

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

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C10 F-146

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.

APPEARANCES:

Letitia C. Jones, Assistant Corporation Counsel, for Respondent

Martha M. Champine, Assistant General Counsel, for Charging Party

DECISION AND ORDER

On January 26, 2012, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Detroit, did not violate its duty to bargain under § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). Among other things, Charging Party, Police Officers Association of Michigan, alleged that it was not given notice and an opportunity to bargain before Respondent unilaterally instituted a requirement that bargaining unit members satisfactorily complete a fitness evaluation that includes a test of the employee's lifting capabilities when undergoing retraining following a leave of absence. The ALJ determined that the bargaining unit's former representative had agreed to the lifting test requirement in fitness evaluations and, therefore, found the lifting test was not a new requirement. The ALJ further found the charge did not assert that Respondent refused to bargain over the issue after Charging Party's May 7, 2010 bargaining demand. The ALJ recommended that the unfair labor practice charge be dismissed. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time to file its exceptions to the ALJ's Decision and Recommended Order, Charging Party's exceptions were filed with a supporting brief on March 22, 2012. Respondent requested and received an extension of time to file its response to the exceptions and filed its brief in support of the ALJ's Decision and Recommended Order on April 5, 2012.

In its exceptions, Charging Party argues that the ALJ erred in her finding that the charge did not allege that Respondent refused to bargain over the fitness evaluation and lifting requirement after Charging Party's May 7, 2010 bargaining demand. Charging Party contends the charge was broad enough to encompass both the allegation that Respondent refused to bargain after Charging Party's demand, as well as the claim that Respondent made an unlawful unilateral change in working conditions. Charging Party also takes exception to the ALJ's conclusions that the lifting requirement was not newly imposed and that it had been agreed to by the unit's former bargaining agent. Charging Party also asserts that Respondent failed to show that Charging Party explicitly acquiesced to the change in the fitness evaluation process or that Charging Party waived its right to bargain on the subject.

In its brief in support of the ALJ's decision, Respondent asserts that Charging Party did not present any evidence that the Employer failed or refused to bargain after Charging Party's 2010 demand. Respondent contends that the ALJ correctly found no PERA violation because the lifting requirement had been in existence for some time prior to 2010.

We have considered the arguments made in Charging Party's exceptions and find them to be without merit.

Factual Summary:

Charging Party represents a bargaining unit of nonsupervisory, emergency medical service employees (EMs), including emergency medical technicians, employed in Respondent's fire department. Charging Party has represented the unit since June 1, 2009, when it replaced another labor organization as the unit's bargaining agent. While Charging Party and Respondent were negotiating their first contract, the collective bargaining agreement between Respondent and the former bargaining agent remained in effect by agreement of the parties.

As part of their regular job responsibilities, EMs are required to lift and carry individuals who are ill or injured. As a condition of hire, EMs must demonstrate that they are able to lift at least 100 pounds. After hire, but before actually beginning to perform their duties as an EM, EMs are required to go through training. EMs returning to work after a leave of absence of more than thirty days must go through retraining. Before Charging Party replaced the bargaining unit's former bargaining agent, the former agent agreed that a test of lifting ability would be included in the retraining program. However, Respondent was not consistent in requiring EMs in retraining to complete lifts.

Around March 24, 2010, Courtney Ford, an EM, returned from a maternity leave and was required to undergo retraining. During her retraining, Ford and other EMs being retrained at that time were told they were required to perform lifts in order to demonstrate fitness for duty. Ford was unable to satisfactorily complete the lifts and was assigned to light duty around May 1, 2010. Between April 20, 2010 and September 17, 2010, at least a dozen EMs completed the required lifts during retraining. However, in August 2010, another EM was unable to perform the lifts during retraining and was placed on light duty. Subsequently, she and Ford were placed on unpaid medical leaves of absence. Sometime later, Ford was discharged.

At the time of these events, the only documents describing Respondent's retraining policy were two checklists used to certify that EMs had completed retraining, titled: "EMS Training Lifting Record," and "Completed Retraining Procedures for Returning Off-Duty Technicians."

