STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CHARTER TOWNSHIP OF WEST BLOOMFIELD,
Public Employer-Respondent,

MERC Case No. C16 G-079
-and- Hearing Docket No. 16-021555

WEST BLOOMFIELD TOWNSHIP FIRE FIGHTERS, LOCAL 1721, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Howard L. Shifman, P.C., by Howard L. Shifman and Brandon J. Fournier, for Respondent

Michael O'Hearon, PLC, by Michael O'Hearon, for Charging Party

DECISION AND ORDER

On March 22, 2017, 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 either 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: April 25, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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Charging Party-Labor Organization.
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APPEARANCES:

Howard L. Shifman, P.C., by Howard L. Shifman and Brandon J. Fournier, for Respondent

Michael O'Hearon, PLC, by Michael O'Hearon, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed by the West Bloomfield Township Fire Fighters, Local 1721, International Association of Fire Fighters (IAFF) against the Charter Township of West Bloomfield. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (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 (MAHS), acting on behalf of the Michigan Employment Relations Commission.

The Unfair Labor Practice Charge and Procedural History:

The charge, which was filed on January 29, 2016, alleges that the Township violated Sections 10(1)(a) and 10(1)(e) of PERA by negotiating directly with a member of its bargaining unit and by intimidating and coercing that individual into signing a document waiving his right to a promotion. An evidentiary hearing was scheduled for August 29, 2016. The hearing was subsequently adjourned by agreement of the parties to allow the Township the opportunity to file a motion for summary disposition. The Township filed its motion on October 24, 2016. On January 23, 2017, the Union filed a response and cross-motion for summary disposition. The Township filed a reply to the Union's motion on March 1, 2017. Thereafter, I notified the Township and the Union by email that, because there did not appear to be any material disputes of fact and neither party had requested oral argument, I would be placing this matter on the decisional docket.

Facts:

The following facts are derived from the unfair labor practice charge, the motion for summary disposition, cross-motion for summary disposition, reply brief and the attachments thereto, with all factual allegations set forth by Charging Party accepted as true for purposes of this decision.

I. Background

Charging Party represents a bargaining unit comprised of all full-time firefighters employed by the Township of West Bloomfield. The most recent collective bargaining agreement between the parties covers the period January 1, 2015, to December 31, 2017. Article 23 of the contract sets forth the requirements and procedures for the promotion of unit members. The requirements for promotion to fire captain are set forth in Article 23, Section 2(C), which provides, in pertinent part:

> 1. Eligibility. Fire Lieutenants with two (2) years or more in grade/rank within the West Bloomfield Fire Department. If there are less than enough applicants, Fire Lieutenants with less than two (2) years in grade or current rank will be eligible.
>
> 2. Seniority. Rank/Position on eligibility list shall be determined by actual time served in the West Bloomfield Fire Department in the grade or rank of Lieutenant.

Pursuant to Article 23, Section 5(M), promotions are subject to the "Rule of 2" which authorizes the fire chief to bypass a candidate who is in the top two on the eligibility list. In addition, that section of the contract sets forth a notification requirement for any bargaining unit member who is bypassed for promotion. Specifically, Article 23, Section 5(M) provides:

> In the event the Township wishes to fill a permanent Suppression/Line position, in an involved rank/position, the Chief will appoint an individual who is in the top two (2) on the eligibility list on the date of appointment. The list of the top two (2) shall be revised after each appointment. In the event that the Chief chooses to exercise the rule of two (2) and bypass any member on the promotional list, the Chief shall notify the member bypassed, and offer insight as to reasons for bypassing said member. This notification shall take place prior to notifying the successful candidate.

Under Article 23, Section 5(F) of the contract, any bargaining unit member who is on the promotion eligibility list has the right to decline a promotion. That individual will be removed from the eligibility list and may reapply for promotion when subsequent lists are established without any loss of seniority rights. Any bargaining unit member who accepts a promotion is subject to a probationary period based on their job performance. Article Section 1(A) provides, in pertinent part:

> Each person appointed to a rank/classification under this system shall be required to serve a one (1) year performance probationary period. At any time during the performance probationary period, the appointee may be returned to the previous rank or

> grade for cause. . . . Any disputes will be handled through the grievance procedure. Any appointee returned to their previous rank shall be ineligible for promotion to the same position for a period of eighteen (18) months from the date he/she was returned.

The collective bargaining agreement contains a grievance procedure for alleged contract violations. The multi-step procedure, which is set forth in Article 4 of the contract, commences when the steward or the Union president presents a written grievance to the fire chief and, if not resolved, culminates in final and binding arbitration.

II. Events Giving Rise to the Instant Charge

Rocco Guirlanda is a lieutenant in the Township's fire department and a member of Charging Party's bargaining unit. On January 1, 2016, Fire Chief Gregory Flynn issued a memorandum setting forth the eligibility list for promotion to the rank of fire captain. Guirlanda was listed as eligible candidate one (1) on the list. In early June of 2016, Chief Flynn met with Guirlanda and informed him that he was being promoted to fire captain effective at the end of the month. On June 15, 2016, Flynn sent a memorandum to all fire department personnel indicating that effective July 1, 2016, Guirlanda, Hans Drews and Adam McFall would be promoted to the positions of fire captain, fire lieutenant and fire sergeant, respectively. The following day, Flynn notified the Township's personnel office of Guirlanda's promotion and executed an Employee Status Change form authorizing the appropriate salary increase. Around that same time, the department disseminated invitations to a ceremony scheduled for June 30, 2016, celebrating the promotions of Guirlanda, Drews and McFall.

In late June, the fire department conducted a training exercise during which participants were faced with various scenarios which might be encountered at a fire scene. Guirlanda was assigned the role of incident commander for purposes of the exercise, which the parties refer to as "Blue Card" training. It is undisputed that Guirlanda struggled during the training session. Shortly thereafter, Guirlanda was called into Flynn's office for a closed-door meeting with Flynn and the assistant fire chief. The chief began the meeting by talking about the Blue Card exercise. Flynn stated that he could not promote Guirlanda to fire captain due to his poor performance during the training exercise. Flynn then asked Guirlanda if he would be willing to sign a document declining the promotion. The chief made it clear that Guirlanda would not be promoted regardless of whether he signed the document, but that if he did so it would allow Guirlanda to "direct the narrative" as to why he was not appointed to the rank of fire captain. Guirlanda now asserts that he signed the document under "extreme emotional duress." At no point during the meeting was Guirlanda informed that he could have a Union representative present, nor did Guirlanda request that a Union representative be summoned.

Following the meeting, Flynn issued a memorandum to all personnel rescinding his earlier memo announcing Guirlanda's promotion to fire captain. The memo stated, "Lt. Guirlanda has withdrawn from consideration for the Fire Captain position." At approximately the same time, the chief issued another memorandum announcing the promotion of Lieutenant Mike Shimskey to the rank of fire captain. On June 30, 2016, Flynn executed another Employee Status Change form rescinding Guirlanda's promotion and pay increase. That same day, Shimskey was sworn in as fire captain.

Language authorizing the fire department to bypass an employee for promotion has been in the parties' contract for approximately six years. During that time, Respondent has utilized the Rule of 2 on several occasions. However, the incident in June of 2016 was the first time that the department has announced and then later rescinded a promotion.

Discussion and Conclusions of Law:

