STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF PUBLIC WORKS),
Respondent-Public Employer,

Case No. C97 L-256

-and-

ASSOCIATION OF CITY OF DETROIT SUPERVISORS,
Charging Party-Labor Organization.
_____/

APPEARANCES:

City of Detroit Law Department, by Valerie A. Colbert-Osamuede, Esq., for Respondent

L. Rodger Webb, Esq., for Charging Party

DECISION AND ORDER

On February 16, 2001, Administrative Law Judge Julia C. Stern 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: _____

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APPEARANCES:

Valerie A. Colbert-Osamuede, Esq., City of Detroit Law Department, for the Respondent

L.Rodger Webb, Esq., 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 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Detroit, Michigan on October 30, 1998, and August 30, September 29, October 25, and December 3, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Charging Party on October 30, 2000, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on December 10, 1997, by the Association of City of Detroit Supervisors, and amended on February 26, and March 28, 1998. The charge, as amended, alleges that Respondent City of Detroit violated PERA by refusing to pay Charging Party representatives for attending fact finding proceedings held on August 17 and November 5, 1997. Charging Party also alleges that Respondent violated Sections 10(1)(a) and (c) of PERA when it transferred Charging Party President Joseph Solomon to a new job assignment in March 1998. Charging Party asserts that Respondent transferred Solomon in retaliation for positions taken by during contract negotiations and

before the fact finder, and because of facts testified to by Charging Party witnesses during the fact finding. Charging Party alleges that Solomon=s transfer was also caused by his other activities as union president.

Facts:

Charging Party represents a bargaining unit of between 70 and 80 supervisors employed in the Solid Waste Division (SWD) and Vehicle Management Division (VMD) of Respondent=s Department of Public Works (DPW). Charging Party represents about 34 positions in the SWD. The remainder of Charging Party=s unit works in the VMD. Excluded from the unit are higher level supervisors, including individuals with the titles supervisor, senior supervisor, assistant superintendent, and superintendent. Solomon, who is not a full-time paid union representative, works as an auto repair foreman in the VMD. This division is responsible for maintaining and repairing city vehicles, including police cars, road repair equipment, and garbage trucks. The superintendent in charge of the VMD is Gail Brown.

In September 1995, Respondent and Charging Party began negotiating a new collective bargaining agreement to replace the agreement which had expired on June 30, 1995. Charging Party=s bargaining committee consisted of Charging Party=s attorney, Solomon, Charging Party vice-president Dennis Wheeler, and unit member Steve White. The parties had four sessions with a state-appointed mediator, but failed to reach agreement. On June 23, 1996, Charging Party filed a petition asking the Commission to appoint a fact finder. The fact finder held hearings on January 21, 23, August 19, and November 5, 1997. Representatives from Respondent=s Human Resources Department attended the fact finding hearings, as did Charlotte Bush, DPW personnel director. Ulysses Burdell, executive assistant to the DPW superintendent, attended some of these hearings.

One issue before the fact finder was a proposal by Charging Party to give employees the right to transfer to a different assignment within classification by seniority. The expired contract contained no provision on transfers, and Respondent maintained that it should retain the right to make all transfer decisions. Although there was a procedure for requesting transfers, Charging Party and Respondent agreed that Respondent did not routinely honor transfer requests. At the January 1997 hearings Solomon and Frank Laskowski, also an auto repair foreman in the VMD, testified in support of Charging Party=s transfer proposal. Also before the fact finder was Charging Party=s proposal to equalize overtime among unit members at the same work location by allowing them to work overtime outside their regular assignments. This issue arose because the amount of regular overtime worked by foremen varied greatly by assignment, e.g., foremen supervising truck repair worked much more overtime than those supervising the preparation of new vehicles. Charging Party argued that since all foremen had the same job title, were called upon to substitute for each other when someone was absent, and were subject to transfer between assignments, they should be allowed to work overtime outside their regular assignments. Solomon, Wheeler (who works in the SWD), and two other VMD foremen testified on this issue during the fact finding hearings in January 1997.

Another important issue separating the parties was promotions. The expired contract stated that Apromotions shall be made in accordance with department policies subject to Personnel Department Rules and approval.@ Charging Party proposed to replace this with a provision requiring

posting of all vacancies, a clear statement of qualifications, testing, a listing of qualified applicants by seniority, and selection of the most senior qualified applicant. Charging Party contended during negotiations that promotions were routinely based on favoritism, and that the proposed contract language was necessary to permit it to grieve unfair promotion decisions. Solomon and Wheeler testified in support of this contention during the two fact finding hearings conducted in January 1997. Both men gave examples of promotions which they believed had been based on personal relationships rather than qualifications. Solomon testified, for example, that several auto repair foremen, who he named, had been promoted despite lacking the formal qualifications for the job. Wheeler testified that a supervisor in the SWD with family connections to the former mayor had been promoted while serving a disciplinary suspension. Wheeler also testified that a supervisor who played on a recreational baseball team with a superior had been promoted to a position requiring a high school degree even though he did not have one.

