STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CALHOUN COUNTY AND CALHOUN COUNTY SHERIFF,
Public Employer-Respondent,

MERC Case No. C14 J-120
-and- Hearing Docket No. 14-028073

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

APPEARANCES:

Richard C. Lindsey, Jr., Calhoun County Corporation Counsel, for Respondent

Christopher L. Tomasi, Assistant General Counsel, for Charging Party

DECISION AND ORDER

On March 29, 2016, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: May 6, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Richard C. Lindsey, Jr., Calhoun County Corporation Counsel, for the Public Employer

Christopher Tomasi, Assistant General Counsel, for the Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On October 27, 2014, the Police Officers Association of Michigan (Union) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against Calhoun County and the Calhoun County Sheriff under §10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, MCL 423.216, this case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System, acting on behalf of the Commission.

Based on the pleadings, stipulated facts of the parties and the record as a whole as set forth below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Procedural History:

Charging Party's October 27, 2014, unfair labor practice charge alleges that the Respondents violated Sections 9, 10(1)(e) and 15 of PERA by unilaterally establishing an attendance policy which affected the terms and conditions of employment.

On November 6, 2014, a Complaint and Notice of Hearing was issued setting this mater for hearing on December 5, 2014. On November 17, 2014, Charging Party, with concurrence of Respondents, requested in writing an adjournment of the December 5, 2014, hearing.

The hearing was rescheduled to January 7, 2015. On December 1, 2014, Respondents filed their answer to the charge.

On January 5, 2015, the parties participated in a telephone pre-hearing conference. As a result of that conference the January 7, 2015, hearing was adjourned without date. The parties then agreed to forego an evidentiary hearing, stipulate to facts, submit briefs, and allow the undersigned to render a decision on the record as developed.

On February 20, 2015, my office received Charging Party's Brief along with the parties' Stipulations of Fact and Stipulated List of Joint Exhibits; Respondents' Brief was received on February 25, 2015. Reply Briefs were received from Charging Party and Respondents on March 6, 2015, and March 10, 2015, respectively.

Findings of Fact:

Respondents Calhoun County Sheriff and Calhoun County Board of Commissioners are co-employers within the meaning of PERA. Charging Party, Police Officers Association of Michigan, is the certified bargaining representative on behalf of all full-time and part-time deputy sheriffs, detectives, book keepers, transcriptionists, correctional officers, clerks, cooks, and control room officers.

Calhoun County Sheriff Matt Saxton took office in his first term as the Sheriff of Calhoun County (Department) on January 1, 2013. Timothy A. Hurtt, serves as the Calhoun County Undersheriff, while James McDonagh, serves as the Chief Deputy of the Department. Deputy Jon Pignataro, the local union president, has been employed with the Department for more than 12 years.

Upon taking office in 2013, Sheriff Saxton reaffirmed all standing orders from prior Sheriffs, including, but not limited to, a set of work rules titled "21 Rules of Conduct" dating back to 1992. Each year since, Sheriff Saxton has by order reaffirmed "all policies and all rules and regulations."

Standard 4 of the Rules of Conduct is entitled "Maintaining Acceptable Level of Availability for Work", and sets forth the following requirement:

> Each Member of the Sheriff Department must maintain a level of availability for work during any regular reporting period that is at least that of the work unit's calculated average availability for the reporting period.

Standard 4's enforcement guidelines provides for progressive discipline up to and including possible termination.

Standard 13 of the Rules of Conduct, "Establishing Patterns of Absenteeism", requires the following:

> Sheriff Department members shall not establish patterns of absenteeism. Establishing a pattern of absenteeism is a violation of this organizations [sic] rules regardless of whether any part of the absenteeism within the pattern has been approved or disapproved by the management.

Similar to Standard 4, Standard 13's enforcement guidelines allow for progressive discipline up to and including termination. Examples of non-violations of Standard 13 include, but are not limited to, annual preplanned vacations, holiday and personal time as well as the observance of scheduled days off. Standard 13 includes a statement that the reason for an absence is not the "critical factor" in determining a violation, but rather, the establishment of a pattern of absenteeism constitutes the violation.

The parties stipulated that in mid-2014, Respondents, during a discipline review, learned of some current employees who had more than 100 instances of absences. The Respondents took disciplinary action against one such employee and relied upon the Rules of Conduct standards in enforcing said discipline. On September 23, 2014, Chief Deputy McDonagh confirmed that the Employer had begun actively enforcing the above Rules of Conducts standard approximately two month before.