The Township asserts that its actions with respect to Guirlanda were consistent with, and in fact required by, the collective bargaining agreement. In support of this contention, Respondent relies on Article 23, Section 5(M) of the contract which authorizes the Township to utilize the Rule of 2 and bypass a candidate who is in the top two on the promotion eligibility list. That same provision requires the fire chief to meet with the member and offer insight as to reason for the bypass. The Township asserts that after Guirlanda's poor performance in the training session, it exercised its contractual right to bypass the Lieutenant for promotion to the rank of fire captain. Although the Township concedes that the fire chief had previously announced Guirlanda's promotion to the position of fire captain, it claims that the appointment could be rescinded at any time until July 1, 2016, the effective date of the appointment. In other words, the Township asserts that for the promotion to have occurred, it would have been necessary for Guirlanda to have actually assumed the position of captain, an event which never took place. The Township further contends that the meeting which subsequently occurred between the fire chief and Guirlanda was consistent with the requirements of the collective bargaining agreement. According to the Township, the chief met with Guirlanda and informed him of the bypass decision as he was required to do under Article 23, Section 5(M) of the contract. The Township contends that it was not required under PERA or the agreement to provide Guirlanda with an opportunity to retain the assistance of a Union representative or to even notify Charging Party of the meeting. Finally, the Township argues that the issues raised in the charge are, at most, questions of contract interpretation which should have been resolved in accordance with the grievance procedure set forth in the parties' agreement. For these reasons, Respondent contends that the charge should be summarily dismissed.

Charging Party does not dispute that Article 23, Section 5(M) of the collective bargaining agreement gives the fire chief unlimited discretion with respect to the decision of which of the two top candidates on the promotional eligibility list to appoint to fire captain. However, the Union asserts that once the chief announced his decision to promote Guirlanda to the rank of captain in early June of 2016, Article 23, Section 5(M) was no longer applicable and Guirlanda had a contractual right to serve a probationary period in that position. The Union argues that because Article 23, Section 5(M) no longer applied, the Township acted at its own peril when Flynn and the assistant chief met with Guirlanda behind closed doors. According to Charging Party, the Township violated PERA by negotiating directly with Guirlanda at that meeting and by coercing him into signing a letter withdrawing his name for consideration for the promotion. Charging Party further argues that by intimidating Guirlanda into signing the waiver, the Township made it impossible for the Union to file a grievance. Given that Article 23, Section 5(F) of the contract explicitly allows individuals on the eligibility list to decline a promotion, the Union contends that any grievance filed arising from the purported rescission of the promotion would have necessarily failed. Charging Party asserts that the Township's conduct in connection with this matter constituted interference with protected activity in violation of Section 10(1)(a) of PERA and direct dealing prohibited by Section 10(1)(e) of the Act. As a remedy, the Union requests that the Commission issue a cease and desist order and require the Township to immediately

promote Guirlanda to the rank of fire captain with full back pay and appropriate fringe benefits retroactive to June 30, 2016.

Under Section 9 of PERA, public employees have the legal right to "organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice." Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to them under Section 9 of the Act, including the right to "negotiate or bargain collectively with their public employers through representatives of their own free choice." Section 10(1)(e) of the Act prohibits a public employer from refusing to bargain collectively with the representatives of its public employees. In determining whether a party has violated its statutory duty to bargain in good faith, the totality of the party's conduct must be examined to determine whether it has "actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement." See e.g. *Unionville-Sebewaing Area Sch,* 1988 MERC Lab Op 86, 89, quoting *Detroit Police Officers Assn v City of Detroit*, 391 Mich 44, 53-54 (1975). An employer violates Section 10(1)(e) of the Act if it engages in negotiations directly with individual employees who are represented by an exclusive bargaining agent. In such cases, the relevant inquiry is whether the employer's conduct is "likely to erode the union's position as exclusive representative." *City of Detroit (Housing Comm)*, 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987).

Despite Charging Party's efforts to cast this dispute as one involving direct dealing, coercion and intimidation, it is evident from the pleadings and briefs that this case is actually nothing more than an ordinary contract dispute. This case turns on the question of whether Guirlanda was promoted when the appointment to the rank of fire captain was announced on June 15, 2016, or whether the promotion never actually occurred because the fire chief rescinded the decision to promote Guirlanda prior to the effective date of July 1, 2016. If it was the latter, then it follows that the Township acted within its discretion under Article 23, Section 5(M) of the contract in bypassing Guirlanda and selecting a different candidate for promotion to fire captain. Under such circumstances, the fire chief was required under the agreement to meet with Guirlanda and inform him of the reason that he was being bypassed for the promotion. Given that Article 23, Section 5(M) does not require notice to the Union, Guirlanda, then, was not denied any contractual right to representation. The fact that the chief offered Guirlanda the opportunity to withdraw his name from consideration did not, under these circumstances, constitute direct dealing or unlawful coercion given that the decision to utilize the Rule of 2 had already been made and Guirlanda was not going to be appointed fire captain regardless of whether he signed the letter.[1] If, however, the promotion became final on the date that it was announced, then neither the Township's subsequent attempt to rescind that decision or Guirlanda's purported withdrawal from

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1 In *West Bloomfield Twp*, 25 MPER 78 (2012), a case involving the same Employer and the same or similar promotional scheme, a police officer who had remained on a promotional list for over a year but was not selected for any openings was approached by his superiors and asked if he would accept another assignment in exchange for voluntarily removing his name from the promotional list. The ALJ rejected the union's direct dealing allegation, concluding that the Township had the undisputed discretion to never promote the officer. In so holding, the ALJ concluded that "even a successful non-coercive effort by an employer to persuade a single employee to waive discretionary consideration of a promotion would not effectuate any substantive change in the promotion process." *Id.* at 304. The ALJ's findings and conclusions were affirmed by the Commission on exception.

consideration for promotion were effective. Under this scenario, Guirlanda was entitled under Article 23, Section 5(F) to at least serve a probationary period as fire captain.

It is evident from the facts that the parties have a bona fide dispute over whether Guirlanda was actually promoted for purposes of Article 23 prior to the fire chief's declaration that he was rescinding the promotion. This is a quintessential question of contract interpretation. It is well established the Commission will not engage in the interpretation of a collective bargaining agreement, where as here, the matter is covered by the contract and the parties have agreed to a final and binding method of resolving disputes. See e.g. *Mott Cmty Coll*, 1991 MERC Lab Op 621 (no exceptions) (charge alleging that the employer violated PERA when its supervisors dealt directly with a bargaining unit member regarding wages and job descriptions dismissed as a contract matter). See also *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65 (2013); *City of Saginaw*, 1986 MERC Lab Op 209; *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. Under such circumstances, the parties should be relegated to the contractual grievance procedure for a remedy.

It is unclear whether Charging Party also intended to raise a *Weingarten* claim in this matter. Although the charge asserts that Guirlanda was called into a closed-door meeting with management without notice to the Union and without offering Guirlanda the opportunity for Union representation, *NLRB v Weingarten, Inc*, 420 US 251 (1975), is not cited in the Union's cross-motion for summary disposition. Regardless, no valid *Weingarten* claim can be asserted on these facts. In *Weingarten*, the National Labor Relations Board (NLRB) recognized that an employee has the right, upon request, to the presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to discipline. The Commission has adopted the Board's reasoning in cases arising under PERA. See e.g. *Univ of Michigan*, 1977 MERC Lab Op 496. However, it is well established that this obligation arises only when the employee actually requests representation by the Union. *Grand Haven Bd of Water and Light*, 18 MPER 80 (2005); *City of Marine City (Police Dep't)*, 2002 MERC Lab Op 219 (no exceptions). In the instant case, it is undisputed that Guirlanda never asked the fire chief to allow him to consult with Union representatives at any time before or during the June 29, 2016, closed-door meeting. Moreover, the meeting was not convened for the purpose of interrogation or investigation. Rather, the parties' briefs establish that Flynn called the meeting for the purpose of informing Guirlanda that he would not be promoted to the rank of fire captain. Under such circumstances, Guirlanda had no right to union representation and any assertion that the Township violated his *Weingarten* rights fails to state a claim for which relief can be granted under PERA.

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

RECOMMENDED ORDER

The unfair labor practice charge filed by the West Bloomfield Township Fire Fighters, Local 1721, IAFF against the Charter Township of West Bloomfield in Case No. C16 G-079; Docket No. 16-021555-MERC, is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____