On May 7, 2010, Charging Party's Business Agent wrote a letter to Respondent's fire commissioner stating, in relevant part:

The Detroit Emergency Medical Section has changed the conditions of employment by initiating policy regarding the lifting of weighted dummies for union members undergoing retraining. The initiating of the policy has changed the conditions of employment without proper negotiations with the Union. Therefore, the Union demands to bargain on the impact and affect [sic] of this issue, and requests that the City rescind this plan and any possible discipline, suspensions or actions taken against any union members pending proper negotiations with the Union.

The letter asked that a meeting be scheduled. The charge in this matter was filed on June 14, 2010.

Discussion and Conclusions of Law:

Charging Party excepts to the ALJ's finding that the former bargaining agent agreed that Respondent could include a lifting requirement during retraining. At the hearing before the ALJ, Charging Party offered testimony from employees and former employees claiming they were not required and/or knew of others who were not required to perform lifts during retraining after a leave of absence. Respondent offered the testimony of supervisors who identified employees who were required to perform lifts when being retrained upon returning from an extended leave. The ALJ did not find the testimony to be conflicting. Rather, she concluded that it established the inconsistent application of a policy of significant duration. Thus, the ALJ made a credibility determination when she credited the testimony of both the Charging Party's witnesses and the Respondent's witnesses. The ALJ also credited testimony that the bargaining unit's former representative had agreed to the lifting requirement in fitness evaluations. We will not disturb the ALJ's credibility determinations in the absence of clear evidence to the contrary. See *Bellaire Pub Sch*, 19 MPER 17 (2006); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507; *Michigan State Univ*, 1993 MERC Lab Op 52, 54. Consequently, we hold that Respondent did not make a unilateral change to the requirements for retraining, and therefore, did not violate its bargaining obligation by including a lifting capability requirement when retraining Ford and other emergency medical service employees.

In its exceptions, Charging Party also contends that the ALJ erred by determining that the charge did not assert a refusal to bargain over the lifting requirement. The charge states that the Respondent "failed, refused and neglected to respond to Charging Party's demand." Even if we agreed with Charging Party that the charge asserts a refusal to bargain, that would not alter our finding that Charging Party failed to show Respondent violated its duty to bargain. It is Charging Party's burden to produce evidence in support of its unfair labor practice charge. *Local 1467, IAFF v City of Portage*, 134 Mich App 466, 472 n2; (1984). After a careful and thorough

review of the record, we find no evidence regarding Respondent's response, if any, to Charging Party's bargaining demand. Further, we see no evidence that Charging Party made any effort to pursue its bargaining demand even though it appears that the parties were engaged in contract negotiations at the time the demand was made. Consequently, we find that Charging Party has not met its burden of proof, as the record does not support a finding that Respondent refused to bargain or otherwise violated § 10(1)(e) of PERA.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, we affirm the ALJ's decision.

ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Nino E. Green, Commission Member

Robert S. LaBrant, Commission Member

Dated: _____

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C10 F-146

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.

APPEARANCES:

Letitia C. Jones, Assistant Corporation Counsel, City of Detroit, for Respondent

Martha M. Champine, Assistant General Counsel, Police Officers Association of Michigan, for Charging Party

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 17, 2010 and April 12, 2011, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before July 1, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Police Officers Association of Michigan filed this charge against the City of Detroit on June 14, 2010. On June 1, 2009, Charging Party replaced another labor organization as the bargaining agent for a unit of nonsupervisory emergency medical (EM) personnel, including paramedics and emergency medical technicians, employed by Respondent in the emergency medical service (EMS) division of its fire department. The charge alleges that Respondent violated its duty to bargain in good faith by unilaterally imposing a new requirement that EMs returning from extended leaves demonstrate the ability to lift weighted dummies as a condition of returning to active duty. According to Charging Party, it first learned about the change on or about May 1, 2010, when EM Courtney Ford was assigned to light duty after she was unable to do a series of lifts during a retraining course upon returning from a maternity leave.

Findings of Fact:

The Collective Bargaining Agreement

As noted above, Charging Party was certified as the bargaining representative for the EM unit on June 1, 2009. When the charge was filed, Charging Party and Respondent were negotiating their first contract. However, the collective bargaining agreement between Respondent and the former bargaining agent (the 2005-2009 contract) remained in effect during these negotiations per the agreement of the parties. Section 3(B) of the 2005-2009 contract contained management rights language which gave Respondent the right to “maintain order and efficiency . . . direct its working force . . . determine the type and scope of services to be furnished.” Section 3(C) gave it the right to “hire, suspend, discipline, discharge for cause, demote, schedule, assign, transfer . . . relieve employees from duty for other legitimate reasons . . . establish work rules and rules of conduct.”

The 2005-2009 agreement also included, as an appendix, a memorandum of understanding (MOU) executed in 2002. The MOU read as follows:

Re: Performance Evaluations

After considerable discussion of the subject of all management, supervisors, and workers being required to give a high quality work performance for the City of Detroit, the parties acknowledge that the City government management, serving as “the Employer” is obligated to provide adequate leadership in the operation of the City’s services, and has the responsibility to require adequate performance for the public’s benefit by all levels of employees whose wages are paid for with the public’s resources. Furthermore, that management in that role and with such responsibilities possesses the inherent authority to express and record evaluations of the performance of all employees at all levels in the government and to utilize such in the running of the government, so long as such usage does not violate any employee’s rights or the provisions of the Labor Agreement.

Respondent’s Evaluation of EMs’ Ability to Lift

EMs, as part of their normal job duties, are regularly required to lift and carry injured and ill individuals. The requirements for being hired by Respondent as an EM include demonstrating the ability to lift at least 100 pounds. After they are hired, but before they are allowed to work, all EMs are required to complete a training course at Respondent’s fire academy. During that course, EMs lift two days per week as part of a physical training regimen that also includes pushups. They also learn how to carry individuals using a partner and three differing carrying devices - a wheeled stair chair, a backboard and a pole stretcher. At the academy, EMs practice carrying weighted dummies in a variety of situations, including up and down stairs and through obstacle courses.

Respondent does not routinely require EMs to demonstrate their ability to lift once they are on the job. From time to time, EM supervisors receive complaints, usually from an EM’s

partner, that an EM cannot lift well enough to do the job.¹ When this happens, an EM supervisor goes out on runs with the EM and observes him lifting on the job. The record does not reflect what action, if any, is taken if the supervisor concludes that the EM cannot adequately lift.

EMs returning from leaves of more than thirty days are required to undergo retraining, in addition to passing a department physical and a drug screen, before they return to active duty. The content of this retraining has varied, as has its length. In 2010, EMs were assigned during retraining to watch training videos, complete the continuing education credits they needed to maintain their State licenses by doing courses on-line, practice medical procedures, renew their CPR certifications, and fill out paperwork. In early 2010, Respondent began requiring EMs to take and pass a driving skills course for paramedics and emergency medical technicians known as Emergency Vehicle Operation Certification (EVOC), and EMs undergoing retraining in 2010 took the EVOC during their retraining.

Whether EMs had been required before May 2010 to demonstrate their ability to lift during retraining was the subject of most of the testimony in this case. Cheryl Campbell was the sergeant, and then captain, in charge of training for the EMS division between 1985 and 2002. Campbell testified that in 1988 or 1989, Respondent and the unit's former bargaining agent agreed to a lifting protocol after an issue arose about the lifting ability of an EM with an ankle prosthesis. When the EM could not do the prescribed series of lifts, she was terminated. Campbell testified that after this incident, there was a requirement that EMs' lift during retraining. Paul Edwards succeeded Campbell as head of training for the EMS division and held this position between 2002 and August 2009. Edwards testified that lifting was required during retraining during his tenure as head of training. Edwards testified, however, that in about 2006, the superintendent of the EMS division told him to stop requiring EMs to lift during retraining because there was a manpower shortage and the superintendent wanted EMs back on active duty as soon as possible. As a result, according to Edwards, only "some" EMs were required to lift.

Jerold James was hired as an EM in 1991 and became superintendent of the EMS division of the fire department on February 24, 2010. James was also an agent for the EMs' former bargaining representative between 2000 and 2004. He testified that in 2004, when he was chief union steward, EM Eric Williams complained to James that he had been required to do lifts and pushups during retraining. James learned that another unit member, Robert Whitfield, had also been required to demonstrate these abilities on returning from an extended leave around this time. James testified that he was not aware before this complaint that EMs had been required to lift as part of their retraining. According to James, he and Jeff Keaton, business agent for the then-bargaining agent, met with then-EMS division superintendent Green to discuss Williams' complaint. Green contended that Respondent had the right under the performance evaluation MOU to require members to demonstrate their ability to perform physical tasks necessary to the job, and that lifting was part of the job. Green also showed James and Keaton some old checklists showing that the department had required EMs to lift as part of their retraining. James testified that the union and the superintendent reached an agreement that employees returning from leave would not have to do pushups. However, they agreed that EMs could be evaluated to make sure that they could perform physical tasks necessary to the job, which included, according

¹ The department dispatches fire fighters to help EMs move individuals when necessary. It recognizes that EMs will require assistance when required to carry individuals weighing 300 pounds or more.

to James, lifting. James testified that they also agreed that EMs who failed the lifting evaluation would be assigned to light duty until they could pass the lifting test.

Joe Wilson was the head of training between August 2009 and February 24, 2010, when he was promoted to another position. Wilson testified that a lifting evaluation was part of retraining during his tenure and that of the four EMs who underwent retraining during his tenure, three were required to lift. According to Wilson, Pamela Hurst was not required to lift during her retraining because of “the workload we had at training at that time.” Of the three EMs who were required to lift during Wilson’s tenure, two successfully completed the lifts assigned. The third, Rachel Howell, resigned sometime after she was unable to complete the lifts on August 31, 2009.

Shortly after James became superintendent in February 2010, he was approached by a division training instructor and asked if EMs should be required to lift during retraining before they were permitted to return to work. The impetus for this request was the fact that an EM who had recently had cancer therapy was about to undergo retraining. James asked the instructor whether EMs were currently being required to lift as part of their retraining. According to James, the instructor said that they were not because the former superintendent had wanted them back on active duty as quickly as possible. However, the instructor told James that lifting was “part of the checkoff sheet or expectations.” James told the instructor that “whatever was on the form” should be part of the retraining and that all EMs doing retraining should be subject to the same requirements. James and the instructor then went over what the expectations for the lifts would be and how the lifts would be done.

Charging Party’s witnesses, all current or former EMs, testified either that they had not been required to lift when they were retrained and/or that they were not aware of any lifting requirement. Anthony Spitznagel is an EM who underwent retraining after returning from extended leaves in 1998 and 2008. Spitznagel testified that he was not required to lift during either of his retrainings. Leland Blaim, Jr. retired in 2003 after twenty-five years of service as an EM. Blaim was retrained twice, the last time in 1999. Blaim testified that he was not required to lift during either of his retrainings. He also testified that he was not aware of any EM who had been asked to lift during retraining while Blaim was an active employee.

William Brem was assistant superintendent in the EMS division from 2004 until he retired in 2008. Brem never underwent retraining during his career as an EM. However he testified that he was not aware of any requirement that EMs lift during retraining during his tenure. Brem also testified that as assistant superintendent he believed that he would have been aware of this requirement if it existed. EM Rollin Matthews, Jr. was retrained once in 2002 and once in March 2010. Matthews testified that he was not required to do any lifting during either of his retrainings. EM Eric Liddy underwent retraining after returning to work from hand surgery 2002 and after a rotator cuff injury in 2006. Liddy was not asked to lift during either of his retrainings. EM Pamela Hurst was retrained in early 2006, again in December 2006, and a third time in January 2010. Hurst was not required to lift during any of her three retrainings.

Joseph Barney is an EM who is currently Charging Party’s local representative. Barney has never been retrained himself. However, Barney testified that he was not aware that any EM

had ever been required to lift during retraining until he learned in May 2010 that Ford had not been allowed to return to work because she could not complete a lifting task.

I do not find the testimony of the witnesses in this case to be inconsistent. Rather, I conclude from this testimony that, sometime around 1989, Respondent began requiring EMs to demonstrate their ability to lift during retraining. However, I find that beginning at least in the late 1990s and continuing until August 2009, the requirement was imposed selectively and EMs were not routinely required to lift as part of their retraining. This explains, I believe, why long-term employees such as Blaim and Brem, and Jerrold James in 2004, were not aware that the requirement even existed. In addition, the evidence indicates that between 2006 and August 2009, no, or almost no, EMs were required to lift during retraining because the then-superintendent was concerned that the requirement would keep EMs from returning to active duty. However, according to the testimony of James, which I credit, Respondent and the unit's former bargaining agent agreed in 2004 that Respondent could require EMs to demonstrate their ability to lift during retraining. After Wilson became head of training in August 2009, EMs were routinely required to lift as part of their retraining.

