STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LANSING (POLICE DEPARTMENT),
Public Employer-Respondent,

Case No. C15 H-113
-and- Docket No. 15-050936-MERC

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE, LABOR PROGRAM AND CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE, NON-SUPERVISORY DIVISION,
Labor Organizations-Charging Parties
_____/

APPEARANCES:

Jayne McIntyre, City Attorney, and F. Joseph Abood, Deputy City Attorney, for Respondent

Wilson, Lett & Kerbawy, PLC, by Steven T. Lett, for Charging Parties

DECISION AND ORDER

On January 4, 2016, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: February 18, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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Charging Parties-Labor Organizations.
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APPEARANCES:

Jayne McIntyre, City Attorney, and F. Joseph Abood, Deputy City Attorney, for Respondent

Wilson, Lett & Kerbawy, PLC, by Steven T. Lett, for the Charging Parties

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed August 27, 2015, by two labor organizations, Capitol City Lodge No. 141 of the Fraternal Order of Police (hereafter "FOP"), Labor Program, and Capitol City Lodge No. 141 of the FOP, Non-Supervisory Division, against the City of Lansing. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge for the Michigan Administrative Hearing System (hereafter "MAHS"), acting on behalf of the Michigan Employment Relations Commission (hereafter "the Commission").

The Unfair Labor Practice Charge and Procedural History:

The unfair labor practice charge alleges that the City of Lansing violated PERA by failing or refusing to bargain with Charging Parties over terms and conditions of employment for the Public Information Officer position within the police department. Respondent filed an answer to the charge on September 25, 2015, in which it asserted that the City had no duty to bargain with the Unions regarding the Public Information Officer because that position is not in either bargaining unit, and because the issue raised by the charge was previously the subject of a grievance arbitration decision. Following a telephone conference with the undersigned on October 8, 2015, the City filed a motion for summary

disposition. Charging Parties filed a timely response in opposition to summary dismissal of the charge on November 30, 2015. Neither Charging Parties nor Respondent requested oral argument on the motion.

Facts:

The following facts are derived from the unfair labor practice charge and Charging Parties' response to the City's motion for summary disposition, as well as the assertions set forth by the City in its answer and motion which were not specifically disputed by Charging Parties, including the April 20, 2013, Arbitrator's Opinion and Award which was attached as an exhibit to Respondent's answer.

Capital City Lodge No. 141 of the FOP, Labor Program, is the certified bargaining representative of a unit of command officers employed by the City of Lansing (hereafter "the command unit"). The City's police officers are in a separate bargaining unit represented by the Capitol City Lodge No. 141 of the FOP, Lansing Police Non-Supervisory Division (hereafter "the non-supervisory unit"). Both the command and non-supervisory contracts contain identical Managements Rights clauses which provide, in pertinent part:

> [A]ll rights which ordinarily vest in and are exercised by employers except such as are specifically relinquished herein are reserved to and remain vested in the City, including, but not limiting the generality of the foregoing, . . . (h) to direct the work force, assign work and determine the number of employees assigned to operations; (i) to establish, change, combine or discontinue job classifications and prescribe and assign job duties, content and classification, and to establish wage rates for any new or changed classifications; . . . (o) to select employees for promotion or transfer to supervisory or other positions and to determine the qualifications and competency of employees to perform available work.

Both the command and the non-supervisory contracts contain identical provisions governing agreements with individual employees and other organizations. Article 23 of each contract provides:

> The City shall not enter into any agreements with employees in this bargaining unit individually or collectively or with any other organization which in any way conflict with the provisions hereof, nor may such organizations represent any employee with respect to wages, hours or terms and conditions of employment or in derogation of the exclusive bargaining agency of this union.

The City has employed a Public Information Officer (hereafter "PIO") for many years. The PIO works in conjunction with the Chief of Police and the Press Officer of the Mayor in handling press and television relations for the police department by addressing public relations issues, including holding press conferences and issuing written statements to the press. The PIO also works on special projects, including preparing and disseminating safety tips to the public.

Although both the command and non-supervisory contracts list various special assignments and identify the procedures for obtaining special assignments, neither agreement lists the PIO as a special assignment.

