STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY (AIRPORT DEPT),
Public Employer-Respondent in Case No. C01 F-130,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 502,
Labor Organization-Respondent in Case No. CU01 F-35,

-and-

MICHELLE ANN GARLAND,
An Individual-Charging Party
_____/

APPEARANCES:

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

Sachs Waldman, by George H. Kruszewski, Esq., for the Respondent Labor Organization

Ronald S. Olszewski, Esq., for Charging Party Michelle Ann Garland

DECISION AND ORDER

On June 28, 2002, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 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

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

DATED:

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on November 6, 2001, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the Respondent Union and by the Charging Party on or before February 26, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On June 27, 2001, Michelle Ann Garland filed these unfair labor practice charges against her

employer, Wayne County (the Employer), and her bargaining agent, Service Employees International Union, Local 502 (the Union). The charges were amended on July 3 and July 24, 2001. At the time of the hearing, Garland was a corporal in the police division of the County's Airport Police Department, working at Wayne County Metropolitan Airport. Garland asserts that she was at the top of the Employer's 1999-2001 eligibility list for promotion to sergeant when that list expired on June 1, 2001. Garland alleges that the Employer violated Respondents' contract and the Employer's own civil service rules by a variety of irregularities in the filling of vacant positions between 1999 and 2001. She also alleges that during the spring of 2001 the Employer violated the contract and civil service rules by failing and/or refusing to fill vacant sergeant and lieutenant positions. During the hearing, Garland also alleged that the Employer deliberately delayed filling vacant positions to retaliate against her for filing a sexual harassment claim, and because Garland was one of the first African-American females to be assigned to the road patrol division in the Sheriff's Department.1 Garland's charge against the Union alleges that during the spring of 2001 the Union violated its duty of fair representation by refusing to file a grievance or grievances over the Employer's failure to fill vacant positions. Garland also alleges that the Union violated its duty of fair representation: (1) failing to challenge the Employer's use of the 1999-2001 list to make promotions before the list was properly certified; (2) agreeing to allow an individual to be promoted to sergeant when he was not first on the eligibility list. In addition, Garland asserts that during the spring of 2001 the Union breached its duty of fair representation by refusing to allow her to see at the sergeants' eligibility list.

Facts:

The Union represents a bargaining unit of employees of the Employer performing non-supervisory law enforcement work. This unit includes police officers, corporals and detectives in the Airport Department – Police Division, the Sheriff's Department, and the Community Justice Department.

Article 15 of the Respondents' contract covers promotions, including promotion to the rank of sergeant outside the bargaining unit. Promotions to detective and sergeant occur only when there are vacant positions at these ranks to be filled. Section 15.05(C) of the contract states that all detective and sergeant positions shall be filled by promotion of a member of the bargaining unit from the appropriate promotional eligibility list. An individual's placement on an eligibility list is based on his or her performance on a written examination, seniority, and education. Section 15.05(H) states that except as otherwise provided for in Article 15, the Sheriff or Airport Director must promote, appoint, and certify the highest person on the promotional eligibility list in existence at the time a vacancy is declared to exist by the County's Director of Personnel/Human Resources.

Filling a vacancy in the County's classified service begins with a manager's request to fill a position under him or her. In the police division of the Airport Department, the Director of Public Safety and/or the

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1 At the beginning of the hearing, I granted the Employer's motion to dismiss on the ground that Garland's claim that it had violated its civil service rules and/or the contract it failed to state a claim under PERA. It later became apparent from the testimony that Garland was also asserting that the County had retaliated against her for the reasons stated above.

Chief of Airport Police have the authority to request that positions be filled. Depending on budget and workload considerations, they may delay filling a position or may not fill it at all. When they decide to fill a position, they ask the department's personnel director to fill out a personnel requisition form. The requisition goes first to the finance division. From there it is sent to the department director, the Director of Airports. The department director forwards the requisition to the County's Department of Management and Budget for approval. From there it goes to the Department of Personnel/Human Resources. The Department of Personnel/Human Resources must approve the requisition before the position can be filled.

An eligibility list for promotion to sergeant was certified on June 1, 1999, based on the result of an examination given in May 1999. Garland was approximately 41st on this list at the time it was initially certified. In accord with Article 15.05(B) of the contract, the list was to be in effect for 24 months, or until June 1, 2001. On June 21, 2001, the County promoted a police officer in the Airport Department to sergeant even though he was not first on the eligibility list at the time he was promoted. Both the Respondent Union and the union representing sergeants protested his promotion. Eventually, both unions agreed to allow him to keep his position as part of a settlement which included many grievances and the County's agreement to give members of the Union's bargaining unit an extra holiday. The record does not indicate when this settlement was reached. Soon after the June 1 certification there were challenges made to several questions on the exam. In early August 1999 the County issued a corrected list. The only change from the previous list was that the number two and three positions were reversed. By the time the corrected list was issued, both these individuals had already been promoted. On August 2, 1999, Garland was notified that the appeal process had been completed, and that she was then 37th on the list.

Between June 1999 and June 2001, approximately 30 individuals received promotions to permanent sergeant positions from the 1999-2001 list. Garland maintains that in the spring of 2001 there were several vacant sergeant positions, and also several vacant lieutenant positions to which a sergeant could have been promoted. In early April 2001, Garland asked the Union to file a grievance over the Employer's failure to fill these positions. On April 30, 2001, Union Vice President Mary Muhammad sent her a letter stating that the Union had determined that there was no issue to grieve, as no contract language had been violated. Muhammad stated that there was no language in the contract requiring the County to fill a position after it had been vacant for twenty days, as Garland had contended. Muhammad also said that several arbitrators had determined that under the Union's contract the County's Personnel Department had the sole authority to determine when a position was "vacant" and should be filled, regardless of whether the position was actually vacant. Finally, Muhammad stated that the Union representing sergeants and lieutenants in the Sheriff and Airport Departments had indicated that there were no vacant positions at that time. 2

Garland appealed Muhammad's decision to the Union's Grievance Committee. The Grievance Committee discussed Garland's appeal at a meeting held May 31, 2001, and wrote her a letter the

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2 Under the terms of this union's contract, a sergeant position does not become vacant until it is established that no one in that unit is interested in transferring to the position.

following day. The letter repeated Muhammad's statement that there was no rule or contract language requiring the County to fill vacancies within twenty days, and that a position became "vacant" when the Employer deemed it to be. The Grievance Committee also told Garland that it had no authority to grieve for vacant lieutenant positions; the fact that sergeants had not been promoted to these positions was an issue for the union that represented the sergeants.

On June 15, 2001, the Union's Executive Committee invited Garland to appear before it to discuss her objections to the Grievance Committee's decision. However, Garland was scheduled to work at the time of the meeting and could not get permission from her supervisor to attend.

The record indicates that sometime in the spring of 2001 Garland asked the Union President to let her see the 1999-2001 sergeants' eligibility list. The Union President told her that she would be allowed to look at her name and ranking on the list, but could not make a copy of the list. In July 2001, after the list had expired, Garland asked Muhammad if she could see the list. Muhammad said that the secretary who kept the list was on vacation. She told Garland that when the secretary returned, Garland could come in and examine the list if it had not been thrown away. Muhammad told Garland that it was the Union's policy not to let members make copies of eligibility lists.

Discussion and Conclusions of Law:

Garland's first allegation against the Employer is that the Employer violated its own civil service rules and the Respondents' contract by: (1) failing to fill vacant positions with the highest ranking officer on the applicable promotion list; (2) during the spring of 2001, failing or refusing to fill vacant sergeant and lieutenant positions. The Public Employment Relations Act (PERA) prohibits strikes by public employees. It also protects the rights of public employees to engage in union activity or other lawful concerted activities for the purpose of collective negotiation or bargaining, or other mutual aid and protection, as stated in Section 9 of the Act. Section 10(1)(a) makes it an unfair labor practice for an employer to interfere with an employee's exercise of his or her Section 9 rights. Section 10(1)(c) of PERA prohibits an employer from discriminating against employees in order to encourage or discourage union activity. PERA does not prohibit an employer from engaging in actions which are "unfair," unless these actions interfere with an employee's exercise of the specific rights set forth in Section 9. *MERC v Reeths-Puffer School Dist.*, 391 Mich 253, 259, 261 (1974). An individual does not state a cause of action under PERA merely by alleging that his or her contractual rights were violated. *Utica CS*, 2000 MERC Lab Op 268; *Detroit Bd. of Ed*, 1995 MERC Lab Op 75. As I ruled at the hearing, Garland 's allegation that the Employer failed to follow contractual or civil service rules in filling or not filling positions does not state a claim which the Employment Relations Commission has the authority to remedy.

Garland also alleged at the hearing that the Employer deliberately delayed filling vacant positions to retaliate against her for filing an earlier sexual harassment claim against it, and because she was one of the first black females to be assigned to the road patrol division in the Employer's Sheriff's Department. Although PERA prohibits an employer from retaliating against employees for engaging in union or other concerted activity, it does not protect an employee from retaliation for filing an individual complaint against his or her employer. It also does not prohibit an employer from discriminating on the basis of race or sex.

The Elliott-Larsen Act, MCL 37.2101, et seq., a statute administered by the Michigan Department of Civil Rights, prohibits this type of conduct.

For reasons discussed above, I conclude that Garland's charge against the Employer is without merit.

A union's duty of fair representation under PERA consists 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 651,679(1984), citing *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903 (1967). See also *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. When a union acts in good faith, it has considerable discretion to decide whether to proceed with a grievance. It may consider such factors as the likelihood that it would succeed before an arbitrator and whether prosecution of the grievance would serve the interests of the membership as a whole. *Lowe v Hotel Employees*, 389 Mich 124, 146 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1.

"Arbitrary" conduct by a Union includes actions which are impulsive, irrational, or unreasoned. *Goolsby*, *supra*, at 682. Garland alleges that the Union acted arbitrarily in April 2001 by refusing to file a grievance claiming that the County was violating the contract by refusing to fill vacant sergeant and lieutenant positions. The Union takes the position that under the contract language the Union does not have the right to demand that the Employer fill a position until the County's Personnel Department declares that a vacancy exists. The Union asserts that under the contract, a position does not become "vacant" at the time the person holding the position leaves the job, either permanently or temporarily. Instead, it becomes "vacant" when the County decides it is going to fill the position. The Union's interpretation of the contract is supported by the wording of Section 15.05(H). It is also supported by an arbitrator's decision issued in 1988. In this decision the arbitrator noted that in the absence of a contract provision clearly limiting an employer's right to fill vacancies, an employer has the right to determine whether or when it will fill a vacant position. When the arbitrator made this ruling, the Union's contract contained language stating that the "department shall fill all vacant sergeant positions within ninety days after the position becomes vacant." The arbitrator ruled, however, that the ninety days did not begin until the Employer had decided that a vacancy existed and that it was to be filled. I find that the Union's decision not to file Garland's grievance was based on a reasoned interpretation of the contract. I conclude that Garland did not establish that the Union acted arbitrarily or that it otherwise breached its duty of fair representation by refusing to file a grievance challenging the Employer's failure to fill vacancies.

Garland's charge includes three other allegations against the Union. She alleges that the Union violated its duty of fair representation by 'failing to challenge" the Employer's use of the 1999-2001 sergeant's list to make promotions before that list was properly certified, i.e. between June 1 and August 1, 1999. I find this allegation to be untimely under Section 16(a) of PERA, which requires that a charge be filed and served on the Respondent within six months of the date of the alleged unfair labor practice. The limitation period under this section commences when the person knows or should have known of the alleged unfair labor practice, i.e., of the act or acts which caused his injury and that the act was improper. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). Garland knew in August 1999 that the

County had recertified the sergeant's promotion list. She either knew or could easily have discovered at that time both that the County had made promotions from the original list and that the Union had not challenged these promotions.

Garland also alleges that the Union violated its duty of fair representation by entering into a settlement agreement allowing the promotion of an individual who was not at the top of the eligibility list. The promotion was made in June 1999. Although it does not indicate when the Union entered into this settlement agreement, the record indicates that the bargaining unit received an extra holiday from this settlement, which also involved other grievances. As noted above, as long as the Union acts in good faith, it has the discretion to decide not to pursue a grievance on the grounds that the unit as a whole would receive more benefit from a settlement even if a settlement is not in the interest of individual members. I conclude that the Union did not violate its duty of fair representation by entering into the settlement of its grievance over the June 1999 promotion.

Garland's final allegation is that the Union unlawfully refused to let her see a copy of the 1999-2001 sergeants' eligibility list. In its brief the Union contends that it has never been its policy to bar employees from reviewing eligibility lists, even when these lists are in effect, although it does not allow them to make copies. I conclude that Garland did not establish that the Union refused to let her see the list.

For the reasons set forth above, I find no violation by the Union of its duty of fair representation in this case. Based on the findings of fact, discussion, and conclusions of law set forth above, I conclude that Garland failed to establish that either Respondent committed a violation of PERA, and I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____