Charging Party and Respondent are signatories to a collective bargaining agreement effective from January 1, 2014 through December 31, 2016. Article 5 of the parties' contract, entitled “Management Rights”, provides in Section 1, the following:

> A. It is understood and agreed that the Employer possesses and retains the sole power, duty, and right to operate and manage its Departments, Agencies and programs, and to carry out all constitutional, statutory and administrative policy mandates and goals. Any term or condition of employment other than the wages, benefits and other terms and conditions of employment specifically set forth in other provisions of this Agreement shall remain solely within the discretion of the Employer to determine, establish, modify or eliminate. The exercise of the Employer's discretion, judgment, powers or rights as to any such matters shall not be subject to review or attack through the Grievance Procedure, although nothing herein shall prohibit special conferences on any subject.
>
> Such retained Management Rights include, but are not limited to, the right, without engaging in negotiations, to determine matters of managerial policy; mission of the Employer and its parts; the methods, means, and procedures to be used, and the services to be provided; organizational structure; the nature and number of facilities and departments and their locations; to establish classifications of work; to hire and increase or decrease the size of the work force; to assign personnel; to maintain order and efficiency and use outside assistance. However, the Union may request that the exercise of such reserved rights be made the subject of a special conference.

B. The Employer also reserves certain additional rights and powers, which are limited by the express provisions of this Agreement. These include but are not limited to, **the right to discipline, suspend or discharge employees** subject to this Agreement; to lay off and recall personnel; to transfer and promote personnel; **to establish reasonable work rules and to fix and determine penalties for violations thereof**; to make judgements as to skills and abilities; to establish and change work schedules, and to do other acts, **provided, however that these rights shall not be exercised in violation of any specific provisions of this Agreement and, as such, they shall be subject to the Grievance Procedure**.

[Emphasis Added.]

C. This Agreement, including its supplements and exhibits attached hereto (if any), concludes all negotiations between the parties during the term hereof, and satisfies the obligation of the Employer to bargain during the term of this Agreement. The Union acknowledges and agrees that the bargaining process under which this Agreement has been negotiated, is the exclusive process for affecting terms and conditions of employment and such terms and conditions shall not be addressed under the Special Conference Provision of this Agreement.

The parties acknowledge that, during the negotiations which preceded this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any negotiable subject or matter, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. All negotiable terms and conditions of employment not covered by this Agreement shall be subject to the sole discretion and control of the Employer.

Article 5, Section 2, entitled "Policy and Procedures" states:

> **The Employer reserves the right to establish reasonable rules regulations, not conflicting with the provisions of this Agreement**, which shall be provided to all bargaining unit employees at least seven (7) days prior to their effective date, except in case of emergencies. Such rules, regulations, policies, and procedures shall be available for inspection and review by employees if such rules, regulations, policies and procedures concern working conditions. **If the Union believes that any rule, regulation, policy and/or procedure is inconsistent with the terms of this Agreement, a grievance may be timely filed after establishment or application of such rule etc., whichever first occurs, and thereafter considered accordance with the grievance procedure.**
>
> [Emphasis Added.]

Article 10 of the contract sets forth the agreed upon grievance procedure; a procedure that culminates in final and binding arbitration. Section 1 of that article defines a grievance as:

> [A]ny dispute, controversy or difference between the Employer and one or more employees covered by this Agreement, arising during the term of this Agreement, on any issue regarding the meaning, interpretation or alleged violation of the terms and provisions of this Agreement, or any rules or regulations pertaining to hours, wages, working conditions or other conditions of employment.

Article 11 of the contract is entitled "Disciplinary Action, Suspension and Termination" and provides that, except as otherwise provided therein, the disciplinary standard is just cause. Furthermore, Section 8 of that Article, requires that the principles of corrective, progressive discipline are to be applied to the fullest extent possible. Article 16, Section 2 of the contract addresses paid time off (PTO) and provides in subsection B thereof the following:

> Any request to use PTO must normally be made to the employee's immediate supervisor as early as possible, subject to a maximum of six months in advance except in extraordinary circumstances. Requests for non-emergency use of PTO may be denied if the absence of the employee would unreasonably interfere with the efficient operations of the employer or the employer's obligations to the public. Illness, injury and emergency use of PTO (without advance notice and approval) is made conditional upon the employee furnishing written documentation satisfactory to the employer upon request. Use of PTO shall not be construed to relieve an employee of the responsibility to comply with the employer's required procedures concerning notification of absence from work. Nor will use of PTO which is not authorized in advance insulate an employee from disciplinary action.

