STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FARMINGTON HILLS,
Respondent-Public Employer,

Case No. C00 K-189

-and-

FARMINGTON HILLS FIRE FIGHTERS ASSOCIATION,
LOCAL 2659, IAFF
Charging Party-Labor Organization

_____/

APPEARANCES:

Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C., by Dennis B. DuBay, Esq., for the Respondent

Helveston & Helveston, by Michael L. O'Hearon, Esq., for the Charging Party

DECISION AND ORDER

On November 30, 2001, Administrative Law Judge Nora Lynch 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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Dennis B. DuBay, Esq., Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C. for the Public Employer

Michael L. O'Hearon, Esq., Helveston & Helveston, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provision of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Detroit, Michigan, on January 31, 2001, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on November 1, 2000, by the Farmington Hills Fire Fighters Association, Local 2659, IAFF, alleging that the City of Farmington Hills had violated Section 10 of PERA. Based upon the record, including briefs filed on or before April 25, 2001, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that:

> Since October 2000, the above-named public employer, through its Fire Chief, unreasonably withheld the opportunity to work light duty from unit member Don Alati in retaliation for the activities of the Union in asserting its rights under the collective bargaining agreement between the parties.

Facts:

The Farmington Hills Fire Fighters Association represents a bargaining unit consisting of all full-time employees of the Farmington Hills Fire Department below the rank of deputy chief, excluding the fire chief, deputy chief, office clerical employees, paid-callback employees, and all other City employees. There are approximately 33 full-time fire fighters in the unit, and approximately 80 on-call or callback fire fighters who are excluded. At the time of hearing, the most recent collective bargaining agreement between the parties covered the period July 1, 1998 through June 30, 2001. The contract contains the following provision at Article XV, Limited Duty:

> An employee who sustains an injury or incurs an illness while on or off duty, may be returned to work on limited duty at the discretion of the City. Such limited duty may be authorized by the Chief on an eight hour day schedule with no premium pay.

Donald Alati has worked as a fire fighter for the department since 1994. Alati is a member of the bargaining unit; he is not a Union steward, officer, or member of the bargaining team. In June of 2000, Alati suffered an injury to his shoulder while on vacation. On July 10, 2000, Alati's orthopedic surgeon, Dr. Krugel, recommended that Alati remain off work until July 17, and then return to work on light duty for a week due to injuries to the rotator cuff in his right shoulder. The Employer placed Alati on light duty for a week beginning July 17, 2000. His work included developing the department's website and performing hospital pick-ups of paramedics. Alati then worked regular duty from July 24 through August 24, 2000. During this time Alati was referred by Dr. Krugel to another physician, Dr. Petersen. Dr. Petersen indicated to Alati that he would need significant surgery to correct the damage to his shoulder.

On August 18, Alati met with Fire Chief Marinucci to tell him of the upcoming surgery, and to inform him that the rehabilitation time would be extensive, possibly up to six months. At the chief's request, Alati submitted a written summary of his doctor's recommendations, which included a six-month rehabilitation period, and a request to be put on light duty as of October 1, 2000. Alati also contacted Union President John Kastran for advice.

On August 25, when Kastran was coming off his shift, the chief asked to see him in his office. According to Kastran, the chief told him that Alati had been injured and was requesting a light-duty assignment, and that the City would like to hire a temporary employee to fill in while Alati was on light duty. The chief also indicated that due to the length of the requested assignment, finding light work could be difficult. Kastran told him that the Union would consider the chief's request, but it would have to be a "non-issue" as far as the contract provision for paramedics. The contract provided that the City was required to staff all primary ALS (advanced life support) units with a minimum of two career paramedics at all times. The chief indicated that this restriction would defeat the purpose of the temporary employee, which was to defray the costs of overtime. The chief then said that he had no light-duty assignment for Alati.

The chief testified that when a light-duty assignment was requested, he considered factors such as work available, physical ability, and duration of assignment. In making his decision he consulted with the human resources director or the city manager. According to the chief, the duration of Alati's requested assignment—six months or longer—had a significant potential financial impact upon the department. The Employer introduced evidence of seven prior instances in which the department granted light-duty assignments. Four of the seven involved on-the-job injuries; the longest light-duty period was approximately 10 weeks. The other three involved off-duty injuries. Two of the individuals were given short-term light-duty assignments, no longer than five weeks. The third requested light duty for an extended period of time, six months, which extended to one year. In that case the Union agreed to the City's request for a temporary employee.

Alati's surgery took place on August 28, 2000. On September 12, Alati had a telephone conversation with the chief. The chief told Alati that when he received Alati's request for light duty he requested that the Union agree to utilizing a temporary employee to fill in. Since the Union had refused his request, the chief was denying the light-duty assignment. According to Alati, the chief also said "if I had any influence on my Union, to use that influence and maybe things could be different." The chief denied making any statement regarding influencing the Union, and testified that he would not have expected someone with Alati's tenure to have any influence. According to the chief, he stated that because he did not have any financial relief, he was unable to accommodate Alati's request or pursue it at that time.

On September 15, 2000, Chief Marinucci wrote to Alati confirming that at the time there was no light-duty work available. The Union filed a grievance on Alati's behalf on September 20, 2000, alleging that the City had "unreasonably denied" his request for light duty. The chief denied the grievance on October 3, 2000, referring to Article XV of the collective bargaining agreement which gave the City sole discretion with respect to offering light-duty assignments.

The Union appealed the grievance to the third step and a hearing was scheduled for October 25, 2000 by Mary Moultrup, the City's Director of Human Resources. On October 19, Moultrop received a report from Alati's doctor regarding his condition. Dr. Petersen indicated that Alati could not use his right arm for at least six months, and that his treatment would last six months to one year. The October 25 meeting was attended by the chief, Moultrop, the assistant city manager, and Kastran. At that meeting, the chief questioned why they were there, since the contract clearly gave the Employer sole discretion regarding light duty work. The Union acknowledged the contract provision, but stated that they felt that the Employer was imposing a condition and forcing the Union to negotiate regarding a light-duty assignment. Moultrop responded that they needed to come to a middle ground, and that the costs were such that they would need to hire a temporary employee.

On November 7, 2000, Moultrop sent a written response to the third step grievance to Kastran, stating in part:

> A grievance hearing was conducted on October 25, 2000. The Union conceded that there was no contract violation, but they felt the justifications for denial were unreasonable. Although no rationale was required, we discussed some of the factors involved in the denial; length of assignment, extent of physical restrictions,

availability of appropriate work and temporary fill ins. Fundamentally, the Union believes that the department has work, therefore, the employee should be granted limited duty.

The provision in our Agreement is clear and unambiguous. Returning an employee to work on limited duty is at the City's discretion. Each request for limited duty is unique and must be considered based on its own merits, the factors mentioned herein, and any other relevant circumstances. There is no violation of the contract, therefore the grievance and requested remedy are denied.

The Union did not pursue the grievance any further. Kastran testified that he did not take it to arbitration because he did not feel that an arbitrator would sustain the grievance.

On October 25, 2000, Kastran advised the chief that Alati would exhaust all available leave time by October 30, 2000, and requested that he be allowed to access the Union's sick leave bank. Article XIII of the contract provided that the Union could establish a sick leave bank to be used in the event a member exhausts all other leave benefits due to illness or injury. The matter was referred to Moultrup who initially denied the request. Because Alati was eligible for 90 days of disability insurance she suggested that the Union delay its request. A grievance was filed on November 1, 2000, which was eventually resolved in the Union's favor on December 14, 2000.

In early December Moultrup received a work status report on Alati from Dr. Petersen, indicating that as of November 28, 2000, Alati could perform light duty, including office work such as light filing and keyboarding, but no lifting overhead and work was to be performed with his right arm at his side. Moultrup then contacted Alati to discuss his prognosis and rehabilitation and suggested that they have a meeting with the chief to discuss Alati's physical capabilities. That meeting took place on December 18, 2000. The discussion concerned when Alati would be available to return to work. According to Moultrop, the statement was made: "If we could bring you back tomorrow, could you?" She testified that Alati indicated that it was a difficult time because it was right before the holidays and he had made plans. Alati also stated that he had a doctor's appointment on January 9, 2001. Moultrup testified that at that point they all agreed it would be best to wait until after that appointment to get verification and possibly fewer restrictions on his activity. On December 22, 2000, Alati sent an e-mail to the chief, indicating that he believed he had been misunderstood at the meeting and he was available as soon as a light-duty assignment could be found.

