STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT (POLICE DEPT),
Public Employer-Respondent,

-and-

POLICE OFFICERS LABOR COUNCIL (FLINT POLICE SERGEANTS ASSOCIATION),
Labor Organization-Charging Party in Case No. C07 B-022,

-and-

POLICE OFFICERS LABOR COUNCIL (FLINT POLICE CAPTAINS AND LIEUTENANTS ASSOCIATION),
Labor Organization-Charging Party in Case No. C07 B-023.
_____/

APPEARANCES:

Keller Thoma, PC, by Frederic E. Champnella II, Esq., for the Respondent

Thomas R. Zulch, Esq., for the Charging Parties

DECISION AND ORDER

On May 21, 2008, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Flint, violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), by unilaterally changing established promotional procedures agreed upon with Charging Parties, Police Officers Labor Council (Flint Police Sergeants Association, (FPSA)) and Police Officers Labor Council (Flint Police Captains and Lieutenants Association, (FPCLA)). The ALJ found that Respondent violated its duty to bargain under PERA when, without posting, it appointed individuals to fill the ranks of major and inspector in the newly-created Citizens Service Bureau. The ALJ held, however, that Respondent did not by its actions modify or repudiate its collective bargaining agreements with Charging Parties and recommended dismissal of those allegations. In so ruling, the ALJ concluded that because the language in the collective bargaining agreements was ambiguous, the parties have a *bona fide*

dispute that should be resolved by arbitration. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA.

On July 7, 2008, after requesting and receiving an extension of time, Respondent filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On July 10, 2008, Respondent filed a motion to dismiss the charges asserting that this matter should be declared moot. After requesting and receiving an extension of time, Charging Parties filed their response to the Respondent's exceptions and motion to dismiss on August 18, 2008.

In its exceptions, Respondent re-asserts that the charges should be dismissed as moot because the CSB has been suspended. Even if the charges are not dismissed as moot, Respondent excepts to the ALJ's finding that a past practice existed and that Respondent departed from that past practice by appointing individuals to the newly-established ranks of Major and Inspector in the CSB without holding examinations or developing eligibility lists. Respondent asserts that the Commission does not decide contract disputes for the purpose of determining that an unfair labor practice charge exists where, as in this case, the contract provides a mechanism for final and binding arbitration. Respondent contends that the ALJ erred by failing to find that Charging Parties waived their right to bargain by failing to make a timely bargaining demand. On that point, Respondent further argues that the record is devoid of any evidence that the City presented its decision to the Unions as a *fait accompli*. Respondent also alleges that the ALJ erred in failing to find that the positions were temporary or provisional. Finally, Respondent claims that the ALJ's finding of a past practice should be reversed because the alleged past practice concerned only promotions to specific positions and did not apply to these promotions to newly-created positions in the CSB. The Commission has reviewed Respondent's exceptions and finds them to be without merit.

Factual Summary:

We adopt the factual findings of the ALJ and repeat them only as necessary here. Charging Parties are the bargaining unit representatives of supervisory police command officers working in the police department in the City of Flint. The FPSA represents sergeants. Immediately above the sergeants in the department's hierarchy are the lieutenants and above lieutenants are the captains. The latter two ranks are represented by the FPCLA. Until December 2006, only the positions of deputy chief and chief ranked above captain in the departmental hierarchy, and neither of these positions is represented by a union.

On December 1, 2006, Respondent announced the formation of the CSB, a new bureau within its police department. The purpose of the CSB was to improve police community relations and the quality of the service that was provided by the police department. The CSB was to be headed by a major, a new rank reporting directly to the police chief; four inspectors, also a new rank, would work in the CSB and would report to the major. On December 6, 2006, the names of five individuals selected by Respondent to fill these new positions were announced. All five individuals were patrol officers, and only one of those five was on the eligibility list for promotion to sergeant. The positions of major and inspector to work in the CSB were not posted, applications were not taken, and no eligibility list for either position was developed.

Charging Parties did not demand bargaining after Respondent's announcement. Both filed grievances asserting that the promotion provisions of their collective bargaining agreements had been violated.

