

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

INGHAM COUNTY BOARD OF COMMISSIONERS,
and INGHAM COUNTY SHERIFF,
Respondents-Public Employers,

Case No. C99 F-110

-and-

CAPITOL CITY LODGE NO. 141,
FRATERNAL ORDER OF POLICE,
Charging Party-Labor Organization.

/

APPEARANCES:

Cohl, Stoker, & Toskey, P.C., by John R. McGlinchey, Esq., for Respondent

Wilson, Lawler, & Lett, PLC, by R. David Wilson, Esq., for Charging Party

DECISION AND ORDER

On April 28, 2000, Administrative Law Judge (hereafter "ALJ") Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents Ingham County Board of Commissioners and Ingham County Sheriff did not unilaterally change a mandatory subject of bargaining in violation of Section 10(1)(e) of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379 as amended, MCL 423.210; MSA 17.455 (10)(1), and recommending that the Commission dismiss the unfair labor practice charge and complaint. On May 24, 2000, Charging Party Capitol City Lodge No. 141, Fraternal Order of Police, filed timely exceptions to the Decision and Recommended Order of the ALJ. Respondents filed a timely brief in support of the ALJ's decision on June 5, 2000.

The facts of this case were set forth in detail in the ALJ's Decision and Recommended Order and need not be repeated here. On exception, Charging Party contends that the ALJ erred in finding that Respondents' decision to restrict light duty assignments to employees with duty-related injuries was within its inherent managerial prerogative, and as such was a permissive subject of bargaining. Under PERA, a public employer has a duty to collectively bargain in good faith with the union representative over "wages, hours, and other terms and conditions of employment" MCL 423.215(1); MSA 17.455(15)(1). These issues are mandatory subjects of bargaining, while issues falling outside the scope of such classification are permissive or illegal subjects of bargaining. *Grand Rapids Comm College Faculty Ass'n v Grand Rapids*

Comm College, 439 Mich 650, 656-657 (2000); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177-178 (1989). Mandatory subjects of bargaining include, but are not limited to, terms and conditions of employment concerning hourly, overtime and holiday pay, work shifts, pension and profit sharing, grievance procedures, sick leave, seniority, and compulsory retirement age. *St. Clair School Dist v IEA/MEA*, 458 Mich 540, 551; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44 (1974). Terms and conditions of employment which are mandatory subjects of bargaining survive expiration of the contract by operation of law during the bargaining process for a new contract. *City of Detroit (Transportation Dep't)*, 1988 MERC Lab Op 100, 105-106. Because public employees are restricted from striking, the scope of the bargaining obligation for public employers is to be broadly construed. *Bay City Ed Ass'n v Bay City Public Schools*, 430 Mich 370, 375 (1988); *Grand Rapids Comm College Faculty Ass'n*, *supra* at 657.

In recommending dismissal of the charges, the ALJ relied upon a line of Commission decisions standing for the proposition that job assignments within the workday which are the same or substantially similar to existing duties are day-to-day operating decisions and part of an employer's inherent managerial prerogative. See e.g. *City of Westland*, 1988 MERC Lab Op 853; *City of Saginaw*, 1973 MERC Lab Op 975; *City of Lincoln Park*, 1977 MERC Lab Op 679; *City of Hamtramck*, 1978 MERC Lab Op 1275; *City of Kalamazoo*, 1978 MERC Lab Op 11. We find that the ALJ's application of this general rule fails to adequately address the specific issue presented in this case. The record indicates that employees who are denied light duty assignments pursuant to Respondents' new policy must use personal or sick leave, vacation time, or other forms of compensatory time in order to secure compensation during their absence from work. It is well-established that sick leave and other forms of compensatory time are fringe benefits which constitute mandatory subjects of bargaining. See e.g. *Detroit Police Officers Ass'n*, *supra*, 391 Mich at 55; *Detroit Transportation Dep't*, *supra*. Because Respondents' decision to restrict light duty assignments to employees with duty-related injuries has a direct effect on and relationship to terms and conditions of employment established by contract which clearly are mandatory subjects of bargaining, we conclude that the ALJ erred in finding that implementation of the new light duty policy was part of the Employer's inherent managerial prerogative. See e.g. *Grand Rapids Comm College Faculty Ass'n*, *supra*, 439 Mich at 660-663.