In December of 2011, both the command and non-supervisory bargaining units filed grievances challenging the City's decision to appoint Robert Merritt, a police officer and member of the non-supervisory unit, to serve as PIO. The Unions asserted that there was an 18-year history of appointing lieutenants to the PIO position and, for that reason, the position properly belonged in the command unit. On April 20, 2013, arbitrator George T. Roumell, Jr. issued an Opinion and Award denying the grievances. In his decision, Roumell set forth in great detail the history of the PIO position. Roumell found, in pertinent part:

> In reviewing the Department's archives, Captain Yankowski discovered a Board of Police Commissioner's Police Department evaluation dated 1988. This evaluation contained the following statement.
>
> > Public Affairs Officer
> >
> > On Feb. 25, 1988 the Investigations Division was given the responsibility of filling the Public Affairs Officers Position.
> >
> > The 2nd Lieutenant of the Investigations Division is doing an excellent job of providing information regarding serious crimes, incidents, and other newsworthy events to the news media.

This statement suggests that the PIO position at the time was known as the Public Affairs Officer position, handled by the Investigations Division, and the position was filled by a 2nd Lieutenant.

By 1996, the Lansing Police Department annual report was reporting in its organizational chart a Special Events/Public Information area filled by a Sergeant and a Police Officer. The Department's 1997 annual report has the same reference to an organizational chart with a Special Events/Public Information area referring to the area being manned by a Sergeant and a Police Officer.

Sergeant Zolnai, who had been on the force for 18 years, acknowledged that during the reign of Chief Robert Johnson around 1997-1998 Police Officer Loren Glasscock served as Public Information Officer until Glasscock retired in 1998. The then Chief appointed Lieutenant Raymond Hall to be PIO. This was about the time that Chief Mark Alley became Chief of Police. Following Lieutenant Hall, the Chief appointed Lieutenant Steve Mitchell as Public Information Officer in 2004. In 2009, Chief Mark Alley, who served as Chief for 11 years, selected Lieutenant Garcia to become PIO.

* * *

Chief Mark Alley retired in 2010 at which time, namely on March 13, 2010 Chief Teresa Szymanski became Interim Chief of Police. She remained Interim Chief for 10 months until January 18, 2011 when she became permanent Chief of Police.

When Chief Szymanski became the Interim Chief, she continued Lieutenant Garcia on as PIO, explaining that at the time she did not know if she would become the permanent Chief; that for this reason she did not change the PIO. When she became permanent Chief, Chief Szymanski continued Lieutenant Garcia as PIO, maintaining that she had other issues to address before considering changing the PIO.

Lieutenant Garcia took a medical leave due to back surgery. During the leave time, Chief Szymanski selected Patrol Officer Robert Merritt to serve as PIO. When Lieutenant Garcia returned to duty, Chief Szymanski made a decision to continue Officer Merritt as her permanent PIO, which brought forth the instant grievances.

In denying the grievances, Arbitrator Roumell determined that the management rights provisions in the collective bargaining agreements vested the Police Chief with the authority to direct the work force and assign work, including the right to select employees for promotion or transfer to other positions, and that there was no specific language in either contract limiting that authority with respect to the PIO position. Roumell rejected the Unions' assertion that there was a continuous 18 year past practice of appointing lieutenants to the PIO position. To the contrary, Roumell concluded that "if there is any binding practice, it is the practice of having the PIO selected at the discretion of the Chief." In so holding, Roumell concluded that the PIO position had never historically been filled by posting, that the position was not listed as a special assignment in the current or prior contracts for either unit, and that the work had been performed interchangeably by members of both the command and the non-supervisory bargaining units.

Officer Merritt continued to serve as PIO following the issuance of the Arbitration Opinion and Award. On or about March 31, 2015, Merritt, without the knowledge or participation of either Union, signed a contract to continue working for the City as PIO after he retired. The temporary contract employee agreement executed by Merritt and the City covers the period May 18, 2015, to June 30, 2016. Pursuant to that agreement, Merritt began working as a contract employee in the PIO position on May 19, 2015, four days after the effective date of his retirement from the police department. In response, the Unions filed the instant charge on August 27, 2015.

Discussion and Conclusions of Law:

The gravamen of this dispute is a claim that the City unlawfully removed the Public Information Officer position from the FOP bargaining units and transferred the duties of that position to an outside employee without bargaining with Charging Parties over the decision. An employer's decision to remove work previously performed by bargaining unit members and transfer the work to employees outside the unit may constitute a mandatory subject of bargaining for purposes of PERA. *Ishpeming Supervisory Employees, v City of Ishpeming,* 155 Mich App 501 (1986); *Lansing Fire Fighters, Local 421 v Lansing,* 133 Mich App 56 (1984). The Commission has held, however, that an employer has a duty to bargain over the transfer of work performed by a bargaining unit position or positions only when certain conditions are met. In order to prevail on a charge alleging the unlawful removal of bargaining unit work, the charging party must first establish that the work at issue has been exclusively performed by members of its bargaining unit. *City of Southfield,* 433 Mich 168, 185 (1989), aff'g 1985 MERC Lab Op 1025; *Kent County Sheriff,* 1996 MERC Lab Op 294.

In *Southfield*, the Supreme Court upheld the Commission's decision that a charge alleging the unilateral transfer of work from a police unit to positions in another bargaining unit should be dismissed because the duties had not previously been performed exclusively by members of the police unit. The Court cited *Lansing Fire Fighters Union v Lansing*, 133 Mich App 56 (1984), for the proposition that a public employer has a duty to bargain over a decision to transfer unit work to employees outside the bargaining unit, but distinguished *Lansing* on the basis that the work in *Southfield* had been performed by members of both the charging party's unit and members of the other unit. The Court held:

> It seems elementary that a prerequisite to any determination concerning a duty to bargain about the transfer of work is a finding that the work is "bargaining unit work." The exclusivity rule developed by the MERC recognizes that before a bargaining unit may lay sole claim to a particular work assignment, the unit must establish that the work was performed exclusively by its unit members. If the work has not been assigned exclusively to one unit, then there is no obligation on the part of the employer to bargain before shifting duties among the employees to which the work has been assigned. The exclusivity rule represents the logical first step in a duty-to-bargain analysis.
>
> The exclusivity rule is a reasoned interpretation of the PERA and a sensible solution to what otherwise would be, for the employer, an insoluble "Catch-22" situation. The exclusivity requirement goes to the very heart of the parties' bargain. It reinforces the bargaining process by recognizing that in the absence of a negotiated agreement which requires that work will be performed exclusively by one unit, employers and employee representatives have, in effect, agreed that the employer is free to assign work. Very significant are the ramifications for the public employer if the exclusivity rule were not given credence. In such an event, the public employer's transfer of nonexclusive work would always be subject to challenge by whichever unit loses the work. In the present case, for example, public safety technicians, police officers, and command officers all may have a claim to the disputed work. It is not unrealistic to expect that the employer would become snared in interunion rivalries.

In the instant charge, the Unions assert that Respondent violated PERA by "failure to contact and to bargain *with the FOP*" over the decision to transfer the duties and responsibilities of the PIO position to a temporary contract employee. (Emphasis supplied.)

Similarly, in their response to the City's motion for summary disposition, Charging Parties allege that "the City violated its duty to bargain *with the Union* over the Public Information Officer" and that the "*the Union* has attempted to jealously guard its members in the PIO position" (Emphasis supplied.) What Charging Parties seem to overlook in making this argument, however, is the fact that command officers and police officers have separate representation. As noted, Capital City Lodge No. 141 of the FOP, Labor Program, is the certified representative of the bargaining unit of command officers employed by the City, while Respondent's police officers are in a separate unit represented by the Capitol City Lodge No. 141 of the FOP, Lansing Police Non-Supervisory Division. Although both units are affiliates of the FOP, that does not alter their status as separate and distinct bargaining units for purposes of PERA.

