STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization - Petitioner and Respondent,

-and- Case Nos. CU03 C-018 & R03 A-16

AFSCME COUNCIL 25, LOCAL 2259, AFL-CIO,
Labor Organization - Charging Party,

-and-

GENESEE COUNTY SHERIFF,
Employer.
_____________________________________/

APPEARANCES:

Frank Guido, Esq., for Respondent POAM

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq., for Charging Party

DECISION AND ORDER AND DIRECTION OF ELECTION

On June 3, 2003, Administrative Law Judge (ALJ) Shlomo Sperka issued his Decision and Recommended Order in the above matter finding that Respondent, Police Officers Association of Michigan (POAM), did not restrain or coerce public employees in the exercise of the rights guaranteed by Section 9 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.209. The ALJ found that Respondent had not violated Section 10(3)(a), as alleged in the charges, and recommended that the charges be dismissed. The ALJ further recommended that the Commission order an election pursuant to the Petition filed in this matter by POAM.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On July 1, 2003, Charging Party AFSCME Council 25, Local 2259, AFL-CIO (AFSCME) filed timely exceptions to the ALJ's Decision and Recommended Order, a brief in support of the exceptions and a request for oral argument.

On July 11, 2003, Respondent filed timely responses to Charging Party's request for oral argument and Charging Party's exceptions, as well as a brief in response to the exceptions and in support of the ALJ's decision.

After reviewing the exceptions, the response to the exceptions and the briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, Charging Party's request for oral argument is denied.

Upon review of the record including the briefs filed by the parties, we find that the ALJ's decision and recommended order should be adopted. As explained more fully below, the evidence in the record does not establish that the actions complained of by Charging Party, that is, the removal of property from the Local 2259 office and the transfer of money from the Local's bank account, restrained or coerced public employees in the exercise of the rights guaranteed by Section 9 of PERA. Moreover, the evidence does not establish that the persons responsible for the removal of the property and the transfer of the money were acting as agents of Respondent.

Background Facts:

This matter concerns a challenge over the representation of a bargaining unit of deputy sheriffs employed by Genesee County. The bargaining unit is represented by AFSCME Council 25, Local 2259, AFL-CIO. In October 2002, Wayne McIntyre was elected President of Local 2259. McIntyre was dissatisfied with the representation the unit received from AFSCME. Shortly after his election, McIntyre began investigating the possibility of changing the unit's representative from AFSCME to POAM. In November of 2002, a member of the bargaining unit contacted POAM representative Bob Wines and asked Wines to contact McIntyre. Wines spoke to McIntyre, provided him with some literature about POAM, and asked him for permission to address the Local 2259 membership.

On January 16, 2003, a POAM representative spoke to the bargaining unit members. On the same date, Gary Pusheé, the POAM business agent, sent a letter to "the Genesee County Deputy Association" promoting POAM as their bargaining representative and citing the benefits of membership.

On January 17, 2003, McIntyre and the Local 2259 Treasurer Jamie Estep removed $32,610.21 from the Local's bank account, created a new entity in the name of "Genesee County Deputy Sheriff Association," opened a new bank account in that name and deposited the $32,610.21 into that account. On the same day, a computer, a Rolodex containing the names and addresses of bargaining unit members, several drawers of files, and other records were removed from the Local's office and taken to an undisclosed location by persons not identified in the record.

Local 2259 Chief Steward Val Rose was on vacation January 13 through January 26. When he returned from vacation, Rose learned about the removal of the files and heard that McIntyre and Local 2259 Vice-President Mike Cherry were passing out authorization cards for

POAM. Rose concluded that McIntyre was the chief proponent of POAM within the bargaining unit, and served as a source of information about POAM for the other employees.

On January 28, Rose was scheduled to meet with the Employer to discuss several grievances. It was his normal practice to review the grievance files the night before such a meeting. However, on that occasion, he was unable to review the files because they had been removed from the Local's office. At that time, there were about 25 grievances slated for arbitration. Rose testified that it was impossible for him to process those grievances without the files. Some of the files were returned within a week of Rose's return from his vacation. However, the bulk of the files were not returned until early March, after AFSCME obtained a temporary restraining order requiring the return of the files. During this period, several people approached Rose and asked why they should have faith in AFSCME when AFSCME could not keep track of their files. Rose responded to these inquiries by pointing out that AFSCME did not take the files.

On January 28, 2003, POAM filed the Representation Petition in this matter. During a February 21, 2003 telephone conference with a MERC election officer, the parties verbally agreed to a consent election by mail. However, the consent agreement was not executed by all of the parties and the election has not taken place.[1]

At a Local 2259 Executive Board meeting, on January 31, 2003, McIntyre reported to the board that the funds had been placed in the new account to be used as a nest egg for the new union and would not be touched until after the election. He also explained that if AFSCME won the election, the money would be returned to the original account. The board members discussed the merits of staying with AFSCME or moving to POAM, with Val Rose being the only one in favor of staying with AFSCME.

At a Local 2259 membership meeting, on or about February 12, McIntyre informed the members of the formation of the Genesee County Deputy Sheriff Association, which was to be affiliated with POAM. He also told them about the transfer of the funds to the new account, and that the funds were not to be used until after the election.

On February 21, 2003, the leadership of the AFSCME International Union announced the removal of the Local's officers and Executive Board, and appointed an administrator to handle the affairs of the Local. On February 27, 2003, AFSCME Council 25 obtained a temporary restraining order freezing the funds in the new bank account created by McIntyre and Estep, and requiring the return of the personal property of Local 2259 to the administrators of the Local.

During the time that these proceedings were taking place, AFSCME and POAM each issued newsletters to the employees criticizing each other's actions. One document issued by POAM asserts "AFSCME knows that the money was moved to a new account to protect it from

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1 Counsel for AFSCME acknowledged at the beginning of the hearing in this matter that there are no pending issues to be resolved with respect to the representation petition and that the Commission may order an election once the unfair labor practice charge has been resolved.

AFSCME getting it and using it to fund its propaganda campaign in the representation election."

On February 27, 2003, AFSCME Council 25, Local 2259, AFL-CIO, filed the unfair labor practice charge in this matter and asked that the charge block the election. The charges asserted that leaders of Local 2259, upon encouragement by POAM and its attorney, had stolen money, equipment and records belonging to Charging Party as part of POAM's efforts to displace Charging Party as the bargaining representative for the deputy sheriffs. The charge further indicated that these actions interfered with Charging Party's ability to process grievances and otherwise perform its responsibilities as the bargaining agent for the unit. This, it charged, restrained or coerced employees in the exercise of their rights guaranteed under Section 9 of PERA. In the light of the allegations made by Charging Party, it was necessary to determine whether the alleged unfair labor practices had occurred and whether they were of such a nature as to destroy the laboratory conditions necessary for an election. Accordingly, the Bureau of Employment Relations Director issued an order blocking the representation election pending the hearing on the unfair labor practice charge.