We also disagree with the ALJ's determination that Charging Party waived any right it may have had to require Respondents to bargain over the change in policy by agreeing to Article 27, Section 6(a) of the contract, a clause giving the Sheriff the "exclusive right to assign personnel in the bargaining unit to any position in the bargaining unit and to determine assignments." While contract language may, under certain circumstances, effect a waiver of bargaining rights, see e.g. *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441 (1991), a waiver will not be found where such language conflicts with terms and conditions of employment established by a widely acknowledged and mutually accepted past practice. See *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339 (1996); *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309 (1996). Here, the ALJ explicitly found that, prior to March of 1999, there existed a practice, mutually accepted by both parties, of allowing employees with temporary non-duty related disabilities to work light duty assignment upon their request. Although Respondents discuss that finding in some detail in their brief in support of the Decision and Recommended Order, no exception or cross-exception was

taken to the ALJ's determination on that issue. In fact, Respondents specifically request in their brief that we "adopt the ALJ's Decision and Recommended Order." Thus, regardless of whether Article 27, Section 6(a) actually "covers" light duty assignments, we must conclude that Charging Party did not relinquish its right to bargain concerning the light duty policy. See Rule 66(3), R 423.466(3), of the General Rules and Regulations of the Employment Relations Commission ("An exception to a ruling, finding, conclusion, or recommendation which is not specifically urged is waived.").

Similarly, neither Article 2, the "Management Rights" clause, nor Article 4, the "Past Practices" clause, in the contracts constitute a waiver of Respondents' bargaining obligation. This Commission has consistently found that neither a zipper clause nor a broadly worded management rights clause will serve as a waiver of bargaining rights unless such a waiver is clear, explicit and unmistakable. See e.g. *City of River Rouge*, 1981 MERC Lab Op 663; *Oakland County*, 1983 MERC Lab Op 1; *City of Rochester*, 1982 MERC Lab Op 324; *City of Roseville*, 1982 MERC Lab Op 1372. Although we have found a waiver where the contract makes specific reference to the subject matter at issue, see e.g. *Comstock Public Schools*, 1987 MERC Lab Op 267; *Michigan State Univ*, 1987 MERC Lab Op 939; *City of Detroit (Dep't of Transp)*, 1989 MERC Lab Op 30; *City of Romulus*, 1988 MERC Lab Op 504, we decline to make such a finding here. The record establishes that the light duty practice was in existence for at least 25 years and, despite the presence of the management rights and zipper clauses in the 1996-1998 contract, both parties continued to adhere to that practice through March of 1999. Moreover, the issue of light duty assignments was discussed in negotiations on the 1999 agreement, and the Union expressly indicated its desire that the practice continue. Under such circumstances, we find that these generalized provisions do not constitute a waiver of bargaining rights with regard to light duty assignments. See e.g. *Ohio Power Co*, 317 NLRB 135; 150 LRRM 1098 (1995).

For the reasons set forth above, we find that Respondents violated Section 10(1)(e) of PERA by unilaterally implementing a change in the light duty policy.

ORDER

It is hereby ordered that Respondents Ingham County Board of Commissioners and Ingham County Sheriff, their officers and agents, shall:

1. Cease and desist from making changes in the light duty policy for employees represented by Charging Party Capitol City Lodge No. 141, Fraternal Order of Police without first bargaining to impasse or reaching agreement on these changes.
2. Restore the light duty policy in existence for Charging Party's employees prior to March of 1999 and make employees whole for all monetary losses and/or loss of personal or sick leave, vacation time, or other forms of compensatory time suffered as a result of the unlawful unilateral change.
3. On demand, bargain in good faith with Charging Party over all changes in the light duty policy applicable to employees represented by the Union.
4. Post the attached notice to employees in conspicuous places on Respondents' premises, including all locations where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

PURSUANT TO AN UNFAIR LABOR PRACTICE PROCEEDING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, AFTER A PUBLIC HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE, IN WHICH INGHAM COUNTY BOARD OF COMMISSIONERS AND INGHAM COUNTY SHERIFF HAVE BEEN FOUND GUILTY OF AN UNFAIR LABOR PRACTICE IN VIOLATION OF SECTION 10 OF PERA, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make changes in the light duty policy for employees represented by Capitol City Lodge No. 141, Fraternal Order of Police without first bargaining to impasse or reaching agreement with the Union on these changes.

WE WILL restore the light duty policy in existence for employees represented by Capitol City Lodge No. 141, Fraternal Order of Police prior to March of 1999, and make employees whole for all monetary losses and/or loss of personal or sick leave, vacation time, or other forms of compensatory time suffered as a result of the unlawful change.