On or about September 3, 2014, Respondent provided Charging Party a draft of a proposed attendance policy (Attendance Policy). That policy provides a progressive discipline system based upon the accumulation points for various attendance violations - the level of discipline corresponding to the amount of points earned in a rolling 12-month period. Listed in the policy as attendance violations are the following: unscheduled absence, unscheduled absence (weekend), unscheduled absence (scheduled training/court), unscheduled absence (holiday), and no call/no show. The policy defines "unscheduled absence" as "[a]ny absence for any reason which deviates from the scheduled hours of work and is not approved in advance by the supervisor." The points levied for the first four unscheduled absences begins at three (3) points for the first, increases to four (4) points for the next two and increases once again to five (5) points for an unscheduled absence on holiday. A no call/no show will earn the employee eighteen (18) points.

Employee point accumulation begins to be addressed at eight (8) points which takes the form of counseling and attendance policy review. Twelve (12) points results in a documented verbal warning. Fifteen (15) points earns a documented written reprimand. Upon attaining eighteen (18) points, the employee receives discipline as well a "Final Warning-Behavioral Contract. At twenty-four (24) points, further discipline, up to and including termination, may be issued.

The Charging Party made repeated demands to Respondent to bargain over the implementation of the Attendance Policy on September 23, 26, and 29, 2014, as well as on October 2, 5, and 15, 2014. Respondent has consistently and repeatedly responded to the Charging Party by denying any duty to bargain over the proposed policy.

On or about September 29, 2014, Charging Party instituted a verbal grievance for breach of the contract, asserting that Respondent was in violation of Article 16 of the collective bargaining agreement, the article covering leaves of absences, which included, but was not limited to, paid time off. On October 2, 2014, Pignataro, sent, by email, a written follow up to the September 29, 2014, verbal grievance. In that email Pignataro alleges that the County had violated the following contract provisions and working conditions: Article 5, Section l(C), Article 5, Section 2, Article 16, Section 2(B), as well as Standards 4 and 13 of the Code of Conduct.

Respondent unilaterally implemented the Attendance Policy on October 3, 2014. Also that same day, Undersheriff Hurtt, by memo, denied the grievance previously filed by Pignataro. The Undersheriff's memo stated in part:

The grievance contends that recently adopted J30.17, Staff Attendance ("J30.17" or "Policy"), should have been a subject of mandatory bargaining. The provisions of the Sheriffs Attendance Policy are not in dispute. The Policy was created pursuant to Article 5 Section l(B) of the contract which allows the Sheriff to establish reasonable work rules (among other rights), so long as the rules do not violate any specific provision of the contract. Article 16, as written, is broad in its scope and the policy was created to elaborate, clarify and define the contract terms and provisions. The Policy was also intended to make the process predictable, consistent and fair for every employee.

On or about October 15, 2014, a formal written grievance was filed concerning the breach of the CBA, as well as the refusal to bargain. The present unfair labor practice was filed on October 27, 2014.

Discussion and Conclusions of Law:

Charging Party argues that because the Attendance Policy impacts matters of absenteeism, use of PTO, and the issuance of discipline, up to and including termination, for violations thereof – all of which are mandatory subjects of bargaining under Commission precedent - the Employer's refusal to bargain before taking unilateral action violates a public employer's duty to bargain in good faith under PERA. Essential to Charging Party's argument is the supposed conflict between the definition of unscheduled absences set forth in the Attendance Policy and Section 16 of the parties' contract which, according to Charging Party, allows employees to use PTO for illness, injury and emergency - without advance notice and approval - made conditional upon the furnishing of documentation satisfactory to the County upon request; Respondent's new Attendance Policy does not contain similar conditional language and instead counts all absences, without prior approval, as the same subject to points and possible discipline.

Respondent, while conceding the point that the Attendance Policy, as an absentee policy, does affect the terms and conditions of employment and as such must be bargained pursuant to PERA, defends its actions on the grounds that the Union waived its right to bargain over an absentee policy.

According to Respondent, its right to establish and promulgate just such a policy is explicitly acknowledged in the contract, the bargaining over which Respondents claim was waived by the Union in Article 5, Section 1 (A) and (2) of that same agreement. Respondent claims its waiver argument is further strengthened when considered in light of the Rules of Conduct in place for more than twenty years. Addressing the Union's argument regarding Article 16, Section 2(B) Respondent asserts there is no conflict between this section and the Attendance Policy because the contract explicitly states that requests for nonemergency use of PTO may be denied if the absence would unreasonably interfere with its efficient operation. Respondent further claims that all provisions in the contract that relates to PTO are dependent upon two long-acknowledged concepts; first, that the Sheriff retains the right to enact rules regarding procedures concerning notification of absences from work; and, second, that PTO use cannot conflict with the efficient operations of the Respondent.

