

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

In the Matter of:

CITY OF DETROIT (POLICE DEPARTMENT),
Public Employer - Respondent,

Case No. C02 K-249

-and-

DETROIT POLICE OFFICERS ASSOCIATION,
Labor Organization - Charging Party.

APPEARANCES:

City of Detroit Law Department, by Dara M. Chenevert, Esq., and Valerie A. Colbert-Osamuede, Esq.

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by James M. Moore, Esq.

DECISION AND ORDER

On February 26, 2004, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Harry Bishop, Commission Member

Maris Stella Swift, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan by Roy L. Roulhac, Administrative Law Judge for the Michigan Employment Relations Commission (MERC) on September 23, 2003, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based upon the record and post-hearing briefs filed by November 21, 2003, I make the following findings of fact, conclusions of law and recommended order pursuant to Section 16(b) of PERA.

The Unfair Labor Practice Charge:

Charging Party Detroit Police Officers Association (DPOA), filed this unfair labor practice charge against Respondent City of Detroit on November 8, 2002. As amended on June 12, 2003, Charging Party alleges that Respondent unilaterally changed the standards and criteria for promoting DPOA members by agreeing to honor an Act 312 Arbitration Award between the City of Detroit and the Detroit Police Lieutenants and Sergeants Association (“DPLSA”) that directed the City to promote all investigators to sergeant ahead of its members.

Stipulated Facts:

The facts are not in dispute; the parties stipulated to them at the hearing. The DPOA is the exclusive bargaining representative of all police officers employed by Respondent below the rank of investigator. Investigators are represented by the DPLSA. The parties have a long-standing practice of creating eligibility registers for making

promotions to the rank of sergeant. The register combines both police office and investigators. Investigators do not receive any additional consideration for promotions to sergeant. Promotions are made from the register in strict order of listing. The register remains viable until it is exhausted or until there is another promotional exam, whichever comes first. On May 19, 2000, Respondent issued Personnel Order 00-297 that set forth promotional criteria for an August 13, 2000 promotional exam for sergeant. An eligibility register was created on October 17, 2000, and remains in effect. On October 27, 2000, Respondent made promotions to sergeant from the register in numeric order.

Respondent and the Charging Party have negotiated a collective bargaining agreement for the period July 1, 2001 through June 30, 2004. During contract negotiations and the Act 312 proceedings, except for a proposal by Respondent to make candidates who had been the subject of disciplinary action ineligible for promotion, neither party proposed changes to sergeant's promotional procedure. The Act 312 panel did not adopt Respondent's proposal.

On June 23, 2003, an award was issued in an Act 312 arbitration proceeding between the DPLSA and Respondent. One of the issues before the arbitration panel was a proposal by Respondent to develop new promotional criteria for promotions to Lieutenant. In response to Respondent's expressed intention to eliminate the rank of investigator, the DPLSA presented what the arbitrator referred to as "credible testimony" that investigators performed many of the same duties and assumed the same responsibilities as sergeants. The DPLSA asked the panel to include, as part of its award, an order to promote all investigators to sergeant. The panel adopted DPLSA's recommendation and concluded that, "the Department shall promote any and all Investigators to the rank of Sergeant without either adhering to past practice or adhering to these new criteria as it deems necessary."

Charging Party did not receive notice from any interested party in the DPLSA Act 312 proceedings regarding the promotion of all investigators to sergeant without regard to past practice before the Act 312 award was issued. Respondent has indicated its intention to implement the Act 312 award and to promote all investigators to sergeant.

During the March 2003 Act 312 Arbitration proceeding between Respondent and Charging Party, Labor Relations Director Roger Cheek acknowledged that an Act 312 panel did not have authority to direct changes in conditions of employment that affected more than one bargaining unit without the consent, or a comparable and consistent Act 312 Awards, of the other affected units. In the same Act 312 proceeding, former Police Chief Jerry A. Oliver, Sr., testified about the importance of equal opportunity in the promotion process. He observed that, "we want to give opportunities to those people who, in fact, have prepared themselves and have done all the right things, who follow the rules, so they can, in fact, be promoted, and that they won't be discouraged by us treating someone who have not done all those things the same way that we treat them." He noted that, "it's a tremendous morale issue when things aren't equal and when there aren't equal opportunity for people to be promoted and to be recognized for the hard work and the preparation they've given. He offered that, "it's important to have clear, published, understood rules that employees can follow to become – to get promoted."

Conclusions of Law:

Charging Party argues that Respondent will commit an unfair labor practice by promoting to sergeant investigators who are ranked lower on the eligibility roster than its members, and more than a hundred investigators who are not even on the eligibility register. According to Charging Party, Respondent's action will change an existing condition of employment that is a mandatory subject of bargaining. Charging Party also contends that Respondent cannot attempt to hide behind the cloak of its Act 312 Award with the DPLSA to justify unilaterally changing the promotion system to the detriment of its members. Charging Party asserts that an Act 312 arbitrator is not empowered to change conditions of employment that exist between the Respondent and another bargaining unit.

Respondent claims that it cannot unilaterally change the promotional system because the investigators' promotion to sergeant do not involve promotions from the eligibility register but are from a statutorily created Act 312 proceeding between the City and DPLSA. Therefore, according to Respondent, it was not obligated to bargain with the Charging Party regarding promotions that involve its members. Moreover, Respondent asserts that the DPLSA Award that promoted the investigators is not a mandatory subject of bargaining between the City and the DPOA.

I find no merit to Respondent's arguments. It is well settled that if a public employer takes unilateral action on a mandatory subject of bargaining before reaching an impasse in negotiations, the employer has committed an unfair labor practice. *Local 1467, International Ass'n of Firefighters, AFL-CIO v. City of Portage*, 134 Mich App 466, 472 (1984). Mandatory bargaining subject are matters that have a significant impact on wages, hours, or other conditions of employment or settles an aspect of the employer-employee relationship. *Portage* at 472. It is well established that standards and criteria for promotion are a mandatory subject of bargaining. In *Detroit Police Officers Association v City of Detroit*, 61 Mich App 487, 497 (1975), the Court observed:

There is no doubt that promotional standards and criteria "vitally affect" the terms and conditions of employment for DPOA members. In a profession dedicated to the pursuit of excellence, promotion – and important indicator of successful striving – is a crucial motivating force. (61 Mich App at 496)

Respondent's former Chief of Police recognized the importance of equal opportunity in promotions and its impact on officers' morale when he testified during the Act 312 proceeding between Respondent and DPLSA. He observed that "it's a tremendous morale issue when things aren't equal and when there aren't equal opportunity for people to be promoted and to be recognized for the hard work and the preparation they've given."

I find that Respondent is not relieved of its duty to bargain with Charging Party over promotional standards and criteria by claiming that the investigators' promotions will not made from the eligibility register, but from an Act 312 award involving the City of Detroit and a different bargaining unit. The facts of this case are analogous to those

presented in *City of Port Huron*, 1985 MERC Lab Op 872 (no exceptions). There the employer negotiated changes in the promotional system with its supervisory police union that adversely affected promotional opportunities of non-supervisory police officers. In finding an unfair labor practice, the ALJ stated:

The City is in the unusual position of being obligated to bargain with both the nonsupervisory and supervisory police units regarding promotions to lieutenants. One, for promotion out of the nonsupervisory bargaining unit to lieutenants. Another, for promotion within the supervisory bargaining unit. The Employer cannot be absolved of its duty to bargaining concerning promotional standards, as it seeks to do here, by telling the Charging Party to go bargain with the supervisory police unit. The supervisory police bargaining agent has no duty to bargain with the Charging Party – the Employer has.

I agree with Charging Party's assertion that the significance of the holding in *City of Port Huron* is not diminished because the unilateral change resulted from a negotiated agreement rather than an Act 312 award, as in this case. During the Act 312 proceeding between Respondent and DPLSA, Labor Relations Director Roger Cheek recognized that an Act 312 panel could not direct changes in conditions of employment that affected more than one bargaining unit without the consent, or a comparable and consistent Act 312 Awards, of the other affected units. Yet, it seeks to do so in this case. Respondent is not absolved of its bargaining duty because a statutorily created Act 312 arbitration panel changed the promotional procedure. I find that Respondent's unilateral change in the standards and criteria for promotion to sergeant, without bargaining with Charging Party, represent a basic and clear failure to bargain in good faith in violation of PERA. To find otherwise would render an employer's duty to bargain in good faith meaningless.

I have carefully considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. Based on the above findings of fact and conclusions of law, I recommended that the Commission issue the order set forth below:

Recommended Order

It is ordered that the City of Detroit, its officers, agents, representatives, and successors shall:

A. Cease and desist from:

1. Refusing to bargain collectively and in good faith concerning wages, hours, and working conditions with the Detroit Police Officers Association and unilaterally changing the promotional standards and criteria.
2. Unilaterally imposing and changing terms and conditions of employment in the absence of a lawful impasse.

3. In any other manner, interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them in Section 9 of PERA.

B. Take the following affirmative action to effectuate the policies of PERA and to remedy the unfair labor practices:

1. Upon request, bargain collectively and in good faith concerning wages, hours and working conditions with the Detroit Police Officers Association as the exclusive bargaining representative of police officers below the rank of investigator.
2. Restore to the police officers the terms and conditions of employment that were applicable prior to issuance of a June 23, 2003, Act 312 award that promoted all investigators to sergeant and continue them in effect until the parties reach an agreement or a good-faith impasse in bargaining.
3. Make the police officers whole for any losses they may have suffered because of promotions to sergeant that did not comply with the parties' past practice, including interest at the statutory rate.
4. Post copies of the attached Notice to Employees in conspicuous places on its premises, including all locations where Notices to Employees are customarily posted for thirty consecutive days. The notice shall not be altered, defaced or covered with any other material.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before an Administrative Law Judge of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, the CITY OF DETROIT (POLICE DEPARTMENT) was found to have committed unfair labor practices in violation of the MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). Based upon an ORDER of the COMMISSION, WE HEREBY NOTIFY OUR EMPLOYEES that:

WE WILL NOT refuse to bargain with the collective bargaining representative, DETROIT POLICE OFFICERS ASSOCIATION, of our police officers below the rank of investigator by unilaterally changing their working hours, pay and benefits without first giving notice and bargaining, upon request, with the DETROIT POLICE OFFICERS ASSOCIATION.

WE WILL rescind our unilateral change in the working hours, pay, and benefits of the fire fighters and restore the conditions that existed prior to the issuance of a June 23, 2003 Act 312 Award, including making them whole for any loss of wages and benefits to the date of compliance with the Commission's order.

WE WILL, upon request, recognize and bargain in good faith with the DETROIT POLICE OFFICE ASSOCIATION, regarding the hours of work, pay, and benefits of police officers below the rank of investigator.

All of our employees are free to engage in lawful, concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid or protection as provided by Section 9 of the Public Employment Relations Act.

CITY OF DETROIT

DATE: _____