WE WILL, on demand, bargain in good faith with Capitol City Lodge No. 141, Fraternal Order of Police over changes in the light duty policy applicable to employees represented by the Union.

INGHAM COUNTY BOARD OF COMMISSIONERS
and INGHAM COUNTY SHERIFF

By: _____

Dated: _____

(This notice shall remain posted for a period of thirty (30) consecutive days and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, State of Michigan Plaza Building, 1200 Sixth Street, Suite 1400N, Detroit, MI 48226, (313) 256-3540.)

STATE OF MICHIGAN
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Joint Employers-Respondents,

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CAPITOL CITY LODGE NO.141, FRATERNAL ORDER OF POLICE,
Labor Organization-Charging Party.

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by John McGlinchey, Esq., for the Respondents

Wilson, Lawler & Lett, P.L.C., by R. David Wilson, 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), as amended, MCL 423.210 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Lansing, Michigan on October 5, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before December 8, 1999, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on June 15, 1999, by Capitol City Lodge No.141, Fraternal Order of Police, against the Ingham County Board of Commissioners and the Ingham County Sheriff. Charging Party represents a bargaining unit consisting of nonsupervisory deputy sheriffs, detectives and jail corrections officers employed by the Respondents. The charge alleges that sometime between March and June 1999, Respondents unilaterally altered their existing practice of allowing employees with non-job-related temporary disabilities to work "light duty" assignments in lieu of using sick leave. Charging Party asserts that this practice had become a term and condition of employment and that Respondents were obligated to bargain with Charging Party before promulgating a new policy restricting light duty assignments to employees injured while on duty.

Facts:

Charging Party represents nonsupervisory deputies and corrections officers employed by the Respondents. Throughout late 1998 and early 1999, the parties were negotiating a contract to replace their 1996-1998 collective bargaining agreement. The expiration date of this contract was January 1, 1999, but the parties agreed to extend the contract until they reached a new agreement. Sometime between March 2 and May 4, 1999, the parties reached a tentative agreement. Charging Party's membership ratified the tentative agreement on May 4, and the County Board of Commissioners approved it shortly thereafter. A new contract for the term

January 1-January 31, 1999 was signed in July.

None of the parties' contracts have explicitly referenced light duty assignments. Prior to the spring of 1999, the sheriff's department had no formal light duty policy, written or unwritten. The record establishes, however, that for at least the past 25 years, employees suffering from temporary illnesses or injuries preventing them from performing all the regular duties of their jobs were permitted to work light duty assignments for the duration of their disabilities. Both employees with on-the-job injuries and those with non-duty-related disabilities, including pregnant employees, were given light duty assignments. Deputies qualified for light duty were assigned to the communications(dispatch) center, or to the complaint desk. Corrections officers were assigned to lobby control, which is the jail's visitor area. The record indicates that employees presented their requests, accompanied by documentation from their doctors, to their command officers or directly to the sheriff's department administration. The administration decided what hours the employee would be offered; most often, but not always, employees were assigned to the day shift. There is no indication that prior to the spring of 1999 Respondent ever denied a light duty assignment request when: (1) Respondent was satisfied that the employee could not perform his or her usual assignment but could perform a light duty assignment; (2) the employee agreed to work the schedule that Respondent offered.

During late 1997 or early 1998, Charging Party filed a grievance on behalf of a pregnant employee who had requested a light duty assignment and had been given hours that did not satisfy her. The grievance was settled when the Respondent and the grievant reached an agreement on a schedule. In the spring of 1998, the undersheriff, with the assistance of supervisory personnel, began working on a formal light duty policy.

During a negotiation session for the parties' 1999 contract held on November 30, 1998, Charging Party presented Respondent with a written contract proposal covering light duty assignments. Charging Party proposed to add language to the sick leave provision stating that whenever an employee is approved by a physician for a light duty assignment, "the employee shall automatically be deemed to be working a day assignment," defined as the hours of 8:00 a.m. to 4:00 p.m., Monday through Friday. The proposal also stated that a second light duty position would be created whenever an employee requested light duty when the day assignment light duty position was filled. The employee assigned to this second position would "automatically be deemed to be working a night assignment from the hours of 4:00 p.m. until midnight, Monday through Friday." The proposal stated that employees injured on duty would have priority over employees with "an off duty related injury or sickness." Respondent advised Charging Party that it was working on a light duty policy itself, and there was no further discussion of the issue at this meeting. At a subsequent negotiating session, Charging Party suggested that Respondent bring a draft of its policy to the bargaining table for discussion. Respondent did not do this, and Charging Party made no further request.

On March 2, 1999, Respondent sent Charging Party a copy of a light duty policy in the form of an internal order. The policy stated that requests for light duty assignments would be accepted only in cases of on-the-job injuries temporarily precluding an employee from performing his regular duties. It stated that light duty assignments would not be available for non-job-related injuries or illnesses. The policy also limited the number of light duty assignments, and provided that employees assigned to light duty would work certain specified days and hours. The cover memo sent to the Charging Party stated that the policy "should be implemented within the next two weeks." Sometime between March and June, an employee with a non-duty-related injury requested a light duty assignment and received a denial which cited the new policy. The signed internal order was distributed to employees in early June 1999.

Provisions of the Collective Bargaining Agreement:

_____The parties' 1996-98 and 1999 agreements both contain the following provisions:

Article 2. Management Rights

_____ Section 1. The Division recognizes that the Sheriff reserves and retains, solely and exclusively, all rights to manage and direct his work force and to manage and operate the Sheriff's affairs.

_____ Section 2. All rights, functions, powers and authority which the Sheriff has not specifically abridged, delegated or modified by this Agreement are recognized by the Division as being retained by the Sheriff.

_____ Section 4. Neither the constitutional nor the statutory rights, duties, and obligations of the Sheriff shall in any way be abridged by this Agreement, unless otherwise specifically provided hereunder.

Article 4. Past Practices

There are no agreements which are binding on any of the Parties other than the written provisions contained in this Agreement. No further agreement shall be binding on any of the Parties until it has been put in writing and signed by the Parties to be bound.

Article 27. Layoff and Recall

_____ Section 6. The Parties to this Agreement recognize that:

A. The Sheriff has the exclusive right to assign personnel in the bargaining unit to any position in the bargaining unit and to determine assignments; and

B. The Sheriff has the legal authority to determine which particular position(s) shall be subject to layoff pursuant to this Article.

Discussion and Conclusions of Law:

Respondents argue that this charge should be dismissed because it involves a matter of contract interpretation. The Commission has refused to find an unfair labor practice where a union alleges that the employer has unilaterally changed a term of the contract, and the parties have a good faith dispute over the meaning of the contract language. See, e.g., *Wayne State Univ*, 1997 MERC Lab Op 484; *City of Battle Creek*, 1994 MERC Lab Op 91; *Co of Oakland, Sheriff's Dept*, 1983 MERC Lab Op 538. In such cases the Commission has held that the contract interpretation dispute should be resolved by means of the grievance procedure agreed to by the parties in their contract. Here, however, Charging Party does not claim that light duty assignments are covered by the contract.¹ Rather, it alleges that Respondents' practice of awarding light duty assignments to employees with non-duty-related injuries and illnesses developed into a term and condition of employment outside of the contract, and that Respondents could not take away this benefit without first giving Charging Party an opportunity to bargain. Respondents, however, assert that Charging Party waived its right to bargain by language in the contract. In these circumstances, the Commission may interpret the contract to determine

¹ Where a subject is covered by an existing contract, the employer has fulfilled its duty to bargain over that subject. *Port Huron EA v Port Huron Area SD*, 452 Mich 309, 322 (1996)

whether the union has waived its right to bargain. *City of Rochester*, 1982 MERC Lab Op 324; *Kent Co Ed Assoc v Cedar Springs P.S.*, 157 Mich App 59 (1987), *aff'g* 1985 MERC Lab Op 1101.

Respondents also argue that there was no consistent past practice with respect to light duty assignments. They point out that the record reflects that at least five employees with non-duty-related disabilities had their light duty requests denied. The record establishes, however, that two of these five were offered light duty assignments, but, at least initially, refused to work the schedules Respondents offered them. In two other cases, Respondents initially determined that the employees were not physically able to do even light duty assignments. The fifth employee's request was denied after Respondents had notified Charging Party that it was adopting a new policy.

I find that prior to March 1999 there existed a practice, mutually accepted by both parties, of allowing employees with temporary non-duty-related disabilities to work light duty assignments upon their request. Under the established practice, the sheriff had the discretion to determine whether the employee was capable of performing the light duty assignment. He also had the discretion to decide what shift or hours were available for the employee to work. However, the fact that the sheriff retained discretion over these matters does not mean that there was no consistent past practice. A well-established past practice may become a term and condition of employment even though it allows for the exercise of substantial discretion by the employer. *Oakland Co Rd Comm*, 1983 MERC Lab Op 1.