Respondent routinely pays all the representatives of its many unions for the time they spend at negotiation sessions held during work hours. Pamela Osborne, supervisory labor relations representative in Respondent=s Human Resources Department, testified without contradiction that Respondent does not pay employees to attend fact finding hearings unless they are full-time paid union representatives or the parties have negotiated an agreement to pay employees for this time. Osborne recalled communicating this information to Bush around the time of Charging Party=s fact finding proceeding.

Solomon, Wheeler, and White were paid by Respondent for attending the negotiating and mediation sessions preceding the fact finding. All the union officers and bargaining unit members who attended or testified at the fact finding hearings held in January 1997 were paid for attending these hearings. On August 19, 1997, the morning of the third scheduled day of fact finding, Solomon came to work before the hearing at his regular starting time of 6:30 a.m.. After he had punched in and worked for about an hour, Solomon›s supervisor told him to punch out, that he was not going to get paid for that day. Solomon took a personal business day. Wheeler also punched in that morning, worked for a couple of hours, then left to attend the hearing without punching out. When Wheeler returned to work after the hearing, he was told by his supervisor that he was not going to be paid for the day. Wheeler was sent home, despite the fact that his subordinates were working overtime. Although Wheeler=s paycheck was docked eight hours for August 19, Respondent eventually paid him for the time. White was on vacation and did not attend the hearing on August 19.

On November 5, the fourth scheduled day of fact finding, Solomon left his workplace to attend the fact finding at 10:30 a.m. Solomon was paid for four hours that day, and charged the other four hours to his leave bank. White, like Wheeler, works in the SWD. Both White and Wheeler clocked in on November 5, worked, left to attend the hearing, and were told when they returned to work that they would not be paid for the time. Both elected to take a vacation day. As on August 19, Wheeler was told that he had to go home instead of going back to work even though employees in his area were working overtime.

Charging Party submitted its brief to the fact finder on about January 13, 1998. Charging Party gave a copy of this brief to every member of its bargaining unit. The brief reviewed in detail

Solomon=s and Wheeler=s testimony about promotions in the department. Shortly after copies of the brief were distributed, an assistant superintendent in the SWD who had been named in Wheeler=s testimony came up to Solomon while he was at the copy machine. The assistant superintendent said, AMan, I didn=t think you guys would go that far. I can=t get a raise either. Why don=t you guys go ahead and settle the contract? I=m ashamed of what I saw in the brief.@ Solomon replied that he was sorry if he had hurt someone=s feelings, but that what he had said was true. Around this time Solomon encountered a supervisor in the VMD whose promotions Solomon had criticized. Solomon asked the man if something was wrong, and he replied that he didn=t care to talk about it. Solomon said, Aif it is about that paper, I had to make that statement. I was under oath. I=m sorry if I hurt your feelings but I didn=t tell a tale or exaggerate anything.@ The supervisor said, Aok,@ and left. Shortly thereafter, Wheeler was approached by the senior supervisor who, as Wheeler had testified, had been promoted while suspended. The senior supervisor told Wheeler that Ahe didn=t appreciate@ what Wheeler had said.

On March 18, 1998, VMD Superintendent Brown issued a memo announcing the promotion and/or transfer to new assignments of 14 members of Charging Party=s bargaining unit. Four individuals were promoted into Charging Party=s unit as new foremen. One foreman was promoted to a senior foreman. Two senior foremen were transferred to different shifts at their same locations, and seven of the VMD=s 24 existing auto repair foremen received transfers to new assignments. According to Brown=s uncontradicted testimony, the first priority of Brown and her staff was to assign newly promoted foremen to locations and shifts where there were upper-level supervisors who could evaluate them. Many of these assignments are those where the most overtime is worked. According to Brown=s testimony, one of the purposes of the transfers was to cross train foremen in other assignments, and another purpose was to equalize overtime. Brown admitted, however, that she and her staff did not try to transfer foremen to locations where they had never worked, or to move foremen from assignments where overtime was high to assignments where it was low. Brown and her staff did look at transfer requests, of which there was only one, Frank Laskowski=s, on file. However, following the DPW=s position that assignments should be solely the prerogative of management, Brown looked only at the shifts and locations Laskowski had requested, ignoring the specific assignments he had asked for.

Among the transfers announced on March 18 was Solomon=s transfer from the tire room at the VMD=s Russell Ferry yard to its street maintenance equipment garage at 19th and Michigan. When Solomon first became a foreman in the VMD in 1987, he worked in the tire room at Russell Ferry. In 1993, about the time he became president of the Charging Party, he was transferred to the body shop at the VMD=s Livernois garage. While Solomon was in the body shop, he had arguments with Brown over whether it was his job or that of the senior foreman to inspect body shops doing contract work for the City. Solomon and Brown also had a dispute of some kind about invoices. During this period Solomon and Brown had an argument over Solomon=s attempt to tape one of their meetings. At the end of the meeting Brown knocked the tape recorder to the floor where it broke. After about a year in the body shop, Solomon was transferred back to the tire room. Solomon objected to this transfer and voiced his opinion to Brown that the transfer was a punishment. Solomon continued to work in the tire room until his 1998 transfer to the street maintenance garage.

In March 1998 the four newly promoted foremen were assigned to car and truck line positions, including two of the positions Laskowski had requested. Laskowski was transferred to Russell Ferry, a location he had asked for, where he took over Solomon=s job in the tire room, an assignment Laskowski had not wanted. Laskowski=s old assignment, new vehicle prep, was given to a foreman whose previous assignment was given to a new foreman. Solomon was transferred to street maintenance, where there was a vacancy left by the promotion of a foreman to senior foreman.

After receiving the March 18 transfer memo, Solomon called Brown and told her that he did not want to be transferred from Russell Ferry because he would have contact with fewer of his members at the new location. The Russell Ferry yard is big, and supervisors from the SWD also work out of that yard. By using his lunch hour, or coming in early or leaving late, at Russell Ferry Solomon could have personal contact with about one-third of Charging Party=s members. At the 19th and Michigan location there are only three bargaining unit positions, including Solomon=s. Brown told Solomon that although there were fewer members at 19th and Michigan, there were more classifications there. In another phone conversation, Brown told Solomon, AYou said that you guys could equalize the overtime by working at any location, so I=m giving you a job at street maintenance.@

Two other foremen told Solomon after the transfers were announced that they would have been willing to take the street maintenance assignment. However, there is no indication that either of these men informed Brown of this before the March 18 memo, or that Brown knew before March 18 that Solomon did not want to leave the tire room.

On March 19, 1998, Charging Party filed a grievance alleging that the transfers were unfair and discriminatory. In its June 1998 answer, Respondent replied that the VMD wanted to Across-train its supervisors for maximum efficiency,@ and that there was no violation of the contract. Charging Party took the grievance to third step of the grievance procedure, but did not request arbitration.

Solomon asserted that Brown took certain other actions against him after his testimony at the fact finding which demonstrated her animosity toward him and/or his union activities. Sometime after January 1997, Brown told Solomon=s supervisor that he was not to be released for union business without her express permission. In August or September 1997, Solomon was told by his supervisor that his vacation requests had to be personally approved by Brown; this was not the normal practice. In October 1997, Solomon=s request for vacation time for his annual hunting trip was denied. His request was eventually approved, but not for all the dates he had requested. At Russell-Ferry Solomon had been allowed to use the phone freely for union business. A week or so after his transfer, Solomon called Brown from the phone in the street maintenance garage to talk about a grievance. Brown then called Solomon=s immediate supervisor and told him not to let Solomon use the phone. In March 1998, Solomon was called to the Livernois garage to represent an employee who had been in a fight. When Solomon went into the garage to look at the site of the incident, Brown had him paged. She told him, AI expect to see you in the office until I call for you.@ Later Solomon was told to leave the office and go to the reception area; after he had sat there for a few minutes, he decided to go back into the garage to look again at the scene. This time Brown called him out into the reception area and shouted, AI=m paying you for eight hours, and I don=t care what you=ve got to do. You stay in that office and don=t come out.@ On February 4, 1999, Solomon was called to meet with Brown about a

grievance filed by another foreman. Brown called Solomon a liar when he said he didn=t know anything about the grievance, and called him a liar again when he said he didn=t know who that foreman=s immediate supervisor was. Brown then began taunting Solomon, referred to the 1993 incident in which she had broken his tape recorder, and made faces at him. Solomon filed an internal complaint against Brown for this behavior, but the complaint was dismissed after investigation.

Discussion and Conclusions of Law:

Charging Party argues in its brief that Respondent unlawfully altered an existing term and condition of employment, in violation of its duty to bargain under Section 10(1)(e) of PERA, when it refused to pay its representatives Solomon, Wheeler and White for time spent attending fact finding hearings on August 17 and November 5, 1997.

