, he estimated the savings from less overtime, lower staffing and pension costs.

Public Safety Director Robert Seifert disputed the accuracy of the information in the flyer. He testified that the Union's claim that the City had reduced on duty firefighters by 50% was inaccurate, in fact the City had not reduced the number of responding firefighters by any percentage. Seifert testified that the number of public safety positions in the City of Oak Park has not changed for years and he disagreed with the statement that the department was understaffed. With respect to ticket writing, according to Siefert the purpose was not to generate revenue, but to establish a performance evaluation system with one of the parameters measuring the work effort of employees.

Discussion and Conclusions:

The Employer asserts that the collective bargaining agreement requires the use of the grievance arbitration procedure to settle all grievances or disputes. By sending the flyer and the letter containing recklessly false statements, the Employer argues that the Association has repudiated the contract in violation of PERA. The Union maintains that the Employer has failed to establish any violation of PERA, arguing that it did access the grievance procedure and the grievance is still pending. The Union contends that nothing in PERA prevents a union from communication with the public about matters of mutual concern; the Union has a right to a difference of opinion with the Employer, and the right to air that difference publicly.

I agree with the position of the Union. There is no question that the activity of publicizing a union-management dispute is protected concerted activity. *City of Warren (Fire Dept),* 1980 MERC Lab Op 590; *City of Detroit (Water & Sewerage),* 1993 MERC Lab Op 157. Even where an employer has a rule against such communications to the media or outside entities, the Commission has stated that there must be a substantial and legitimate business justification for the application of the rule to prohibit protected activity. *Twp of Redford,* 1984 MERC Lab Op 1056.

The Employer relies on *Meridian Twp*, 1997 MERC Lab Op 457, in which the Commission found that a union president's false statement to the media which alarmed the public was not protected activity and the employer had a legitimate justification for restricting such a remark and

issuing discipline.1 The instant case is substantially different. The Union was communicating its views and concerns with respect to staffing and public safety; its comments reflect a difference of opinion and a different interpretation of figures utilized rather than constituting knowingly false statements. In addition, the Employer is not justifying a disciplinary action but claiming that the Union *repudiated the contract* by not utilizing the grievance procedure as the exclusive means of resolving its dispute over manpower. However, there is nothing in this record which would establish a repudiation of contract by the Union as the Commission has defined that term.

In *Plymouth Canton Com Sch*, 1984 MERC Lab Op 894, 897, the Commission stated that it will find repudiation of a collective bargaining agreement only when 1) the contract breach is substantial and has a substantial impact on the bargaining unit; and 2) no bona fide dispute over contract interpretation is involved. As discussed in subsequent cases, repudiation also may be defined as an attempt to rewrite the contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Wayne County Juvenile Detention Facility,* 1997 MERC Lab Op 108,115; *Central Michigan Univ*, 1997 MERC 501, 507. I find that the Employer has failed to establish repudiation under any of these standards. Although the Union has not moved the grievance to arbitration, as far as the record reveals, the grievance is still pending. The fact that the Union has also chosen to bring the manpower dispute to the attention of the public and the Berkley city council does not indicate an abandonment of the contractual dispute resolution procedure.

Based on the above discussion, I find that Charging Party has failed to establish a violation of PERA by the Union. It is therefore recommended that the Commission issue the following order:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch
Administrative Law Judge

1 But see *POAM v Ottawa County Sheriff (COA 194712),* in which the Court of Appeals in an unpublished decision issued November 21, 1997, reversed the Commission's finding that the discipline of a union officer for statements to the media was justified. *Ottawa County Sheriff,* 1996 MERC Lab Op 221. The Court indicated that although the statements reflected negatively on the employer, they concerned a union-management dispute and thus were protected concerted activity which the employer had no overriding business justification in restraining.

DATED: _____