On January 12, 2001, Alati submitted another request for light duty, attaching a January 9 work status report from his doctor which continued his previous restrictions. He also indicated that he would be back to full active duty on or about March 1, 2001. The Employer placed Alati on light duty on January 18, 2001.

Discussion and Conclusions:

The Charging Party maintains that the Employer refused Alati's request for a light-duty assignment in retaliation for the Union's refusal to permit the City to alter the minimum staffing

requirements of the paramedic agreement by hiring a temporary employee. According to the Charging Party, the City discriminated against Alati and refused a light-duty assignment because of the Union's enforcement of the collective bargaining agreement, thereby violating Sections 10(1)(a) and (c) of PERA. The City denies any PERA violation. The City argues that under the collective bargaining agreement it had sole discretion to grant a limited duty assignment and when the Union refused its proposal of hiring a temporary employee to defray costs, the Employer exercised this discretion and elected not to grant the request. The City asserts that the Union sought a benefit not provided for in the contract, and the City in turn sought a similar accommodation; this attempt at a compromise does not establish an unfair labor practice.

I find no violation of PERA established by this record. Charging Party has failed to demonstrate any animus towards the Union or Alati, either by direct or circumstantial evidence, which would support a claim of retaliation. *Colon Com Sch*, 1997 MERC Lab Op 1,8; *Berrien County Probate Court,* 1995 MERC Lab Op 209, 222. The Union's claim that retaliation is supported by the fact that light duty "normally would have been granted" but for the protected activity of the Union in asserting its rights under the contract is not supported by the record. Light-duty assignments are not automatic. When considering light duty assignments the Employer takes many factors into consideration. Alati's case was a difficult one, considering the fact that his injury was off-duty, he was totally disabled after his surgery, and six months was outside the normal boundaries of light-duty assignments, making it difficult to find light work for that lengthy duration. The only other time such a lengthy period was granted, the Union agreed to allow temporary help to ease the financial constraints upon the Employer.

There is no question that the Employer had legitimate reasons for denying limited duty under Alati's circumstances. More importantly, however, the Employer had complete discretion under the contract with respect to the light duty request, as acknowledged by the Union when it dropped its grievance on the same matter. No union animus can be inferred when an employer exercises a right expressly permitted by contract. *City of Battle Creek,* 1994 MERC Lab Op 914, 917; *Ingham County,* 1996 MERC Lab Op 26, 29. Nor can a retaliatory motive be inferred based solely on the fact that an employer exercises a management right, such as instituting layoffs after warning employees that layoffs could be the consequence if no concessions were made in bargaining. *Branch County Bd Comm*, 1989 MERC Lab Op 642; *Benzie County,* 1986 MERC Lab Op 55; *Schoolcraft Com Coll,* 1985 MERC Lab Op 253, *affd MESPA v Schoolcraft College*, 156 Mich App 754, 763 (1986); *MSU (Dept of Public Safety),* 1983 MERC Lab Op 587.

As stated by the ALJ in *City of Portage*, 1976 MERC Lab Op 790, 785, not all employer action which is distasteful or constitutes pressure on a labor organization representing its employees automatically constitutes a violation of 10(1)(a). Both sides are permitted to use whatever legitimate pressures or economic weapons are available to them in negotiations. This is simply what happened here. When the Employer's attempt to reach a compromise was rejected by the Union, the City acted in accordance with its rights under the collective bargaining agreement. No PERA violation can be found under these circumstances.

Based on the above discussion, I find that the Charging Party has not met its burden in demonstrating that the Employer's denial of a light-duty assignment for Alati in October of 2000 was illegally motivated. It is therefore recommended that the Commission issue the order set forth

below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch
Administrative Law Judge

DATED: _____