Although the major and inspectors were given individual employment contracts stating that their appointments were provisional and that they could be returned to their former positions at the discretion of the police chief, the duration of the appointments was not specified. The major's salary was set at a rate higher than that of a newly-promoted captain with five years of experience or less. The inspectors' salaries were set at a rate between the salaries of a newly-promoted lieutenant and a newly-promoted captain. Both the inspectors and the major were paid more than sergeants. Supervision of patrol officers and civilian employees in the department's mini-stations, formerly assigned to a lieutenant, and responsibility for a citizen crime-reporting program, formerly assigned to a sergeant, were functions that were transferred to the CSB.

Discussion and Conclusions of Law:

Respondent requests that the Commission dismiss the unfair labor practice charges claiming that they are moot. In requesting dismissal based on mootness, Respondent refers to a memorandum, signed by its Chief of Police, dated March 27, 2008 -- after the record closed in this case. The memo, therefore, was not in the record of proceedings before the ALJ and there has been no motion seeking to reopen that record; as such, it will not be considered by the Commission in reaching a ruling in this matter.

Even if we were to consider this memorandum, however, we would not find that the charges should be dismissed based on mootness. In *Wayne State Univ and UAW*, 1991 MERC Lab Op 496, 499-500; 4 MPER 22082 (1991), the Commission observed:

> The defense of mootness is not an uncommon one; frequently in labor relations the parties' underlying disputes are resolved before the legal issues can be joined and decided in the legal forum. However, we have held that where the statutory issues are of sufficient importance, resolution of the specific underlying dispute between the parties does not require granting a motion to dismiss for mootness, even if the employer voluntarily corrects its course of conduct.

Here, the issue raised by the unfair labor practice charges has not been resolved. Respondent does not claim that it has satisfied the bargaining obligation that it allegedly violated. Respondent's claim of a right to establish police positions outside of its unionized police department and to make unilateral appointments to those positions remains unsettled. Because of the importance of the statutory issues raised by the unfair labor practice charges, dismissal based on mootness would not be warranted.

Next, Respondent excepts to the finding by the ALJ that a past practice existed and that it had a duty to bargain over the departure from its past practice for making promotions by appointing individuals into these new ranks without holding examinations or developing eligibility lists. It claims that it had the right to make appointments to the newly-created

positions without following established promotional procedures and without bargaining, because the appointments were temporary and did not involve typical police department work. Respondent also argues that the issue of whether it violated an established past practice should be determined in arbitration, and not by this Commission[1].

In a footnote to her decision, the ALJ observed that an employer does not have a duty to bargain over the transfer of unit work unless the transfer has a significant impact upon bargaining unit employees, citing *City of Detroit Water & Sewerage*, 1990 MERC Lab Op 34, 40-41; 3 MPER 21035 (1990). There, the Commission acknowledged that "speculation about the loss of promotional opportunities is not sufficient to trigger an obligation to bargain." See also *City of Iron Mountain*, 19 MPER 29 (2006) (no exceptions). Here, however, the loss of promotional opportunities was more than mere speculation. The ALJ found the work assigned to the positions of major and inspector to be police work. No exception has been taken to that finding. The ALJ also found that major and inspector are ranks that represent authority and prestige. We agree with the ALJ that Respondent was not justified in departing from established promotional procedures simply because these new positions involving police work were outside of the regular chain of command.

Respondent also takes exception to the finding by the ALJ that Charging Parties did not waive their right to bargain by failing to make a timely bargaining demand. It disputes the ALJ's conclusion that the creation of the positions of major and inspector was presented to Charging Parties as a *fait accompli*, and argues that it had not established a method of selection when it announced the creation of these positions on December 1, 2006. We note, however, that in its announcement, Respondent stated: "If the officers selected decline these positions, I will have backup officers to accept this opportunity." Five days later, Respondent issued a second press release announcing the names of the individuals that it selected to fill the positions. The ALJ found, and we agree, these announcements make it clear, that creation of these two positions and selection of persons to fill them were presented to the bargaining units as a *fait accompli.* Thus, presentation of a bargaining demand by Charging Parties would, in fact, have been futile. See *Allendale Pub Sch*, 1997 MERC Lab Op 183, 189.

Respondent claims that the ALJ improperly found that the positions at issue were neither temporary nor provisional. It argues further that it has no obligation to bargain concerning the creation of temporary positions. The ALJ found that the appointments at issue were for an indefinite period and not for a fixed term, and we agree with her finding that labeling the positions as provisional does not suffice to make them temporary.

Finally, Respondent urges us to hold that there cannot be an enforceable past practice with regard to promotions to positions that had no prior existence. We have already addressed the subject of the duty to bargain the transfer of bargaining unit work. We will not condone the circumvention of established promotional procedures by the unilateral transfer of bargaining unit

1. Charging Parties' dispute Respondent's arguments, citing two arbitration awards submitted with their brief. The awards are not in the record of proceedings before the ALJ and there has been no motion seeking to reopen the record. They, therefore, have not been considered by the Commission in reaching our determination.

work to newly-created positions outside of the bargaining unit where, as here, the transfer impacts upon the promotional opportunities of bargaining unit members.

We have considered all other arguments presented by the parties and conclude that they would not change the result in this case.

For the reasons set forth above, we issue the following order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Keller Thoma, PC, by Frederic E. Champnella II, Esq., for the Respondent

Thomas R. Zulch, Esq., for the Charging Parties

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 Detroit, Michigan on November 9, 2007 before Julia C. Stern, Administrative Law Judge of the State Office of Administrative Hearings and Rules, for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before January 11, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

The Police Officers Labor Council, Flint Police Sergeants Association (FPSA) and the Police Officers Labor Council, Flint Police Captains and Lieutenants Association (FPCLA) filed these charges on February 5, 2007 against the City of Flint. Both charges assert that in December 2006, Respondent, in disregard of provisions in the parties' contracts covering promotions and

the creation of new positions, created two new command ranks in its police department and filled them with police officers personally selected by Respondent's mayor. Charging Parties allege that Respondent's actions constituted a mid-term modification of their collective bargaining agreements. In the alternative, Charging Parties allege that Respondent's actions constituted an unlawful unilateral change in existing promotional procedures and an unlawful unilateral transfer of bargaining unit work to positions outside the unit.[2]

Findings of Fact:

Background and the Creation of the New Ranks

Both the FPSA and the FPCLA represent bargaining units of supervisory police command officers employed by the City of Flint Police Department (the department). The FPSA represents sergeants. The FPCLA represents lieutenants, who rank immediately above sergeants in the department's hierarchy, and captains, who rank immediately above lieutenants. There is no dispute that until December 2006, the only ranks above captain in the department were deputy chief and chief. Neither of these positions is represented by a union. The deputy chief position has been vacant since about 2004.

David Winch, current president of the FPCLA, has worked for the department since about 1983. He testified without contradiction that during this time all promotions to a higher rank within the department have been made by creating a list or lists of eligible candidates based on the results of an examination. Positions at each rank are then filled from the top candidates on these eligibility lists. As set out below, Respondent's contracts with both the FPSA and the FPLCA contain detailed provisions governing promotions. The FPSA contract also contains a provision covering the creation of new positions within its bargaining unit.

Responding to citizen complaints about lack of responsiveness in the police department, Respondent's mayor, Donald Williamson, issued a press release on December 1, 2006 announcing the formation of a new bureau within the department, the citizens' service bureau (CSB), and the creation of a new command structure for this bureau. The CSB was to be headed by a major, a new rank, who was to report directly to the police chief. Four inspectors, another new rank, were to report to the major. In addition to meeting with citizens and hearing their concerns, each inspector was to "focus on the services provided by" different areas of the police department. One inspector was to be responsible for the detective bureau. Another was to be responsible for patrol division operations between the hours of 12 and 9 p.m., and the other two were to be responsible for patrol division operations on the third and fourth shifts.

The mayor's December 1 press release stated, "If the officers selected decline these positions, I will have back up officers to accept this opportunity." Charging Parties were not

[2] Neither Charging Party claims to represent the new positions. The Flint Police Officers Labor Council (FPOLC), the labor organization representing nonsupervisory patrol officers, filed a unit clarification petition, Case No. UC07 A-005, seeking clarification of whether the new positions were part of its bargaining unit. The petition was withdrawn after Respondent and the FPOLC stipulated that the positions were not included in the FPOLC unit.

given any advance notice of Respondent's decision to create the new positions/ranks. The positions were not posted, applications were not taken, and eligibility lists were not created.

On December 6, 2006, the mayor issued a second press release announcing the names of the five individuals selected to fill the positions of major and inspector. At the time of their appointments, all five individuals were employed as nonsupervisory patrol officers in the department. Only one of the five, the individual appointed to fill the major position, was at that time on the eligibility list for promotion to sergeant.

Responsibilities of the New Positions and Transfer of Work

The announced purpose of the CSB was to improve police community relations and the quality of service provided by patrol officers, detectives, emergency dispatchers, and command staff. No command officers other than the major and the inspectors were assigned to the CSB. The December 1 and December 6 press releases did not explain how the new positions were to fit into the department's hierarchy. The presidents of both Charging Parties testified that they assumed that the major and inspectors ranked above their members because of the salaries of the new positions and because major and inspector are generally ranks above captain and lieutenant in a paramilitary organization like a police department. Richard Hetherington, the current president of the FPSA, asked the mayor directly where the major and inspectors stood in the department's hierarchy and what their exact authority was, but the mayor refused to answer him. Winch directed the same questions to the police chief, Gary Hagler. In response, Hagler issued a memo to all police and 911 personnel on December 7, 2006 stating that the staff assigned to the CSB would have authority within their bureau, but would not be supervising command staff or officers of other bureaus. In response to continuing questions from officers outside the CSB, Hagler issued another memo on February 21, 2007. This memo stated that members of the CSB were not to issue orders to other members of the police department or countermand orders given by supervisors in other bureaus or divisions. Hetherington testified, however, that he continues to hear inspectors issuing orders to patrol officers over the police radio.

The inspectors' formal job description lists their essential duties as follows:

1. Assists in the coordination/operations of an assigned area of responsibility as designated by the Chief of Police and/or Police Major.

2. Directs police personnel within assigned area of responsibility.

3. In coordination with the Chief of Police and/or Police Major, identifies, implements and evaluates community service programs.

4. Acts as a liaison between Police Administration and the constituents of the City of Flint to ensure effective, quality services are being provided to the citizens.

5. Identifies and works to resolve issues that arise with regard to Community Service in the Police Department.

6. Coordinates, implements and evaluates the effectiveness of programs addressing residential policing concerns.

7. Attends public meetings and addresses the public as required; addresses school groups, clubs and civic organizations on police/community relations.

8. Attends or conducts meetings, conferences and training related to the Citizens Services Bureau.

The major performs these same duties in addition to overseeing the bureau.

Two specific functions were transferred to the CSB from elsewhere in the department. A lieutenant in the community policing division formerly supervised patrol officers and civilian employees assigned to the department's mini-stations. One of the inspectors in the CSB now has this responsibility. In addition, responsibility for Crime Stoppers, a citizen crime-reporting program, was transferred from a sergeant in the police operations bureau to another of the new inspectors.

On January 12, 2007, the mayor issued a memo directing the major and inspectors to develop a form for evaluating "the attitudes and performance of all personnel of the Flint Police Department, including, but not limited to Captains, Lieutenants, Sergeants and 911 personnel." According to the memo, the form was to be used to assess officers' dress, appearance and attitudes; their response time to calls, whether they cleared their calls with dispatch promptly; whether they properly cleaned and maintained their vehicles; and whether they "needed help." The major and inspectors were also to evaluate whether duties assigned to different officers could be consolidated and which positions or areas of operations needed more attention. It is not clear from this memo or from the record whether the major and inspectors were supposed to develop a form for use by other command officers or if they were to use the form themselves to evaluate officers. There was no indication that the major and inspectors had done any type of evaluation of individual officers as of the date of the hearing in this case in November 2007.

Insofar as the record discloses, no member of Charging Parties' bargaining units has been laid off or had his or her hours or overtime reduced as a result of the creation of the new positions.

Appointment of the CSB Staff

As noted above, the major and inspector positions were not posted and no eligibility list for the positions was developed. It is not clear from the record exactly how the individuals picked to fill these positions were selected.

The major and inspectors were required to enter into individual employment contracts setting out their salary and other benefits. These contracts state that the officers' appointments are provisional, and that they can be returned to their former positions at any time at the discretion of the police chief. The contracts do not give the duration of the appointments. The salary paid to the major under his contract is higher than that paid to a newly-promoted captain

with five year or less of experience. The inspectors' salaries fall between that of a newly-promoted lieutenant and a newly-promoted captain. The inspectors and the major are paid more than all sergeants. Although their employment contracts state that they are not allowed to take their department vehicles home, Charging Parties' witnesses testified that the major and inspectors are allowed to drive their vehicles on personal errands while off duty, a privilege not granted to any member of the Charging Parties' bargaining units.

Relevant Contract Provisions

In December 2006, a contract/stipulated Act 312 award existed between the FPSA and Respondent which contained the following provisions:

Article 11 – Seniority

* * *

Section 5. New Position. In the event of a newly created position in this bargaining unit, Employees [sic] in the same rank may request transfer on the basis of qualification, experience and seniority. In all such cases the newly created position shall be posted at least seven (7) calendar days prior to the selection to fill such newly created position. All persons requesting transfer under these conditions shall be given due consideration by the Chief of Police. Transfers under this section shall not be made for purposes of reprimand. A newly created position is to be defined as a position heretofore not in existence.

Article 46 – Promotions

Section 1. Promotional lists for lieutenant shall have a duration of 18 months.

Section 2. The Personnel Director, or his/her designee, will meet with the Union prior to establishing each promotional examination, it being agreed that the promotional selection procedure shall be job related and shall satisfy the Uniform Guidelines on Employee Selection Procedures. 29 CFR 1608 et. seq.

Section 3. The parties wish to assure that the obligation of providing for equality of opportunity for all members of the bargaining unit is satisfied. Consistent with the provision of the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1608, future selection procedures shall be construed to minimize or eliminate adverse racial impact.

Section 4. Promotional lists shall be developed on the basis of the test scores. Candidates for promotion shall be selected from among the top three (3) persons appearing on the then current eligible [sic] list.

The FPLCA contract/stipulated award in effect in December 2006 contained the following provisions:

Article 3 – Union Rights

Section 1. Management Rights Clause

Whenever any change in a "Management Rights" clause or a rank below lieutenant is contemplated, the Association shall be consulted regarding any such change.

Article 37 – Promotions

The Personnel Director, or his designee, will meet and confer with the Association prior to the posting of the job opportunity announcements for promotion to the position of Captain in the Flint Police Department.

The Association will be provided the opportunity to discuss with the Personnel Director, or his designee, such matters as eligibility, service ratings, seniority credit, method of examination and such other criteria used to obtain the final examination score.

Section 1. The promotional lists for Captain and Deputy Chiefs shall have a duration of eighteen (18) months.

Section 2. The Personnel Director, or his/her designee, will meet with the Union prior to establishing each promotional examination, it being agreed that the promotional selection procedures shall be job related and shall satisfy the Uniform Guidelines on Employee Selection Procedures, 29 CFR Sec. 1608 et. seq.

Section 3. For promotion to the rank of Captain, should the City find it appropriate the City shall have the right to maintain two separate promotional lists, one consisting of minorities, as defined by Federal Law, and one of non-minorities, made up of those Lieutenants who have successfully passed the promotional examination for Captain. Until such time as the number of minority Captains in the Police Department reach 30% (rounded to the nearest whole number, e.g. 1.49 to 1 and 1.50 to 2) promotion may be made on the basis of one minority to one non-minority. After the purpose of this section is satisfied, the promotional list shall be combined on the basis of the test scores and thereafter, candidates for promotion to the rank of Captain shall be selected from among the top three (3) persons appearing on the then current eligible [sic] list.

Section 4. The parties wish to assure that the obligation of providing for equality of opportunity for all members of the bargaining unit is satisfied. Consistent with the provisions of the Uniform Guidelines on Employee Selection Procedures, 29 CFR Sec. 1608, future selection procedures shall be construed to minimize or eliminate adverse racial impact.

Section 5. For promotion to the rank of Deputy Chief, candidates for promotion shall be selected from among the top three (3) persons appearing on the then current eligibility list.

Section 6. To be eligible for promotion to the rank of Captain, an employee must have one year in the rank of Lieutenant. To be eligible for promotion to the rank of Deputy Chief, an employee must have one year in the rank of Captain, unless the number of Captains on the eligibility list falls below three. If there are less than three Captains on the eligible [sic] list, the City reserves the right to allow Lieutenants with one or more years in the rank of Lieutenant to compete.

Letter of Understanding

In implementing the provisions of the Promotions Article 37, the Personnel Director or his designee agrees to meet with representatives of the Association and the Chief of Police or his designee for purposes of reviewing the types(s) of test(s) to be used in addition to such other matters as are provide for under said Promotions Article 37.

The FPSA and FPLCA agreements contained essentially identical provisions entitled "Scope of Agreement." These provisions read as follows:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the City and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated and signed this Agreement.

The FPLCA agreement included an additional paragraph:

No agreement or understanding contrary to this collective bargaining agreement, or any alteration, variation, waiver or modification of any of the terms or conditions contained herein shall be binding upon the parties hereto unless such agreement, understanding, alteration, variation, waiver or modification is executed in writing between the parties. It is further understood and agreed that this contract constitutes the sole, only and entire agreement between the parties hereto and cancels and supersedes any other agreement, understandings, practices and arrangements heretofore existing.

Neither Charging Party made a demand to bargain after the mayor's December 1, 2006 announcement, but both filed grievances alleging that the promotion provisions in their collective bargaining agreements had been violated. Respondent's response was that the new positions were appointments, not promotions.

Discussion and Conclusions of Law:

An employer has a duty under PERA to bargain with a union representing its employees over standards and criteria for promotion to positions outside the bargaining unit. *Detroit Police Officers Ass'n v City of Detroit, Police Dept*, 61 Mich App 487 (1975). In *City of Detroit*, the Court held that the City of Detroit had a duty to bargain with the union representing police patrolmen over the standards and criteria for promotion to sergeant. The Court noted that a union is normally forbidden from bargaining about the terms and conditions of employment of employees outside its unit, but that this rule is not absolute. It stated, at 496:

> There is no doubt that promotional standards and criteria "vitally affect" the terms and conditions of employment for DPOA members. In a profession dedicated to the pursuit of excellence, promotion - an important indicator of successful striving - is a crucial motivating force. The factors to be considered in the establishment of a promotional list and the weight to be given to such factors are matters of serious concern to police officers. We agree completely with the administrative law judge's conclusion on this issue:
>
> > The union does not question the rights and responsibilities given to the commissioner by the city charter to make promotions, but it desires an opportunity to discuss with the city the factors that will be considered in making promotions and what weight will be given to such factors. . . . Suffice it to say, members of the union's bargaining unit have a vital and continuing interest in the requirements and achievements he or she must fulfill or attain before they may be permitted to rise in the ranks of the department. The knowledge of when and under what conditions advancement is possible is obviously important to unit employees and ultimately tied to effective performance of unit work.

Midterm Modification of the Collective Bargaining Agreements

Charging Parties' argue that the method by which Respondent appointed individuals to the newly created ranks of major and inspector unlawfully modified certain provisions of their collective bargaining agreements. When a party negotiates a contract provision that fixes the parties' rights with respect to a mandatory subject of bargaining, it satisfies its obligation under PERA to bargain over that subject for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dis.*, 452 Mich 309, 318 (1996). Once agreement is reached, both parties have a right to rely on the language of the agreement as the statement of their obligations on a topic covered by the agreement. A midterm modification of the contract by either party, without the consent of the other, violates that party's duty to bargain in good faith. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 563-569 (1998); *Allied Chemical & Alkali*

Workers of America v Pittsburgh Plate Glass, 404 US 157, 183 (1971). Since neither party may compel the other to bargain over the alteration or modification of a contract in midterm, a union has no duty to demand bargaining over a mid-term modification of the contract proposed by the employer. *36th Dist Court,* 21 MPER _____ (issued April 9, 2008.) If the change involves a mandatory subject of bargaining, the only issues are whether the contract was modified and whether Charging Party consented to the modification or waived its rights. *St Clair*, at 565, n 27.

Both Article 46 in the FPSA contract and Article 37 in the FPLCA contract require Respondent to meet with the Union prior to establishing job related promotional examinations, require that promotions be based on the scores of these examinations, and require Respondent to fill vacancies with one of the three highest-scoring candidates on an eligibility list. However, Article 46 specifically references promotion to the rank of lieutenant, while Article 37 references promotions to the ranks of captain and deputy chief. Charging Parties argue that the parties did not intend these articles, or the letter of understanding in the FPLCA agreement, to apply only to promotion to the ranks specifically mentioned in the contracts. According to Charging Parties, these sections mention specific promotional ranks only because these ranks represent "the traditional career path and command structure in the City of Flint."

The Commission has consistently held it will not find a breach of the duty to bargain where there is a contract covering the subject matter of the dispute, the parties have a bona fide dispute over the meaning and application of the contract language, and the contract has a grievance procedure providing for final and binding arbitration of contract interpretation disputes. See *City of Dearborn,* 20 MPER 110 (2007); *Wayne Co,* 19 MPER 61 (2007); *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897. I find that in the instant case the parties have a bona fide dispute over whether these articles cover promotions to ranks other than those specifically mentioned in the contract. I conclude that this is a dispute that should be resolved through arbitration, the procedure agreed to by the parties to resolve contract interpretation disputes, and not by the Commission. Because the contract language is ambiguous, I find that Charging Parties have not established that Respondent modified or repudiated Article 46 of the FPSA contract or Article 37 of the FPCLA contract.

Charging Parties also argue that Respondent's actions altered Article 3 of the FPLCA agreement and Article 11 of the FPSA contract. However, Article 11 unambiguously applies only to the creation of new positions within the sergeants' bargaining unit, and the FPSA has not claimed that either the major or inspector positions belong in its unit. Charging Parties did not provide any explanation of how Respondent's actions constituted a modification of Article 3. I conclude that Respondent did not violate Section 10(1) (e) of PERA by modifying or repudiating its collective bargaining agreements with either Charging Party in this case.

Unilateral Change in Terms and Conditions of Employment

Charging Parties also argue that even if Respondent's actions did not amount to a midterm modification of their contracts, Respondent had a duty to bargain over an alteration in the traditional procedures for making promotions and over the transfer of bargaining unit work to

nonunit positions.[3] Contrary to Respondent's claim in its post-hearing brief, Charging Parties do not assert that Respondent had a duty to bargain over the decision to create the CSB or over the creation of new positions outside Charging Parties bargaining units.

In this case, the president of the FPLCA testified, without contradiction, that it is the department's established practice to promote officers to a higher rank by creating lists of eligible candidates based on the result of an examination and then filling positions at the higher rank with the top candidates on the eligibility lists. It is well established that a mutually accepted past practice of long duration which does not derive from the collective bargaining agreement but is based on the parties' tacit agreement that the practice will continue may become a term and condition of employment which is binding on the parties and which cannot be changed without negotiations. *Amalgamated Transit Union, Local 1564, AFL-CIO v SEMTA*, 437 Mich. 441, 454-455 (1991). Respondent departed from this practice when it appointed individuals to the new ranks of major and inspector without holding examinations or developing eligibility lists.

Respondent asserts that it had the right to appoint these individuals to these positions without following established promotional procedures or bargaining with Charging Parties over a different procedure because, first, the appointments were only temporary, and, second, the major and inspector jobs did not involve "typical, bargained for, police department type work." The major and inspectors, however, were not appointed for a fixed term. Nothing other than the labeling of their appointments as provisional in their employment contracts indicates that their appointments are temporary. As to the duties performed by the major and inspector, these positions clearly perform a function – overseeing the services provided by the rest of the department from a customer service perspective – that was not previously assigned to any specific position or positions within Respondent's department. However, the fact that Respondent gave the new positions military ranks, appointed uniformed officers to these positions, and emphasized these officers' experience within the police department when it announced their appointments indicates that even Respondent recognized the duties of the major and inspectors to be police work.

I also see no merit to Respondent's argument that it had no obligation to bargain with Charging Parties before departing from established promotional procedures because the major and inspector positions were not in the regular chain of command. The major and inspectors are paid more than all sergeants and some captains and lieutenants. They also carry ranks that, within a paramilitary organization like the department, indicate authority and prestige. Clearly, these positions represented opportunities for advancement for Charging Parties' members even if

[3] Respondent admits that some bargaining unit work was transferred from members of Charging Parties' units to the major and inspectors. However, an employer does not have a duty to bargain over the transfer of work performed by members of the bargaining unit work to positions outside the bargaining unit unless the transfer has a significant adverse impact on unit employees and the transfer dispute is amenable to collective bargaining. A union may demonstrate significant adverse impact by establishing that unit employees were laid off or terminated, demoted, not recalled, or experienced a significant drop in overtime as a result of the transfer. However, the mere loss of positions or speculation about the loss of promotional opportunities is not sufficient to trigger an obligation to bargain. *City of Detroit (Dept of Water & Sewerage)*, 1990 MERC Lab Op 34, 40-41. In this case, there is no evidence that any member of Charging Parties' bargaining units suffered a significant adverse impact from the transfer of unit work to the major and inspector positions.

they did not directly command sergeants, lieutenants or captains. I conclude that Respondent had an obligation to follow established promotional procedures in appointing individuals to the new ranks or give Charging Parties the opportunity to bargain over changes in these procedures.

Respondent also asserts that the provisions entitled "Scope of Agreement" in each of the contracts constitute a waiver of any right Charging Parties may have had to bargain. Both of these "zipper clauses" state that the unions "waive the right to bargain with respect to any subject or matter not specifically referred to or covered in this agreement even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated and signed the agreement." The Commission and Courts have consistently held that a waiver of bargaining rights under PERA must be "'clear, unmistakable and explicit.'" *Amalgamated Transit Union; Southfield Police Officers Assn v Southfield*, 162 Mich App 729 (1987); *Lansing Fire Fighters v Lansing*, 133 Mich App 56 (1984). The Commission has also consistently held that a zipper clause or a broadly worded management rights clause that makes no reference to the subject at issue will not, standing alone, serve as a waiver of bargaining rights. *Ingham Co*, 2001 MERC Lab Op 96; *Wexford Co*, 1998 MERC Lab Op 162-195,196; *City of Rochester*, 1982 MERC Lab Op 1372. Language in a zipper clause stating that the parties do not have an obligation to bargain over subjects not within the contemplation of the parties at the time they negotiated the agreement does not constitute a clear and explicit waiver of the right to bargain over changes in the status quo of which the union had no notice at the time it entered into the contract. *City of DeWitt*, 16 MPER 38 (2003) (no exceptions). See also *Kent County Ed Ass'n/Cedar Springs Ed Ass'n v Cedar Springs Pub Schs*, 157 Mich App 59, 65-66 (1987), and *California Newspapers Partnership*, 350 NLRB No. 89, n 3 (2007), discussing the distinction between the use of zipper clauses as a "shield" against demands to bargain and as a "sword" to make changes in the status quo. I conclude that Charging Parties did not waive their rights to bargain over changes in established promotional procedures by entering into the "Scope of Agreement" clauses.

Finally, I agree with Charging Parties that they did not waive their right to bargain over the unilateral change in promotional procedures by failing to make a demand to bargain. In his December 1, 2006 press release, the major stated, "If the officers selected decline these positions, I will have back up officers to accept this opportunity." Five days later, the mayor issued another press release announcing the names of the individuals selected to fill the positions. I find that Respondent presented its decision to appoint individuals to fill the ranks of major and inspector without following established promotional procedures as a *fait accompli*. I conclude that Charging Parties had no obligation to demand to bargain over this decision because such a request would have been futile. See *St Clair Co ISD*, 17 MPER 77 (2004); *Intermediate Ed Ass'n/Mich Ed Ass'n*, 1993 MERC Lab Op 101, 106; *City of Westland*, 1987 MERC Lab Op 793, 797.

For the reasons set out above, I conclude that Respondent violated its duty to bargain with Charging Parties by unilaterally changing established promotional procedures when it appointed individuals to fill the new ranks of major and inspector. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Flint, its officers and agents, are hereby ordered to:

1. Cease and desist from changing the existing terms and conditions of employment of employees represented by the Flint Police Sergeants Association (FPSA) and Flint Police Captains and Lieutenants Association (FPCLA) without bargaining with these labor organizations.

2. Upon demand, bargain with the FPSA and FPCLA over the procedures to be used to appoint officers to the ranks of inspector and major in the police department and the standards and criteria for promotion to these ranks.

3. Within four months of the date of this order, absent agreement between the parties to some other procedure, post the positions of inspectors and major and allow qualified candidates to apply for promotion to these ranks, create promotional examinations reasonably related to the qualifications necessary for these positions, create lists of eligible candidates for each position based on the results of these examinations, and appoint officers to fill the positions from among the top-scoring candidates on each list. The officers appointed to the major and inspector positions in December 2006 shall remain in their positions unless and until the positions are filled by other more qualified candidates appointed in accord with these procedures.

4. Post the attached notice to employees in conspicuous places in Respondent's police department, including all places where notices to employees are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____