An employer has no statutory obligation under PERA to pay union representatives for time spent in negotiations or on other union business during working hours. *City of Detroit(Detroit General Hospital)*, 1968 MERC Lab Op 378; *City of Birmingham*, 1974 MERC Lab Op 642. Although both of these decisions were opinions by administrative law judges, adopted by the Commission when no exceptions were filed, the holding of these cases has never been challenged. Union release time (i.e., payment for time spent on union business during working hours) is, however, a mandatory subject of bargaining. *Central Michigan Univ*, 1994 MERC Lab Op 527.

In order for a past practice to become a term or condition of employment subject to the duty to bargain, the practice must be mutually accepted by both parties. *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454 (1991). That is, there must have been at least tacit agreement that the practice would continue. *Amalgamated, supra* at 454-455, n19. According to the uncontradicted testimony of a representative from Respondent=s labor relations division, Respondent does not automatically pay union representatives to attend fact finding hearings. Insofar as the record discloses, the parties here had not used fact finding before 1997, and therefore had no established practice regarding release time for fact finding. Solomon, Wheeler and White were paid for attending bargaining and mediation sessions in 1995 and 1996. Fact finding is, as Charging Party asserts, an Aextension of bargaining.@ However, the fact that Respondent paid Charging Party representatives to attend negotiating sessions does not mean that Respondent tacitly agreed to pay them to attend fact finding hearings. Moreover, although Respondent paid Charging Party=s representatives and member for attending the two fact finding hearings held in January 1997, two occasions do not constitute a past practice. I find no evidence that there was a practice, mutually accepted and binding on both parties, to pay Charging Party representatives to attend fact finding hearings. I conclude, therefore, that Respondent did not violate its duty to bargain by refusing to pay Solomon, Wheeler and White for attending fact finding hearings on August 19 and/or November 5, 1997.

In its first and second amended charges, and at the beginning of the hearing, Charging Party also asserted that Respondent=s refusal to pay Solomon, White and Wheeler for attending the fact findings sessions held in August and November 1997 constituted unlawful retaliation against them for the testimony presented at the earlier sessions. However, Charging Party did not specifically raise the issue again during the hearing and did not argue this claim in its brief. For these reasons, I assume that Charging Party has dropped this aspect of its charge.

Charging Party=s second allegation is that on March 18, 1998, Respondent unlawfully transferred Solomon to a different assignment because of his union and other protected activities, including his testimony at the fact finding proceeding. In order to establish a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA, Charging Party must show that the employee engaged in union or other protected activity; that the employer knew of this activity at the time it took the action constituting the alleged discrimination; that the employer had anti-union animus or was hostile to the employee=s exercise of his or her protected rights; and that there was suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discrimination. *Rochester School Dist*, 2000 MERC Lab 38, 42; *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703,706.

I conclude that Charging Party has failed to make a prima face showing that Solomon=s protected activity was a motivating factor in his transfer. Brown was aware, of course, that Solomon was Charging Party=s president. Moreover, the fact finding hearings were public, Solomon=s testimony was well-publicized within the department, and the record demonstrates that several high-level supervisors who did not attend the hearing knew what Solomon had said about the DPW=s promotion practices. Although the record did not demonstrate that Brown, specifically, was angered by Solomon=s testimony, several other high level supervisors did express their displeasure. Brown

knew, from the position Charging Party had taken at the bargaining table, that Charging Party was opposed to involuntary transfers. The transfers were announced fairly soon after Charging Party=s brief to the fact finder was distributed, although more than 13 months after Solomon testified. The problem with Charging Party=s argument, however, is that there is no evidence that Brown knew in March 1998 that Solomon, in particular, did not want to be transferred. Solomon had previously objected to his assignment at the tire room at Russell Ferry, despite the fact that it gave him access to a large number of his members. He had complained that he was being punished when he was transferred to that assignment from the Livernois bump shop. There is no indication that the tire room was a particularly desirable assignment, or that street maintenance was a particularly undesirable one. If Brown had wanted to punish Charging Party=s members for the union=s testimony at the fact finding, or the position it had taken on transfer rights, it would have made more sense to leave Solomon out of the transfers. The record indicates that Solomon called Brown after the transfers were announced to object to his reassignment. However, the fact that Brown refused Solomon=s request that she undo a decision she had already announced, and which affected 13 other people, does not justify the inference that the transfers were an attempt to retaliate against Solomon for his union activity.

In accord with the findings of fact, discussion and conclusions of law set out above, I conclude that Respondent did not violate Section 10(1)(e) of PERA by refusing to pay Joseph Solomon, Dennis Wheeler and Steve White for time spent attending hearings in a fact finding proceeding on August 19 and/or November 5, 1997. I also conclude that Respondent did not violate Sections 10(1)(a) and (c) of PERA by transferring Solomon to a new assignment in March 1998. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: