STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (RECREATION DEPARTMENT),
Respondent-Public Employer,

Case No. C04 D-095

-and-

OPERATIVE PLASTERERS & CEMENT MASONS
INTERNATIONAL UNION, LOCAL 67,
Charging Party-Labor Organization.

_______________________________________/

APPEARANCES:

City of Detroit Law Department, by Andrew Jarvis, Esq., for Respondent

Miller Cohen, P.L.C., by Eric I. Frankie, Esq., for Charging Party

DECISION AND ORDER

On April 20, 2006, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

____
Nora Lynch, Commission Chairman

____
Nino E. Green, Commission Member

____
Eugene Lumberg, Commission Member

Dated: ____________

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (RECREATION DEPARTMENT),
Respondent-Public Employer,

Case No. C04 D-095

-and-

OPERATIVE PLASTERERS & CEMENT MASONS
INTERNATIONAL UNION, LOCAL 67,
Charging Party-Labor Organization.
____/

APPEARANCES:

City of Detroit Law Department, by Andrew Jarvis, Esq., for Respondent

Miller Cohen, P.L.C., by Eric I. Frankie, Esq., 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 September 29, 2004, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before February 17, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On April 12, 2004, Charging Party, Operative Plasterers & Cement Masons International Union, Local 67, filed an unfair labor practice charge alleging that Respondent, City of Detroit (Recreation Department), violated Sections 9, 10(1) and 11 of PERA by refusing to comply with certain articles and sections of the collective bargaining agreement, including the grievance procedure.

Finding of Facts:

I. Background

Charging Party is an affiliate member of the Greater Detroit Building & Construction Trades Council (Building Trades Council). The Building Trades Council negotiates contracts on behalf of is affiliates, including Local 67. The most recent contract between the Building Trades Council and City of Detroit is dated 1998 to 2001, but was extended by the parties and remained in effect at the time of hearing.

Article 9 of the parties' contract sets forth a five-step grievance procedure, culminating in final and binding arbitration. Under Step 1 of the grievance procedure, any employee who believes that a provision of the contract has not been properly applied or interpreted may discuss the complaint with his or her supervisor. If the matter is not satisfactorily settled orally, the Union may advance the grievance to Step 2 by submitting a written grievance to the division head.

Steps 3 and 4 of the grievance procedure are described in the contract, in pertinent part, as follows:

STEP 3:

A. If the Division Head's answer is not acceptable to the Union, the Steward will refer the grievance to the Local Business Representative who may submit an appeal on an agenda listing the grievance(s) to be discussed with the Department Head or his/her designated representative.

B. Within five (5) working days of the receipt of the appeal the Department Head or his/her designated representative will make arrangements for a meeting with the Local Business Representative and Steward involved and one other City representative. The Department Head may also invite a member of the Human Resources Department to attend this meeting.

C. The Department Head or his/her designated representative will answer the grievance in writing to the Local Business Representative within ten (10) working days from the date of the meeting at which the grievances were discussed. Management's written answer after the Third Step meeting shall briefly state the factors considered by Management in its decision regarding the grievance.

STEP 4:

A. In the event the dispute is not settled by the Department Head, it may be referred to the Labor Relations Division, within ten (10) working days of receipt of the Department Head's written answer, for review. The Union's

written appeal to the Fourth Step shall state the facts in dispute and/or reasons for dissatisfaction with Management's Third Step answer.

* * *

The City shall submit a written answer to the Building Trades Council within twenty (20) working days of the Appeal and Review hearing on the grievance.

D. If the grievance is not settled at Step 4 it may be referred to Arbitration (Step 5) within twenty (20) working days from the date of receipt of the City's answer at Step 4. All grievances not referred to Step 5, arbitration, within the prescribed time limits shall be considered settled based on the City's last answer.

Article 10 of the contract, entitled "Stipulations to the Grievance Procedure" states that any grievance not appealed in writing from a decision at Step 2 to Step 3, or from a decision at Step 3 to Step 4, within five working days shall be considered settled on the basis of the City's last answer to the grievance. Article 10 further provides that the "time elements in the first four (4) steps of the grievance procedure may be shortened or extended or steps may be eliminated by mutual agreement.

Marcus Holmes, a human resources consultant with the City, testified that Charging Party has the right to advance grievances to Step 4 even if a third step meeting is not held, and that it is not unusual for the Union to take such action. Holmes' testimony was corroborated by labor relations specialist Sean Junior, who asserted the City often fails to respond at the third step due to communications problems within City government. According to Junior, Charging Party's remedy in such situations is to push the grievance directly to Step 4 by submitting a grievance appeal. The grievance is then referred to the City's labor relations division, which either prepares a written response or refers the matter back to the third step. I found Holmes and Junior to be credible witnesses and credit their testimony on this point.

II. Injury to Lamoris Johnson and Grievance Chain

Lamoris Johnson, an employee with the City's recreation department and a member of Local 67, was placed on leave of absence by Respondent after allegedly suffering a work-related injury. In February of 2004, Johnson notified Terry Van Allen, business manager for Local 67, that he was having a problem with Respondent concerning his leave of absence. Johnson told Van Allen that he had been ordered by the City's doctor to return to work, with certain restrictions. Johnson indicated that these instructions were contrary to the findings of his own physician, who concluded that Johnson was not fit to return to employment with the City. It is not clear from the record whether Johnson discussed his complaint with his supervisor as provided for in Step 1 of the grievance procedure.

After discussing the matter with Johnson's personal physician, the president of the Building Trades Council and the Building Trades Council's business representative, Van Allen filed a written grievance via a letter addressed to Johnson's division head, Don Burton. The

grievance alleged that Respondent had violated several articles of the parties' collective bargaining agreement by requiring Johnson to return to work, including Article 30, which pertains to workers' compensation. That provision states, in pertinent part:

> A. All employees shall be covered by the applicable Workers' Compensation laws and related benefits. An employee sustaining injury or occupational disease arising out of and in the course of City employment shall be continued on the payroll and his/her time shall be charged to his/her sick leave reserve for all days not covered by Workers' Compensation payments . . . .
>
> E. 1. Consistent with the Workers' Compensation Act and current City practices, the City shall continue its program of returning workers who suffered job injuries back to active employment to perform work tasks which are compatible with their physical capabilities.
>
> * * *
>
> 7. Should a medical dispute arise between the employee's physician and the Employer's physician, a third physician will be mutually selected by the doctors and the third doctor's opinion shall be final and binding on the City and the Union.

Burton responded to Van Allen by letter dated March 12, 2004. In the letter, Burton indicated that the City was awaiting Johnson's return to work, and he directed Van Allen to contact Respondent's human resources department for any questions regarding workers' compensation. Three days later, on March 15, Van Allen filed a written appeal to Burton's response, alleging that Burton had failed to address the issues and contract violations set forth within the grievance. Van Allen requested that a Step 3 meeting be scheduled pursuant to Article 9 of the parties' contract.

Upon receipt of the March 15 letter, Burton telephoned Van Allen and stated that any further communications concerning the grievance should be directed to Holmes. Van Allen then contacted Holmes to discuss the grievance. Holmes told Van Allen that the issue was not a grievance matter but rather, a situation to be resolved by the bureau of workers' compensation. Van Allen insisted that the parties meet to discuss the issue, and Holmes agreed to set up a meeting the following week. No meeting was ever scheduled. Instead, Holmes sent Van Allen a letter dated March 31, 2004, in which he reiterated the City's position that the subject matter of the Johnson grievance was a matter for the workers' compensation bureau to resolve. At the hearing in this matter, Holmes explained that he did not "answer" the grievance because "it wasn't a grievance matter from my purview. The employee had an injury not, you know, confirmed as being work-related, he had an injury [and] he was placed on leave. We referred him to workers comp."

Van Allen filed the instant charge rather than process the Johnson grievance to the fourth step of the grievance procedure. However, Van Allen did not explicitly deny that Charging Party could have moved the grievance to Step 4. Rather, he testified that he did not appeal the matter

further because he felt that it would have been fruitless for Charging Party to take such action. Van Allen testified, "[Holmes'] position all along was that it didn't belong in the grievance procedure. Why would I even continue with the grievance procedure when [they are] not willing to deal with Step Three?"

Discussion and Conclusions of Law:

Charging Party contends that Respondent's failure to schedule a Step 3 hearing constitutes a repudiation of Article 9 of the collective bargaining agreement in violation of Section 10(1)(e) of PERA. Respondent asserts that its actions do not rise to the level of an unfair labor practice because the City responded to the grievance in writing, and because Charging Party could have pushed the grievance to the third step of the grievance procedure on its own. In addition, Respondent asserts that Charging Party failed to comply with the procedure set forth in Article 9, since the grievance was not filed by the Union's "business representative" as required under the contract. Finally, Respondent contends that this dispute is governed by the Michigan Workers Disability Compensation Act, MCL 418.101 *et seq*., and that this Commission lacks jurisdiction to resolve the matter.

The Commission has consistently held that an employer's alleged breach of the collective bargaining agreement will not constitute an unfair labor practice unless repudiation of the contract can be demonstrated. A finding of repudiation cannot be based on an insubstantial or isolated breach of contract. *Oakland County Sheriff*, 1983 MERC Lab Op 538, 542. Repudiation exists when 1) the contract breach is substantial, and has a significant impact on the bargaining unit 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 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.

In the instant case, Respondent did not completely ignore the grievance filed by Van Allen. To the contrary, the City responded in writing to the grievance at both the second and third steps of the grievance procedure, each time asserting that the subject of the dispute was a matter for the workers' compensation bureau to resolve. In addition, Burton and Holmes each separately discussed Johnson's complaint with Van Allen. Although Respondent failed to schedule a Step 3 hearing as provided for in the parties' contract, the record indicates that Charging Party could have processed the grievance to Step 4 on its own. Absent conduct closing the door to the entire grievance procedure, the Commission does not involve itself in procedural matters relating to grievance processing. *Gibraltar Sch Dist,* 16 MPER 36 (2003); *Twp of Argentine,* 2000 MERC Lab Op 176 (no exceptions); *Kalamazoo Pub Sch*, 1977 MERC Lab Op 771, 793. I conclude that that the alleged breach in this matter did not constitute a repudiation of the grievance procedure set forth in the collective bargaining agreement.

In its charge and at the hearing, the Union also asserted that Respondent repudiated the collective bargaining agreement by refusing to comply with Article 30, Section E(7) of the contract, which requires the parties to mutually select a physician in the event of a disagreement between the City's physician and the employee's physician. However, Charging Party failed to

advance any legal argument in support of this allegation in its post-hearing brief beyond the conclusory assertion that the City's conduct with respect to Article 30 constituted a repudiation in violation of PERA. In any event, I find that record does not establish a repudiation of Article 30. Charging Party contends that Article 30, Section E(7) is invoked whenever an employee claims to have suffered a work-related injury, while the City asserts that the provision in question applies only after Respondent's liability under the Workers' Compensation Disability Act has been determined. I find that a bona fide dispute exists over whether the provisions of Article 30, including Section E(7), apply where, as here, it has not been determined that an injury occurred which arose "out of and in the course of City employment."

I have carefully considered all other arguments of the parties and conclude that they do not warrant a change in the outcome. Based upon the above facts and conclusions of law, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

David M. Peltz
Administrative Law Judge

Dated: ____________