STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY (SHERIFF DEPARTMENT),
Respondent-Public Employer in Case No. C98 H-179,

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES (AFSCME), LOCAL 3317,
Respondent-Labor Organization in Case No. CU98 H-43,

-and-

WALTER L. EPPS,
An Individual Charging Party.
____/

APPEARANCES:

John L. Miles, Esq., for the Public Employer

Miller Cohen, P.L.C., by Gail M. Wilson, Esq., for the Labor Organization

Robert Van Cleef, P.C., by Robert Van Cleef, Esq., for the Charging Party

DECISION AND ORDER

On November 29, 1999, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondents 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

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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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APPEARANCES:

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

Gail M. Wilson, Atty, Miller Cohen, P.L.C., for the Labor Organization

Robert Van Cleef, P.C., by Robert Van Cleef, Atty, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

These cases were heard at Detroit, Michigan, on February 18, 1999, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission, pursuant to a consolidated complaint and notice of hearing, originally dated December 15, 1998, issued 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). Based upon the record and the post-hearing briefs filed by May 20, 1999, 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 August 27, 1998, the individual Charging Party, Walter L. Epps, filed these charges

against his Employer, the Wayne County Sheriff Department, and against the bargaining agent of supervisory officers of the Department, including the ranks of sergeant and lieutenant, Wayne County Law Enforcement Supervisory Local 3317, AFSCME. The charges involve the promotion of Epps with several other officers to the rank of sergeant on or about November 7, 1997. This occurred at a time when the County was engaged in a dispute relative to the promotional examination with the labor organization that represents the nonsupervisory deputies in the department, National Union of Police Officers, Local 502, Service Employees International Union (SEIU). The charges allege that the promoted sergeants were demoted by the Employer back into the Local 502 unit on July 14, 1998, contrary to the Local 3317 collective bargaining agreement, and that the Union, AFSCME Local 3317, refused to represent them in that regard.

AFSCME filed a motion to dismiss, with a brief in support, on November 12, 1998, contending that the charges failed to state a claim under PERA, and that the charges involved a contract matter relative to the sergeant examination between the Employer and SEIU Local 502. Charging Party, through his attorney, filed a response in opposition to the motion to dismiss, asking that the charges proceed to hearing and that a full record be developed before a decision was made in this matter. Charging Party contended that he had sought to file a grievance regarding his demotion, but had been informed by the Local 3317 executive board that a grievance could not be filed because the promotions were provisional appointments, that such appointments did not have seniority status in the unit, and that there was no contract violation. The County filed a motion to dismiss on the day of the hearing, claiming that no violation of PERA was alleged. SEIU Local 502 was not a party to these proceedings and did not participate herein.

Factual Findings:

The County and the bargaining agents for Sheriff deputies have had contractual provisions and an established practice governing the promotion of deputies to the rank of sergeant. Under the agreed procedure the County, through its civil service commission, gives a promotional examination for sergeant every two years. Those deputies passing the exam are placed on a promotional eligible list and ranked according to their score on the test. Vacancies in the sergeant classification are filled strictly according to the placement of the deputy on this list. The last promotional list before the events in this case was effective August 1, 1995. A new examination was given in May 1997, which Charging Party did not pass. A cheating scandal arose over this exam, so the civil service commission in July 1997 canceled the results and scheduled a new examination for September.

In the meantime, the County decided to fill certain sergeant vacancies in August 1997 using the 1995 promotional list. Local 502 protested this action, contending that only those who had cheated on the May 1997 exam should be disqualified, and that the May results should then be certified and used as the new promotional list. When the Employer refused to agree with this procedure, Local 502 filed a grievance under its contract, an unfair labor practice charge with this Commission, and a lawsuit in Wayne Circuit Court. The promotional examination was again given in September to those deputies that took the May exam, and Charging Party passed and was ranked number 40 on its eligibility list. On October 7, 1997, the Court issued a preliminary injunction enjoining the County from making any further promotions to sergeant from the 1995 list, and from

making any permanent promotions from the September 1997 eligibility list. The Court ruled that the August promotions from the 1995 list would be considered permanent, but any further promotions would be provisional as permitted by civil service rules.

The County still had vacancies in the sergeant classification, so on or about November 7, 1997, Charging Party and four other deputies were promoted to sergeant. Charging Party testified that he was not told at the time of the promotion that it was only provisional, though he was aware that there was controversy over the promotion and that it was not based on his placement on the examination. When he asked about the provisional nature of the promotion, he was assured by the undersheriff that the position was permanent and he even received a formal certificate of promotion from the sheriff. On November 10 the Local 502 president sent a letter to the membership setting forth the history of the dispute over the promotional lists, and expressing its opposition to the recent provisional appointments. The letter noted that Local 502 did not recognize the appointments as promotions, that there would be no recall rights to the rank of sergeant, and that the Local's pending grievance was scheduled for arbitration. The letter stated that, "[T]he integrity of the promotional system is at stake," and it cautioned that time spent out of its unit would not count for unit seniority purposes. Charging Party testified that he never saw this letter.

Charging Party did receive a copy of a letter sent by the president of the Respondent Union to each of the recent provisional appointments to its unit, dated December 18, 1997. This letter advised that it was Local 3317's position under the provisions of its collective bargaining agreement that "until such time as you are promoted from a certified eligibility list, you cannot gain status as a sergeant." The letter stated that the Union would represent the provisional appointees in all matters, "with the exception of assisting you in obtaining regular status in the classification of Sergeant." The letter attached a copy of the October 7 order of the Circuit Court, and indicated that if the appointees had any concerns about the letter they could request a hearing before the executive board of the Local.

The arbitration hearing on the Local 502 grievance was held on March 2, 1998, and a decision upholding the actions of the Employer in canceling the May 1997 exam and ordering a new examination and list was issued on April 13, 1998. The arbitration award required the County to honor the September 1997 promotional list and to make the appointments to sergeant based on that list, with back pay and seniority retroactive to the date of the provisional appointments. This meant that Charging Party and the other provisional appointees would be returned to the deputy's unit. Realizing this was imminent, Epps wrote a letter dated June 22, 1998, to Local 3317, arguing against demotion and the notion that the Union could not represent him. A similar letter was sent to Local 3317, dated June 23, with the names of the five provisional sergeants, requesting representation as dues paying members of Local 3317. This letter pointed out that they had successfully completed their probationary period, and they asked that a grievance be filed to maintain their rank and seniority as sergeants.

The president of Local 3317 issued a response to the provisional sergeants under date of June 29, taking the position that no article of the contract with the County had been violated by what it termed to be their temporary provisional appointment to the rank of sergeant. The letter cited the

order of the Circuit Judge and the ruling of the arbitrator in the Local 502 grievance. The letter stated as follows:

> Provisional appointments are not promotions. Promotion into Local 3317 is based solely on a numerical standing from a certified eligibility list. A person gains rank or status when properly promoted from such a list. A grievance concerning status cannot be filed for a person who has not gained status.

The letter expressed the Union's concern over the situation of the provisional appointees, and it noted that "The Union's position has remained constant throughout this ordeal." The letter closed with the invitation to address any concerns to the Union's next executive board meeting scheduled for July 22. Charging Party attended this hearing before the Union's executive board, contacted the County civil service commission, and attempted to have AFSCME Council 25, Local 3317's parent organization, intervene on his behalf. These efforts were all unsuccessful in affecting his transfer back into the Local 502 bargaining unit.

On July 6 Epps was notified that effective July 13 he would be "demoted" to his former classification. In the meantime, Locals 3317 and 502 became concerned over the County's initial position, expressed in a June 29 letter, that the provisional appointees could be placed on a "recall list" for future promotion into the Local 3317 unit before the promotion of others on the eligibility list. Local 3317 responded on July 20, taking the position that under the contract only individuals that were legally promoted and subsequently demoted through no fault of their own could be placed on a recall list. On July 31 the two deputies' locals entered into a memorandum of understanding with the County that provided that the provisional appointees that had been returned to Local 502's unit "do not have, and have not had, recall rights to a vacant or new Sergeant's position under the agreement between the County and Local 3317, AFSCME." This was confirmed by an August 3 memorandum from the County personnel/human resources director to the undersheriff, pointing out that the provisional appointees had been "reinstated - not demoted to their former classifications." The memo noted that the provisional sergeants were not "regular" employees who could complete a probationary period, since "they had not been appointed from an eligibility list established through the examination process."

Discussion and Conclusions:

There is nothing in the actions of the Employer or the Union in these cases that raises any issue under PERA, whether by way of a breach of contract by the County, or a breach of the duty of fair representation on the part of AFSCME Local 3317. *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. In these hybrid breach of contract/breach 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). Neither can be found on the facts in these cases.

Given the turmoil and litigation that followed the May 1977 cheating scandal over the promotional examination to sergeant, including a pending grievance over the proper promotional list to use and a court injunction forbidding permanent promotions while the issues were being sorted out, everyone in the department had to know that accepting such a promotion was problematical, at best. Both labor organizations affected by the scandal, Locals 502 and 3317, made it clear from the outset that they intended to uphold the integrity of their promotional procedures and practices, as well as enforcing the terms of their contracts. These contracts and the past practices required that promotions be made in strict order of passing the promotional examination. This was not followed in the November 1977 promotions, which included the Charging Party who had not passed the May exam and who ranked only 40 on the second substitute exam given by the County in September.

More to the point, the November promotions were granted under a court order that forbade permanent promotions and required that they be provisional in nature. Under these circumstances, there can be no claim that anybody was deceived in this matter. The fact that officers in the department may have misrepresented the nature of the promotions when made, whether intentionally or otherwise, has no bearing on the reality of the situation at the time. By reason of the ongoing dispute and litigation, including the issuance of a Circuit Court injunction, it had to be obvious to everyone in the department that the County could not legally and contractually make permanent promotions, no matter what some supervisory employees may have represented to the contrary. In fact, this knowledge is what prompted Charging Party, according to his testimony, to ask the undersheriff at the time of his promotion in November about its permanency. Thus, the fact that Epps may have personally understood and believed that his promotion was permanent has no bearing on the outcome of these cases.

Charging Party's arguments that the Union breached its duty of fair representation and committed an unfair labor practice by refusing to take a grievance relative to his transfer back to the bargaining unit are without merit. Had it taken such a grievance, an argument could be made that it was breaching its duty owed to the unit as a whole. The bargaining representative has a duty to uphold the contract and the common good of the entire unit, which duty may clash with what are perceived to be individual rights. This responsibility often involves the bargaining agent taking a stand on an issue that may be unpopular with part of its unit or which may affect individuals adversely, but the general good is paramount. See *Lansing School Dist.*, 1989 MERC Lab Op 210, 216, quoting from the Supreme Court's decision in *Lowe, supra* at 145. To require a labor organization to accept and process a grievance that is contrary to its stated position on an issue is not only useless and futile, but also raises questions as to its good faith in the first place. Thus, the fact that the Union "could have grieved" a number of issues relative to Epps' retention and time as a sergeant, including his pay, seniority, and fringe benefits, does not violate its duty of fair representation, especially where it initially took a position that the promotion was violative of its contract, and in this particular case also violative of a court order.

In conclusion, the actions of the Union 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, for example, *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 not only acted upon its contract, past practices, and convictions as to how the promotions should be handled, but also acted in accord with the SEIU court and arbitration proceedings which supported its position. Though Charging Party was not satisfied with these determinations, 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 resembling an unfair labor practice, or that would establish a wrongful failure to pursue a grievance. *AFSCME Council 25, Local 3308 (36th Dist. Ct)*, 1999 MERC Lab Op 132, 133-134, 138. 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: __________________