Respondents' third argument is that light duty assignments are not a mandatory subject of bargaining because an employer has the inherent managerial right to assign work. Here, Respondents' practice of permitting employees with non-job-related disabilities to work light duty assignments had become an established benefit; permitted to work light duty assignments, employees received full pay without using time from their sick pay bank. A topic which impacts the wages, hours, or working conditions of employees is a mandatory subject of bargaining unless it unduly restricts a public employer's ability to make decisions regarding the size and scope of services or to function effectively, or it poses serious questions with regard to political accountability. *Local 1277 AFSCME v City of Center Line*, 414 Mich 642, 660 (1982); *City of Hamtramck*, 1985 MERC Lab Op 1123; *Co of Wayne*, 1989 MERC Lab Op 1135. Requiring a public employer to bargain over day-to-day decisions about what work will be done, and who will be assigned to do it, may seriously impact that employer's ability to function effectively. The Commission, therefore, has held that changes in job assignments within the normal workday which do not substantially change the nature of an employee's job are within an employer's inherent managerial prerogative, although the employer has the duty to bargain over the impact of these decisions. See *City of St. Joseph*, 1996 MERC Lab Op 274; *City of Westland*, 1988 MERC Lab Op 853; *City of Saginaw (FD)*, 1973 MERC Lab Op 975.

Here, employees with duty-related disabilities are not better qualified to perform light duty work than their equally disabled co-workers whose injuries or illnesses are not job-related. However, restricting temporary light duty assignments to employees with duty-related disabilities obviously reduces the number of such assignments, and thereby reduces the disruption caused by special assignments. Simply stated, the issue here is whether Respondents' have the right to unilaterally decide who will be assigned to perform certain duties which have been designated as light duty. I conclude that the decision to restrict light duty assignments to employees with duty-related injuries was within Respondents' inherent managerial prerogative and a permissive subject of bargaining. Accordingly, Respondent did not have a duty to bargain with Charging Party before altering its practice.

Although this conclusion disposes of the charge, I will also address the final issue argued by the parties: whether the contract waived Charging Party's right to bargain over the change in Respondents' practice. In order to serve as an effective waiver of the right to bargain under PERA, contract language must "clearly and unmistakably" indicate the union's intention to cede

to the employer the right to make the specific change unilaterally. *Lansing Fire Fighters Union, Local 421 v City of Lansing*, 133 Mich App 56 (1984), *aff'g* 1983 MERC Lab Op 97. The Commission has also held that a “zipper” clause, stating that during the term of the contract both parties waive the right to bargain collectively with each other on any subject, whether or not discussed in negotiations or contained in the contract, does not by itself constitute a waiver of the right to bargain over a change in a subject not covered by the contract. *City of Rochester, supra*. Cf. *Capital Area Transportation Authority*, 1994 MERC Lab Op 921. A management rights clause does not serve as a waiver of the right to bargain unless it explicitly addresses the subject at issue. Compare *Riverview CS*, 1974 MERC Lab Op 59 and *New Haven CS*, 1992 MERC Lab Op 426 (general management rights language did not constitute an effective waiver), with *School District of the City of River Rouge*, 1981 MERC Lab Op 663 (detailed management rights clause giving the employer the explicit power to “establish classifications, control promotions, demotions, transfers and dismissals, determine schedules, responsibilities and assignments and determine whether and to what extent any work shall be performed by employees” waived the union’s duty to bargain over the employer’s decision to substantially change the job duties and effectively demote five employees.) In this case Article 27, Section 6(A) of the contract gives the Sheriff “the exclusive right to assign personnel in the bargaining unit to any position in the bargaining unit and to determine assignments.” I agree with Respondents that this language clearly and unmistakably waived any right Charging Party may have had to bargain over the assignment of light duty work.

In summary, I find that Respondents’ did not have an obligation to bargain with Charging Party over Respondents’ decision to change its practice of giving temporary light duty assignments to employees with non-duty-related disabilities. I conclude, first, that this decision was within Respondents’ inherent managerial prerogative and as such was not a mandatory subject of bargaining. I also conclude that Charging Party clearly and explicitly waived any right it may have had to bargain over this change by agreeing, in Article 27, Section 6(A) of the contract, that the Sheriff had the exclusive right to assign personnel and to determine assignments. In accord with the findings of fact, discussion and conclusions of law set forth above, I find that Respondents did not violate their duty to bargain under Section 10(1)(e) of PERA, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: