

STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
LABOR RELATIONS DIVISION

In the Matter of:

**CITY OF BATTLE CREEK (POLICE DEPARTMENT),**  
Respondent-Public Employer,

**Case No. C96 L-283**

-and-

**POLICE OFFICERS LABOR COUNCIL,**  
Charging Party-Labor Organization.

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APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, LLP, by John Patrick White, Esq. for Respondent

John A. Lyons, P.C., by John A. Lyons, Esq., for the Labor Organization

**DECISION AND ORDER**

On July 29, 1998, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above case, recommending dismissal of charges alleging that Respondent City of City of Battle Creek (Police Department) refused to promote Detective David Adams because of his protected concerted activities in violation of Section 10(1) of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.210; MSA 17.455(10).

Charging Party filed timely exceptions to the Decision and Recommended Order of the Administrative Law Judge on September 4, 1998. Respondent filed a timely brief in support of the Administrative Law Judge's decision on September 17, 1998.

Background:

David Adams is a detective with the City of Battle Creek Police Department and a member of a bargaining unit represented by Charging Party Police Officers Labor Council (POLC). The bargaining unit includes all full time sworn police personnel and corrections officers employed by the department, excluding command officers and identification technicians. Adams has been chairperson of the unit since 1994.

In 1996, Adams tested for promotion to the position of sergeant and placed third on the eligibility list. The rankings were based on the results of written and oral examinations, as well as seniority. The collective bargaining agreement between the parties authorized the police chief to fill

any permanent vacancy by selecting any one of the top five applicants on the eligibility list. Throughout the year, Chief Jeffrey Kruithoff offered promotions to five candidates, four of whom were rated lower on the eligibility list than Adams. On December 2, 1996, the POLC filed an unfair labor charge alleging that Adams was denied promotion to the rank of sergeant because of his activities on behalf of the Union. In particular, the POLC asserted that the Employer had retaliated against Adams for giving testimony unfavorable to the department at an arbitration hearing in January of 1995.

The matter came on for hearing in our Lansing office on October 22, 1997. To establish that Chief Kruithoff was motivated by anti-union animus in passing over Adams for promotion, the POLC elicited testimony concerning various actions taken by the Employer against Adams following his appearance at the 1995 arbitration hearing. One of the incidents relied upon by the Union to establish a prima facie case of discrimination involved a dispute regarding the cloning of Adams' pager. It is this incident which is at the heart of Charging Party's exceptions in this case.

The cloning incident was first alluded to on direct examination when the Union's attorney, Barton J. Vincent, asked Adams whether he had recently been threatened by Kruithoff. In response, Adams testified that he received a letter from Kruithoff in May of 1997 accusing him of making "false, vicious and malicious" remarks about the chief. On cross-examination, the Employer introduced the letter into evidence and questioned Adams further regarding its contents. Adams indicated that the letter referred to statements which he had made to Commander DeBoer and a third party alleging that the FBI was investigating Kruithoff to determine whether he had violated federal wiretapping laws. The dispute involving the pager was finally referred to explicitly on redirect examination during the following exchange between Vincent and Adams:

Q : In this letter, it references comments you made to Commander DeBoer. What information did you have available prior to making your comments to Commander DeBoer?

A: Information provided by somebody that was directly involved in the cloning of my pager.

\* \* \*

Q: In terms of this letter that was introduced, what was the dispute going on between yourself and the chief relating to your pager? You just made reference to the pager. For the Judge, explain that.

A: I had received information through another member of the department that sometime in 1995, at that time Deputy Chief Kruithoff had initiated a cloning of my pager. The pager is a department-issued piece of equipment . . . . He had allegedly obtained a duplicate number, so that whenever anyone called my pager, it would activate the pager that the deputy chief had so that he could keep track of who was contacting me by pager.

The Union's attorney asked several more questions of Adams concerning the pager before moving on to other issues.

Chief Kruithoff also testified regarding the pager incident. In response to a question from Respondent's attorney, Kruithoff asserted that he attended meetings with Chief Pope at which the idea to clone Adams' pager was discussed. Kruithoff testified that he contacted the pager company at the direction of Chief Pope to determine whether it was technologically possible to do so and that was the extent of his involvement. He subsequently became aware that the department had attempted to clone the pager, but that the matter was dropped after the Employer was informed by the FBI that such action might be in violation of federal wiretapping laws. Kruithoff testified that he terminated the investigation into Adams' conduct after taking over as chief because no credible evidence of wrongdoing had been produced.

After the Employer rested its case, counsel for Charging Party asked the Administrative Law Judge for a second day of hearing so that the Union could call two rebuttal witnesses to testify regarding the cloning incident. Vincent indicated that the witnesses were not present at the time because he did not anticipate that the cloning incident would be an issue. Without going into specifics, Vincent asserted that the witnesses would impeach Kruithoff's credibility regarding his involvement in the cloning incident and establish that the chief was motivated by anti-union animus in targeting Adams. The Employer objected to the request on the ground that the dispute regarding the pager was a collateral issue. The Administrative Law Judge agreed with Respondent and denied the Union's motion.

#### Discussion and Conclusions of Law:

Where it is alleged that a decision is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor. *MESPA v Evert Public Schools*, 125 Mich App 71, 74 (1982). The elements of a prima facie case of discrimination under Sections 10(1)(a) or (c) of PERA include: (1) employee, union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility towards the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. Once the prima facie case is established, the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct. The ultimate burden of proving discrimination, however, remains with the charging party. See *Evert, supra*; *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9; *Residential Systems*, 1991 MERC Lab Op 394, 405; *University of Michigan*, 1990 MERC Lab Op 272, 288.

On exception, Charging Party does not challenge the Administrative Law Judge's determination that the evidence was insufficient to establish the required nexus between Adams' protected activity and the Employer's failure to offer him a promotion. Rather, the exceptions are based solely on the ALJ's refusal to grant a continuance of the hearing so that Charging Party could call two rebuttal witnesses to testify regarding the cloning issue. The Union contends that prejudice

resulted from this decision because the testimony of the rebuttal witness would have established that Kruithoff was motivated by anti-union animus. Charging Party failed to make an offer of proof detailing the excluded testimony, and the substance of the proposed testimony is not otherwise apparent from the record. Therefore, it is impossible to determine whether exclusion of this testimony, if error, was prejudicial to the Union's case. *Michigan State University (Dep't of Public Safety)*, 1983 MERC Lab Op 587, 590. See also MRE 103(a)(2); *Slayton v Michigan Host, Inc*, 144 Mich App 535, 550 (1985); *Wolak v Walczak*, 125 Mich App 271, 278 (1983); *Bremerton Sun Publishing Co*, 311 NLRB No. 51; 143 LRRM 1212, 1215 n 8 (1993).

In any event, we do not believe that the Administrative Law Judge's decision to deny the Union's request for a continuance was erroneous. At the hearing, the Union's attorney admitted that the two rebuttal witnesses were present at our Lansing office that morning, but that he had sent them home because he did not anticipate that the cloning incident would become an issue. However, it was Vincent himself who first injected the issue into the case by questioning Adams about the Kruithoff letter and, later, by asking Adams about the dispute referred to therein. Under such circumstances, Vincent should have anticipated that the letter itself would be admitted into evidence by the Employer and that Adams and Kruithoff would be questioned as to its contents. The Union cannot claim the benefit of error occasioned by its own conduct. Accordingly, we believe that the Administrative Law Judge's decision denying the Union's request for a continuance was a proper exercise of her authority under PERA to regulate the course of the hearing. See Rule 62, R423.462, of the General Rules of the Employment Relations Commission. In so holding, we note that there is not a scintilla of evidence in the record suggesting that the cloning incident involved animus or hostility toward Adams because of his protected activity.

For the reasons stated above, we affirm the findings and conclusions of law of the Administrative Law Judge.

### **ORDER**

Pursuant to Section 16 of the Act, we hereby adopt and incorporate the Administrative Law Judge's Decision and Recommended Order as our final order in this case and dismiss the charges in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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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 Patrick White, Esq., Varnum, Riddering, Schmidt & Howlett, for the Public Employer

Barton J. Vincent, Esq., Law Offices of John A. Lyons, for the Labor Organization

DECISION AND RECOMMENDED ORDER  
OF  
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Detroit, Michigan, on October 22, 1997, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on December 2, 1996, by the Police Officers Labor Council, alleging that the City of Battle Creek Police Department had violated Section 10 of PERA. Based upon the record and briefs filed on or before January 22, 1998, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that Detective David Adams was denied a promotion to the rank of sergeant because of activities on behalf of the Union, and in particular his testimony at an arbitration hearing.

Facts:

The Police Officers Labor Council, Battle Creek Police Department, Local 121, represents a bargaining unit consisting of all full time sworn police personnel and correction officers

of the Battle Creek Police Department, excluding command officers and identification technicians. David Adams has been chairman of that nonsupervisory unit since 1994. Adams has worked in the department for 16 years, serving first as a patrol officer and then as a detective. The department is headed by Chief Jeffrey Kruithoff, who replaced Chief Pope in July of 1996. Kruithoff has worked for the department since 1979, first as a patrol officer, then a sergeant, and as deputy chief from 1991 until his appointment as chief. During his tenure, Kruithoff has held steward positions and served as chairman of both the nonsupervisory and command bargaining units. Adams and Kruithoff were formerly partners as well as friends.

In January of 1995, the Union filed a grievance with respect to a work assignment. The Union objected to the assignment of a black female to an administrative aide position, asserting that it was done on the basis of race and also that it violated the contract with regard to the right to bid for special assignments. At the arbitration hearing held on November 16, 1995, both Adams and Detective David Walters testified that Deputy Chief Kruithoff told them that the reason the officer had been selected for the position was because she was a black female. The arbitrator issued his ruling on February 22, 1996, finding that the Employer violated the contract by failing to post the position and by filling it in a discriminatory manner.

As indicated above, Adams is assigned to the detective bureau. The regular hours of the detective bureau are from 8 a.m. to 4 p.m., Monday through Friday. Adams had expressed an interest in working an afternoon shift, from 1 p.m. to 9 p.m., for a number of years. The former commander of the detective bureau had no interest in assigning a detective to the afternoon shift but when that commander retired, Kruithoff, then deputy chief, authorized the new supervisor to make an assignment on a temporary basis. Adams was assigned a staggered shift in early 1995 for approximately four or five months. In January of 1996, Adams was placed back on the day shift by the department supervisor, Sergeant Phil Reed. According to Adams, he was given no explanation for the change.

In 1996, Adams tested for promotion to sergeant, a supervisory position, and placed third on the eligibility list as announced on April 15, 1996 by Chief Pope. The rankings were based on a weighted score determined from a written test, oral examination, and years of seniority. The collective bargaining agreement between the Union and the City authorizes the police chief to fill any permanent vacancy by selecting any one of the top five applicants on the eligibility list; there are no restrictions on who is selected from those five. Adams testified that the practice in the department was to promote in order down the list, and that prior to becoming chief, Kruithoff indicated that he would continue that practice. Kruithoff denied in his testimony that he had ever made such a representation and stated that he would not like to be locked into making them in that order. Department records indicate that although it was generally the practice to promote in order, there have been exceptions.

By the time the 1996 promotions were to be made, Kruithoff had become chief. Kruithoff testified as to how he made his selections. He interviewed the top five candidates, touching on six or seven issues he thought were significant. According to Kruithoff, those promoted to sergeant became part of the management team and had input on a variety of issues as to the direction

and goals of the department. Kruithoff testified that he was looking for leadership skills, and questioned the candidates as to how they felt about different programs in the police department and the direction the organization was going, and how they intended to direct their staff. In particular, he asked about COPS, or community policing, and their commitment to that change in law enforcement services. COPS involves actively forming partnerships in the community in an attempt to get at root causes of crime rather than being strictly responsive to calls for service.

Kruithoff began his selections for sergeant in the summer of 1996. As his first selection, Kruithoff chose the first individual on the list, Bruce Penning. His next selection was the fourth rated candidate, Ray Felix. Dave Walters, second on the list, felt that he had been skipped, and expressed his concerns to the chief in July of 1996. Walters testified that the chief told him that he had a ten year plan for the police department and that he, Walters, did not fit. Kruithoff told Walters that those promoted had to be 100 percent backers of the COPS program. According to Walters, during that discussion Adams' name came up and Kruithoff stated that Adams was choosing to wage some fights or "battles," and that he, Kruithoff, would continue to fight those battles for the seven or eight years he had left in the department. Kruithoff subsequently did offer a promotion to Walters, who declined. Kruithoff next chose James Saylor, the fifth ranked officer. Following this selection, he again offered a promotion to Walters, who again declined. As his final selection, Kruithoff chose Timothy Kendall, originally the eighth ranked candidate. Adams was not offered a promotion by Kruithoff. Kruithoff testified that this was not because of a deficiency in Adams, but that those he promoted were the strongest candidates and the ones he felt were most likely to contribute to the management team.

Adams testified regarding his promotion interview with Kruithoff. According to Adams, the interview lasted about one hour, with the chief asking him a series of questions. Adams testified that for the last half hour they discussed Union issues. According to Adams, he raised the labor issues, telling the chief not to take the grievances personally. Adams testified that the chief indicated that he thought the Union had made a mistake in filing the grievance with respect to the aide position. According to Adams, the chief referred to protecting management rights, and said that "he could run the department in his sleep and dedicate 16 hours a day to fighting me and the Union, or Union issues." Kruithoff had no recollection of making such a statement to Adams. He did recall a discussion with Walters on the different viewpoints of management and labor and their adversary relationship. Kruithoff testified that "the gist of the conversation was there's a tremendous amount of energy that gets burned up when you have that type of a relationship going on, and that's counterproductive to the organization as a whole."

Adams suffered a heart attack in September of 1996 and had bypass surgery. He was on sick leave for approximately nine weeks, returning to work on December 12, 1996. Because Adams had been referred to cardiac rehabilitation by his cardiologist, he asked his supervisor whether he would be allowed to go to rehab while on duty. His supervisor informed him that he would have to expend vacation or comp time. Adams then made a request for flex time, asking permission to change his hours to 10:00 a.m. to 6:00 p.m. to accommodate his morning rehab. He made the request to Commander De Boer and Sergeant Jack Shepperly. Adams testified that DeBoer told him he had to use comp or vacation time. When Adams mentioned some other employees who had been allowed

to flex their hours, DeBoer told him to speak with Shepperly. Shepperly subsequently told Adams that he had discussed it with DeBoer, who had gone to Chief Kruithoff, and Kruithoff had denied the flex hours. Kruithoff testified that he did not recall being consulted about Adams' request. According to Kruithoff, City policy dictates that flex time is granted only for work related injuries; flex time is not authorized for sick and accident claims.

Shortly after returning to work in December of 1996, Adams was called into the chief's office with Commander DeBoer. The chief indicated to Adams that Adams was acting in an unprofessional and disrespectful manner towards him. Kruithoff testified that earlier that day he had been walking through the building with a new assistant city attorney, introducing the attorney to different staff members. According to the chief, when he attempted to stop Adams, Adams brushed by him without saying anything, making it impossible for the chief to make an introduction. Adams testified that on that occasion he said good morning to the chief, but when the chief asked if he had a minute, Adams said he was busy and walked on. Adams testified that:

I chose not to engage the chief in trivial conversation in the hallways, but if he spoke to me, I acknowledged that greeting. But other than that, I felt no need to discuss anything with him at that point unless it was tied to official duties.

The chief testified that he did not discipline Adams for the incident because he perceived that there was a personal problem between the two of them and discipline would further exasperate the communication problem. According to Adams, giving the cold shoulder to the chief was a continuation of problems with labor issues which had been taking place for quite some time. The membership had previously held a vote of no confidence in the administration, which included Chief Pope, Deputy Chief Kruithoff, and the personnel director.

In May of 1997, Adams received a letter from Chief Kruithoff describing statements allegedly made by Adams about him as "clearly false, vicious and malicious" and indicating that if the statements continued, Kruithoff would be inclined to seek discipline under the City Administrative Code. There was an ongoing dispute between Adams and the chief regarding the cloning of Adams' pager. Adams testified that he had received information in 1995 from another member of the department that the chief, then a deputy chief, had initiated the cloning of his pager. According to Adams, Kruithoff had obtained a duplicate pager with a duplicate number so that whenever anyone called Adams' pager, Kruithoff could keep track of who was contacting Adams. Adams acknowledged that he had no personal knowledge as to whether his allegations were true, he was relying on information received from someone directly involved. Kruithoff testified with respect to his involvement with the attempt to clone Adams' pager. According to Kruithoff, the special investigations unit supervisor had reports that narcotics information was being compromised by a member of the department, specifically, Adams. Meetings were held with Chief Pope and as deputy chief Kruithoff would sit in on those briefings. Several tactical options were considered in order to substantiate the complaint. One of the options considered was the cloning of Adams' department

pager. At the direction of the chief, Kruithoff called the pager company to see if it was technologically possible to do so; according to Kruithoff this was the extent of his involvement. Kruithoff subsequently became aware that they had attempted to clone the pager but after being informed by the FBI that there was a potential violation of the federal wiretapping law, the action was dropped. According to Kruithoff, he terminated the investigation into Adams' conduct after no credible evidence had been produced over several months. Kruithoff testified that he wrote the letter to Adams after it came to his attention that Adams was making false statements that Kruithoff was under federal indictment, that he had destroyed records, and that he was going to lose his job.

#### Discussion and Conclusions:

Charging Party asserts that the failure to promote Adams to the position of sergeant constituted retaliation for his active role in asserting Union causes, including providing testimony for the Union at an arbitration hearing. The Employer denies that Adams' union activities were in any manner a consideration in the promotion recommendations made by the police chief.

The elements of a prima facie case of discrimination under Section 10(1)(c) of PERA, include: union or other protected concerted activity; employer knowledge of the activity; suspicious timing; and union animus or hostility towards protected rights as a motivating factor in the Employer's adverse action. *North Central Community Mental Health Services*, 1998 MERC Lab Op \_\_ (Issued 7/10/98); *MESPA v Evart Public Schools*, 125 Mich App, 71, *aff'g* 1982 MERC Lab Op 384. While there is no question that Adams, as Union chairman, was engaged in concerted activity known to the employer, in the opinion of the undersigned, Charging Party has failed to establish the required nexus between that activity and the Employer's failure to offer him a promotion. There is no evidence of union animus directed at either the Union or at Adams in particular.

Kruithoff may have aggressively articulated his intent to assert management rights and to run the department in his own way. However I find his statements in this regard do not establish union animus but are simply an articulation of how he saw his role as chief. *Twin Cities Area Transportation Auth*, 1994 MERC Lab Op 186, 193. It is fairly typical in labor relations for the parties to take opposing views; there is nothing in this record which establishes an anti-union stance on the part of the Employer or the chief. On the contrary, Kruithoff was a former union member and had taken an active role in union affairs, serving as a union officer in the nonsupervisory and the command units.

Charging Party points to several actions of the Employer adverse to Adams following his testimony at the arbitration hearing which it claims establish animus of the chief directed at Adams. These include the change of shift in January of 1996, the denial of flex time, and the so called "threats" of the chief as exhibited by his criticism of Adams' behavior in the December interview, and the letter he sent to Adams in May. While there may be a personal antagonism between the two individuals, there is no convincing evidence that Kruithoff's actions involving Adams were in any way motivated by Adams' Union activities or were so inappropriate as to raise an inference of discrimination. There is nothing in the record to establish that Kruithoff was responsible for the termination of Adams' afternoon shift. It was an experimental schedule change, and it was Kruithoff who approved the experiment in the first place. Similarly, Adams did not have first hand knowledge

that Kruithoff was involved in the denial of flex time, Kruithoff did not recall it, and in any event it was the Employer's policy that flex time was not granted unless the injury was work related. As for the December interview, the chief had every right to criticize Adams' behavior in snubbing him; no discipline was issued for this behavior. Lastly, I credit Kruithoff's testimony that he had only a limited role in the aborted cloning of Adams' pager.<sup>1</sup> Adams had no personal knowledge of the department's investigation which was originated by the previous chief. After he became chief, Kruithoff called off the investigation into Adams' conduct due to a lack of evidence. It must also be noted that Walters, who gave the same testimony in the arbitration hearing, was twice offered a promotion.

Charging Party refers to Kruithoff's explanation for passing over Adams for the promotion as a "mystery." Charging Party also alleges that Kruithoff's selections are questionable because he did not promote in order down the list as had been the past practice. I find nothing suspect in Kruithoff's method of selection. While it was often the practice to promote in order, there were exceptions, and there was no contractual requirement that this order be followed, as long as the selections were made from the top five candidates. Further, Kruithoff explained that he was looking for individuals who agreed with his general approach and would contribute to the management team, legitimate considerations when considering promotions to a supervisory rank. Kruithoff asked interview questions and made his selections with these goals in mind. To the extent that Union matters were discussed at Adams' interview, it was Adams who raised them, not Kruithoff. In short, I find nothing out of order in the process used by Kruithoff to make the promotions.

Based on the above discussion, I find that Charging Party has failed to produce substantial evidence that Adams was denied a promotion for discriminatory reasons in violation of Section 10(1)(c) of PERA. See *MERC v Detroit Symphony Orchestra, Inc.*, 393 Mich 116, 87 LRRM 3095 (1974); *Three Rivers Area Hospital Authority*, 1984 MERC Lab Op 1126. It is therefore recommended that the Commission issue the order set forth below:

#### RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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<sup>1</sup>Attached to Charging Party's post-hearing brief was a letter from the U.S. Department of Justice to Adams concerning the pager cloning dispute. By letter of January 27, 1998, Respondent objected to this letter, asserting that its submission after the close of hearing, and contrary to a ruling made at hearing, was improper. The undersigned agrees with Respondent's objections and hereby rejects this document as evidence in this matter.

Nora Lynch  
Administrative Law Judge

Dated: \_\_\_\_\_