STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HAMTRAMCK FIRE FIGHTERS ASSOCIATION,
LOCAL 750, IAFF, AFL-CIO,
Labor Organization - Respondent,

Case No. CU07 G-032

-and-

CITY OF HAMTRAMCK,
Public Employer - Charging Party.
_____/

APPEARANCES:

Sachs Waldman, P.C., by John R. Runyan, Esq., for Respondent

Allen Brothers, PLLC, by James P. Allen, Esq., and Charles S. Rudy, Esq., for Charging Party

DECISION AND ORDER

On February 25, 2008, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above case finding that Respondent, Hamtramck Fire Fighters Association, Local 750, IAFF, AFL-CIO (Union) did not violate Section 10(3)(a)(ii) and (b) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(3)(a)(ii) and (b), by seeking to enforce a provision of the parties' collective bargaining agreement governing promotions to the non-unit position of fire chief. The ALJ found that because the provision in question is contained in a collective bargaining agreement voluntarily entered into by the parties' representatives and is otherwise lawful, there is no PERA violation. Furthermore, the ALJ held that there were no facts alleged that could support a conclusion that the Union's conduct in seeking to enforce a lawful contract provision constituted restraint or coercion with respect to the City of Hamtramck's (City) right to select its bargaining representatives. Accordingly, the ALJ recommended that the unfair labor practice charge be summarily dismissed for failure to state a claim under PERA. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On March 19, 2008, the City filed exceptions to the ALJ's Decision and Recommended Order. On March 27, 2008, the Union filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, the City alleges that the ALJ erred when he concluded that the provision cannot be illegal because it was voluntarily entered into by the lawful representatives of the parties. The City also alleges that the ALJ erred when he found that the agreement's provision does not compel the City to discriminate based upon union affiliation when hiring for the position of fire chief. We have reviewed the City's exceptions and find them to be without merit.

Factual Summary:

The facts found by the ALJ are not in dispute, and we summarize them here only as necessary. Prior to 2005, the principal operational manager for the City's fire department was its safety director. At that time, the City's fire chief reported to the safety director and was a member of the bargaining unit represented by the Union. In 2005, a new City Charter made the fire chief the head of the fire department and directly responsible to the city manager. From that point on, the fire chief began serving as the City's collective bargaining representative for the fire department. However, the position of fire chief continued to be in the Union's bargaining unit and, pending the outcome of an Act 312 arbitration, the parties continued to abide by the terms of a collective bargaining agreement that had expired in 2004.

On January 18, 2005, the parties entered into a written agreement establishing the procedure and the criteria for promotion to fire chief from the ranks of the Union's bargaining unit. On February 11, 2006, the agreement setting the procedure and criteria for promotion to the position of fire chief was incorporated into a new collective bargaining agreement covering the period from July 1, 2004 to June 30, 2009. The new collective bargaining agreement removed the position of fire chief from the bargaining unit. It also carried over a union security clause that allows employees to refrain from membership in the Union and instead pay an agency service fee.

On May 17, 2007, the incumbent fire chief retired. On June 21, 2007, he was rehired by the City as an independent contractor serving as fire chief with a reduced compensation package. On June 27, 2007, the Union filed a grievance asserting that the City had violated the agreement regarding promotion to the fire chief position. The City, in turn, filed the unfair labor practice charge in this matter alleging that enforcement of that agreement would violate Section 10 of PERA.

Discussion and Conclusions of Law:

The City claims that the agreement regarding promotion to the position of fire chief is illegal because it compels the City to discriminate based upon union affiliation when hiring for the position of fire chief. Furthermore, the City argues that the Union acted unlawfully in attempting to enforce the collective bargaining agreement because the promotional language constitutes a material restraint on its right to select a bargaining representative. It cites Section 10(3)(a)(ii) of PERA, which makes it unlawful for a labor organization or its agents to restrain or coerce a public employer in the selection of its representatives.