Respondent also claims that this unfair labor practice proceeding before the Commission is not the appropriate forum in which to challenge the Attendance Policy. Respondent argues that under Article 5, Section 2, any challenge to a promulgated rule, regulation, policy and/or procedure on the grounds that said action is inconsistent with the contract instead should proceed via the grievance procedure.

Under Section 15 of PERA, a public employer is required to bargain collectively with the representatives of its employees over "wages, hours, and other terms and conditions of employment." Once a specific subject has been classified as a mandatory subject of bargaining, neither party to a collective bargaining relationship may take unilateral action on the subject absent an impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277 (1978). As correctly pointed out by Charging Party and conceded to by Respondent, the subjects of absenteeism and discipline have consistently been held to be mandatory subjects of bargaining. See *Oakland County Road Comm 'n*, 1983 MERC Lab Op 1; *City of Detroit*, 19 MPER 70 (2006); *Amalgamated Transit Union v SEMTA*, 437 Mich 441 (1991); *Coopersville Public Schools*, 1978 MERC Lab Op 945. A party may satisfy its obligation to bargain over a mandatory subject of bargaining when it negotiates a contract provision that fixes the parties' rights with respect to that subject, for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 318 (1996). Agreement on such a subject enables both parties to rely on the language of that agreement as the statement of their obligations regarding that topic as covered by the agreement.

When a term or condition of employment is covered by a provision in a current collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of such provision are generally left to arbitration. *Port Huron Ed Ass'n*, 317-321.

As our Supreme Court recently reaffirmed in *Macomb Co v AFSCME Council 25*, 494 Mich 65 (2013), when a charging party claims that a respondent has failed to bargain over a mandatory subject "when the parties have agreed to a separate grievance or arbitration process, the [Commission's] review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim." *Id.* at 81.

In order to address Respondent's claim that this matter should proceed through the grievance process as opposed to the present unfair labor practice, the first step is determining whether the issue the Union sought to negotiate is "covered by" the collective bargaining agreement; only if it is not "covered by" the contract does the Respondent's assertion of waiver become an issue. It is clear to the undersigned that the contract covers both discipline in the general sense as well as the possibility of discipline relating to absenteeism. The contract, in Article 5, Sections 1(B) and 2, explicitly allows the Respondent to make reasonable rules, regulations, policies, and procedures, and to determine penalties for violations thereto, so long as they do not conflict with the provisions of the contract. Furthermore, the aforementioned sections clearly provide that challenges to such rules, policies, or regulations, based upon such being inconsistent with the agreement, i.e., unreasonable, precluded by some other contract provision, etc.,. are to be processed through the grievance procedure. Accordingly the question of whether the rule at issue, the Attendance Policy, is reasonable or whether it conflicts with the agreement in some other fashion, are questions that the parties agreed would be dealt with in grievance arbitration. Charging Party's attempts to frame the dispute as a violation of a public employer's duty to bargain fails because, by agreeing to a contract that covers the issues in dispute, the Respondents, under *Port Huron Ed Ass'n* and *Macomb Co*, did in fact satisfy their duty.[1]

Having concluded that the parties' dispute is "covered" by the contract, it is the opinion of the undersigned that the present dispute should proceed according to the parties' agreed upon grievance and arbitration procedure. As such, consideration of the alternative defense of waiver as set forth by Respondents is not necessary. I have considered all other arguments as set forth by the parties and conclude they do not warrant a change in the conclusion. Accordingly, it is the recommendation of the undersigned that the Commission issue the following order:

[1]However, even when a collective bargaining agreement covers a subject in dispute between the parties and that contract includes a grievance and arbitration procedure, an employer's conduct or actions may still give rise to an unfair labor practice charge. A party's repudiation of a provision or provisions of its collective bargaining agreement may be tantamount to a rejection of its duty to bargain. The Commission has defined repudiation as an attempt to rewrite the parties' contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501; *Redford Twp Bd of Ed*, 1992 MERC Lab Op 894. In order for the Commission to find an unlawful repudiation, the contract breach must be substantial and have a significant impact on the bargaining unit, and there must be no bona fide dispute over interpretation of the contract language. Plymouth-Canton Community Schools, 1984 MERC Lab Op 894, 897. However, Charging Party has not alleged a repudiation, nor does the record support the finding of such a violation.

RECOMMENDED ORDER

This unfair labor practice charge, Case No. C14 J-120; Docket No. 14-028073-MERC, is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 29, 2016