STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CHARTER TOWNSHIP OF MARQUETTE,
Public Employer-Respondent,

Case No. C08 K-232

-and-

MICHIGAN COUNCIL 25 AFSCME, AFL-CIO,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Bodman, L.L.P., by Aaron D. Graves, Esq., for the Public Employer

Peter J. Dompierre, Staff Specialist for AFSCME Council 25, for the Labor Organization

DECISION AND ORDER

On July 20, 2009, Administrative Law Judge Doyle O' Connor issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Peter Dompierre, for the Charging Party

Aaron D. Graves, for the Respondent

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). This matter is being decided on the Employer's motion for summary disposition which has been fully briefed by the parties.

The Unfair Labor Practice Charge and the Positions of the Parties:

On November 3, 2008, a Charge was filed in this matter by Michigan Council 25 AFSCME, AFL-CIO (the Union) alleging that the Charter Township of Marquette (the Employer or Township) had violated PERA by refusing to arbitrate a pending grievance, as anticipated by the grievance procedure in an unexpired collective bargaining agreement between the parties. The matter was set for hearing on March 18, 2009 , with the notice of hearing accompanied by a copy of the Commission's decision in *City of Detroit (Police Dep't)*, 1989 MERC Lab Op 331, holding that a refusal arbitrate an arguably arbitrable grievance violated obligations under the Act.

On March 13, 2009, the parties jointly requested that the hearing in the matter be adjourned so that a summary disposition motion could be filed and ruled upon. Under Commission Rule R 423.165, summary dismissal of a charge, or a ruling in favor of the charging party, may be granted on a motion filed by either party. The Employer's motion for summary disposition and brief in support were filed on March 23, 2009, with the

Union's response brief filed on April 6, 2009. By letter of April 15, 2009, I advised the parties that the matter would be decided on summary disposition as, based on the motion pleadings, there was no dispute of material facts. The letter noted that neither party requested oral argument on the motion. The Employer sought leave, which was granted, to file its April 21, 2009 reply brief.[1]

The undisputed facts are that AFSCME and the Township are parties to a collective bargaining agreement with a term of January 1, 2006 through December 31, 2009. During the term of that contract a grievance arose and, on June 17, 2008, the Union sought to advance the grievance to arbitration through the Federal Mediation and Conciliation Service (FMCS) as mandated by the contract; however, because FMCS lacks any enforcement mechanism, the grievance was not placed before an arbitrator. By its letter of August 15, 2008, the Employer asserted that the underlying grievance was untimely filed and pursued, and that, therefore, the Employer would not further process the grievance.[2] The Union responded with the Charge, timely filed on November 3, 2008.

The underlying contractual dispute arose on December 26, 2007 when the Township Manager denied, in writing, a position bump requested by Cindy LaMere. A grievance was filed at Step 2 of the contractual grievance procedure on December 31, 2007. The collective bargaining agreement, Article 13 Grievance Procedure §A, provides that "In order to be a proper matter for the grievance procedure, the grievance must be presented within fifteen (15) working days of the employer's or the Union's knowledge of its occurrence." The Employer calculated the deadline for the proper filing of the grievance as January 17, 2008. However, the Employer asserted in its letter of August 15 that the grievance was untimely when filed on December 31, 2007, because, according to the Employer, it was initially filed at the wrong step in the grievance procedure. Under the Employer's interpretation of the grievance procedure, LaMere failed to comply with the grievance procedure by first discussing the grievance with her immediate supervisor, which is the normal first step in the grievance procedure, prior to reducing the grievance to writing at the second step of the grievance procedure. The Employer asserts that this first verbal step was necessary even though the grievance was over a decision made by the Township Manager over whom the lower level supervisor presumably had no control.

The Township asserts that the untimeliness of the initial filing of the grievance was compounded by later delays in the processing of the grievance by the Union. As recounted in the August 15 letter, the parties initially agreed to extend time limits on the grievance, which was denied at the 3rd step of the grievance procedure. The Employer asserts that the demand for arbitration was untimely. The contract provides at Article 14 that a demand for arbitration must be made within thirty (30) working days of the mailing of the written response by the Township Personnel Committee, which comprises the 4th step of the contractual grievance procedure. As indicated in the Union's letter of June 17,

[1] The Employer additionally, and without seeking leave, inappropriately filed letter briefs of May 6, 2009 and July 9, 2009, each of which in essence reiterated arguments already made in the earlier pleadings.

[2] The Charge asserts, and it is apparently not disputed, that the Employer's attorney sent a follow-up letter of August 22, 2008, which reiterated the earlier unequivocal refusal to arbitrate the underlying grievance; however, that second letter was not made a part of the record.

2008, attached to the Employer's brief, the Employer refused to allow the grievance to be heard by the Personnel Committee and therefore no written response was ever issued by the Personnel Committee. The Union sought through its June 17 letter to secure confirmation from the Employer that the Personnel Committee would not hear the grievance, so that the Union could advance to the next step of the grievance procedure, which is arbitration. The contract at Article 13 (B) provides that "Any grievance not answered by the Employer within the time limits provided, shall allow the grievant, at his or her option, to advance to the next step of the procedure, but excluding arbitration."

By letter of July 22, 2008, the Union demanded arbitration of the dispute. As noted above, the Employer announced its refusal to take part in arbitration by its letter of August 15, 2008. The refusal was apparently confirmed by its attorney on August 22, 2008.

Discussion and Conclusions of Law:

The Commission has long, and unequivocally, held that an employer violates its bargaining obligation by refusing to submit an arguably arbitrable grievance to arbitration. *Hurley Hospital*, 1973 MERC Lab Op 584; *City of Mt. Clemens*, 1974 MERC Lab Op 336, aff'd 58 Mich App 635 (1975); *City of Detroit (Police Dep't)*, 1989 MERC Lab Op 331; *Washtenaw County Rd Comm*, 20 MPER 69 (2007) and *City of West Branch*, 1978 MERC lab Op 352. The refusal to submit a contractual dispute to arbitration for resolution, where the collective bargaining agreement provides for binding arbitration, is a refusal to bargain in good faith. The frustration of the dispute resolution mechanism functions as a repudiation of the collective bargaining agreement and the bargaining process itself. An employer's honestly held belief that the grievance lacks merit is no defense to the allegation that the employer has blocked the contractual grievance process. See, *Detroit (AME)*, 22 MPER 11 (2009). The Commission does not involve itself in minor procedural matters related to the processing of grievances, and will only find a violation where the action by one party "closes the door to the grievance procedure or substantially frustrates the process." *Detroit (AME)*, *supra*, relying on *Gibraltar Schls*, 16 MPER 36 (2003); *Kalamazoo Pub Schls*, 1977 MERC Lab Op 771.

The Employer asserts several defenses of its acknowledged refusal to take part in the arbitration process provided for in the collective bargaining agreement. The Employer argues that it has not entirely closed the door to the grievance process; rather it has closed the door only as to this one grievance. Such a defense is unavailing. To accept it would be to allow any party in each grievance instance to decide unilaterally whether or not to submit a dispute to the contractually mandated binding arbitration. It is, and has long been, "the national policy to encourage settlements of grievances via the arbitration process." *City of Coldwater*, 1972 MERC Lab Op 362, quoting the Steelworkers Trilogy, *Steelworkers v Warrior & Gulf Navigation*, 364 US 574 (1960); *Steelworkers v American Manufacturing Company*, 364 US 564; *Steelworkers v Enterprise Wheel and Car Company*, 363 US 593 (1960). Despite the Employer's belief that its position is contractually justified, the Employer must comply with its agreement to have all such disputes resolved by a neutral arbitrator.

Additionally, the Employer asserts its belief that the grievance was initially filed in an untimely manner and that it was separately untimely when the Union later sought to advance the claim to arbitration. As indicated above, the Employer's theory that the grievance was initially untimely is premised on its interpretation of which step of the grievance procedure was the proper step to be utilized. Its theory, that the grievance was untimely advanced to arbitration ignores the apparently undisputed fact that the Employer refused to allow the matter to be heard at the predicate fourth step of the grievance procedure, where the contractual time limits for arbitration only begin to run after the fourth step answer is issued. The Employer's argument likewise ignores the contractual language which seemingly permits the grievant to choose to advance a grievance to the next step in the event that the Employer fails to timely respond, or to simply await the Employer's eventual response. The Union, of course, disputes the validity of the Employer's interpretation of the contract, and seeks resolution of the dispute by a labor arbitrator. All that is established by the respective arguments is that there is arguable merit in each position. The question of which interpretation of the contract is the correct one is not properly before the Commission. *Hurley, supra*. It is an issue which can properly be resolved by an arbitrator.

Precisely as in the *Hurley Hospital* case, the Employer asserts that the pending dispute is outside of the power of an arbitrator to resolve. That is an argument that can well be placed before an arbitrator for binding resolution. As the Commission held, "It is for the arbitrator to decide whether the grievance is properly before him." *Hurley*, supra, at 588. I find that the Employer here, as in *Hurley*, has acted unlawfully in seeking to unilaterally impose its interpretation of the contract and by refusing to submit the dispute for binding arbitration, in violation of its duty to bargain under §10 (1)(e) of the Act, and I, therefore, recommend that the Commission issue the following order.

RECOMMENDED ORDER

The Charter Township of Marquette, its officers, agents, and representatives shall:

1. Cease and desist from refusing to bargain in good faith with Michigan Council 25 AFSCME, AFL-CIO by refusing to comply with the steps necessary to submit grievance disputes to binding arbitration.

2. Take affirmative action necessary to effectuate the purposes of the Act, by timely taking all steps necessary to cooperate with the Federal Mediation and Conciliation Service (FMCS) in processing demands for arbitration submitted by the Union, including by cooperating in the selection of an arbitrator, the scheduling of dates for the arbitration hearing, and by taking part in the arbitration process.

3. Post the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: July 20, 2009

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the **CHARTER TOWNSHIP OF MARQUETTE**, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

Refuse to bargain in good faith with the **Michigan Council #25 AFSCME, AFL-CIO** by refusing to comply with the steps necessary to submit grievance disputes to binding arbitration.

WE WILL

Timely take all steps necessary to cooperate with the Federal Mediation and Conciliation Service (FMCS) in processing demands for arbitration submitted by the Union, including by cooperating in the selection of an arbitrator, the scheduling of dates for the arbitration hearing, and by taking part in the arbitration process

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CHARTER TOWNSHIP OF MARQUETTE

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.