It is well established that standards and criteria for promotion are a mandatory subject of bargaining under PERA. *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 487, 497 (1975); *City of Lathrup Village*, 1990 MERC Lab Op 105; 3 MPER 21043 (1990). This is true even when the promotions are to non-unit positions, provided such positions are not executive positions exempt from the protections of PERA. *City of Detroit (Police Dep't)*, 1978 MERC Lab Op 159, 162. See also *City of Lincoln Park*, 1982 MERC Lab Op 479, 491 (no exceptions); *City of Detroit (Fire Dep't)*, 1977 MERC Lab Op 347 (no exceptions).

In this case, the parties bargained and voluntarily reached an agreement on the criteria to be used for promotion to the position of fire chief. After the initial agreement was made, the City agreed to incorporate the same criteria for promotion to fire chief in the parties' collective bargaining agreement. Clearly, as the ALJ finds, the parties entered into this agreement freely and voluntarily. By so doing, the City agreed to limit its choice for promotion to fire chief to individuals who meet the agreed upon criteria. The City may lawfully accept such limitations and did so in this case. See *Sloan v City of Madison Heights*, 425 Mich 288; 389 NW2d 418, (1986); *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 487, 497 (1975).

On exceptions, the City contends that it does not question the validity of an agreement on promotional criteria; it merely disputes the application of such an agreement to the fire chief because that is the position responsible for representing the City in collective bargaining with Respondent. However, the City has pointed to no authority that would support its assertion that the Employer's voluntary agreement to limit its selection of a non-unit position to a member of a subordinate bargaining unit is an unlawful restraint on the Employer's choice of bargaining representative or is otherwise illegal.

The appointment of a union member or officer to a non-unit, managerial position is a common occurrence. Although the language of the parties' contract may result in the promotion of a Union member, the agreement is no less valid. The collective bargaining agreement does not limit the composition of the bargaining unit to members of the Union as it specifically provides that employees may pay a service fee as an alternative to membership in the Union. Consequently promotion from within the bargaining unit is available to Union members and non-members alike. Because the agreed upon provision involves no inherent conflict of interest, it imposes no unlawful restraint upon the right of the City to select its bargaining representatives.

Upon viewing the allegations in the unfair labor practice charge, the City's response to the Union's motion for summary disposition, and its exceptions to the ALJ's Decision and Recommended Order in the light most favorable to the City, we find that the City has failed to state a claim under PERA. We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Christine A. Derdarian, Commission Chair

_____

Nino E. Green, Commission Member

_____

Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF HAMTRAMCK,
Charging Party-Public Employer,

Case No. CU07 G-032

-and-

HAMTRAMCK FIRE FIGHTERS ASSOCIATION
LOCAL 750, IAFF, AFL-CIO,
Respondent-Labor Organization.
_____/

APPEARANCES:

Allen Brothers, PLLC, by James P. Allen and Charles S. Rudy, for Charging Party

Sachs Waldman, P.C., by John R. Runyan, for Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

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 assigned to David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

On July 16, 2007, the City of Hamtramck filed an unfair labor practice charge alleging that the Hamtramck Fire Fighters Association, Local 750, IAFF, AFL-CIO (the Union) violated Sections 10(3)(a)(ii) and (b) of PERA by seeking to enforce a provision in the parties' collective bargaining agreement governing promotions to the non-unit position of fire chief. According to the Employer, this provision, if enforced, would restrain the City's right to select its bargaining representative and force it to discriminate against candidates for the fire chief position based upon Union membership.

On December 3, 2007, the Union filed a motion for summary disposition, asserting that promotional standards constitute a mandatory subject of bargaining and that the contract clause in dispute in this matter was freely negotiated by the parties and lawful. The City filed a response to the Union's motion on January 10, 2008. Neither party requested oral argument.

Findings of Fact:

The following undisputed facts are derived from the unfair labor practice charge and the City's response to the union's motion for summary disposition. Respondent represents a bargaining unit of employees of the City of Hamtramck Fire Department. Prior to 2005, the principal operational manager for the fire department was the safety director. The fire chief, James Szafarczyk, reported to the safety director and was a member of Respondent's bargaining unit.

On November 15, 2000, the Governor of the State of Michigan, pursuant to the Local Government Fiscal Responsibility Act, MCL 141.1201 *et seq*., declared that a financial emergency existed in the City of Hamtramck. On December 6, 2000, the Governor appointed Louis Schimmel as the City's Emergency Financial Manager (EFM). Thereafter, the City reorganized its administrative structure in an attempt to address its financial difficulties. The reorganization included the hiring of a city manager and the elimination of the safety director position.

The reorganization was codified in a new City charter which was adopted by the Charging Party's Charter Revision Commission on November 18, 2004 and approved by the residents of the City of Hamtramck at a special election on February 22, 2005. The duties and powers of the fire chief are set forth in Chapter 9, Section 9-17 of the new charter, which provides:

> The chief of the fire department shall be the head of the fire department of the City of Hamtramck. He shall have the qualifications prescribed by Chapter 5 Sec. 5-01 of this charter for appointive officers, and in addition shall reside within a thirty (30) mile radius of the city, except as otherwise provided in MCL 15.602.
>
> (a) He shall be responsible for the faithful performance of his duties to the city manager. He shall have the power and authority to make all proper rules for the government and discipline of the fire department, subject to the approval of the city attorney and city manager.
> (b) He shall be responsible for making application for available resources for the fire department and shall provide a quarterly report to the city manager regarding these applications.
> (c) He shall design an effective training program for the fire department, and recommend such training program to the city manager. Such training shall be reported to council by the city manager on a semi-annual basis.
> (d) He shall submit to the city manager each year, as in this charter provided [sic], an estimate in detail of the expenditures of his department for the ensuing year, to be included in the yearly budget, and shall make such other reports as may be required by the city manager, provisions of this charter or by law or ordinance of the city.
> (e) He shall have the custody and control of all evidentiary property books, records, and equipment belonging to the fire department.

(f) He shall have such powers, duties and responsibilities as are conferred by laws of the state, and the provisions of this charter, and the ordinances of city council.

Following the adoption of the new charter, Szafarczyk began serving as Charging Party's collective bargaining representative with respect to all labor relations matters involving the fire department. However, the position of fire chief remained a part of Respondent's bargaining unit. At that time, the parties were still operating under the terms of their 2001 - 2004 collective bargaining agreement.

On January 18, 2005, the parties entered into a written agreement to change certain provisions of the 2001 - 2004 contract. That agreement was negotiated on the City's behalf by EFM Schimmel and signed by his assistant, William Barnett. The agreement repeats, without material change, language from Article XV, Section 2 of the 2001 - 2004 contract which requires that the Employer give "preference" to members of the bargaining unit with respect to all "personnel revisions, vacancies, and assignments."

The 2005 agreement also included new language pertaining to promotion to the fire chief position. That section, Article XV, Section 3, provides, in part:

> A. The Union and the City recognize that the selection of the Fire Chief is currently a subject of Act 312 Arbitration. The City and the Union agree to maintain the status quo selection of the Fire Chief until such time that the 312 case is settled or a new Collective Bargaining Agreement is reached.
>
> B. For purposes of clarification, the procedure identified in this section shall be used for the selection of the Fire Chief and shall supercede any testing procedure not identified in this section. No Personal [sic] shall be appointed Fire Chief unless he possesses Fire Officer III in the training program offered by the Michigan Firefighters Training Council at the time of his promotion.
>
> C. All candidates to the classification of Fire Chief shall have served in at least one of the immediate subordinate classifications (Fire Captain, Fire Marshal, and/or Assistant Chief). Those serving three years or more in such classification shall be first in order for promotion and eligible for the primary list.
>
> * * *
>
> E. However, in the event that no candidate with three years or more of service in any of the immediate subordinate classifications attains the minimum passing score of 70% in the promotional examination, the selection for promotion shall be made from candidates with less than three years of service in the same immediate subordinate classifications who shall have attained the highest score above the passing grade of 70%. Such candidates shall be eligible for the secondary list.
>
> * * *

G. If it should occur that all eligible candidates in the immediate subordinate classifications, both with three years or more of service and those with less than three years of service, fail to attain a minimum passing score of 70% in a promotional examination, then, where possible, candidates with three years or more service in the next lower classification, which is two steps below the position for which the examination is given (i.e. Fire Lieutenant), shall be eligible for the Fire Chief examination; and upon passing the examination with the highest score above the minimum passing grade of 75% shall be placed on the eligibility list.

H. Persons shall be ranked on the eligibility list for Fire Chief in the order of highest total score (written, oral and seniority points). The eligibility list shall be valid for one (1) year. The promotion shall be offered in the order of highest ranking on the eligibility list. At any time a person is offered a promotion, that person has the right of refusal. If the right of refusal is exercised, the next eligible person on the list shall be offered the position, and the person who refused the position shall remain at the top of the list.

I. In the event that no candidate has qualified by the process set forth above, the candidate with the highest score and three or more years of service in any of the immediate subordinate classifications shall, upon his acceptance of the position, be promoted to the position of Fire Chief.

On February 11, 2006, the City, via EFM Schimmel, and the Union entered into a new collective bargaining agreement covering the period July 1, 2004 to June 30, 2009. The 2004 - 2009 contract incorporated virtually all of the terms and conditions of the prior agreement, including "existing provisions regarding promotion to Fire Chief." Also carried over from the parties' prior agreement was a union security clause pursuant to which employees may elect to refrain from membership in the Union and instead pay an agency service fee to Respondent for expenses relating to "contract negotiations, administration and enforcement." As part of the new contract, the position of fire chief was removed from the bargaining unit.

On May 17, 2007, Szafarczyk retired from his position as fire chief for the City of Hamtramck. Approximately one month later, on June 21, 2007, Szafarczyk was rehired by Charging Party as "an independent contractor." In that capacity, Szafarczyk once again serves as Hamtramck's fire chief, but with a significantly reduced compensation package than he had previously received.

On June 27, 2007, the Union filed a grievance asserting that the City's decision to continue to use Szafarczyk to perform the duties of fire chief constituted a violation of Article XV, Section 3 of the contract. The grievance requested that the City rescind the promotion of Szafarczyk and that it comply fully with the provisions of Section 3 in making a promotion to the fire chief position.

Discussion and Conclusions of Law:

Charging Party argues that the Union acted unlawfully in attempting to enforce Article XV, Section 3 of the collective bargaining agreement. According to the Employer, Section 3 requires that the City select its fire chief "from the senior ranks of the Union." Because the fire chief has served as the fire department's principal labor relations representative since the adoption of the new Hamtramck city charter, Charging Party contends that the promotional language in the parties' contract constitutes a material restraint on its right to independently select a bargaining representative in violation of Section 10(3)(a)(ii) of PERA, which makes it unlawful for a labor organization or its agents to restrain or coerce a public employer in the selection of its representatives "for the purpose of collective bargaining or the adjustment of grievances." I disagree.

There are no facts alleged which, if proven, could support a conclusion that the Union's conduct constituted restraint or coercion of the Employer regarding its selection of representatives. It is well established that the standards and criteria for promotion, including promotions to non-unit positions, are a mandatory subject of bargaining under PERA.[1] See e.g. *City of Detroit (Police Dept)*, 2004 MPER 18 (no exceptions). The contract provision at issue here, Article XV, Section 3, is far from unusual. To the contrary, contract language mandating promotion from within the bargaining unit is commonplace in the public sector, even in a quasi-military workplace such as a fire or police department. In *Detroit Police Officers Association v City of Detroit*, 61 Mich App 487, 497 (1975), the Court observed: "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." To the extent that such standards and criteria have the effect of limiting the Employer's decision-making process with respect to promotions, there can be no PERA violation where, as here, the provision in question is the product of a collective bargaining agreement voluntarily entered into by the lawful representatives of the parties.

Charging Party argues that the contract's promotional language violates Section 10(3)(b) PERA because it requires that the Employer "hire only union members." In fact, the Employer complains that enforcement of this language will result in the City being forced to appoint a "Union activist" to the position of fire chief. Such an assertion demonstrates a failure on the part of the City to acknowledge or grasp the distinction between "Union membership" and membership in "the bargaining unit." Although Section 3 has the effect of requiring that the Employer appoint a fire chief from within Respondent's bargaining unit, there is no requirement that candidates for the position be dues paying members of the Hamtramck Fire Fighters Association, Local 750, IAFF, AFL-CIO. As described above, the contract contains a standard agency shop provision allowing bargaining unit members to refrain from joining the Union and

[1] An exception to this rule exists with respect to promotions to "executive" positions excluded from collective bargaining. The Commission has held that an employer is not obligated to negotiate promotional criteria from a rank-and-file unit to an executive position within the meaning of PERA. See e.g. *City of Detroit (Police Dept)*, 1978 MERC Lab Op 159, 162; *City of Lincoln Park*, 1982 MERC Lab Op 479, 491. However, even assuming *arguendo* that the fire chief is an executive for purposes of the Act, that fact would not render Article XV, Section 3 of the contract unenforceable, as the topic would be a permissive, rather than illegal, subject of bargaining.

instead pay an agency service fee to Respondent for expenses relating to administration and enforcement of the agreement.

That Article XV, Section 3 of the parties' contract may in fact result in the promotion to fire chief of a Union member or even a former Union officer or agent in no way renders the clause itself unlawful. It is not a PERA violation for an employee to wear two hats at the same time, acting as both an agent of management as well as a union member, provided there is no evidence of an abuse of power. See *Wayne County Juvenile Detention Facility*, 1998 MERC Lab Op 578, in which the ALJ characterized as "nonsense" the argument that it was improper or a conflict of interest for an employee to accept a promotion to a managerial position while serving as the union's area representative. See also *Bloomfield Hills Ass'n of Paraprofessionals*, 1997 MERC Lab Op 221, 223-224; *Flint Fire Dep't*, 1971 MERC Lab Op 467, 475. Certainly, the appointment of a former Union member or officer to the non-unit fire chief position does not result in any per se conflict of interest. In so holding, I note that the Employer's expression of disdain for the possibility of promoting a "Union activist" to the position of fire chief may itself constitute a violation of Sections 10(1)(a) and (c) of the Act, which prohibit public employers from retaliating against employees because of the exercise of their Section 9 rights and from discriminating against employees for the purpose of encouraging or discouraging membership in a labor organization.

To the extent that the City's relies on Chapter 9, Section 9-17 of the city charter to justify its refusal to comply with Article XV, Section 3 of the parties' contract, the Michigan Supreme Court has consistently construed PERA as the dominant law regulating public employee labor relations and has held that the bargaining obligation under PERA prevails over conflicting legislation, charters, ordinances, or resolutions. *IAFF, Local 1383 v City of Warren*, 411 Mich 642 (1981); *Pontiac Police Officers Assn v City of Pontiac*, 397 Mich 674 (1976); *Detroit Police Officers Assn v City of Detroit*, 391 Mich 44 (1974).

Taking each factual allegation in the unfair labor practice charge and the City's response to the Union's motion for summary disposition in the light most favorable to the Employer, I find that the charge fails to state a claim under the Act. Rather, it is clear that the charge was driven by the Employer's disagreement with the terms of a contract lawfully negotiated on its behalf by its Emergency Financial Manager and its intent to carry out its scheme of having the incumbent fire chief purport to retire and then return him to work as a supposed independent contractor. I find that the matter was pursued even though it was not warranted by existing law and without any apparent good faith argument for the extension, modification or reversal of existing law. If not for the contrary holding in *Goolsby v City of Detroit*, 211 Mich App 214 (1995), which I believe was wrongly decided, I would follow the Commission's earlier decision in *Wayne-Westland Community School District*, 1987 MERC Lab Op 381, aff'd sub nom *Hunter v Wayne Westland Community School District*, 174 Mich App 330 (1989), and award compensatory damages to Respondent. See also *Police Officers Labor Council*, 1999 MERC Lab Op 196, 202, 209; *Michigan State University*, 16 MPER 52 (2003).

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____