STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
EMPLOYMENT RELATIONS COMMISSION
FACT FINDING

In the Matter of:

KALAMAZOO MUNICIPAL EMPLOYEES ASSOCIATION (KMEA),

Petitioner (Union),

-and- MERC Case No: L01 L-4001

CITY OF KALAMAZOO,

Respondent (Employer).
_____/

APPEARANCES

On Behalf of the Union:

Dennis S. McCune, Esq.
Dennis S. McCune, P.C.
232 W. Michigan Ave., Ste. 200
Kalamazoo, MI 49007

On Behalf of the Employer:

Kurt N. Sherwood, Esq.
Miller Canfield
444 W. Michigan Ave.
Kalamazoo, MI 49007

Fact Finder:

JOHN A. LYONS

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
EMPLOYMENT RELATIONS COMMISSION
FACT FINDING

In the Matter of:

KALAMAZOO MUNICIPAL EMPLOYEES ASSOCIATION (KMEA),

Petitioner (Union),

-and- MERC Case No: L01 L-4001

CITY OF KALAMAZOO,

Respondent (Employer).
_____/

- Petition Filed: October 13, 2002
- Answer of Employer: December 2, 2002
- Fact Finder Appointed: March 26, 2003
- Hearing: September 10, 2003
- Post-hearing deposition (C. Darling): October 22, 2003
- Post-hearing written arguments exchanged: February 2, 2004
- Fact Finder Report/Recommendations: February 18, 2004

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
EMPLOYMENT RELATIONS COMMISSION
FACT FINDING

In the Matter of:

KALAMAZOO MUNICIPAL EMPLOYEES ASSOCIATION (KMEA),

Petitioner (Union),

-and- MERC Case No: L01 L-4001

CITY OF KALAMAZOO,

Respondent (Employer).
_____/

FACT FINDER REPORT AND RECOMMENDATIONS

BACKGROUND

The parties, the City of Kalamazoo and the Kalamazoo Municipal Employees Association (KMEA) have had a collective bargaining relationship. Their last agreement (Joint Ex. 1) covers the period of January 1, 2002 to December 31, 2004. In the agreement,

> . . . the City recognizes the Association as the sole exclusive collective bargaining agency for all of the full-time regular and part-time regular office clerical and technical employees of the City, including those positions set forth in Appendix "A" attached hereto and by this reference made a part hereof, but excluding elected officials, department heads, assistant department heads, managerial employees, professional employees, police service officers, confidential employees, and supervisors within the meaning of the Act, and all other employees.

The parties had been in collective bargaining for this current contract (Joint Ex. 1), in the latter part of 2001. At the same time there had been an apparent ongoing job study of those classifications assigned to the Assessor's Office. There were

recommendations made which in effect reorganized the Assessor's Office and reclassified certain functions, and consequently employees. This issue apparently was not taken up during the contract negotiations which resulted in Joint Ex. 1. A job study was conducted by Human Resources which resulted in changes in the then current assignments. There was some belief that the assessors were overqualified, under-utilized and overpaid. The City unilaterally changed classification assignments and pay grades as a result of the job study. After the job study, a demand was made by the Union to bargain pursuant to the terms of Article IX - Wages, Section 4 - Creation of New Jobs. That Section states:

> If, during the life of this Agreement, a new job is created or a substantial or material alteration in job content is effected by the City in an existing job classification, the City shall establish a rate of pay and the requirements therefor and shall promptly notify the Association of its decision. If, during a period of forty-five (45) days after the establishment of the new job classification or alteration in job content of an existing job, the Association desires to question the adequacy of the rate of pay established for such job classification, it may submit a demand to bargain regarding the contested rate of pay. If no demand to bargain is submitted within the forty-five (45) day period, the rate of pay thus established by the City shall become regular.

After some brief discussion the parties couldn't resolve their differences. As noted, the Union made a demand to bargain pursuant to Section 4 on February 21, 2002. Negotiation sessions were held on February 27 and March 27, 2002. In addition, two mediation sessions occurred on June 6 and June 14, 2002. The parties could not reconcile their differences.

A petition for fact finding was filed on November 13, 2002 by Lee Larson, the President of the Association. It states in paragraph 4 regarding the unresolved issues: "City of Kalamazoo's unilateral reduction of pay grades for City Assessors and City's refusal to negotiate those reductions." In paragraph 4a, as for reasons why publicizing

the facts and recommendations would assist the Union rights: "City residents should be informed of the City's actions in light of the Collective Bargaining obligations between the parties."

In response to the petition, Ms. Doreen Brinson, Director of Human Resources, submitted, on December 2, 2002, the City's answer. It states:

> This letter constitutes the City of Kalamazoo's response to the Petition for Fact Finding filed by the Kalamazoo Municipal Employees Association, I would like to offer the following information.
>
> On February 1, 2002 the City of Kalamazoo exercised its management's right and reorganized the Assessor's Office to be more efficient and economical. This was done due to work productivity issues and happened to coincide with shortages foreseen in the 2002 budget. Prior to the reorganization the Assessor's Office had three (3) positions titled Property Assessor III, one (1) Property Assessor II and one (1) Personal Property Examiner. All of these were eliminated. After the reorganization the Assessor's Office had one (1) Commercial Property Appraiser III, one (1) Personal Property Appraiser II and two (2) Residential Property Appraiser I positions. The City Assessor, who was in charge of the department, allowed the employees who were displaced by the reorganization to bid on the new positions as required by the collective bargaining agreement between the Association and the City. The displaced employees bid by seniority and were respectively granted these positions.
>
> The wage rates for the above named positions were as follows:

OLD		NEW	
3 Property Assessor III	$21.89	1 Commercial Property Appraiser III	$21.89
1 Property Assessor II	$20.89	1 Personal Property Appraiser II	$20.89
1 Personal Property Examiner	$19.92	2 Residential Property Appraiser	$19.92

> Relevant contract language includes:
>
> Article II, Section 1 - City's Rights.
> Article VI, Section 5 - Layoffs.
> Article IX, Section 4 - Creation of New Jobs.
> Article IX, Section 8 - Moving to a Lesser Paying Job.
>
> On February 22, 2002 the Association filed a demand to bargain wages as allowed by the CBA with the creation of the new positions. It is important to note here that the positions created already existed in the CBA and had negotiated wage rates attached to them. It is also important to note that the Association never filed a grievance or a claim of an Unfair Labor Practice in this matter. Management met with members of the Association on February 27, 2002 in order to hear the Association's argument as to the reasons why they felt the employees

who once held the Property Assessor III position should continue to earn the same wage rate as before the reorganization. The City maintained its right to eliminate positions and create new ones as allowed in the current contract with KMEA. The Association argued that an established career ladder was unilaterally removed by management and a loss of wages was the result. Management feels that clear and concise contract language supercedes(sic) past practice and personnel policies and for that reason has refused to move from the stand that the wages are correct for the positions created.

A second bargaining meeting was held on March 27, 2002. No resolution was reached between KMEA and management on that date.

KMEA then filed for mediation with the Michigan Employment Relations Commission (MERC). Mr. James Spaulding was assigned as the mediator and a date of June 6, 2002 was scheduled for the meeting. No resolution was found at the first meeting, and a second day of meeting was scheduled for June 14, 2002. Ultimately, on June 14 no resolution was reached between the parties.

All told, there were two meetings between KMEA and management without a mediator, and two meetings with a mediator after the Association requested a Demand to Bargain. Because of this, management strongly objects to the statement made by KMEA officials in their Petition that the City has refused to bargain. A requirement to bargain does not mean any one party is forced to capitulate their position. Further, management believes that we followed the collective bargaining agreement in all matters relating to the reorganization of the Assessor's Office.

Interestingly, Ms. Brinson indicated that management "refused to move from the stand that the wages are correct for the positions created." Obviously, the parties couldn't resolve their situation since in the Employer's view the Union made several self serving comments, and in the Union's view the Employer took a "take it or leave it" position. Two negotiation sessions and two mediation sessions later the parties didn't resolve the differences. The Union could not obtain increases in the suggested Assessor classification wage rates, nor would the Employer budge off its original position.

DISCUSSION/RECOMMENDATION

Interestingly, one of the reasons the City gave for its reorganization of the office was economic. That is, there were a number of generalists or cross trained assessors not really being utilized in the most efficient way. It was losing money on their assignment. On the other hand, the Union urges that the reorganization results in lost monies to the City because assessors with Class III certificates are not being utilized properly. And, the method by which residential property is assessed results in lost tax revenue to the City. However, the best testimony of Ms. Darling, the current Assessor, could only confirm this notion is "possible". See the deposition of October 14, 2003.

Regardless, there are two thrusts to the Union's position. One, the Employer did not negotiate wage rates even though a demand was made pursuant to the terms of the collective bargaining agreement; and two, that the Employer had unilaterally changed the "career ladder" of those in the Assessor classification. The so-called career ladder is a manner of promotion. The Union argues that this concept is based in code and the Assessor's manual. That is, a promotion is tied to the state certification process. For instance, a Level III certification would be the equivalent of pay grade S-38. The Employer refers to this promotional procedure as "open promotion". It was started in the early 90's by Human Resources and the Assessor at the time. It has amounted to an expected promotional procedure for employees in the classification Property Appraiser (assessor). The reorganization eliminated the career ladder or promotional opportunity and resulted in a significant wage reduction for at least two of the assessors.

The Union complains that they had no real opportunity for "genuine" collective bargaining. The unilateral elimination of the promotion or "career ladder" and a reduction in pay rates was unilaterally made and the City refused to budge from this position.

At hearing the following witnesses testified: Lee Larson, MEA President; Rebecca Gnatuk, Appraiser; Barbara Winterowd, Appraiser/Assessor; Tina Parker, Appraiser/Assessor and the deposition of Constance Darling was obtained on October 14, 2003. On behalf of the Employer: Valerie Lippincott, retired Assessor; Jeanne Doonan, Human Resources, and Jerome Post, Labor Relations Specialist, testified on behalf of the City. In addition to that testimony, the following exhibits were admitted:

U-1 Binder containing several documents comprising the history, references to the State Assessor's Board, and the Union position statement and item identified as A-U which are attachments and job descriptions, budget recommendations, demands to bargain, Assessor's training manual, miscellaneous communications, job audit questionnaires, State Assessor's Board general rules, miscellaneous information regarding the appraisal process and performance evaluation reports

U-2 Commercial and industrial building uses
E-1 Rationale leading to property appraiser classifications
E-2 Appraiser reclassification study review (3/21/02) and memo from Noonan to Brinson 1/16/02 (U-1C)

Two of the employees that were reclassified and reduced in pay grade are Barbara Winterowd and Tina Parker. This reduction occurred as a result of the so-called reorganization. The reductions were made in spite of the fact that both employees had received excellent performance evaluation reports as contained in Union Ex. 1, subsection U.

The Employer points out that the fact finding process should not be used to advance claims that could have been made through a grievance or unfair labor practice. That is true. The fact finder has no authority to stand in the shoes of a grievance arbitrator or administrative law judge considering an unfair labor practice. However, the fact finder can make a recommendation based on the facts as presented. The Union suggests in its Union Ex. 1, in its final post-hearing brief submitted January 28, 2004, that there are two issues to be resolved. The issues are: whether the City unilaterally changed the "career ladder" without negotiation and whether as (an unintended)

consequence of the City's unilateral action in eliminating the "career ladder", the City faces potential loss of revenue. The Union also requests that the fact finder "determine the City violated Article IX, Section 4 and failed to bargain regarding the contested rates of pay". The Employer objects for a number of reasons and ultimately urges that the fact finder issue recommendations consistent with the facts. It suggests that no evidence was produced that the job study was incorrect or that the appraisers were improperly classified. Moreover, it also urges that the KMEA failed to produce any objective evidence that the City refused to bargain. The evidence does disclose, and is confirmed by the response of the Employer, that the City early on, made the decision regarding pay rates. This is essentially the impact of the reorganization. It "refused to move from the stand that the wages are correct for the positions created." The President of the KMEA testified that the Employer took the position "take it or leave it". So, there is some evidence that the Employer made the decision to change the classification and then fixed the rate of pay to those classifications and simply refused to move from its initial decision.

For instance, at least two of the employees, certified at Level III, with excellent performance reviews suffered severely reduced pay. According to the Union it was a *fait accompli*. The Employer didn't want to discuss the issue and obviously refused to change its position. That position remained firm through two sessions of negotiation and two mediation sessions.

Obviously, the Employer has the right to reorganize, which has been confirmed in several cases. See *Local 128, AFSCME v Ishpeming*, 155 Mich App 501, 510 (October, 1986). However, that case also held that the impact of such a decision to reorganize is a mandatory subject of bargaining. "Once the initial decision has been made, the Union has the ability to protect its members by bargaining regarding the impact of the

decision. For instance, if any employees are to lose their jobs because of the reorganization, the Union can bargain concerning the specific individuals. . . " *supra, p. 510.*

Moreover, the position of management is that the so-called "open promotion" concept could be eliminated because its classifications were not being utilized properly. In fact, there was some suggestion that perhaps employees through that concept became over qualified, under utilized and overpaid. Regardless, the employees, consistent with the practice of the City and the recommendations apparently of the Michigan State Assessor's Board Training Manual as well as the practice in the City Assessor's Office at the time supported this so-called "open promotion" concept. The Union refers to this as a "career ladder". By any other name this process is and was a promotional procedure. Standards and criteria for promotion have been held for the longest period of time to be mandatory subjects of collective bargaining and should not be unilaterally changed. See *DPOA v City of Detroit*, 61 Mich App 487, 493-494 (1975).

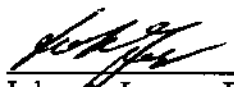
Obviously, the so-called career ladder or open promotion concept, as well as the rates of pay assigned to the reclassified positions, was unilaterally changed by the Employer based on these facts. The "open promotion" or so-called "career ladder" was in fact a promotional procedure for the individuals in the Assessor's office. The answer to the first issue is that the City did unilaterally change the promotional opportunity without negotiations. What followed is really not what the courts and MERC have envisioned concerning discussions or negotiations as to the impact of these modifications. While it is clear that the Employer has the right to reorganize, the impact of that reorganization is always a mandatory subject of bargaining including elimination of positions, promotional opportunities, as well as wage rates. Obviously, wage rate negotiation can occur under the provisions of the collective bargaining agreement. It

was requested pursuant to the contract provision Section 4 - creation of new jobs. But, query, were new jobs created? The "generalists" became "specialists" by being unilaterally reclassified. The two assessors reduced in grade remain at Level III certification. Perhaps they are under utilized. They both received excellent performance evaluations which seemed to belie any claim that they were not working to their capacity prior to the reorganization. In any event, based on these facts, the fact finder can suggest that the City negotiate in good faith regarding the elimination of the so-called open promotions or career ladder situation that existed in the Assessor's Office because this promotional procedure cannot be unilaterally eliminated without collective bargaining. This recognizes that the City's obligation is to bargain, not necessarily agree to a proposal. This whole situation may have been avoided if the Union was involved from the beginning. Secondly, the evidence is scant and quite frankly conjectural on whether or not the unintended consequence of the City's action created a potential loss of revenue to the City. It could have, but the current assessor responded it was only "possible" given the two examples that were attached to Ms. Darling's deposition. The Union argues that there is a loss, but the best the evidence can support is "possibly".

SUMMARY

It is recommended that the Employer negotiate the impact of the elimination of the so-called "open promotion" or "career ladder" and its reduced monetary impact on the appraiser classifications. The evidence supports that changes were unilaterally made to wages, and the pay group categories were unilaterally assigned. Therefore, it is recommended that the Employer enter into meaningful collective bargaining negotiations with the Union on these topics.

Respectfully submitted,



John A. Lyons, Fact Finder

Dated: February 18, 2004