Courtney Ford and Charging Party's Demand to Bargain

EM Courtney Ford was retrained in 2005 after being off work due to a driver's license issue. She was retrained again in 2006 and 2008 after returning to work from back injuries. Ford was not required to lift during any of these retrainings. On or about March 24, 2010, Ford was assigned to retraining upon return from a maternity leave. During her retraining, Ford and the other EMs being retrained with her were told that they were going to be required to lift. Ford and other members of the class asked the instructor if they could see the lifting policy and find out what they were going to be required to do, but were told that the policy was not available. A few days later, the class was taken to a stairway to lift. Ford testified at length regarding what she was required to do, but her testimony was confusing. In any case, Ford's training instructor filled out a form stating that Ford was unable to complete the lifts without using the wall as an aid to ascend or descend the stairs. On the last day of her retraining, on or about May 1, 2010, Ford was told that she was not going to be released to go back to work because she had failed to complete the lifts. Ford was then assigned to light duty administrative work.

Ford's training instructor filled out her lifting evaluation sheet on April 24, 2010. On April 26, John Barr, Charging Party's business agent, wrote the following letter to a Respondent labor relations representative.

I have been told that there are policies regarding retraining of members when they return to a full duty status. The policies never seem to be consistent nor have the members been shown any written policies.

The members are concerned that the policies change when they come to who is waiting to be retrained. I have been told that members have requested to see the policies and have never seen anything. Further concern is that once I approach the department concerning these policies, the policies will be put in writing.

Another concern of mine is that the Union should be able to review any such policies to make sure that they are compatible with the collective bargaining agreement. All that said, and taking into consideration the membership's concerns, I am requesting a copy of all policies regarding retraining.

The only written retraining policies Respondent had at that time were two checklists to be signed by instructors certifying that EMs had completed retraining. One was entitled "EMS Training Lifting Record, and the other was entitled "Completed Retraining Procedures for Returning Off-Duty Technicians."

On April 27 and again on May 6, Barr raised the issue of Ford's retraining during a meeting with Respondent on a grievance and in a contract negotiations session. On May 7, Barr wrote the following letter to Respondent's fire commissioner:

The Detroit Emergency Medical Section has changed the conditions of employment by initiating policy regarding the lifting of weighted dummies for union members undergoing retraining. The initiating of the policy has changed the conditions of employment without proper negotiations with the Union. Therefore, the Union demands to bargain on the impact and effects of this issue, and requests that the City rescind this plan and any possible discipline, suspensions or actions taken against any union members pending proper negotiations with the Union.

The letter asked for a meeting to be scheduled. It is not clear from the record whether Respondent agreed to meet, or whether any negotiations took place.

On September 24, 2010, after failing again to complete a series of lifts to the satisfaction of Respondent's instructors, Ford was placed on a medical leave of absence without pay. Sometime between November 2010 and April 2011, Ford was terminated.

According to forms submitted by Respondent as exhibits in this case, at least twelve EMs successfully completed a series of required lifts while undergoing retraining between April 20 and September 17, 2010. However, in August 2010, EM Brenda Harris was unable to complete the lifts during her retraining. Harris was told that she could not return to work as an EM due to her inability to lift. Harris was given a light duty administrative assignment, but warned by her supervisors that she might be terminated if she was unable to complete the lifts. According to the testimony of Charging Party representative Barney, Harris and another EM who failed the lifting test were placed on medical leaves of absence without pay on February 16, 2011.

Discussion and Conclusions of Law:

The first issue in this case is whether a requirement that EMs demonstrate their ability to lift during retraining is a mandatory subject of bargaining. Respondent asserts that it is not because the lifting evaluation does not have a significant impact on conditions of employment. Respondent also argues that a lifting requirement is, at best, a permissive subject because the public's concern that EMs be able to lift outweighs any concern of the employees over the test.

