STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY, DEPARTMENT OF PUBLIC HEALTH, ENVIRONMENTAL HEALTH DIVISION,
Respondent-Public Employer in Case No. C96 L-292

-and-

GOVERNMENT ADMINISTRATORS ASSOCIATION (GAA),
Respondent-Labor Organization in Case No. CU96 L-46

-and-

LAWRENCE A. FIELDS,
An Individual Charging Party.
_____/

APPEARANCES:

John L. Miles, Esq., Wayne County Labor Relations, for the Public Employer

Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., by Gordon A. Gregory, Esq., for the Labor Organization

Lawrence A. Fields *in pro per*

DECISION AND ORDER

On September 15, 1998, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 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

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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John L. Miles, Atty, Labor Relations, for the Public Employer

Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., by Gordon A. Gregory, Atty, for the Labor Organization

Lawrence A. Fields, on his own behalf as Charging Party

DECISION AND RECOMMENDED ORDER ON STIPULATED RECORD

The above cases were scheduled for hearing at Detroit, Michigan, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission, pursuant to a consolidated complaint and notice of hearing dated December 17, 1996, issued by ALJ Bert H. Wicking under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, and 1973 PA 25, as amended, MCLA 423.216, MSA 17.455(16). Due to the illness of ALJ Wicking these cases were transferred to the undersigned prior to hearing. Pursuant to the order of the undersigned dated October 22, 1997, the record in this matter was based upon the stipulation of the parties and closed effective February 2, 1998. Based upon the record agreed to by the parties, the undersigned makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA, and Section 81 of the Administrative Procedures Act (APA) of 1969:

Charges and Background Matters:

On December 9, 1996, the individual Charging Party, Lawrence A. Fields, filed the same charge against his Employer, the Wayne County Health Department, and against his bargaining agent, the GAA, which represents a broad multilevel unit of County supervisors. The charge against the County, which is repeated with minor variations against the Union, states:

> On 7-15-96 the County of Wayne filled the position of Assist. Director of Environmental Health for Wayne County by provisionally promoting an Hispanic male to the position. The County changed the previous qualifications (that required management experience) and promoted the Hispanic male who was without management experience. The County of Wayne has on other occasions refused promotional opportunity to the complaining party (a white male) based on the County's false and contrived "lack of experience" and "wrong degree" claims while promoting minorities who lacked specific degrees and/or experience. In the instant case, the County sought to hide their improper promotion (of Al Guardiola) by changing the position qualifications to match his personal qualifications. While it is prima facie evident that a Division Deputy Director should have some management experience, one need only look to the past requirements for this position or to required qualifications for other Division Deputy Directors in Wayne County. The County's qualifications for this position are not based on any meaningful skills, knowledges or abilities but were "tailored" to the hand picked candidate.
>
> The County and the GAA simply play a "shell game" to achieve their goal of violating the civil service rules and the contract. When they want, they quote the reorganization plan to justify appointing the Division Deputy Director (WCJDF), yet ignore that reorganization plan claim to provisionally promote (Guardiola). The Division Deputy Director (Environmental Health) even though the reorganization plan states the last position is non classified. This whole argument is a sham as the reorganization plan cannot supercede the labor contract or the civil service rules. The County (and GAA) simply quotes the (wrong) basis for their actions in one case and ignores that basis in the next.
>
> GAA cannot process a grievance in this matter because they have participated in the scheme to circumvent the contract. They have to protect the County in order to protect themselves, because they were without authority to agree to the things they in fact agreed to.
>
> This complainant has recently exhausted all "union " administrative remedies prior to this appeal.

These cases were originally joined with three other charges filed by Fields against the same Respondents, Case Nos. C96 B-41, CU96 B-11, and CU96 E-20; and with two other charges, Case

Nos. C96 C-42 and CU96 B-5, which were filed by employees of the Juvenile Detention Facility (JDF) against the County and the GAA. The JDF cases involved the promotion of Stanley M. Daniel on February 24, 1995 to the position of operations manager (Department Manager III) at the JDF. The JDF charges contended that Daniel did not possess the minimum requirements for the position, including the requisite degree; and that the Union breached its duty to represent the membership by condoning the promotion of Daniel notwithstanding his lack of qualifications. A decision dismissing the JDF cases was issued by the undersigned on August 28, 1998.[1] Since similar allegations, issues, and Respondents are involved in the JDF and the instant cases, albeit separate County facilities and different charging parties, the undersigned will take official notice of the contents of the August 28 ALJ decision.

Motions and Pleadings of the Parties:

On December 26, 1996, the Union filed an answer to the charges filed by Fields. The Union denied the allegations and affirmatively alleged that the charges failed to state a claim upon which relief can be granted; that the charge was untimely under Section 16(a) of PERA; that Charging Party had failed to invoke or exhaust available contract and/or internal Union remedies; and that the Michigan Department of Civil Rights had original and exclusive jurisdiction over the matters alleged in the charges. Thereafter, the Union filed on August 28, 1997 a motion to dismiss the two cases, a brief in support of the motion with attached exhibits, and an affidavit of the GAA Executive in support of the motion. Fields filed a response with attached exhibits on September 23, 1997. On October 6 Fields requested that these cases be ruled upon prior to a hearing, on the ground that his previous charges in Case Nos. C96 B-41 and CU96 B-11 involved the same circumstances and contract articles as the instant cases and the prior cases had been found to not state a claim under PERA by the undersigned at a hearing held on September 30, 1997. Fields renewed this request for a ruling on the pleadings without a hearing in a letter dated October 14, 1997, asking for an opportunity to file post-hearing argument.

On October 17 the undersigned informed the parties that the hearing in this matter was being waived, and on October 22 an order issued rescheduling the cases without date and setting February 2, 1998 as the deadline for filing any supplemental argument. No such argument was filed by any of the parties. The essential facts herein are set forth for the most part in the Union's motion to dismiss and in the response of the Charging Party, and are not in dispute. Since this decision is based upon a motion to dismiss, any well-pled allegations must be accepted as true and construed in a light most favorable to the Charging Party. *Senior Accountants, Analysts and Appraisers Ass'n*, 1997 MERC Lab Op 436, 437; *Detroit Bd of Ed., Westside Bus Terminal*, 1996 MERC Lab Op 449, 451, and cited cases; see also *Smith v Lansing School Dist.*, 428 Mich 248, 257-259, 126 LRRM 3169, 3172-3173 (1987).

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[1]Fields attacked the same promotion in his charges in Case Nos. C96 B-41 and CU96 B-11, contending that the promotion of Daniel, a black male, over Fields was improper, and that the GAA failed to properly represent him. These charges were eventually withdrawn, along with the charge by Fields in CU96 E-20 attacking the composition of the GAA bargaining unit.

Factual Findings:

The immediate cause of these charges was the promotion of Guardiola to assistant director of environmental health (Department Administrator III) in July 1996. The attack of the Charging Party, however, is much broader in that he claims that the County is changing or tailoring qualifications for promotions in order to further affirmative action goals in favor of minorities, and that the Union refuses to challenge what he considers to be discriminatory or invalid qualifications. The collective bargaining agreement contains general language regarding not discriminating against employees and promoting "qualified" applicants, but no specific promotional requirements are set forth in the contract or in the civil service rules that are incorporated into the contract. The Charging Party, however, argues that the Union has a duty to ensure that qualifications for promotions are "fair and valid," and that "no discriminatory application occurs."

On July 18, 1996, Charging Party wrote the Union raising questions about the promotion of Guardiola, contending that the position should have been posted so that nonminorities could compete for the position, and asking the GAA to investigate and file a grievance. On July 25 the Association Executive acknowledged in writing the complaint of Fields, stating as follows:

> Please be advised that we have reviewed the areas of concern expressed in your communication. We find that the County has properly exercised its rights pursuant to the Collective Bargaining Agreement in filling the position in question.
>
> We further conclude that there has been no violation of your contractual rights which would warrant the Association to file a grievance on your behalf.

About the same time, under date of August 1, the Union wrote the director of the department, noting that it had received two complaints contesting the promotion of Guardiola on the ground that he did not possess the proper qualifications for the position as set forth in the last posted examination. The Union asked the Employer to provide it with the current job description and qualifications, as well as any other information related to the promotion. The Employer responded on August 5, sending a copy of the description of work and qualifications for the position, which had a June 1996 date. The Employer stated in its response that Guardiola met the stated qualifications for his new position.

Charging Party was not satisfied with the Union's disposition of his complaint/grievance, and he appealed the matter to the Union's grievance screening committee. A meeting of this committee was held on August 21, and after hearing testimony from Fields it resolved that there was no merit to a grievance regarding the filling of the position held by Guardiola. Fields then sought to appeal this decision of the screening committee to the Union's executive board, and on September 10 the executive board notified Fields that it would consider his appeal at its next meeting on October 8, 1996. Fields did not attend and testify at the executive board meeting, but that board addressed the merits of his grievance nevertheless. The board resolved to sustain the decision of the grievance screening committee not to process his grievance on the ground that there was no violation of his

contractual rights.

Discussion and Conclusions:

Both the instant case, and the prior August 28 decision involving the JDF, are essentially attacks on the alleged affirmative action policies of the County and the acquiescence of the GAA therein. In non-bargaining situations, issues involving racial preferences or discrimination in promotions are left to the appropriate civil rights agencies and are generally considered to be beyond the scope of the jurisdiction of this Commission. *Highland Park Fire Dep't*, 1985 MERC Lab Op 1226, 1230; *Saginaw Police Dep't*, 1976 MERC Lab Op 996, 1004; but where unilateral action is involved, an employer must first bargain with the collective bargaining representative, *Menominee Area Public Sch.*, 1977 MERC Lab Op 570, 575-576; but see *Center Line Public Sch.*, 1976 MERC Lab Op 729, 733; see also *Detroit Bd of Ed.*, 1975 MERC Lab Op 564, 565-570. Thus, no PERA issue is raised by the allegations that promotions were based on race or national origin, and that the Union acquiesced in the alleged practice.

Further, there are no factual allegations in the charges that raise any triable issue of a breach of contract by the County, or a breach of the duty of fair representation on the part of the Union. *Merdler v Detroit Bd of Ed.*, 77 Mich App 740, 746-747, 96 LRRM 3264, 3266 (1977). The actions of the GAA relative to the complaints of Fields do not rise to the level of being "arbitrary, discriminatory, or in bad faith" as required by *Goolsby v City of Detroit*, 419 Mich 651, 661, 120 LRRM 3235, 3238 (1984), and the body of case law dealing with fair representation. See also *Zeeland Ed. Ass'n*, 1996 MERC Lab Op 499, 508-509; *Grosse Ile Office & Clerical Ass'n*, 1996 MERC Lab Op 155, 158-161; and *Ypsilanti Public Schools*, 1994 MERC Lab Op 234, 239. The Union promptly responded to the July 18 complaint of Fields about the Guardiola promotion on July 25, finding no contract breach or violation of Fields' rights. At the same time the Union sought information from the department director regarding the promotion, which was promptly supplied. Fields then took his case to the Union's grievance screening committee, and thereafter to the Union's executive board, both of which upheld the original decision that he had no grievance. Fields was not happy with these determinations, but on these facts there can be no finding of bad faith or other arbitrary conduct on the part of the Union that could elevate this case to anything near an unfair labor practice, or that would establish a wrongful failure to pursue a grievance. *Lowe v Hotel & Restaurant Employees, Local 705*, 389 Mich 123, 145-152, 82 LRRM 3041, 3048-3050 (1973); *Leider v Fitzgerald Ed. Ass'n*, 167 Mich App 210, 215 (1988); *Detroit Bd of Ed.*, 1997 MERC Lab Op 394, 398.

As for the allegations of changed qualifications by the County, absent a contractual restriction, which does not exist herein, an employer is free to change the qualifications for the appointment of its supervisors at any time. Despite what the Charging Party characterizes as changing the rules in the middle of the game, employers generally guard their right to pick who will be their supervisors and, thus, their agents, and labor organizations typically have little or no input into such decisions. See *Ginther v Ovid-Elsie Schools*, 201 Mich App 30, 37 (1993), where a school district was held responsible in a civil rights case for the hiring decision of its supervisor. Despite the Charging Party's

arguments to the Union that a contractual violation exists herein that can be pursued through the grievance procedure, the contracting parties, the County and the GAA, disagree, and their interpretation of their agreement is generally conclusive.

In these hybrid breaches of contract/breaches of the duty of fair representation cases, a viable claim cannot be established without a finding of both a breach of the duty of fair representation by the labor organization involved, and a breach of the collective bargaining agreement by the employer. *Knoke v E. Jackson Sch. Dist.*, 201 Mich App 480, 485, 145 LRRM 2246, 2248 (1993); *Martin v E. Lansing Sch. Dist.*, 193 Mich App 166, 181 (1992); *Pearl v City of Detroit*, 126 Mich App 228, 238 (1983), wherein the Court noted that generalized conclusionary allegations that a union acted arbitrarily and discriminatorily are inadequate to repel a summary judgment motion; see also the decision on remand of the *Goolsby* case, *Detroit Environmental Protection and Maintenance*, 1993 MERC Lab Op 268, 272. There being no substantial allegation or evidence of a failure by the Union of its duty of fair representation, and no PERA-related violation on the part of the Employer, the undersigned recommends that the Commission issue the following order:

ORDER DISMISSING CHARGES

Based upon the discussion and conclusions set forth above, the unfair labor practice charges filed in this matter are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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James P. Kurtz,
Administrative Law Judge

Dated: _____