STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF KALAMAZOO,
Respondent-Public Employer,

Case No. C00 D-70

-and-

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

APPEARANCES:

Miller, Canfield, Paddock & Stone, P.L.C., by Kurt N. Sherwood, Esq., for Respondent

Michael F. Ward, Esq., for Charging Party

DECISION AND ORDER

On April 26, 2001, Administrative Law Judge Roy L. Roulhac issued his 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: _____

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Michael F. Ward, Attorney, for the Charging Party

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, MSA 17.455(10) *et seq*., this case was heard in Lansing, Michigan on August 3, 2000, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. The proceedings were based upon an unfair labor practice charge filed by the Kalamazoo Police Officers Association against the City of Kalamazoo on April 27, 2000. Based upon the record, and briefs filed by October 16, 2000, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Charge:

In its April 27, 2000 charge, Charging Party claims that Respondent violated Section 10(1)(a) and (e) of PERA by interfering with employees' protected rights. According to Charging Party, Respondent conditioned the length of disciplinary suspensions upon whether employees exercised their right to file grievances. In its May 24, 2000 answer, Respondent denied that its conduct violated the Act.

Findings of Fact:

Charging Party Kalamazoo Police Officers Association (KPOA) is the certified collective bargaining agent for approximately two hundred sworn public safety officers below the rank of

sergeant and 30-40 civilian employees employed in Respondent City of Kalamazoo's public safety department. The parties' latest collective bargaining agreement covers the period January 1, 1998 through December 31, 2001. It contains a procedure that allows employees to file grievances to protest disciplinary actions.

In the fall of 1999, thirteen public safety department employees, including eleven members of the KPOA and two members of the Kalamazoo Municipal Employees Association (KMEA), were implicated in a region-wide illegal pyramid scheme. Although no employees were criminally charged, the department was subjected to media attention and scrutiny. The department conducted an internal investigation and concluded that the employees' conduct warranted discipline. Deputy Chief David Purdy testified that he and Chief Gary Hetrick decided that Officer Douglas Diekman, who introduced the pyramid scheme to the department's employees, deserved the highest level of discipline; sworn officers deserved more than non-sworn officers; and secretarial and clerical employees deserved less than sworn and non-sworn officers. Purdy testified that in order to minimize the media's interest and avoid lengthy and costly arbitrations, he was directed by Chief Hetrick to contact the Unions to explore reaching agreement on an appropriate level of discipline.

Subsequently, Purdy met with detective Charles Culver, vice president of KPOA, and Meloise Jones, a KMEA's steward. Culver and Purdy offered different versions of what transpired during their meetings. According to Culver, during a meeting in early February 2000, he was told by Purdy that the department had completed its internal investigation and if all of the employees agreed, the department was looking at suspending the seven sworn officers for one week, Officer Diekman for one month, and the three civilian employees for two days, but the suspensions would be doubled if any employee decided to file a grievance. Culver testified that during a second meeting he told Purdy that he had talked with three employees and each one told him that they would not waive their right to grieve and would grieve any suspension. Culver also testified that during both meetings with Purdy he made proposals about what discipline he thought the employees would accept. However, Culver denied that they engaged in settlement discussions because Purdy told him that it was a "take it or leave it" proposition.

Purdy testified that between the end of January and February 9, he met with Culver 5-6 times and kept notes of their discussions. He testified that at their initial meeting, he explained his interest in providing the Union with an opportunity to enter into negotiations and reach a settlement that would be non-precedent setting and non-grievable in order to minimize the media attendance that would result from grievances and arbitrations. According to Purdy, when he first met with Culver no final decision had been made about the length of the suspensions because he was not sure how many hours represented a week, month, or day for each employee. Purdy related that he never discussed the number of hours that employees would be suspended, but rather only explained that the department was looking at significant suspensions – one or two months for Diekman, several weeks for the sworn officers - and wanted to know what the Union thought was appropriate discipline. Purdy testified that during one of their meetings he told Culver:

> Hey, you know, we are willing to come to, say a month for Diekman, but if we don't reach a settlement, in reality we are probably looking at a couple of months. The same for the sworn and the civilians is that if – you know, we can come just so far in

> an agreement where we feel that we have gotten what is necessary to satisfy the needs of the administration, so far as administering discipline and what is reasonable for the tradeoff for settlement . . . and the caveat of a settlement agreement is that it be non-precedent setting and it is non-grievable.

According to Purdy, during a February 1 meeting, Culver proposed that Diekman be suspended for one week; other sworn officers for one day; and civilian employees be given a written reprimand. Purdy was also told that Diekman planned to grieve any level of discipline. According to Purdy, the proposal was rejected because it "wasn't even close" since the department was looking at between one and two months for Diekman and a couple of weeks for sworn officers. According to Purdy, he also dismissed Culver's suggestion that the department settle each case separately because it would not avoid arbitration nor minimize the media's scrutiny.

Purdy testified that when he and Culver met again on February 3, Culver rejected, as too extreme, the department's proposal of a settlement which involved a one-month suspension for Diekman; one week for sworn officers with a week held in abeyance; and a couple of days for civilians with a couple held in abeyance. According to Purdy, on February 9, during their last meeting, Culver gave him KPOA's "last and final offer." It involved all employees receiving two-day suspensions with two days held in abeyance. Purdy testified that this proposal was unacceptable because it was less than KPOA had proposed earlier and it was apparent that the parties could not settle the matter. On February 18, 2000, the employees were suspended for double the time the Employer stated that they would have been suspended if a settlement had been reached.

In early February 2000, Purdy also met with KMEA's Union steward Melois Jones. They discussed the discipline that two bargaining members would receive for their involvement in the pyramid scheme. Jones' testified that Purdy informed her that he had decided to suspend each employee for one day and that the suspension was non-grievable. According to Jones, when she asked what the suspension would be if the employees grieved the discipline, Purdy told her "probably a week." According to Purdy, he told Jones that if they were able to reach a settlement he would be willing to agree to a one-day suspension, but if they could not it would be more - at least twice that. After the meeting Jones explained the options to each employee. Both decided to accept a one-day suspension. The employees were required to sign a Memorandum of Understanding which stated that the suspensions were non-precedent setting and non-grievable.

Conclusions of Law:

Under Section 9 of PERA, employees have the right to file grievances free from employer threats. *MERC v. Reeths-Puffer School District*, 391 Mich 253, 265-66 (1974), *aff'g* 1970 MERC Lab Op 967; *University of Michigan*, 1995 MERC Lab Op 81, 84. Employees also have the right to use the grievance procedure without fear of punishment or reprisal. *City of Detroit (DOT)*, 1978 MERC Lab Op 1302. It is the chilling effect of a threat and not its subjective intent that PERA was created to address. *University of Michigan*, 1990 MERC Lab Op 272, *aff'd* Court of Appeals, Dkt. No. 128678 (7/16/92, unpublished). However, the employer's remarks must be analyzed in light of the context in which they occurred, as well as to their content, to determine

whether they constitute an implied or express threat. *New Haven Community Schools*, 1990 MERC Lab Op 167, 179.

Charging Party claims that Purdy's proposition to Culver that all eleven employees must agree not to write a grievance or they all would receive double discipline was a threat that interfered with and discriminated against employees in the exercise of their right to engage in protected activity in violation of Section 10 of PERA. To support this view, Charging Party cites *City of Detroit (Dept of Transportation)*, 1978 MERC Lab Op 1302, for the view that the threat of additional discipline for making use of the grievance procedure discourages the use of such procedure and therefore violates PERA. Charging Party also relies on *Kenowa Hills Public Schools,* 1993 MERC Lab Op 637, and *New Haven Public Schools*, 1990 MERC Lab Op 167, for the premise that any threat by an employer against an employee for their use of the contractual grievance procedure is unlawful.

Respondent argues that Purdy and Culver engaged in settlement discussions to resolve the pyramid scheme matter and Purdy never threatened to impose double discipline if any of its members filed grievances. Rather, Respondent offers that their discussions centered around the fact that the discipline would be more severe – possibly double – if the parties were unable to settle, than if they were able to settle. Respondent asserts that in order to fashion an arguable unfair labor practice claim, Charging Party had to "twist" the facts to create the appearance that the Employer interfered with KPOA members' protected rights.

I credit Purdy's testimony that the parties met several times between the end of January and February 9, 2000. Culver did not take notes of his meetings with Purdy and could only recall two of his several meetings with Purdy. Moreover, I find no credible evidence on the record that Purdy ever threatened to double discipline imposed on bargaining unit members if they filed grievances. Rather I credit Purdy's testimony that the parties engaged in settlement discussions and exchanged various proposals in their attempts to mutually agree to an appropriate level of discipline for the employees' participation in the pyramid scheme. Purdy credibly testified that he proposed basing the length of suspensions for both KPOA and KMEA employees upon whether or not they were able to reach a settlement. A settlement implies finality and conclusiveness which precludes the need to file grievances to resolve underlying disputes. The Commission has held that efforts or statements made by parties during attempted settlement discussions are inadmissible and have no probative value in establishing whether or not a violation of law has occurred. *Village of Chesaning*, 1974 MERC Lab Op 580, 586-587, *aff'd Michigan Council 55 AFSCME v Village of Chesaning,* 62 Mich App 157(1975); See also *Saginaw Township Community Schools*, 1994 MERC Lab Op 701, 712; *Saginaw Valley Trotting Ass'n*, 1982 MERC Lab Op 783, 796. Compare Rule 62 (Michigan Administrative Code (1979 AC, R 423.423) which classifies as confidential all information disclosed by a party to a mediator in the performance of his duties to effectuate the settlement of disputes. As noted by Respondent, the use of settlement discussions to form the basis for unfair labor practice charges would have a chilling effect on parties' efforts to settle future disputes.

Based on the above discussion, I find that Respondent did not interfere with Charging Party's members right to engage in activity protected by Section 9 of PERA. I have carefully

considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. I, therefore, recommend that the Commission issue the order set forth below:

Recommended Order

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____