In dismissing the grievances filed by Charging Parties over the selection of Officer Merritt for PIO, Arbitrator Roumell found that the PIO was not listed as a special assignment in the current or prior contracts covering the command and non-supervisory units and that the duties and responsibilities of the PIO position have historically been performed by members of both units. I find that Charging Parties are precluded from challenging this factual determination by the doctrine of collateral estoppel, which bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in the earlier action. See e.g. *Ditmore v Michalik*, 244 Mich App 577 (2001). The doctrine is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Detroit v Qualls*, 434 Mich 340 (1990). Findings of fact made in an arbitration proceeding are binding in subsequent proceedings, including administrative or judicial tribunals. See e.g. *Blue Water Area Transp Comm'n*, 25 MPER 26 (2012), in which the Commission affirmed the ALJ's finding that the charge was barred, under collateral estoppel, by an arbitrator's binding determination that the employer did not implement or change a work rule. See also *Senior Accountants, Analysts and Appraisers Association v City of Detroit*, 60 Mich App 606 (1975), aff' d, 399 Mich 449 (1976); *Porter v Royal Oak*, 214 Mich App 478, 485 (1995); *Van Dyke Sch Dist*, 29 MPER 32 (2015); *Detroit Police Officers Ass'n*, 23 MPER 79 (2010). In fact, Charging Parties do not genuinely dispute the fact that the PIO work has been performed interchangeably by members of the command unit and the non-supervisory unit. Both in the charge and in the response to the City's motion for summary disposition, the Unions acknowledge that lieutenants, sergeants and police officers have historically been assigned to the PIO position. Consequently, I conclude that Respondent had no duty to bargain over the transfer of the position to a temporary contract employee since the work in question was never exclusive to either bargaining unit.

I also find no merit to Charging Parties' assertion that the City violated Article 23 of the non-supervisory contract by entering into an agreement with Merritt to perform the PIO duties following his retirement from the police department. First, there is no reference to an alleged breach of Article 23 or any other contract provision in the charge itself, nor did the Unions seek to amend the charge to include such an allegation. In any event, no PERA violation has been established with respect to the City's application of Article 23. The Commission's role in disputes involving alleged contract breaches is limited. *Genesee Twp*, 23 MPER 90 (2010) (no exceptions).

Where there is a collective bargaining agreement covering the subject matter of the dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is present. *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65 (2013). An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated. See e.g., *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. A finding of repudiation cannot be based on an insubstantial or isolated breach of contract. *Oakland Cnty Sheriff*, 1983 MERC Lab Op 538, 542. Repudiation exists when (1) the contract breach is substantial, and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

Even assuming arguendo that Article 23 is applicable to Merritt, who was retired when the temporary employment contract went into effect and, thus, no longer a member of the non-supervisory unit, I would nonetheless conclude that no PERA violation has been established. Article 23, by its terms, only serves as a restriction on the City's ability to enter into an outside agreement which "conflicts in any way with the [non-supervisory contract's other] provisions." Arbitrator Roumell concluded that there was no language in either the command contract or the non-supervisory agreement limiting the police chief's discretion with respect to the appointment of a PIO, and Charging Parties have not cited any contractual provision that would lead to a contrary conclusion. Therefore, the agreement between the City and Merritt which resulted in the transfer of non-exclusive PIO work to a temporary contract employee cannot be deemed to conflict with the other provisions of the non-supervisory bargaining agreement. Accordingly, the record does not support a finding that the City repudiated the terms of its collective bargaining agreement with the non-supervisory unit by entering into a temporary employment contract with Merritt.

I have carefully considered the other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result.1 For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by Capitol City Lodge No. 141 of the Fraternal Order Of Police (FOP), Labor Program, and Capitol City Lodge No. 141 of the FOP, Non-Supervisory Division in Case No. C15 H-113; Docket No. 15-050936-MERC, is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 4, 2016

1 This includes any claim that the City's actions in this matter constituted direct dealing in violation of PERA. Although PERA prohibits employers from negotiating directly with individual employees who are represented by an exclusive bargaining agent, the inquiry into alleged direct dealing focuses on whether the employer's conduct is "likely to erode the union's position as exclusive representative." *City of Detroit (Housing Commission)*, 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987). Since Charging Parties had no right to demand that any unit member be placed in the PIO position, there can be no legitimate claim of direct dealing in this matter.