Discussion and Conclusions of Law:

The ALJ found that the evidence did not establish that an unfair labor practice had been committed by POAM, and recommended that the charge be dismissed and that the election be ordered. Charging Party excepts to the ALJ's recommendation and has delineated several of the ALJ's findings with which it disagrees.[2] Charging Party also contends that the ALJ erred in finding that there was no evidence that public employees were restrained in the exercise of their Section 9 rights and asserts that a ruling by the ALJ precluded it from offering such evidence. Charging Party's exceptions center on two issues: first, whether the persons responsible for the removal of the files and other property from Local 2259's office and the transfer of funds from the Local's bank account were agents of POAM; and secondly, whether these actions restrained or coerced public employees in the exercise of their rights under Section 9 of PERA. We will address the latter point first.

Restraint or Coercion of Public Employees in the Exercise of Their Section 9 Rights:

It is Charging Party's contention that the removal of the grievance files from the Local 2259 office restrained bargaining unit members in their efforts to pursue their grievances and thereby restrained them from exercising their rights under Section 9 of PERA. Charging Party has merely argued in its brief about the effect of the removal of the money and personal property on its ability to contact its members, its ability to process grievances, its ability to bargain with the employer, and its ability to carry out various other responsibilities. It has not offered evidence that these actions somehow restrained or coerced the bargaining unit members in the exercise of their Section 9 rights. Indeed in urging us to condemn the actions in question, Charging Party asserts, "[t]he benefit of a holding that a union may not, under PERA, steal the money and property from its competing union during an election, will assure that unions who

2 We have reviewed each of those points of disagreement with the ALJ's findings and as we find no merit in Charging Party's arguments, we do not find it necessary to specifically address each one.

are victimized by this behavior have a remedy within the very agency established to resolve labor disputes." (Emphasis added.) The flaw in this argument is that Section 10(3)(a)(i) does not protect "unions who are victimized" by other unions; it protects public employees. See *SEIU (Britten et al)*, 2002 MERC Lab Op _____ (issued April 16, 2002).

In addressing a similar point made by the ALJ, Charging Party contends that the ALJ erroneously held that a union cannot file a PERA charge against another union. Respondent contends that the ALJ correctly held that a representation election petitioner is not subject to an unfair labor practice charge claiming a violation of Section 10(3)(a)(i). In support of their conclusions as to the ALJ's findings, the parties point to the language on pages 11 and 12 of the ALJ's decision and recommended order, which states:

> The threshold issue is best summarized and addressed by reading Charging Party's brief. It asserts that if POAM is found to be behind "these acts of thievery," then POAM will be guilty of restraining AFSCME's "right" to represent its membership. The brief describes the protected right of the Union to file grievances. The flaw here is that Section 9 rights run to employees and not to a union. . . . One would speculate whether, if an employer persuaded local officers to do similar acts to hinder a union, this would be an unfair labor practice. But this is not the case here. . . . Conceptually, classic labor law deals with employer acts against employees or unions, or unions against employees or employers. Even if a rival union somehow caused union members to do these acts, this does not appear to fall within any PERA unfair labor practice charge.

The above-quoted statements are mere dicta and we find no ruling in those statements to the effect that a union cannot file unfair labor practice charges against a rival union, whether that union is a representation petitioner or an incumbent representative. It was not necessary for the ALJ to make such a broad ruling, since the facts contained in the record do not support the charge that POAM violated Section 10(3)(a)(i). Nor is it necessary for us to reach the issue of whether a union can file an unfair labor practice against a rival union, since the evidence in the record does not establish that POAM or its agents restrained or coerced public employees in the exercise of their rights under Section 9.

Charging Party contends that the ALJ erred in indicating that an employer who committed similar acts would be found to have violated PERA, but a union would not. In *Michigan Education Association (Branch Intermediate School Dist)*, 2000 MERC Lab Op 236, 237, we pointed out that when viewing actions alleged to restrain or coerce employees in the exercise of their Section 9 rights, "[i]n recognition of the considerable power which an employer has over tenure of employment, wages and working conditions, this Commission evaluates the actions of employers and unions differently." See also *Branch Intermediate School Dist*, 2000 MERC Lab Op 18, 24; and *Detroit Ass'n of Educ Office Employees*, 1980 MERC Lab Op 4, 9-11 (no exceptions).

Moreover, Charging Party fails to take into account the differences between Section 10(1), which applies to unfair labor practices by employers, and Section 10(3), which applies to

unfair labor practices by labor organizations. Section 10(1) specifically prohibits employers from interfering with the administration of any labor organization. Section 10(3) contains no such prohibition. The only provision of Section 10(3) that is arguably applicable here is Section 10(3)(a)(i), which prohibits a labor organization from restraining or coercing public employees in the exercise of their Section 9 rights. Inasmuch as there is no evidence that public employees were affected, much less restrained or coerced, in the exercise of their Section 9 rights, there is no PERA violation.[3]

Charging Party offered no testimony to indicate that the difficulty in processing the grievances without the files caused the loss of any of the grievances or had any other effect on the individual employee grievants. There is simply no evidence that the removal of the files from the Local's office caused public employees to be restrained in the exercise of their Section 9 rights.

Charging Party would have us reopen the record to permit it to offer evidence of the consequences to the grievants of having their files removed from the Local 2259 office. Charging Party contends that it was precluded from offering such evidence by the ALJ's ruling that it was not necessary to go into detail about the difficulty of processing grievances without the files. The ALJ did not find it necessary to take testimony about the difficulty that AFSCME officials had processing grievances after the removal of the files. Inasmuch as it is clear that it would be difficult to process the grievances without the files, we find no error in the ALJ's determination that testimony on that point was unnecessary.

The fact that it was difficult to process the grievances does not necessarily mean that the grievances were lost or that the grievants were adversely affected. As the ALJ's decision points out, the rights Charging Party accuses Respondent of affecting are rights belonging to the individual employees, not to a union. To show that the removal of the files from the Local's office restrained or coerced public employees in the exercise of their rights, Charging Party needed to offer evidence that individual public employees were affected. We do not view the ALJ's statements as precluding such testimony.

Neither the ALJ's ruling nor Charging Party's attorney's response indicates that the testimony the ALJ found unnecessary was testimony regarding the effect on the final outcome of the grievance or the effect on individual employee grievants. If Charging Party interpreted the ALJ's ruling so broadly as to preclude not only testimony about AFSCME's difficulty in processing grievances but also testimony regarding the outcome of the grievances, Charging Party could have objected to the ruling or made an offer of proof. Charging Party did neither.

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3 Clearly, the actions Charging Party wishes to attribute to POAM are distinguishable from the actions of the labor organization involved in the MERC case relied upon by Charging Party, *Wayne County Regional Educational Service Agency*, 1994 MERC Lab Op 996 (no exceptions). In that case, the Commission adopted an ALJ's decision finding a labor organization had violated Section 10(3)(a) by demanding voluntary recognition at a time when it did not enjoy majority support. The actions Charging Party wishes to attribute to POAM did not restrain bargaining unit members from choosing their representative, as they will still be able to have an election.

The failure to raise a timely objection constitutes a waiver of that objection. Thus, Charging Party's failure to object at the hearing bars it from filing an exception on this basis. See *Teamsters State, County & Municipal Workers, Local 214, -and- Ann Arbor Public Schools,* 2003 MERC Lab Op _____ (issued February 12, 2003)*;* and *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 540. See also *Plymouth-Canton Community Schs*, 1998 MERC Lab Op 545, 554. It is now too late to complain that the ALJ precluded Charging Party from offering evidence necessary to establish that an unfair labor practice had been committed.

Further, Charging Party's request for reopening is governed by Rule 166 of the Commission's General Rules, R 423.166. Under Rule 166, reopening of the record can only be granted upon a showing that the additional evidence Charging Party seeks to offer, if adduced and credited, would require a different result. Charging Party has not identified the additional evidence it seeks to offer. Without knowing what the evidence is and how it affects the issues in this case, we cannot conclude that it would require a different result.

Moreover, if we were to assume that Charging Party seeks to offer evidence that individual grievances were lost as the result of the removal of the files, that evidence, by itself, would not justify reopening. Even if such evidence were offered, and even if we were to conclude that the loss of the grievances caused individual grievants to be restrained in the exercise of their Section 9 rights, that would not be sufficient to require a different result in this case. For a different result to be justified, there must also be evidence that Respondent was responsible for the acts about which Charging Party has complained. As explained below, there is no evidence that the person or persons responsible for the removal of the files were agents of Respondent. Accordingly, we find that Charging Party's request for reopening of the record must be denied.

<u>Agency Status</u>:

Even if we found that the Section 9 rights of bargaining unit members were affected by the removal of the money and other property, we could not find that POAM committed an unfair labor practice because there is no evidence that POAM was responsible for the transfer of the money or the removal of the property from the Local's office. Charging Party contends that McIntyre and the other individuals responsible for the removal of the money and other property from Local 2259 were agents of POAM. However, the evidence in the record does not support that conclusion.

The only individuals identified in the record who were involved in the activities Charging Party complains about were McIntyre and Estep. They were both involved in the transfer of the funds from the Local's bank account, but there is no evidence that either of them were involved in the removal of the property from the Local's office. While McIntyre played a role in having the property returned, the record lacks information as to the extent of his role. We do not know whether he encouraged others to remove the property and aided in planning the removal and subsequent concealment of the property, or whether he merely learned about the removal of the property after it occurred. From his testimony that the files were not touched

while they were out of the office, we can assume that he had knowledge of the files' whereabouts at some point after they were removed from the office and knew who had possession of them. However, we cannot assume from that testimony that he had custody or control of the files at that time. Thus, the evidence does not establish that he was responsible for denying Charging Party access to the files and other records for the brief period they were away from the Local's office.

The NLRB and federal courts have long held that the common law of agency governs the question of who acted for whom for purposes of determining the culpability of unions or employers under the NLRA. See *St Clair Intermediate Sch Dist* v *Intermediate Educ Ass'n*, 458 Mich 540, 556-563 (1998).[4] That common law dictates that "An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." Restatement (Second) of Agency, §15 (1958). An individual is also given apparent authority to act for the principal if the words or other conduct of the principal, reasonably interpreted, cause the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. Restatement (Second) of Agency, §27 (1958). It, therefore, follows that a union may create an agency relationship either by directly designating someone to be its agent or by taking steps that lead third parties reasonably to believe that the putative agent was authorized to take certain actions. *Overnite Transp Co* v *NLRB*, 104 F3d 109, 113 (7th Cir 1997).

There is no evidence that POAM consented to having Estep act as its agent or that POAM did anything to indicate to third parties that she was its agent. At most, the record arguably supports the conclusion that McIntyre was POAM's agent for the limited purpose of soliciting authorization cards from his co-workers. The only evidence that an agency relationship was created is Rose's testimony that he heard from someone else that McIntyre had passed out show-of-interest cards. Assuming, based on that testimony, that McIntyre obtained authorization cards from POAM and solicited signatures on those cards, McIntyre would have the status of a "special" agent for POAM. See *Davlan Engineering, Inc*, 283 NLRB 803 (1987).

If we assume that McIntyre was authorized by POAM to solicit signatures on authorization cards, POAM would be responsible for acts done within the general scope of McIntyre's authority. *Hampton Merchants Association* 151 NLRB 1307, 1308 (1965). That is, POAM's liability for McIntyre's actions would be limited to representations made in the course of the solicitations. See *DID Bldg Services, Inc* v *NLRB*, 915 F2d 490, 496 (1990), and *Local 32B-32J, Service Employees' International Union*, 293 NLRB 325, (1989). McIntyre's status as a special agent is not sufficient to make POAM liable for McIntyre's actions in transferring Local 2259's funds from its bank account to the new account established for the Genesee County Deputy Sheriff Association or for whatever involvement McIntyre had in the removal of the files and other personal property from the Local's office. Neither activity could be

4 This Commission and Michigan courts have long recognized that PERA is patterned after the National Labor Relations Act (NLRA) and have looked to the federal courts and the National Labor Relations Board (NLRB or Board) in their construction of the NLRA for guidance in interpreting PERA. *St Clair Intermediate Sch Dist* v *Intermediate Educ Ass'n*, 458 Mich 540, 556-563 (1998); *Goolsby* v *Detroit,* 419 Mich 651, 660, n 5 (1984); *Gibraltar School Dist* v *Gibraltar MESPA,* 443 Mich 326, 335 (1993).

considered to be within the general scope of the special agent status that would have been granted to McIntyre if POAM provided him with authorization cards and literature to distribute.

