STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF HOLLAND,
Public Employer – Respondent,

Case No. C03 A-010

-and-

HOLLAND FIRE FIGHTERS, IAFF LOCAL 759,
Labor Organization – Charging Party.

_____/

APPEARANCES:

Miller, Johnson, Snell & Cummiskey, P.L.C., by Michael A. Snapper, Esq., for the Respondent

Randall D. Fielstra, Esq., for the Charging Party

DECISION AND ORDER

On April 9, 2004, 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

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Nora Lynch, Commission Chairman

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Harry Bishop, Commission Member

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Maris Stella Swift, Commission Member

Dated: _____

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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 and 423.216, this case was heard at Lansing, Michigan on May 23, 2003, 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 July 14, 2003, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Holland Fire Fighters, IAFF Local 759, filed this charge against the City of Holland on January 21, 2003. Charging Party represents a bargaining unit of employees in Respondent's fire department, including the ranks of fire fighter, lieutenant and captain. According to the charge, Respondent created three new lieutenant positions in the spring of 2002. On October 2, 2002, Respondent announced the promotion of three fire fighters to fill these positions. However, on October 11, 2002, Respondent's city manager rescinded the promotions pending "a satisfactory resolution" of two outstanding grievances. Both grievances concerned out-of-class pay for temporary assignments to officer positions. Charging Party alleges that the city manager's action interfered with the employees' exercise of their Section 9 rights under PERA and discriminated against them in violation of Sections 10(1)(a) and (c) of PERA.

Facts:

At the beginning of 2002, Charging Party's bargaining unit included three lieutenants and three captains. Article XXII, Section 1 of the parties' collective bargaining agreement stated:

ARTICLE XXII

WORKING OUT OF CLASSIFICATION

> Section 1. Temporary Appointment. The Employer may immediately fill a job vacancy or new position on a temporary basis; provided however, that the employer's filling of any such vacancy or new position shall not exceed thirty (30) duty days; and provided further, than any employee assigned to temporarily fill a vacancy or new position carrying a higher rate of pay shall after one (1) duty week on such temporary assignment receive that rate of pay corresponding to the vacancy or new position for the balance of this continuous temporary assignment. Conversely, any employee who voluntarily agrees to a temporary assignment for the employer's benefit to a position carrying a lower rate of pay shall after one (1) duty week on such temporary assignment receive that rate of pay corresponding to the position occupied for the balance of this continuous temporary assignment. Temporary assignment for training and job development shall not be subject to the requirements of this provision.

Between 1999 and the spring of 2002, the parties had at least four disputes over the payment of out-of-class pay under Article XXII. The parties settled all these disputes with Respondent agreeing to pay the out-of-class pay. On January 25, 2002, Soren Wolff, Respondent's city manager, wrote Charging Party proposing a settlement of an out-of-class grievance filed in December 2001.1 In this letter, Wolff suggested that the parties meet to attempt to clarify the language of Article XXII.

In early February 2002, Respondent's fire chief presented Wolff with a budget proposal to add three new lieutenant positions to the fire department. One of the fire chief's arguments in support of his proposal was that having more lieutenants would eliminate the disputes over out-of-class pay, because the additional lieutenants would be able to take over the duties of a lieutenant on long-term sick leave. Wolff was not persuaded that adding lieutenants would be cheaper than paying fire fighters to work out-of-class. However, he agreed to recommend that Respondent create the new positions. Respondent's budget for the fiscal year beginning July 1, 2002 contained money to fund the promotions. Between June 27 and September 16, 2002, Respondent interviewed and selected three fire fighters to fill the new positions.

Meanwhile, on March 18, 2002, Charging Party sent a letter to Respondent setting forth its interpretation of Article XXII. Charging Party stated that, in its view, the contract language clearly entitled an employee to out-of-class pay whenever a vacancy was filled "at the City's election" for a week or

1 The third step of the parties' grievance procedure is a meeting with the city manager.

longer. According to Charging Party's letter, Respondent's obligation to pay out-of-class pay did not depend on the reason for the vacancy; Article XXII applied to vacancies resulting from vacations as well as other leaves. Charging Party also stated that when a captain's position was vacant, both the lieutenant filling the captain's slot and the fire fighter filling the lieutenant's slot should be entitled to out-of class pay. Moreover, according to Charging Party, any fire fighter appointed temporary station officer or temporary lieutenant/EMT was automatically entitled to out-of-class pay under Article XXII. Charging Party expressed its hope that its letter would prevent further disputes over out-of-class pay. Charging Party sent its March 18, 2002 letter to the fire chief. A copy was passed on to Respondent's personnel director. Wolff testified that he did not see this letter until October 2002. Since Charging Party did not send him a copy of the letter, and since the letter did not directly relate to a pending grievance, I credit Wolff's testimony that he did not receive a copy of this letter.

In March 2002, or shortly thereafter, Charging Party filed a grievance seeking out-of-class pay for a fire fighter, Alex Pena, who had filled in for his absent lieutenant. Part of the lieutenant's absence was due to vacation and part was due to illness. Respondent settled the grievance and paid Pena the out-of-class pay he requested.

On July 8 and July 18, 2002, Charging Party filed grievances seeking out-of-class pay for two fire fighters. Both these fire fighters had allegedly served as "acting station managers" while their lieutenants and captains were on vacation. In early July, Wolff went on vacation and then suffered a heart attack. Wolff did not return to work until mid-August. Wolff learned of the grievances from the assistant city manager in early August, while Wolff was still on leave. On August 9, the assistant city manager, acting in Wolff's stead, issued a third step answer on both grievances. The answer stated that the language of Article XXII did not, on its face, require Respondent to pay out-of-class pay unless there was a vacancy due to resignation or discharge. The answer admitted that Respondent's past practice was to pay out-of-class pay when Respondent temporarily appointed a fire fighter to fill in for his officer during an extended sick leave. However, Respondent maintained that this practice did not extend to leaves due to vacations. According to Respondent, when it paid Pena out-of-class pay for covering for his lieutenant in March 2002, it was not aware that part of the lieutenant's absence was due to vacation. Respondent denied that it had any obligation to pay out-of-class pay to a fire fighter appointed to perform the duties of an officer during that officer's vacation.

On September 3, 2002, Charging Party filed a demand for arbitration of the July grievances. This demand was addressed to Wolff. However, at this time Wolff was working only part-time and undergoing cardiac rehabilitation. Wolff testified that he did not see the demand or hear about it. I do not find this improbable, given Wolff's health status and work schedule, and I credit his testimony. Sometime between September 3 and September 27, Respondent's personnel director and its labor counsel, with Charging Party's representatives, selected an arbitrator to hear the July grievances. The arbitration hearing was scheduled for February 2003.

On October 2, 2002, the fire chief notified three fire fighters of their promotion to lieutenant, effective October 6. I credit Wolff's testimony that the following events took place sometime between October 8 and October 10. First, Respondent's personnel director placed the personnel action forms Wolff

needed to sign to approve the new lieutenants' pay increases on Wolff's desk. The personnel director attached a stick-it note to the forms noting that there were still grievances outstanding involving the issue of filling officer vacancies. When Wolff saw the note, he was surprised. Wolff went to the personnel director's office, where he learned that the July grievances were proceeding to arbitration. Although Wolff had received a copy of the assistant city manager's third step answer, Wolff had not heard anything further about these grievances since August. Since Wolff had not heard otherwise, he assumed that Charging Party had dropped the grievances. The personnel director also showed Wolff a copy of Charging Party's March 18, 2002 letter. After reading this letter, Wolff became concerned about the possible impact on the fire department's budget of an arbitration decision that required Respondent to pay out-of-class pay when an officer was on vacation. It also occurred to Wolff that if the arbitrator agreed with Charging Party's interpretation of Article XXII, Respondent would be required to pay out-of-class pay more often with six lieutenants than with three. Wolff decided not to sign the personnel action forms. On October 11, 2002, the fire chief sent the following memo to the three promoted fire fighters:

> Please be advised that the City Manager has indicated that he will not sign the payroll action orders authorizing your promotions to Lieutenant until the pending union grievance regarding temporary officer pay is satisfactorily resolved. Therefore, the promotions and accompanying pay increases are considered to be on hold.

On May 5, 2003, the arbitrator issued his decision granting the July grievances and awarding out-of-class pay to the two fire fighter grievants. The arbitrator held that Article XXII, Section 1 did not distinguish between temporary appointments to cover vacations and temporary appointments to cover sick leave. He noted that even if there was a past practice of paying out-of-class pay only when an officer was on sick leave, the past practice could not amend the clear language of the contract. The arbitrator concluded that if the grievants were authorized to work as temporary appointments, they must be paid at the higher classification rate. The arbitrator further concluded that the grievants' captains had the general authority to make temporary appointments, and that they had, in fact, informed the grievants that they had been temporarily appointed.

Discussion and Conclusions of Law:

Charging Party maintains that Respondent's motive for rescinding the promotions was to coerce Charging Party into dropping the grievances it filed in July 2002 and accepting Respondent's position on the interpretation of Article XXII. According to Charging Party, Wolff did not offer any consistent alternative explanation for his decision to put the promotions on hold.

I conclude, however, that Wolff provided a legitimate explanation for his decision to rescind the promotions on October 11, 2002. The evidence indicates that the parties had several disputes over the payment of out-of-class pay pursuant to Article XXII before Wolff decided, in February 2002, to support the fire chief's request for three new lieutenants. The parties settled one of these disputes less than a month before the chief came to Wolff with his request. Wolff supported the chief's request in part because he believed that this would reduce the number of disputes over out-of-class pay, even though Wolff did not believe that adding lieutenants would be cheaper than paying out-of-class pay per Respondent's

interpretation of the contract. On March 18, 2002, Charging Party sent Respondent a letter setting forth an interpretation of Article XXII under which Respondent would be required to pay out-of-class pay in situations where it had not previously done so. However, Wolff did not see this letter until October.

In July 2002, Charging Party filed two grievances seeking out-of-class pay for fire fighters appointed temporarily to fill in for officers on vacation. Although Wolff was on leave at this time, he learned of the grievances in August 2002. However, Wolff did not learn that Charging Party was taking these grievances to arbitration until October 2002, after the lieutenant promotions had been announced. When Wolff learned of the positions Charging Party had taken in March 2002, he was concerned about the financial implications of an arbitration decision on the July grievances. Wolff was also concerned that if the grievances proceeded to arbitration and the arbitrator held that Respondent had to pay out-of-class pay when it temporarily appointed a fire fighter to fill in for an officer on vacation, Respondent would end up paying out-of-class pay more frequently with six lieutenants than with three.

The Commission has held that an employer's decision to exercise its legitimate managerial prerogative to lay off employees does not give rise to an inference of unlawful motive simply because the decision has a connection to employees' exercise of their protected rights. In *Michigan State University*, 1982 MERC Lab Op 587, the Commission held that an employer did not violate Sections 10(1)(a) or (c) of PERA by laying off employees in a bargaining unit that had refused the employer's request for wage concessions, even though employees of units that accepted the concessions were not laid off. See also *Schoolcraft Community College*, 1985 MERC Lab Op 253. In *Benzie County*, 1986 MERC Lab Op 56, the Commission refused to draw an inference of unlawful motive from an employer's decision to lay off eight sheriff's deputies to cover the costs associated with the handling of a compulsory interest arbitration petition initiated by their union under 1969 PA 312 (Act 312), MCL 423.231 et seq. The employer in that case did not contend that it was unable to pay these costs in any other way, but maintained that the sheriff's payroll account was the proper account to charge with these expenses. Similarly, in *Branch County*, 1989 MERC Lab Op 642, an administrative law judge refused to drawn an inference of unlawful motive from an employer's decision to lay off bargaining unit employees because a pay increase awarded to their unit by an Act 312 panel put their department over budget.

As Respondent points out in its brief, Respondent was not obligated to create the new lieutenant positions. One of the reasons Wolff agreed to create these new positions, and fund the wage increases they required, was to reduce the need for temporary appointments under Article XXII. In October 2002, he suddenly learned that Petitioner was insisting on an interpretation of Article XXII that might increase the number of temporary appointments, especially if the number of lieutenants was increased. I find that Wolff's refusal to approve the new lieutenant positions was not an attempt to coerce Charging Party into dropping the grievances. Rather, it was a legitimate reaction to his concern over increasing the number of lieutenant positions in light of what he had just learned about Charging Party's interpretation of Article XXII, and the possibility of an arbitration award supporting that interpretation. I conclude that Charging Party did not establish that Wolff's decision to rescind the promotions violated Sections 10(1)(a) or (c) of PERA. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____