A fitness for duty test or evaluation has an impact on employees' conditions of employment if this evaluation is mandatory and can adversely affect their employment status. The Commission has held that a requirement that already-hired employees submit to a fitness for duty test is a mandatory subject of bargaining. *City of Detroit*, 1989 MERC Lab Op 788, aff'd 184 Mich App 551 (1990) (drug testing); *City of Detroit*, 1990 MERC Lab Op 67 (drug testing); *Allegan Co (Sheriff's Department)*, 1992 MERC Lab Op 134 (psychological evaluation); *City of Oak Park*, 1997 MERC Lab Op 126 (psychological evaluation). See also *LeRoy Machine Co.*, 147 NLRB 1431, (1964) (requirement that employees undergo physical examinations as a condition of employment after returning from leave was a mandatory subject of bargaining.) Compare with *City of Grand Rapids*, 1994 MERC Lab Op 1159, in which the Commission held that an employer did not have a duty to bargain over the implementation of a physical fitness evaluation for its employees where participation was voluntary and there was no showing that the evaluation had any impact on employment status.

In the instant case, EMs undergoing retraining were required to complete a series of lifts. As a result of their inability to complete these lifts, Ford was placed on unpaid leave and then fired, and Harris was placed on unpaid leave and threatened with termination. The lifting requirement clearly had an impact on their employment as well as on the employment of EMs required to take this test in the future. Respondent appears to argue that there was no impact because the EMs were only required to do what they have to do every day on the job. However, this argument begs the question. EMs clearly have to lift in order to do their jobs, and Charging Party does not contest Respondent's right to discipline or remove EMs who are unable to perform their job duties. The issue here is whether Respondent should be required to bargain with Charging Party over the testing of EMs' abilities to lift. An obligation to bargain, of course, does not mean that Respondent cannot test its employees' ability to lift, but only that it must satisfy its obligation to bargain before mandating that employees complete any such test. Moreover, as we noted in *City of Detroit*, 1990 MERC Lab Op 67 at 71, fitness for duty tests typically involve issues in addition to whether a test should be required. In the case of the drug testing involved in that case, these included the type of test used, the qualifications of the person administering the test, the consequences of failing the test or refusing to be tested, the circumstances under which a test should be required, and the right of a union representative to be present during the test. In this case, these issues might include whether employees should be tested only when they return from extended leaves, how much weight an employee should have to lift, how many lifts the employee should have to do in one session, whether an employee should be allowed to lean on a wall for support as Ford wanted to do, and how many opportunities the employee should be given to pass the test before being terminated. I conclude that a requirement that EMs demonstrate their ability to lift during retraining upon returning from an extended leave of absence affects their terms and conditions of employment and, therefore, is a mandatory subject of bargaining under PERA.

I also find that neither the contractual management rights language nor the performance evaluation MOU waived Charging Party's right to bargain over the evaluation of EMs ability to lift during retraining. A contractual waiver of the statutory right to bargain requires "clear and unmistakable" language indicating that the union consciously yielded its right to negotiate. *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441 at 461 (1991); *Port Huron Ed. Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309,

312 (1996). Lifting and or other fitness for duty tests are not “work rules” or “rules of conduct,” and I find that the management rights clause, while comprehensive, does not explicitly cover such tests or evaluations. I also find that the right of Respondent in the MOU to “express and record evaluations of the performance of all employees,” did not clearly and unmistakably waive the union’s right to bargain over tests, such as the lifting evaluation, designed to measure employees’ abilities away from the worksite.

This charge, however, does not assert that Respondent violated PERA by refusing to bargain over the lifting evaluation after Charging Party demanded to bargain on May 7, 2010. Rather, it asserts that Respondent unilaterally changed existing working conditions by requiring Ford and the other EMs to lift during retraining and violated its duty to bargain by making this change without giving Charging Party notice and an opportunity to bargain over the change. Charging Party maintains that the requirement that EMs demonstrate the ability to lift during retraining was new in 2010. However, I conclude that the evidence does not support this claim. As I have found above, while EMs undergoing retraining were not consistently required to lift prior to Wilson’s becoming head of training in August 2009, some EMs were required to do so. Moreover, there was an agreement between Respondent and the former bargaining agent that Respondent could require EMs to demonstrate their ability to lift during retraining. This agreement, I find, established a lifting evaluation during retraining as a term and condition of employment for EMs. I conclude, therefore, that Respondent did not alter existing terms and conditions of employment when Wilson, in August 2009, required EMs undergoing retraining to lift. It follows, therefore, that Respondent did not violate PERA by failing to give Charging Party notice and an opportunity to bargain over this action. I will, therefore, recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____