

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

DETROIT POLICE OFFICERS ASSOCIATION,
Respondent-Labor Organization,

Case No. CU98 C-9

-and-

JOAN MERRIEWETHER,
An Individual Charging Party.

APPEARANCES:

Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., by William A. Schimmel, Esq., for the Respondent

Joan Merriewether *in pro per*

DECISION AND ORDER

On December 8, 1998, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent did not violate its duty of fair representation under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10). On February 26, 1999, we granted Charging Party Joan Merriewether's motion for a retroactive extension of time to file exceptions to the Decision and Recommended Order of the ALJ. Pursuant to that order, Charging Party's exceptions were considered to have been timely filed on January 21, 1999. Respondent did not file a brief in support of the ALJ's decision.

Discussion and Conclusions of Law:

Charging Party is employed as a police officer with the City of Detroit and is a member of a bargaining unit represented by Respondent Detroit Police Officers Association. She is also a licensed pilot. Several years ago, Charging Party requested a transfer to the department's aviation section. Her request was approved and she was placed on the transfer list to that section. In December of 1997, the department transferred four officers to aviation. As set forth more fully in the Decision and Recommended Order, Charging Party was not among the officers who were to be transferred to that section. On March 11, 1998, Charging Party filed an unfair labor practice charge alleging that the Union had breached its duty of fair representation by refusing to file a grievance on her behalf. The ALJ found no merit to her allegations and recommended that this Commission issue an order dismissing the charge.

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty; and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651; 120 LRRM 3235 (1984). See also *Vaca v Sipes*, 386 US 171, 177; 64 LRRM 2369 (1967). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123, 146; 82 LRRM 341 (1973). Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe, supra*. A union satisfies the duty of fair representation as long as its decision was within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67; 136 LRRM 2721 (1991); *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

In the instant case, the grievance chairperson initially suspected that the Employer had breached the contract in order to avoid transferring Charging Party to the aviation section. He told Charging Party that he would look into the matter and file a grievance if he found evidence to support his suspicion. Thereafter, the grievance chairperson conducted an investigation which resulted in the conclusion that the Employer had complied with the terms of the collective bargaining agreement between the Union and the City. The record indicates that this decision was neither irrational nor unreasonable. Article 10C(1)(a) of the contract provides that all openings shall be filled by the most senior employee on the transfer list who is qualified for that position. Although certain sections are listed in the contract as being excluded from this procedure, aviation is not among them. It is undisputed that the four officers who received transfers in December of 1997 had more seniority than Charging Party. Under such circumstances, we agree with the ALJ and conclude that the Union did not breach its duty of fair representation in deciding not to file a grievance on Charging Party's behalf.

Next, Charging Party contends that she was not fairly represented because the grievance chairperson did not inform her of the Union's decision not to file a grievance in a timely manner. The collective bargaining agreement provides that grievances must be filed within 30 calendar days of the event giving rise to the grievance. Charging Party argues she would have filed a grievance herself within that time period had she known that the Union did not plan to take action on her behalf. A union does not breach its duty of fair representation by a delay in communicating its reasonably-based decision not to proceed with a grievance unless the delay causes harm to the employee's rights. See *Wayne County Community College Bd of Trustees*, 1998 MERC Lab Op 286 (no exceptions); *Detroit Assn of Educational Office Employees*, 1997 MERC Lab Op 475, 480 (no exceptions). In the instant case, there is no dispute that the grievance chairperson did not inform Charging Party that the Union would not be filing a grievance on her behalf until March 4, 1998, approximately three months after the transfers were made. However, there was conflicting testimony elicited at the hearing regarding what the grievance chairperson actually told Charging Party prior to that date.

Charging Party testified that the grievance chairperson initially told her that he would conduct an investigation to determine whether the Employer violated the contract in refusing to transfer her to aviation. Shortly thereafter, the grievance chairperson allegedly informed Charging Party that he would indeed be filing a grievance on her behalf. Charging Party testified that she telephoned the grievance chairperson several times between December of 1997 and February of 1998 and asked him

for a copy of the grievance. According to Charging Party, the grievance chairperson repeatedly promised to provide her with a copy of the document. The grievance chairperson, however, denied ever telling Charging Party that he would file a grievance on her behalf, or indicating to her that one had, in fact, been filed.

In dismissing the charges, the ALJ did not resolve the conflict between the testimony of Charging Party and that of the grievance chairperson. Rather, she held that Charging Party was not denied her right to be fairly represented because she was not entitled under the contract to file a written grievance on her own behalf. Article 7(E) of the contract, however, states that an individual employee may present a grievance to the employer and have it adjusted without the intervention of the union, provided that the union is given notice and an opportunity to be present at the adjustment. Based upon the plain language of this provision, we believe that it is essential to determine whether the Union acted in bad faith, or in an arbitrary or discriminatory manner, with regard to its communications with Charging Party. To this end, it should be noted that a union does not necessarily breach its duty of representation by failing to notify an employee of its decision not to process a grievance – even where the employee had the right to take action on his or her own behalf.¹ Accordingly, we remand to the ALJ for the limited purpose of making specific credibility resolutions concerning the testimony of Charging Party and the grievance chairperson and the issuance of findings of fact, conclusions of law, and a supplemental recommended order regarding this issue.

Finally, Charging Party argues that a breach of the duty of fair representation occurred in February of 1998 when the grievance chairperson made an inaccurate remark about her at a union meeting. In support of this contention, Charging Party cites extrajudicial authority pertaining to the tort of defamation. See *Lewis v Equitable Life Assurance Society*, 389 NW2d 876 (Minn. 1986). The duty of fair representation covers only matters which have an impact on an employee's employment status or terms, *Organization of Classified Custodians*, 1996 MERC Lab Op 181. While the statement in question may have caused Charging Party some embarrassment, we agree with the ALJ's determination that it did not constitute a breach of the Union's legal duty to represent her fairly under PERA.

For the aforementioned reasons, we adopt the recommended order of the ALJ as modified below.

¹ See e.g. *Eichelberger v NLRB*, 765 F2d 851; 119 LRRM 3333 (CA 9 1985) (no breach of the duty of fair representation found where union's conduct did not serve to completely extinguish the aggrieved employee's contractual right to file a grievance on her own behalf); *Stephens v Postmaster General*, 623 F2d 594; 104 LRRM 2808 (CA 9 1980) (no breach found where employee had notice of the filing deadline but chose to ignore it in reliance on erroneous advice from his union steward). But see *Robesky v Qantas Empire Airways, Ltd*, 573 F2d 1082; 98 LRRM 2090 (CA 9, 1978) (breach found where union's failure to inform employee that it would not take her grievance to arbitration led her to reject an offer of settlement that she would otherwise have accepted); *Local 417, UAW (Falcon Industries, Inc) and Cheryl Houck*, 245 NLRB No. 75; 102 LRRM 1466 (1979) (union violated LMRA by wilfully misinforming employee about the status of her grievance); *Ruzicka v General Motors Corp*, 523 F2d 306, 310; 90 LRRM 2497 (CA 6 1975) (Ruzicka I) (union acted arbitrarily in not filing grievance with employer and failing to notify employee of its decision).

ORDER

Those portions of the unfair labor practice charge pertaining to the Union's failure to file a grievance on Charging Party's behalf and statements made by the grievance chairperson at a Union meeting are hereby dismissed. That portion of the charge relating to the Union's delay in communicating its decision not to file a grievance is remanded to the ALJ for the limited purpose of making credibility resolutions concerning the conflict in the testimony of Charging Party and the grievance chairperson. The ALJ shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended order in light of the Commission's remand. Following service of the supplemental decision on the parties, the provisions of R 423.466 through R 423.470 of the Commission's Rules and Regulations shall be applicable.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____