Charging Party contends that not only was McIntyre a special agent of POAM, he was a general agent. Charging Party relies on *Bristol Textile Co*, 277 NLRB 1637 (1986), and argues that McIntyre's situation is analogous to that of Anthony Pirolo, who in that case was found to be the union's conduit to the employees in the bargaining unit. However, the Board's finding that Pirolo was the union's conduit to the employees was based on facts that are not analogous to the facts of this case. In *Bristol Textile Co*, aside from a few meetings, the union's only link with employees was through Pirolo. No union official had access to the plant. Pirolo conveyed employees' questions and made weekly reports to the union's vice president, who described Pirolo as his contact with the employees. Moreover, the employees, perceived Pirolo as the union's representative.

Unlike Pirolo, McIntyre was not POAM's only link to the employees. POAM sent a letter to the bargaining unit members and sent a representative to address them at a meeting. McIntyre did not have weekly contact with POAM. There is no evidence that he regularly submitted employees' questions to POAM. Further, there is no evidence that anyone from POAM ever identified McIntyre as POAM's spokesperson or as the spokesperson for the employees with respect to contacting POAM. Moreover, there was at least one other bargaining unit member who contacted POAM directly, the person who assisted McIntyre in initiating contact. Also, if Rose's hearsay testimony is to be credited, there was at least one other bargaining unit member who promoted POAM within the unit, Mike Cherry. Rose testified that he heard that Cherry distributed authorization cards. Clearly, the evidence does not establish that McIntyre was POAM's conduit to the employees. It is therefore evident that there was no agency relationship between McIntyre and POAM that would impose responsibility on POAM for McIntyre's actions with respect to the transfer of the bank account or the removal of the property from the Local's office.

Ratification:

Charging Party contends that even if POAM did not authorize McIntyre to act as its general agent, and even if his actions with respect to the bank account and other property were beyond the bounds of his authority as a special agent, POAM is liable for McIntyre's actions because it ratified those actions. Charging Party contends that Respondent had a duty to disavow McIntyre's actions and its failure to do so constituted ratification.

Indeed, an affirmance of an unauthorized transaction can be inferred from a failure to repudiate it, even in the absence of an agency relationship. Restatement (Second) of Agency, §94 (1958). See *BE & K Constr Co* v *NLRB*, 23 F3d 1459 (8th Cir 1994). In such a case, liability rests on two factors: knowledge of the transaction and circumstances creating a duty to disavow the transaction. See *Dean Industries, Inc* 162 NLRB 1078, 1093 (1967). See also *District 30, United Mine Workers of America* v *NLRB*, 819 F2d 651, 655-657 (6th Cir 1987); and *Southern Pride Catfish*, 331 NLRB 618, 619 (2000).

Those factors are not present with respect to any role that McIntyre may have had in the removal of the files and other property from the Local's office. First, there is no evidence that POAM had any knowledge of those activities. It is evident that Frank Guido knew about the removal of those items since he is McIntyre's attorney in the circuit court action brought by AFSCME. However, the fact that Guido is also POAM's attorney does not mean that his knowledge of McIntyre's actions can be imputed to POAM.[5]

Secondly, the record also lacks evidence of circumstances that would give rise to a duty on the part of POAM to disavow McIntyre's actions. McIntyre was not acting as POAM's agent with respect to the removal of those items. There is no evidence that POAM did anything to give others the impression that McIntyre was acting on its behalf with respect to the removal of the files or the other property. In addition, there is no evidence that the removal of those items provided any benefit to POAM. Although Charging Party has argued that the detriment to AFSCME caused by the temporary loss of the files was a benefit to POAM, Charging Party has failed to present any evidence of such a benefit. We will not find that POAM was benefited solely due to the fact that POAM's rival was inconvenienced.

It might appear that POAM ratified the transfer of the funds from the Local's bank account since POAM campaign literature openly endorses that action. It is clear that POAM had knowledge of McIntyre's actions. However, the circumstances do not give rise to a duty by POAM to disavow McIntyre's actions, as POAM received no benefit from the transfer of the bank account funds.

Although Charging Party argues that McIntyre took the money to be used by POAM, the evidence does not support this assertion. It is clear from Rose's testimony that the money was not removed from the bank account for the benefit of POAM, but for the benefit of the members of the bargaining unit. Rose testified that McIntyre stressed that the money would not be touched until after the election, that it would be used by the Genesee County Deputy Sheriff Association if POAM won the election and that it would be returned to the Local 2259 account if AFSCME won the election. Moreover, it is clear from both McIntyre's testimony and that of Rose, that McIntyre, as president of the Local, intended to keep the money for the sole benefit of his membership regardless of which labor organization represented them. In fact, the POAM campaign literature asserts that the money belongs to the bargaining unit members and does not claim that POAM would have any interest in those funds in the event it is successful in a representation election.

As with the removal of the files, there is no evidence McIntyre acted as POAM's agent, that POAM did anything to indicate to third parties that McIntyre was acting on POAM's behalf, or that POAM received any benefit from the transfer of the money in the bank account. As with the removal of the personal property, POAM had no duty to disavow McIntyre's actions in transferring the money. Accordingly, we find that the evidence in the record does not establish that POAM ratified McIntyre's actions.

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5 We completely reject any notion that Guido's status as both POAM's attorney and McIntyre's attorney somehow gave rise to an agency relationship between McIntyre and POAM.

In conclusion, we find no evidence that POAM or its agents restrained or coerced public employees in the exercise of their rights under Section 9 of PERA. We find that Respondent did not violate Section 10(3)(a)(i) of PERA, and that the order blocking the election in this matter must be set aside.

Order

We find the exceptions of Charging Party to be without merit and adopt the Administrative Law Judge's Recommended Order dismissing the Charge.

Direction of Election

We find that a question concerning representation exists within the meaning of Section 12 of PERA. Accordingly, we direct an election in the following unit, which we find appropriate for collective bargaining purposes within the meaning of Section 13 of PERA:

> All regularly scheduled personnel employed by the Genesee County Sheriff's Department classified as police deputies, corrections deputies and cooks, but excluding the Sheriff, undersheriff, corrections administrator, command officers, confidential, temporary and all seasonal employees and all other employees.

Pursuant to the attached Direction of Election, the above employees shall vote to determine whether they wish to be represented by the Police Officers Association of Michigan, or the American Federation of State County and Municipal Employees or neither.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Member

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Harry W. Bishop, Commission Member

Dated:___________________

CHAIRMAN LYNCH, CONCURRING SEPARATELY:

I concur with the result reached in this matter because I believe there is insufficient evidence to establish an agency relationship between Local 2259 President McIntyre and the POAM.

However, I do not agree with the legal analysis or conclusions reached with respect to the effect of the actions taken. If a rival union directs the transfer of the funds of another union, and the removal of its property and files, including grievance files, it almost certainly would restrain and coerce the membership in the exercise of rights protected under Section 9 of PERA, and violate Section 10(3)(a)(i). In my opinion, the diminishment of the exclusive bargaining agent's ability to police the contract, file and process grievances, contact the membership, and utilize dues monies, even on a temporary basis, would necessarily impact the PERA rights of its members.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

Dated:____________________

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN
Labor Organization–
Petitioner and Respondent

-and- Case Nos. CU03 C-018
R03 A-16

AFSCME COUNCIL 25, LOCAL 2259, AFL-CIO
Labor Organization –
Charging Party

-and-

GENESEE COUNTY SHERIFF

Employer
/

APPEARANCES:

Frank Guido, Esq.,
for Respondent POAM
Richard G. Mack, Jr., Esq., Miller Cohen, P.L.C.,
for the Charging Party

A. DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Section 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 9, as amended, MCL 422.210, MSA 17.455 (10), this matter came on for hearing at Detroit, Michigan, on April 18, 2003, before Shlomo Sperka, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on February 27, 2003, by American Federation of State County and Municipal Employees, Council 25, Local 2259, AFL-CIO, alleging that Police Officers Association of Michigan had violated Section 10 of PERA. Based upon the record, including briefs filed on or before April 28, 2003, 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 unfair labor practice charge filed in this matter reads, in pertinent part, as follows:

Charging Party Michigan AFSCME Council 25 and its affiliated Local 2259 file this attachment to its unfair labor practice charge. Charging Party alleges that Respondent Police Officers Association of Michigan violated the Public Employment Relations Act ("PERA") in the following manner:

Charging Party is currently the representative of the deputy sheriffs of the Employer. Earlier this year, the Police Officers Association of Michigan ("POAM") began speaking with Local 2259 leaders, in an attempt to convince them to replace AFSCME with POAM as their bargaining unit representative. Earlier this month and after these conversations began, some of the AFSCME Local 2259 leadership depleted the AFSCME Local 2259 account, created an entity entitled the Genesee County Deputy Sheriff's Association, d/b/a/, and opened a business account at Bank One and placed all of the AFSCME Local 2259 funds into that account. When AFSCME Council and International leadership learned of this, the Local was placed under administratorship as pursuant to the International Constitution, and the Local leaders who stole the Local 2259 money were removed. Upon the AFSCME International attempting to return the stolen funds of Local 2259, the removed Local leaders refused and indicated that AFSCME could not speak with their attorney, the in-house counsel for POAM – Frank Guido.

These same removed Local leaders stole all of the Local 2259 equipment, including the Local computer, which contained much membership information, all hard copies of all membership information, all grievance files, contract negotiation notes, and all other property of Local 2259 that was used to represent the membership. These removed local leaders have refused to tender this property back to the newly appointed Local 2259 administrators.

The Local 2259 administrators are now left without the ability to run the affairs and business of Local 2259. Filing grievances, assuring grievance time limits, protecting contract rights, and general representational issues have all been frustrated as the Local has no money and no information. The POAM attorney has justified the theft of the removed Local leadership in writing, and, on information and belief, had instructed the leadership to take these actions. Now, the AFSCME representation of the Local 2259 membership has been frustrated, one month before the POAM moves to replace AFSCME via election.

By these and other acts, Respondent has violated the PERA. AFSCME requests that this charge block the up-an-{sic} coming election where the Police Officers Association of Michigan is seeking to represent the Employer's deputy sheriffs.

Findings of Fact:

The employees in this matter are deputy sheriffs employed by the Genesee County, Michigan, Sheriff's Department. For some time prior to the events in question, which occurred in 2002, these employees have been represented by AFSCME Local 2259 of Michigan Council 25, AFSCME. The constitution of the International Union Governs the International and the Council. The Local Union has a Local constitution. Approximately 195 members make up the unit.

In October, 2002, Wayne McIntyre was elected President of the Local. He had been a Board member and Vice President. Shortly thereafter, he began to discuss with members of the Board and of the unit the possibility of selecting a new bargaining representative. He expressed his interest in the Police Officers Association of Michigan (POAM), at a November, 2002 Board Meeting and in other conversations. In January, 2003, he passed out show-of-interest cards for unit numbers to sign designating POAM as their bargaining representative for the purpose of securing an election. These cards were used in support of the petition in Case No. R03 A-16 (which is described in more detail below).

Local 2259 maintained an office in the Sheriff's Department. In this office were located its records in filing cabinets, a computer, address lists and other records including current grievances. Local 2259 also maintained a checking account in a nearby bank.

The specific events which gave rise to this charge took place on January 17, 2003. On that day, McIntyre and Union Treasurer Deputy Sheriff Jamie Estep went to the branch bank where the Local's account was located. McIntyre's intention was to remove most of the funds in the Local's account and transfer them to a new account not subject to control of AFSCME. He testified that the Branch Manager suggested he create a new " d/b/a" entity to receive the funds. The same day he went to the Genesee County Clerk's Office and registered the name of "Genesee County Deputy Sheriff's Association." He secured a tax I.D. number for the organization and returned to the bank. He and Estep, as president and treasurer, then signed a check for $32,610.21, made out to themselves. They then wrote a check to the newly established "Genesse County Deputy Sheriff's Association" for the same amount and created a new account.

On the same day, property belonging to the Local was removed from the Local's office. There is no eyewitness testimony as to who actually removed the property, where it was taken, where it was held, or a precise description of the property taken. The equipment included filing cabinets, a computer, Roll-a-dex containing addresses of members and other containers of Local Union records. It appears this office was used primarily by Deputy Sheriff Val Rose, the Chief Steward.

Rose, called as a witness by the Charging Party, testified that soon after McIntyre became President he began to discuss affiliation with the POAM at Executive Board Meetings. Rose was on vacation from January 13th to January 26. He learned that, during that time, McIntyre and Union Vice President Deputy Sheriff Mike Cherry were passing out show-of-interest cards. When he returned from vacation on January 26th, he was told by the second shift Steward that the office equipment and records of the Local were missing and that the bank account had been moved. He approached Estep, who told him to speak to

McIntyre. On January 28th, Rose spoke to McIntyre and asked about the missing files. McIntyre told him they were at an undisclosed location and that he had taken these steps to "protect the interest, our interest." Rose further testified that on January 31st, a meeting was called between the Executive Board of the Local and the officers and staff of Council 25 of AFSCME. According to Rose, McIntyre stated at this meeting that the funds had been placed in a new account as a basis for starting a new Union, but if the members should vote in the coming election to remain with AFSCME, those funds would be returned to the old Local. When the meeting with Council 25 officers ended, the Executive Board of the Local continued to meet. According to Rose, he was the sole member of the Board who criticized the transfer of funds and property. In February, at a general membership meeting, McIntyre told the membership of the new checking account and discussed the plan to use this money for a new Union. This was before February 21 because, according to Rose, at this membership meeting McIntyre told the members that on February 21, a consent election conference call would be conducted by the Employment Relations Commission involving the Employer and representatives of POAM and AFSCME, to determine whether an election would take place.

After the January 31 meeting, the leadership of the AFSCME International Union proceeded under its constitution to create an administratorship over the Local. This was announced on February 21, 2003. All of the Local officers and Executive Board were removed and an administrator and deputy administrator were appointed over the affairs of the Local. The deputy administrator Dennis Nauss, a staff member of Council 25, was given direct responsibility for the administration.

Nauss testified that he approached McIntyre and asked for return of the funds and office equipment on or about February 24. McIntyre declined to discuss the matter and referred Nauss to his attorney, Frank Guido. It appears that during this conversation representatives of AFSCME told McIntyre and others that they might be subject to criminal or civil penalties because of their actions. On February 25, Attorney Frank Guido wrote the International Union and filed his appearance on behalf of McIntyre, Michael Cherry, Jamie Estep, David Hoover, Steven Rippel, Jerry Yott and Timothy Bruchett, whom he described, in his letter, as the officers and Executive Board members of Local 2259.

On February 27, 2003, AFSCME and Council 25 secured a temporary retraining order in Genesee County Circuit Court against Wayne McIntyre, Jamie Estep and Bank One (the bank holding the checking account), freezing the funds in the new account, requiring McIntyre and Estep to return the personal property of Local 2259 to the administrators of the Local and scheduling a court hearing at a later date. (For reasons unrelated to the parties, having to do with the availability of the Circuit Court Judge, that hearing was put off.) The personal property was returned. The record does not reflect who had possession of the property, but McIntyre testified that he arranged for its return.

POAM called McIntyre as a witness who testified that he never actually had possession of the funds, but simply wrote one check from the old account and then a check to the new

account. Funds are frozen in that account as a result of the later temporary restraining order.

He testified as to the reasons for his actions. He was aware that the POAM would soon be filing a petition to represent the unit and believed that the Executive Board and members supported leaving AFSCME. He had heard of several Michigan AFSCME locals which had contemplated such changes, where the International Union had taken control of the assets of these local units. He spoke to members of these units in other communities and wanted to avoid this. He chose to remove the funds and property from the control of the Local to avoid the provisions of the International Constitution, which creates the relationship between the International and the subordinate units.

He testified that the Executive Board and membership supported this move. No vote was taken at the Executive Board meeting because no specific expenditure was contemplated at the time. However, after the transfer, the Board, according to his testimony, unanimously expressed support. He also testified that a Membership Meeting was held at which members approved the transfer. His first contact with his attorney, Frank Guido, took place on or about February 21, when he was threatened with civil and criminal action and he sought legal counsel. An attorney from the POAM staff had spoken at a membership meeting on January 16. On that same date, the POAM wrote a letter to the members of the unit addressed to "The Genesse County Deputy Association," setting forth the benefits of membership and representation by POAM. He denied any contact with Guido or the POAM legal staff in connection with his actions on January 17. Organizing for POAM began when one of the unit members contacted POAM in November, 2002, and a POAM representative then contacted him.

There is no direct testimony as to the taking of the files. According to McIntyre, he was not present when the files were removed, but he did arrange for their return. The files and equipment were in disarray when removed. He testified that the Union had once occupied a large office, but in January, 1999, the Sheriff had required a move to a much smaller office which resulted in substantial disorder of the files. This office was used mainly by Val Rose.

McIntyre admitted that the Local Union constitution calls for a membership vote and a vote of the Executive Board for all expenditures in excess of $400. Both the membership and the Executive Board voted after the fact, but he was unable to produce minutes of either of these meetings. The membership meeting which he called to approve this transfer took place on February 26. The meeting notice to the membership was in the form of an invitation to "Coffee and Donuts with Wayne" rather than the usual formal notice of the meeting. He was not aware of whether the usual attendance record was taken at this meeting of members present. He learned on the afternoon of February 24 that he had been removed from office, and of the appointment of the administrator.

He testified regarding the dues structure of the Local and the nature of the funds in the account. The funds which were removed were the difference between the required dues

and per capita tax payable by each member for the Local, the Council and the International and the total paid by each member.

In July, 1999, the Local membership increased their dues from $25 to $30 per month. The amount of $4.55 was in excess of the amounts required for the constitutionally defined dues. This voluntary increase was intended by the members for social and other non-business needs of the Local. He was able to determine that the amount in the bank balance derived from the voluntary contributions because every month all other funds were expended for regular Union needs. On January 17, there was approximately $33,000 in the account. A small amount was left to cover outstanding checks.

Charging Party introduced substantial testimony and exhibits relating to the dues structure. Dues are paid by a voluntary employee check-off sent by the Employer to the Union. Under this procedure, certain amounts will be paid to the International as the so-called per capita tax, certain amounts are retained by Council 25, and the balance rebated to the Local. Some of this rebated money is used for local expenses. The precise amount due to each entity is defined by the International Constitution and is carefully accounted for by various documents and reports introduced on the record. The parties devoted considerable attention to this topic on the record. The Charging Party stressed that all collected funds are dues belonging to the Local. Respondent stressed that the rebate to the Local includes both funds required by the dues structure for Local Union business and the additional $4.55 per month, assessed upon itself by the Local membership primarily for social functions. McIntyre considered this money to belong to the members rather than to the Local and it was, therefore, available to the membership for a new Local if they so choose.

Charging Party placed much emphasis in the record on the fact that the attorney representing McIntyre is General Counsel of POAM. The record indicates that Mr. Guido and other attorneys are referred to in POAM literature as the POAM legal staff.

Charging Party presented substantial testimony on the impact on the Local's functioning of the removal of files. Rose testified that he was scheduled to process four or five grievances when he returned from his vacation on January 27 or 28, and that he was unable to do so because of the missing files. McIntyre told him to go ahead with the cases anyhow. Rose also testified that when the files were returned, they were in disarray and not in order. Respondent presented testimony that responsibility for arbitration and grievance processing is with Council 25 and the International whose records were not affected by this removal. McIntyre also testified that the files were returned in the same condition in which they were found. The files were not handled or used in any way during the time they were away from the Local office. They were in disarray because of the earlier move in 1999, from a larger to a smaller office, which was done by Sheriff's Department employees who were not careful with the files which they moved. Rose disputed this. The testimony seems to agree that as Chief Steward Rose was the person only, or primarily, using the Union office and the files it contained. Incidentally, it appears that between the removal of the files on January 17 and Rose's return from vacation there was little, if any, notice of this event. Rose testified that the Assistant

Steward told him about it, but otherwise no notice was given Council 25 or the International Union of the loss. The legal responses, and other activity, began after Rose returned at the end of January.

Case #R03 A-17

This representation case was consolidated for Hearing with the unfair labor practice case. This Petition was filed by the POAM on January 28, 2003, seeking to represent a unit described as "All Regularly Scheduled Personnel Employed by the Genesee Sheriff's Department, classified as Police Deputies, Correction Deputies and Cooks. Excluded: the Sheriff; Corrections Administrator; Command Officers; Confidential, Temporary, and all seasonal Employees; and all other Employees." It appears that a consent conference by telephone took place in which there was verbal agreement to a consent election by mail, ballots to be mailed on March 17, 2003, and the votes to be counted by April 2, 2003. This agreement was never executed by all the parties. At the hearing, a letter from the Employer was placed in the record waiving the opportunity to the present at the hearing. Representatives of both unions stipulated that there were no issues to be raised in regard to the Petition. Accordingly, it is recommended that, when the Commission issues its final order in this matter, it includes an Order Directing an Election based on the petitioned for unit.

The election contemplated by the proposed consent agreement did not take place. It was blocked by administrative action of the Director, following filing of these charges.

DISCUSSION AND CONCLUSIONS

The parties outlined their theories of the case in their respective briefs. The Charging Party devoted two pages of its brief to establishing that an unfair labor practice had been committed. The bulk of the brief sought to establish an agency relationship between Respondent POAM and McIntyre, who carried out the acts alleged to be unfair labor practices.

Charging Party's theory of the unfair labor practices can best be set out by quoting its brief.

AFSCME has filed a charge against POAM for interference with its section 9 rights under the Public Employment Relations Act. MCLA § 423.210 states that a labor organization or its agents shall not "restrain or coerce…public employees in the exercise of the rights guaranteed in section 9. Section 9, MCLA § 423.209, states that

"It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other natural aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice."

In this case, AFSCME claims that POAM, by having AFSCME's money and property taken, caused a restraint in and coercion of AFSCME's right to "engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid or protection." The actions also restrained and coerced AFSCME's right to "negotiate and bargain" grievances and other matters with the employer, the Genesee County Sheriff. These rights were also lost to the many Local 2259 members, who had grievances that were not being processed, or that were not contacted by the Local due to the loss of the Local's contact information.

Filing grievances is but one example of how the loss of files and funds can hamper the process of a union. Other areas affected are: the general contract administration, such as reviewing old arbitration opinions to determine whether the employer is correctly interpreting the agreement; organizing finances to assure the employer is deducting dues properly and to assure that each employee is being assessed for the correct amount of dues; maintaining the accurate financial records of liabilities and expenditures; and maintaining contact with membership; filing and processing unfair labor charges; etc. There are many functions that POAM purposefully frustrated within AFSCME, all of which are protected "concerted activity" within the PERA.

The bulk of the argument of the brief is devoted to establishing an agency relationship between McIntyre and POAM. Recognizing that there is no direct evidence of POAM involvement in the removal of the property or funds, the brief argues that under common law and Commission precedent, McIntyre had "apparent authority" on behalf of POAM and was either a "general" or "special" agent of POAM. The brief cites NLRB cases holding that employees passing out show-of-interest cards have a "special agency relationship" with the union for purposes of card solicitation. It argues that "apparent authority" arose because as principal organizer for POAM, McIntyre "held himself out" to others as an agent of POAM. It argues that POAM had a "right of control" (often a basis for finding agency), because POAM provided information about its representation and McIntyre could only promote POAM "to the extent of what they provided him." The brief argues that POAM "ratified" McIntyre's actions by taking the benefits of his action to show that POAM "authorized" the actions. The brief cites cases holding unions responsible when Union Officers failed to disavow illegal picketing or violence by individuals.

The brief sees similar ratification in the actions of POAM. POAM sent a letter on January 16, addressed to the "Genesee County Deputy Sheriff's Association, a day before McIntyre secured a d/b/a for the Genesee County Deputy Association. McIntyre announced to the membership at the subsequent meetings that the funds and property would be used to support the new local which will be associated with POAM. When Nauss approached McIntyre to recover property, McIntyre referred him to his attorney. His attorney, in conversations and written communications, asserted the legality of McIntyre's actions and claimed to represent McIntyre and the other Executive Board members individually. However, this same attorney is general counsel of POAM. According to the Charging Party, this is sufficient basis for third parties (Nauss, Rose and

the Local 2259 membership) to conclude that the principal (POAM), had authorized the agent (McIntyre), to do the acts in question. The brief argues that since McIntyre was the "main point of contact" with the Deputy Sheriff unit for POAM, this establishes his agency. The brief cites an NLRB case, holding that threats of violence by individual union supporters in some circumstances may be considered conduct attributable to the Union. Charging Party rests this argument on the testimony of Rose that he never saw any other POAM officials at the work site from which we must conclude that McIntyre was the "sole contact" of unit employees with POAM. The brief finally argues that even if McIntyre is not employed by POAM and if it is found that POAM did not instruct McIntyre to take these actions, POAM is still liable because it received the benefit of his actions and thereby ratified the actions.

Respondent POAM argues different issues. POAM filed a motion for summary dismissal of the charge on three grounds:

(1) That MERC lacks personal jurisdiction over POAM;
(2) That the charge fails to state a claim under PERA;
(3) That there is no issue of genuine material fact.

The Brief argues that Section 10 (3)(a)(i) applies only to labor organizations which have some bargaining representative status under the statute. POAM at this point has no representative status. Therefore, the brief argues, there is no jurisdiction for unfair labor practice purposes.

The brief further argues that the allegations do not state a claim of an unfair labor practice but, at best, would represent possible objectionable conduct. The objections themselves have been waived since AFSCME consented to an election after the alleged unfair practices. (Although AFSCME agreed verbally to an election during the telephone consent conference, it never executed the agreement.) It argues that there is no basis in Commission case law for blocking an election because of potential post-election objections.

The brief asserts that no unfair labor practice has been shown by POAM. There is no testimony or evidence linking POAM to McIntyre's actions. Charging Party witnesses admitted that they had no direct evidence and only "assumed" or "had the impression" that McIntyre received directions from POAM. These impressions are based on flimsy and insubstantial bases. Thus, for example, Charging Party claims that its representatives, as "third parties" gained the impression of POAM involvement because McIntyre's attorney is counsel for POAM and shares the same office and phone number. Also, the name selected by McIntyre for the d/b/a is similar to names of affiliates of POAM. The brief stresses that Charging Party has failed to prove what it asserted in its opening statement and communications to the Commission in which it claimed that it would prove that McIntyre was "directed" by Respondent. In fact, there is no evidence of any direction or authorization. Charging Party has been unable to prove any connection of the type asserted. The brief further argues that even under election law theory these events would not constitute objectionable conduct. There is no evidence of any threat, promise, or

limitation on free choice. The absence of the funds and the Union records did not impede functioning of the Local since, according to Rose, some records were returned to him before the Circuit Court hearing and the rest thereafter. The POAM brief cites Commission cases, that MERC will not police or regulate pre-election misconduct including fabrication and false information. The brief argues that these cases are relevant. Finally, POAM argues that even if there were evidence that POAM or its attorney instructed the Local Officers on "how to protect themselves against AFSCME's desire to illegally convert to its own use, money belonging to the bargaining unit members," there is no evidence that POAM or its attorney ever had control over the treasury of the Local and the monies in the checking account.

DISCUSSION AND ANALYSIS:

This case presents a number of issues, both independent and interrelated. The Charging Party has developed a complex set of arguments seeking to establish connections between Respondent, POAM, and the individuals responsible for the alleged improper conduct. Before analyzing that, however, it is necessary to look at the broader picture. These events took place as part of an organizing drive in which one union is seeking to represent employees who have a bargaining agent. The employees who assisted POAM were protected by PERA in seeking to select a bargaining agent. Within the statute there is no difference between unorganized employees who wish to secure a bargaining agent and represented employees who wish to change. Both draw their rights from section 9 of PERA which gives public employees the right to "form, join or assist in labor organizations."

The Charge alleges that the actions are prohibited by Section 10 of PERA. The Motion to Dismiss disputes that legal analysis. Even if the actions could be attributed to POAM, which POAM denies, the Motion contends that the facts alleged would not constitute an unfair labor practice. This threshold issue is best summarized and addressed by reading Charging Party's brief. It asserts that if POAM is found to be behind "these acts of thievery," then POAM will be guilty of restraining AFSCME's "right" to represent its membership. The brief describes the protected right of the Union to file grievances. The flaw here is that Section 9 rights run to employees and not to a union. The brief describes interference with "the membership's right to representation." However, evidence of this is skimpy at best. There is no evidence of direct interference with employee protected activity. There is a contention that the Local had difficulties in carrying on its routine business. Except for delay or difficulty processing several pending grievances, there appears to be no other effect directly on members. While lack of grievance records would impede or delay processing of the grievances, there is no evidence that grievances were lost or employee grievance rights defeated because of these events.

AFSCME argues that these actions caused it to appear incompetent and ineffective in the eyes of its members. This theory has echoes in employer unfair labor practices. When an employer bypasses a union and negotiates directly with employees, one theory of the violation is that this leads these employees to believe that the Union is unnecessary, ineffectual, and thereby discourages membership. In the instant case, the members were

aware that the Local, under administration, was experiencing problems. They well knew, however, that any problems were because of the actions of the former officers and not due to "incompetence" of the AFSCME leadership outside of the Local. This hardly reflects on the way members would view the Charging Party's skills and effectiveness since they would know that these difficulties were not the fault of the Charging Party as a labor organization.

The Charge alleges that McIntyre and the Local officers committed wrongful acts attributable to POAM. A primary question is, under what standards was there a wrongful act. On January 17, the Local officers were responsible for the funds and property of the Local under the International's and the Local's Constitutions. If the Local Officers violated the strictures at any of these, the penalties are also set by these Constitutions. These are internal matters subject to the remedies of the governing documents. If there were criminal acts under State law, the remedies are with the local prosecutor. It is important to note that the action for an injunction to return the property named only the two Local officers. It did not name POAM.

The AFSCME brief states, "The evidence clearly shows that POAM collaborated, and even instructed, McIntyre to take the money and property." Put simply, the evidence does not support this assertion. There is no evidence of direct connection. The Charging Party devoted its brief to trying to prove agency based on ratification. This complex argument does not require a detailed analysis. There is no evidence that POAM had any direct benefit of McIntyre's actions. The bank account was under the control of McIntyre and Estep. POAM had no direct access to this account. McIntyre made clear to the members that this money would be used for a new organization that would be affiliated with POAM. This does not deliver the funds or prove they came, or would ever come, to POAM.

As to the office equipment and supplies, the record is strangely silent. McIntyre testified that he was not the person who took the property. There is no evidence on the record as to what happened to this property and where it was before the Court Order. Although McIntyre testified that he was involved in returning the property, this is insufficient to create any type of ratification or apparent authority deriving from POAM. That the same attorney represents the Local officers as individuals and represents POAM does not create agency from POAM.

The Charge rests on two pillars: (1) that an illegal act took place and (2) that Respondent caused it. The record proves neither. One would speculate whether, if an employer persuaded local officers to do similar acts to hinder a union, this would be an unfair labor practice. But this is not the case here. At most, these were zealous, or over-zealous, employees engaged in a protected activity of planning to join a union. If they broke their Union's law, or criminal law, the remedy is not under PERA. Conceptually, classic labor law deals with employer acts against employees or unions, or unions against employees or employers. Even if a rival union somehow caused union members to do these acts, this does not appear to fall within any PERA unfair labor practice.

As to the second issue, moreover, the record does not establish an agency relationship between the individual officers of Local 2259 and Respondent. Therefore, the charge must be dismissed.

RECOMMENDED ORDER

It is recommended that the Commission issue an Order dismissing the Charge.

Shlomo Sperka
Administrative Law Judge

Date:___________________