STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY PROBATE COURT,
Public Employer-Respondent,

MERC Case No. C17 D-033

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1659,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Foley & Mansfield, by Gregory M. Meihn, and Butzel Long, PC, by Craig S. Schwartz, for Respondent

Shawntane Williams, Staff Counsel, for Charging Party

DECISION AND ORDER

On October 12, 2017, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] 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: December 7, 2017

[1] MAHS Hearing Docket No. 17-008316

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY PROBATE COURT,
Public Employer-Respondent,

Case No. C17 D-033
-and- Docket No. 17-008316-MERC

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1659,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Foley & Mansfield, by Gregory M. Meihn, and Butzel Long, PC, by Craig S. Schwartz, for Respondent

Shawntane Williams, Staff Counsel, AFSCME Council 25, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On April 18, 2017, AFSCME Council 25 and its affiliated Local 1659 filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Wayne County Probate Court pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On May 3, 2017, pursuant to Rule 165 of the Commission's General Rules, 2014 AACS, R 423.165, I issued an order to Respondent to show cause why it should not be found guilty of violating its duty to bargain in good faith. On June 8, 2017, Respondent filed a response to my order to show cause and a request that I issue an order to Charging Party to show cause why the charge should not be dismissed. On June 13, 2017, I wrote the parties a letter stating that I interpreted Respondent's request that I issue an order to show cause to the Charging Party as a motion for summary dismissal, and set a date for Charging Party to respond to that motion. Charging Party filed its response to the motion on July 13, 2017. Based on facts contained in the charge and pleadings and not in dispute 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:

Charging Party represents a bargaining unit of employees of the Respondent. Charging Party and Respondent are parties to a collective bargaining agreement for this unit covering the term April 1, 2015, through March 31, 2017. The agreement includes a grievance procedure ending in binding arbitration. On December 22, 2016, Charging Party filed two grievances on behalf of terminated employees. Charging Party alleges that Respondent repudiated the parties' collective bargaining agreement, and violated its duty to bargain under Section 10(1)(e) of PERA, by refusing to accept and process the grievances on the grounds that they were untimely filed.

Facts:

Article 7 of the parties' collective bargaining agreement contains the grievance procedure. Article 7 begins with the following paragraphs:

> A grievance is defined as a claim of a violation of this Agreement. Any grievance filed shall refer to the specific provision alleged to have been violated and shall set forth the facts pertaining to the alleged violation. *All grievances shall be commenced within (10) working days after the grievance has become known, or should reasonably have been known, by the employee.* [Emphasis added.]
>
> The Union shall have the right to commence a grievance at the level of management causing such grievance.
>
> *Grievances involving suspension or discharge shall be submitted in writing directly to Step 3 of the grievance procedure within five (5) working days of the date of notice of suspension or discharge.* [Emphasis added.]

Step 1 of the grievance procedure is a meeting between a Charging Party representative and the Respondent's Step 1 designee. Respondent's Step 1 designee is to respond orally to the Union within three working days of the discussion. If the dispute is not resolved, Charging Party may present a written grievance to the Respondent's Step 2 designee within five working days of the date Respondent's Step 1 response was due. Respondent's Step 2 designee is to respond in writing to the written grievance. If the dispute remains unsettled, Charging Party may present the grievance in writing to Respondent's Step 3 designee within five working days of the date Respondent's Step 2 response was due. Respondent or Respondent's designee is then to provide a written Step 3 answer within five working days. If Charging Party is not satisfied with Respondent's Step 3 response, it may submit the grievance to Respondent's Step 4 designee, usually the Probate Register, within ten working days after receipt of the Step 3 response. The Probate Register or other Respondent designee is then to conduct a hearing on the grievance within ten working days. Step 5 of the grievance procedure is binding arbitration and includes this language:

> Only unresolved grievances which relate to the interpretation, application, or enforcement of any specific Article and section of this Agreement, or any written Supplementary Agreement, which have been fully processed through the last step of the grievance procedure as herein provided shall be submitted to arbitration in strict accordance with the following . . .

> Arbitration shall be invoked by written notice to the other party of intention to arbitrate. Such notice shall be given within fifteen (15) working days of receipt of the Step 4 answer.
>
> Within five (5) working days the Employer and the Union shall jointly select an Arbitrator or by blind draw from a panel of twenty (20) Arbitrators.
>
> . . .
>
> All arbitration hearings shall be held within sixty (60) working days of the selection of the Arbitrator.

On Tuesday, December 13, 2016, Respondent terminated two members of Charging Party's bargaining unit. On Wednesday, December 21, 2016, Respondent's Manager of Human Resources and Labor Relations, Yvonne Owen, sent Charging Party President Joyce Ivory a letter stating that as no grievances had been filed over the terminations, and there was no mutual agreement to extend the contractual time frame, Respondent "considers this matter to be undisputed and closed." On Thursday, December 22, 2016, Charging Party filed written grievances over both terminations. The grievances were filed with Owen at the Step 3 level. On January 3, 2017, having received no response, Ivory resubmitted the grievances. On January 5, 2017, Ivory and Owen discussed whether the grievances had been timely filed. Ivory took the position that the ten day time limit set out in paragraph one of Article 7 applied, while Owen maintained that the grievances had to be filed within five working days of the terminations. On January 10, 2017, Owen sent Ivory an email stating that the contract language clearly stated that grievances involving discharge must be filed within five working days. Owens stated that Respondent's "position on the discharges remained the same," and that "these disciplinary terminations are undisputed and closed." Later that day, Ivory responded that the contract did not give Owen the right, as the Step 3 designee, to decide whether the grievances were closed. Ivory told Owen that Charging Party was moving the grievances to Step 4, and that a hearing should therefore be scheduled as per the contract. On January 11, Owen sent another email reiterating that it was Respondent's position that the terminations were "undisputed and closed."

Rather than advancing the grievances to Step 5 by demanding arbitration, Charging Party elected to file new grievances on January 13, 2017. These grievances alleged that Respondent had violated the contractual grievance procedure by refusing to accept the December 22, 2016, grievances. The January 13 grievances were sent to Owen as Step 3 grievances. Owen's Step 3 answer denied that Respondent had violated the contract by refusing to accept the December grievances because, according to Owen, these grievances were filed two days past the deadline. On January 25, 2017, Ivory notified Respondent that it was moving the January 13 grievances to Step 4.

On February 8, 2017, the parties held a Step 4 hearing on the January 13, 2017, grievances. In its Step 4 written answer denying the grievances, Respondent representatives reiterated their argument that the December 22, 2016, grievances were untimely because they involved discharges. It also quoted language from *How Arbitration Works,* by Elkouri & Elkouri, Sixth Ed., to the effect that more specific provisions are generally interpreted as restricting the meaning of a general provision. That is, it argued that the time limit in paragraph three of Article 7 modified the more general language in paragraph one of that Article. On March 1, 2017, Ivory informed Respondent that it was moving the January 13 grievances to arbitration. The parties selected an arbitrator. Owen confirmed that the arbitrator was available to hear the grievance within the time limits set out in the contract, i.e., on or before May 30, 2017, and notified Charging Party that the arbitrator wanted to

hold a conference to discuss scheduling the hearing date. On March 21, 2017, Richard Johnson, AFSCME Council 25 staff representative, explained in an email to Owen that it was premature to schedule a hearing date since Charging Party's process required that the case be reviewed and approved for arbitration by Council 25's arbitration panel. Respondent insisted, however, on adhering to the time lines in the contract. As noted above, Charging Party filed the instant charge on April 18, 2017. On May 3, 2017, Charging Party sent Respondent an email stating that "due to the pending unfair labor practice," Charging Party was withdrawing its grievance.

Discussion and Conclusions of Law:

The law is well established that, in the absence of facts indicating that a party has repudiated its collective bargaining agreement, an unfair labor practice proceeding is not the proper forum for the adjudication of a contract dispute. *Detroit Regional Convention Authority*, 25 MPER 8 (2011); *Wayne Co,* 19 MPER 61 (2006); *Village of Romeo*, 2000 MERC Lab Op 296, 298. Repudiation exists only when both of the following are present: (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. *City of Detroit*, 26 MPER 21 (2012); *Gibraltar Sch Dist*, 18 MPER 20 (2005); *Eastern Michigan Univ*, 17 MPER 72 (2004). The Commission will find repudiation only when the action of a party amounts to a rewriting of the contract or a complete disregard for the contract as written. *Goodrich Area Sch*, 22 MPER 103 (2009); *City of Detroit (Dept of Transp)*, 19 MPER 34 (2006). The Commission will not find repudiation on the basis of an insubstantial or isolated breach. *Michigan State Univ*, 1997 MERC Lab Op 615, 618.

Respondent argues that the charge should be dismissed because: (1) the allegations involved a good faith dispute over the interpretation and application of the grievance and arbitration procedures in the collective bargaining agreement, i.e., the contractual time limit for filing grievances over discharges; and (2) Respondent did not refuse to arbitrate this dispute; rather, the dispute was not arbitrated because Charging Party withdrew from an express agreement to arbitrate the timeliness of the two discharge grievances. However, as Charging Party points out, the charge does not allege that Respondent refused to accept or process the grievances Charging Party filed on January 13, 2017. Rather, it alleges that Respondent repudiated its contractual obligations with respect to the grievances filed on December 22, 2016. According to Charging Party, these two sets of grievances were not identical, because the January grievances did not address the underlying dispute over whether the two employees were discharged for just cause.

Section 15 of PERA requires a public employer to meet and confer in good faith with the representative of its employees over terms and conditions of employment, and, if requested, to execute a written agreement incorporating any agreement reached. The Commission has noted that since disputes over the meaning of a collective bargaining agreement naturally arise during the term of that agreement, a grievance arbitration provision constitutes a significant term of any collective bargaining agreement. The Commission has, therefore, repeatedly found employers with collective bargaining agreements that include binding arbitration to have repudiated those agreements, and violated their duty to bargain, by refusing to arbitrate. For example, in *Hurley Hospital*, 1973 MERC Lab Op 584, the Commission held that the employer's refusal to arbitrate even a single grievance constituted a repudiation of its contractual obligations. It concluded that where the subject matter of the grievance was not clearly and unmistakably excluded from arbitration under the contract, the employer could not refuse to participate in the arbitration on the basis of its unilateral determination that the grievance was not arbitrable because the arbitrator was the appropriate entity

to determine arbitrability in the first instance. The Commission explicitly noted that it was not making a determination that the dispute was in fact arbitrable under the contract. See also *City of Mt Clemens,* 1974 MERC Lab Op 336, enf'd *Fire Fighters Union v Mt Clemens*, 58 Mich App 635 (1975). In *Livingston Co and Sheriff,* 1985 MERC Lab Op 650 (no exceptions), a Commission ALJ found that the employer violated its duty to bargain by refusing to arbitrate a grievance on the grounds that it was untimely filed.

The Commission has also held that an employer violates its duty to bargain if it refuses to accept and discuss a grievance because it believes the grievance lacks merit. In *City of West Branch*, 1978 MERC Lab Op 352, an employee filed a grievance asserting that he had been wrongly fired three months before. The employer called the employee's union representative and told him that it would not process the grievance or meet with the union to discuss it because it considered the employee to have voluntarily quit. The Commission, without passing on the merits of the grievance, found that the employer's duty to bargain in good faith required it to at least accept and discuss the grievance under the contractual procedure.

However, the Commission does not involve itself in disputes over how grievances are handled unless the employer's conduct "closes the door" to the grievance procedure or substantially frustrates the grievance process. In *Hurley Hospital, City of Flint,* 1974 MERC Lab Op 872, the employer's step three grievance answer stated only that the grievance was not appropriate since the grievant had also filed a civil service commission appeal. The union filed a charge alleging that the employer had repudiated its obligations under the collective bargaining agreement because this answer did not "address the subject matter of the grievance." The Commission held that the employer's response did not violate its duty to bargain as there was no legal requirement that an answer to a grievance that raised procedural issues must also deal with the subject matter of the grievance. However, the Commission noted that the employer did not deny that it had an obligation to arbitrate the grievance if the union wished to do so, and that the employer's answer in that case merely served as a denial of the grievance which the union could appeal to the next step. See also *City of Detroit (Public Lighting Dep't),* 1980 MERC Lab Op 131, 137, holding that an employer's failure to properly respond to a grievance acted as denial of the grievance and permitted the union to proceed to the next step.

The question here, therefore, is whether Respondent's response to the December 22, 2016, grievances closed the door to the grievance procedure or substantially frustrated the grievance process. As set out above, Respondent did not acknowledge the grievances filed on December 22, 2016, until after Ivory had had refiled them and confirmed that Owen had received them. At that point, Owen told Ivory that the grievances were untimely and explained why Respondent believed this was the case. She also informed Ivory that Respondent considered the terminations "undisputed and closed." Owen then refused to schedule a Step 4 hearing on the grievances when Ivory requested it.

As noted above, the Commission has held that an employer cannot refuse to arbitrate a grievance on the grounds that it was untimely filed. If an employer believes that a grievance was untimely, it may request that the arbitrator bifurcate the hearing and address the timeliness issue first. In any case, if the arbitrator finds that the grievance was clearly untimely, he or she should not address the merits of the underlying grievance. In the instant case, however, Charging Party did not notify Respondent that it wanted to arbitrate the December 2016 grievances. Respondent did not refuse to arbitrate the grievances, and what it would have done had Charging Party demanded to

arbitrate is mere speculation. I find that Respondent's failure to adhere to the specific procedures set out in the contractual grievance procedure with respect to the December 2016 grievances did not constitute an unlawful repudiation of the parties' collective bargaining agreement. I conclude, therefore, that Respondent's motion for summary dismissal should be granted, and that the Commission should issue the following order.

RECOMMENDED ORDER

The charge in this case is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 12, 2017