STATE OF MICHIGAN

COURT OF APPEALS

CITY OF FLINT, Respondent-Appellant, v POLICE OFFICERS LABOR COUNCIL (FLINT POLICE SERGEANTS ASSOCIATION) and POLICE OFFICERS LABOR COUNCIL (FLINT POLICE CAPTAINS AND LIEUTENANTS ASSOCIATION), Charging Parties-Appellees.	UNPUBLISHED April 14, 2011 No. 295913 MERC LC Nos. 07-000022; 07-000023[1]

Before: O'CONNELL, P.J., and K.F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent City of Flint appeals as of right from the order of the Michigan Employment Relations Commission (the MERC). The MERC adopted the recommended order of the hearing officer in favor of the charging parties, the Police Officers Labor Council, Flint Police Sergeants Association (FPSA), and the Police Officers Labor Council, Flint Police Captains and Lieutenants Association (FPCLA). We vacate the MERC's order and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On December 1, 2006, the mayor of Flint issued a press release concerning the creation of a Citizens' Service Bureau (CSB). The mayor indicated his intention to reduce crime and to protect citizens by creating the CSB, which would include a new command structure consisting of five new positions: a major to oversee the operation of the new bureau, and four inspectors. Subsequently, the charging parties claimed that respondent engaged in unfair labor practices by creating the CSB positions and by filling the new positions without bargaining and without following established promotional procedures. The hearing officer concluded that respondent

[1] The MERC consolidated these cases.

violated its duty to bargain "by unilaterally changing established promotional procedures when it appointed individuals to fill the new ranks of major and inspector." The MERC adopted the hearing officer's order, and this appeal ensued.

II. STANDARD OF REVIEW

"The decisions of the MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28, and MCL 423.216(e)." *Grandville Muni Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). The MERC's findings of fact are "conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Id*. The MERC's legal determinations, however, "may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Id*., citing, in part, MCL 24.306(1)(a), (f).

III. MOOTNESS

Respondent first argues that the MERC should have dismissed the unfair labor practices charges as moot. We disagree.

"An issue is moot if an event has occurred which renders it impossible for the court to grant relief." *General Motors Corp v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (Docket No. 291947, issued October 28, 2010), slip op p 15, lv pending. "An issue is also moot when a judgment, if entered, cannot have, for any reason, any practical legal effect on the existing controversy." *Id*. at 16. A moot issue may be reviewed, however, "if it is publicly significant, likely to recur and yet may evade judicial review." *Id*.

Respondent argued before the MERC that the unfair labor practice charges at issue here were moot because the CSB no longer exists. Respondent relied on a March 27, 2008, memorandum from the Flint police chief, which indicated that the CSB would be "reintegrated" into the Police Operations Bureau due to budget constraints. This document was not part of the record before the hearing officer, and the MERC properly declined to consider it on that basis. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.")

Moreover, regardless of whether the CSB currently exists, the broader issue raised by the unfair labor practice charges at issue here—whether respondent may create new positions and make appointments to those positions without bargaining—remains unresolved, and a similar situation is capable of repetition. The MERC noted that the issues raised by the unfair labor practice charges were important and unresolved. "[T]he Michigan courts have long recognized that an appeal does not become moot, despite the change in position of the parties through the passage of time, when the issue is of public significance and is likely to recur." 7A Michigan Pleading & Practice (2d ed), § 57:8, p 511, citing, *inter alia*, *Castner v Clerk of Grosse Pointe Park*, 86 Mich App 482, 487; 272 NW2d 693 (1978) (holding that a controversy over candidacy requirements for municipal judges was not moot, although the election at issue in the dispute had already occurred, because the issue raised was capable of repetition yet likely to escape review). Thus, we discern no basis for reversing the MERC's conclusion on the mootness issue. See

Plymouth Fire Fighters Ass'n v City of Plymouth, 156 Mich App 220, 222; 401 NW2d 281 (1986) (this Court may address issues that are likely to recur).

IV. ARBITRATION

Respondent argues that the MERC should have dismissed the unfair labor practices charges on the basis of the arbitration provisions in the collective bargaining agreements. We agree with respondent that this matter is covered by the arbitration provisions of the collective bargaining agreements. On remand, it is MERC's responsibility to determine if the alleged unfair labor practices should be dismissed.

Under the Public Employment Relations Act (PERA), it is "unlawful for a public employer or an officer or agent of a public employer . . . to refuse to bargain collectively with the representatives of its public employees . . . ." MCL 423.210(1)(e). "By statute, the employer and the representative of the employees are required to bargain for wages, hours, and other terms and conditions of employment, MCL 423.215, which constitute mandatory subjects of collective bargaining." *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed*, 458 Mich 540, 550-551; 581 NW2d 707 (1998). Seniority, promotions, and criteria for promotions are mandatory subjects of collective bargaining. *Local 1383 Int'l Ass'n of Fire Fighters v City of Warren*, 411 Mich 642, 653; 311 NW2d 702 (1981). "The statutory duty to bargain may be fulfilled by 'negotiating for a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining . . . .'" *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 318; 550 NW2d 228 (1996) (citation omitted). "Once agreement is reached, the terms of the written bargaining agreement are preserved and neither management nor labor may unilaterally modify the agreement without the consent of the other party." *St Clair*, 458 Mich at 566-567 (citations omitted). In *Port Huron*, 452 Mich at 321-322, the Court explained the MERC's task where, as here, there is a statutory failure-to-bargain claim and a collective bargaining agreement that provides for a grievance process, including arbitration:

> In cases in which statutory and contractual issues overlap, the MERC, like the NLRB [National Labor Relations Board], must often review the contract to determine whether there is a statutory violation. The MERC does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration. When the unfair labor charge is the failure to bargain, however, it is often necessary for the MERC, like the NLRB, to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration. [Citations omitted.]

"A subject need not be explicitly mentioned in an agreement in order for the subject to be 'covered by' the agreement." *Port Huron*, 452 Mich at 332 n 16.

In addition, past practice may create a term or condition of employment where the parties have mutually accepted the practice. *St Clair*, 458 Mich at 571. "Where the collective

bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be 'tacit agreement that the practice would continue.'" *Id.*, quoting *Port Huron*, 452 Mich at 325 (internal citation omitted).

In this case, both of the collective bargaining agreements at issue contain multiple-step grievance procedures that begin with oral presentation of the grievance to the employee's immediate supervisor and culminate in arbitration. They also contain the following provisions pertaining to promotions.

The FPSA agreement contains the following relevant provisions:

ARTICLE 11 - SENIORITY

* * *

Section 5. New Position. In the event of a newly created position in this bargaining unit. [sic] Employees in the same rank may request transfer on the basis of qualifications, experience and seniority. In all such cases, the newly created position shall be posted at least seven (7) calendar days prior to the selection to fill such newly created position . . . .

* * *

ARTICLE 46 - PROMOTIONS

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

Section 2. The Personnel Director or his/her designee will meet with the Union prior to establishing each promotional examination . . . .

* * *

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

The FPCLA agreement provides, in relevant part:

ARTICLE 37

PROMOTIONS

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

The Association will be provided the opportunity to discuss with the Personnel Director, or his designee, such matters as eligibility, service ratings,

seniority credit, method of examination and such other criteria used to obtain the final examination score.

Section 1. The promotional lists for Captains and Deputy Chiefs shall have a duration of 18 months.

Section 2. The Personnel Director, or his/her designee, will meet with the Union prior to establishing each promotional examination . . . .

* * *

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

Section 6. To be eligible for promotion to the rank of Captain, an employee must have one year in the rank of Lieutenant. To be eligible for promotion to the rank of Deputy Chief, an employee must have one year in the rank of Captain . . . .

In addition, both collective bargaining agreements contain "Scope of Agreement" provisions. The FPSA provision is as follows:

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

The FPCLA agreement contains an identical paragraph (except for two typographical errors), and adds the following paragraph that is not included in the FPSA agreement:

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

We agree with respondent that this matter is a proper subject of arbitration. The agreements specifically address promotions—at least promotions to certain positions—and "[i]f the term or condition in dispute is 'covered' by the agreement, the details and enforceability of the provision are left to arbitration." *Port Huron*, 452 Mich at 321. Therefore, we conclude that this matter is subject to the arbitration provisions of the collective bargaining agreements.[2]

V. FACTUAL FINDINGS

Respondent also argues that three of the MERC's findings of fact must be reversed because they are not "supported by competent, material, and substantial evidence on the record considered as a whole." *Grandville*, 453 Mich at 436.

A. "*FAIT ACCOMPLI*"

Respondent first takes issue with the hearing officer's finding, adopted by the MERC, that respondent presented the creation of the CSB and the appointments to the new CSB positions as a "*fait accompli*," thus excusing charging parties from making a timely demand for bargaining. We conclude that the record was sufficient to support the hearing officer's finding.

The record indicates that the charging parties' representatives became aware of the CSB on Friday, December 1, 2006, at the earliest. The language of the press release of that date does not suggest that the creation of the CSB or the appointments to the new positions were matters that were being presented for negotiation or bargaining. The press release does state near the end "the foregoing is my proposal," but it also indicates that the mayor was "introducing and implementing" the "new command structure" "effective immediately" and closes by stating "the new police command structure has been provided to you[.]" Moreover, the appointments were announced a very short time later—the following Wednesday. In addition, it is significant that these initial announcements were press releases, intended for the general public, rather than memoranda to the charging parties, their bargaining unit members, or police personnel more generally. Indeed, it appears that the first direct communications to or within the police department were *after* both the new command structure and the appointments were announced to the public. For these reasons, we conclude that the challenged factual finding is supported by the record.

B. "PROVISIONAL" APPOINTMENTS

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[2] Despite the parties' references to pending or completed arbitration proceedings, the record before the hearing officer contained no documentation of arbitration proceedings. Accordingly, we do not base any part of our decision on the alleged pendency or outcome of related arbitration proceedings. But, we note that at oral arguments the parties admitted that this matter was arbitrated, and the arbitrator concluded that he did not have jurisdiction. While we disagree with the arbitrator's conclusion, that matter is not before us.

Respondent also argues that the hearing officer's finding that the CSB appointments were not temporary or provisional lacks competent, material, and substantial evidence on the whole record. The hearing officer acknowledged, based on Sergeant Richard Hetherington's testimony, that respondent had a past practice of using provisional appointments to fill positions temporarily (for less than 90 days) when a valid promotional list was not available, but found that "[n]othing other than the labeling of the[] appointments as provisional in the[] employment contracts indicates that the[] appointments are temporary." The MERC agreed. We conclude that the finding is supported by the record.

The CSB employment agreements describe the positions as "provisional" and indicate that the appointees would be returned to their former positions "[a]t the end of the provisional appointment." Nothing in the record, however, indicates that the positions were provisional in the relevant manner—that is, that the individuals were being appointed to the new positions only until the positions could be filled according to a different hiring process.

In addition, subsequent memoranda suggest that the appointed individuals were intended to remain in their new CSB positions for a significant period of time—long enough to make it worthwhile to charge them with significant, and seemingly ongoing, tasks. A December 2006 memorandum announced that all duties related to the Crime Stoppers program would be transferred to the CSB, that all relevant information and equipment were to be turned over to Inspector David Dicks, and that "Inspector Dicks will be responsible for ensuring the ongoing success of the Crime Stoppers Program." A January 12, 2007, memorandum from Mayor Williamson to the appointees states, "[y]ou were chosen as an elite team to perform a transition of the Flint Police Department," and asks them to work as a team to "evaluate the attitudes and performance of all personnel of the Flint Police Department" and to develop an evaluation form. The record contains no evidence that respondent actually posted the position descriptions or conducted testing to fill the positions in the manner described in the FPSA and FPCLA agreements. On the contrary, the testimony strongly suggests that this did not occur. Further, respondent apparently does not dispute the hearing officer's finding that "the major and inspector positions were not posted and no eligibility list for the positions was developed." Thus, even if the CSB *positions* were temporary, the record supports the hearing officer's finding that the *appointments* were neither temporary nor provisional.

C. "PAST PRACTICE" CONCERNING PROMOTIONS

Finally, respondent argues that the MERC's finding of a "past practice" concerning promotions is not supported by competent, material, and substantial evidence on the whole record. The hearing officer found "that it is the department's established practice to promote officers to a higher rank by creating lists of eligible candidates based on the result[s] of an examination and then filling positions at the higher rank with the top candidates on the eligibility lists." The hearing officer concluded that "[r]espondent had an obligation to follow established procedures in appointing individuals to the new ranks or give [c]harging [p]arties the opportunity to bargain over changes in these procedures." The MERC "agree[d] with the hearing officer that [r]espondent was not justified in departing from established promotional procedures simply because these new positions involving police work were outside of the regular chain of command." We agree with respondent that the finding of a binding "past practice" that

encompasses promotions to new positions not specified in the collective bargaining agreements lacks competent, material and substantial support in the record.

As the hearing officer recognized, an established past practice may become binding:

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment." [*Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 454-455; 473 NW2d 249 (1991) (citations omitted).]

The record in this case supports the finding that *some* past practice existed concerning promotions. Hetherington, who had worked for the police department for 18 years, testified that promotions are normally handled as follows: the personnel director contacts the union president, the two agree on the wording of the position descriptions, the position is posted, applications are taken, then a list of eligible candidates is arranged, and a test is given. A list is then made based on the test scores. Respondent can choose any of the top three scorers on the list. This procedure is used for promotions to the positions of sergeant, lieutenant, captain, and deputy chief. Another witness described the process the same way and testified that, during his 24 years of employment with the police department, all open positions were "posted" in the manner described.

This "past practice," however, consists merely of compliance with the provisions of the collective bargaining agreements concerning promotions. The agreements specifically cover the subject of promotions, at least to certain positions, and there is no indication that the practice was ever extended to promotions to positions not explicitly mentioned in the agreements.[3] We therefore conclude that the MERC's finding of a binding past practice "not derive[d]" from the agreements, *Amalgamated*, 437 Mich at 454, lacks competent, material, and substantial support in the whole record.

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[3] Promotions to the rank of lieutenant are covered in the FPSA agreement. Promotions to the rank of captain and deputy chief are covered in the FPCLA agreement. Hetherington also mentioned that the same practice had been used for promotions to sergeant, but those promotions are presumably mentioned in other bargaining unit agreements, since sergeant would not be a promotion for any of the members of the charging parties' bargaining units (the order of the ranks is sergeant, lieutenant, captain)—everyone at issue here is at least a sergeant.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause