

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

In the Matter of:

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

Case No. C03 B-035

-and-

TEAMSTERS LOCAL 328
Labor Organization-Charging Party.

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APPEARANCES:

Robert J. Jamo, Esq., City Attorney, City of Menominee, for the Respondent

John B. Burcham, Esq., for the Charging Party

DECISION AND ORDER

On July 30, 2004, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

Nora Lynch, Commission Chairman

Harry W. Bishop, Commission Member

Nino E. Green, 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 Escanaba, Michigan on October 13 and 16, 2003, 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 parties on or before December 23, 2003, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 328 filed this charge against the City of Menominee on February 1, 2003. Charging Party represents a bargaining unit of nonsupervisory police officers in Respondent's police department. Charging Party alleges that in January 2003, Respondent violated Sections 10(1) (a) and (c) of PERA when it failed to promote bargaining unit member Andrew Porath to sergeant because of Porath's union activities.

Facts:

Deputy Police Chief James Furlong heads Respondent's police department. Furlong reports to Jefferey Jones, the director of police and fire services. Charging Party's bargaining unit consists of three sergeants and approximately 10 patrol officers. The department also has a patrol lieutenant and a detective lieutenant.

Andrew Porath was hired as a patrol officer in 1996. In January 2003, Porath was the third most senior patrol officer in the department. He has a college degree in criminal justice. Porath is a field training officer and oversees the department's field training program. Porath has several letters of commendations in his file and has no disciplinary record.

In August 2001, a sergeant position became vacant when the incumbent was promoted to lieutenant. A second sergeant left Respondent's employment in December 2001. Between December 2001 and November 2002, Lauri Berg, Charging Party Local 328's president, repeatedly asked Respondent to fill the two vacant sergeant positions. Berg complained that the most senior patrol officers, including Porath, were being required to perform sergeants' duties without extra pay. Throughout this period, Respondent gave several different reasons for its delay in filling the positions. The delay was a source of irritation to the patrol officers, particularly the more senior officers upon whom the extra work devolved and who hoped to be promoted.

During part of this period, the parties also had an ongoing dispute over shift scheduling. The patrol officers' work schedule required them to work six days, have two days off, and then rotate to the next shift. The majority of officers felt that this schedule had an adverse effect on their family lives and their health. Porath felt particularly strongly about this issue. In January 2002, Porath went to Furlong's house to try to persuade him to change to a system of permanent shifts. The two men argued over the issue for over an hour. Shortly thereafter, Charging Party proposed a change in scheduling involving permanent shifts and 12-hour work days.

Patrol officers in Respondent's department wrote seventy-five percent fewer traffic tickets in January 2002 than in January 2001. Furlong suspected that the officers were engaging in a concerted work slowdown. In February 2002, Furlong, in response to Porath's inquiry as to when the sergeant vacancies would be filled, told Porath that he did not feel that "anyone was promotable at that time" because of the drop in officer productivity.

Porath had several informal discussions with Furlong about permanent shifts in February and early March. Around this time, Porath also attended a meeting with Respondent to discuss the shift issue. Present, in addition to Porath, were Berg, Charging Party steward Greg Furmanski, Furlong, Jones, and Anthony Furton, Respondent's city manager and personnel director. The meeting was not cordial. Jones abruptly left the meeting after Porath asked a question, remarking that he "didn't need to listen to this sh-t." Furlong told Charging Party representatives that since the parties were making progress on the scheduling issue, "you can go back to writing tickets."

Ticket statistics did not improve in February. In late February, Furlong told Furmanski that he knew that there was a work slowdown going on, and that everyone in the community knew it too. Furlong told Furmanski that he would give him three weeks to put a stop to the slowdown. Furmanski replied that he did not know what Furlong was talking about. He also said that he would talk to the officers, but that he could not make them do what they did not want to do. A few days later, Furlong called Furmanski to his office and told him that the slowdown “had to end now.”

On March 18, 2002, several patrol officers attended a meeting of Respondent’s City Council with William Nelson, Local 328’s secretary-treasurer. Furmanski, Porath, and Nelson spoke to the Council in support of permanent shifts for patrol officers. Council members told them that they should take up this issue with the Council’s public safety committee.

On April 4, 2002, Furlong issued four memos. The first memo directed patrol officers to leave their patrol cars and physically check doors and windows when doing building checks. The second informed officers that no more than one patrol vehicle was to be at the station during a shift, that patrol officers were to be on patrol from 15 minutes after the start of their shift to 15 minutes before its end, and that if officers needed to be in the station for a longer period they must inform the most senior officer available of the reasons. The third memo announced that all road patrol officers would be spending half their shifts performing selective traffic enforcement duties in assigned areas. The fourth memo reminded uniformed officers of a provision in the departmental manual requiring them to wear their uniform hats at all times except when in a patrol car or building. According to Furlong, he issued these memos to address what he perceived as a decline in officer performance. Several patrol officers saw these memos as retaliation for their complaints over the shift schedule. They were particularly concerned that Furlong would begin reprimanding officers for accidental violations of the hat rule.

During the spring and early summer of 2002, Charging Party filed approximately five grievances. These grievances included two grievances filed on Porath’s behalf over vacation and compensatory time issues. Porath testified that after Charging Party filed these grievances, Furlong avoided looking at him and spoke to him only when necessary. By this time, considerable antagonism had developed between Nelson and Respondent representatives. At a meeting held to discuss one of the grievances, Furton told Nelson, who does not live in Menominee, that he was an outsider who came to town only to cause problems. On another occasion, Respondent’s legal counsel, Robert Jamo, interrupted a meeting between Nelson and Furton over a grievance and ordered Nelson to leave Respondent’s premises.

Sometime between May and the fall of 2002, Respondent decided to fill the detective lieutenant position that had recently become vacant. Porath, Patrol Officer Brian Barrette, and Patrol Lieutenant Dennis Weaver applied for the position. Barrette, who had had approximately two years more seniority than Porath, was chosen for the promotion. Furton told Porath that he had done well on his interview, but that Barrette’s performance as school liaison officer had weighed in his favor. 1

1 Charging Party did not assert that Porath failed to get this promotion because of his union or other protected activities.

Shortly after Barrette was promoted, Furlong called Porath into his office and told him that he had noticed that they did not speak to each other anymore. Furlong asked Porath if they could put their past disputes behind them. Porath replied that he felt that he was the most qualified candidate for the lieutenant position, and that he was disappointed and angry at not receiving the promotion. Porath said that he felt that he could “no longer look Furlong in the eye” because Furlong had told him that being productive and being a field training officer was the way to be promoted. Furlong asked Porath if he had ever promised Porath a promotion. Porath replied that he had not, but that the best qualified candidate should be promoted.

On September 18, 2002, Respondent announced that it was changing to a permanent shift system effective February 2003. On November 12, 2002, Respondent informed the patrol officers that it intended to fill the vacant sergeant positions. As provided in the parties’ contract, the positions were to be first posted for bid by members of the bargaining unit. Respondent announced that Furlong, Jones and the members of the Council’s public safety committee would interview the applicants and make the decision. Respondent has used this method of filling vacancies since at least 1995, and Charging Party did not object to its use in this case.

On November 15, Charging Party filed a grievance on behalf of Porath, Patrol Officer Thomas Barrette, and Patrol Officer Steve Hubert alleging that Respondent had assigned them to perform sergeants’ work without extra pay. At the arbitration hearing in July 2003, Jamo told the arbitrator that Charging Party would probably soon be replaced as bargaining agent by another labor organization. The arbitrator granted the grievance and awarded the patrol officers backpay in August 2003.

Sometime in December 2002, Furlong called Porath to his office. Furlong testified that he wanted to speak to Porath because he had heard rumors that Porath was considering resigning as field training officer, and because Furlong had noticed that Porath was no longer wearing his field training officer pin (the back of the pin was broken). Furlong told Porath that he had noticed some qualities that made Furlong think that Porath should not continue as a field training officer. Porath said that Furlong had previously told him that he was the best field training officer in the department, and asked Furlong for specific examples of why Furlong thought he could not continue to do the job. Furlong did not reply. Furlong asked Porath to “search [his] soul for the next month” and decide whether he should continue to be a field training officer. According to Furlong, he wanted to be sure that if Porath continued as field training officer he would continue to put effort into the job.

Porath, Hubert, Thomas Barrette and Patrolman Richard Hansen submitted applications for the sergeant positions. Hubert had fifteen months more seniority than Porath. Thomas Barrette had three months less. Hansen was the least senior applicant by three years. Like Porath, Hubert had a four-year college degree. Barrette had an associate’s degree.

Respondent interviewed all four applicants on January 3, 2003. The interview panel consisted of Jones, Furlong, Furton, and two of the three members of the Council’s public safety committee, Carl Sorensen and Ernest Pintarelli. The third member was absent. Following the procedure used in previous

promotional interviews, Lieutenant Weaver read each applicant a list of prepared questions. Interviewees were asked to describe their background and experience. Furton and Furlong both asked questions in addition to the prepared questions. Furlong asked Porath if he had applied for and not received any recent promotions, and how he felt about that. Furlong testified that because his relationship with Porath was strained, he decided not to score the candidates. However, he did not tell the candidates or the other panel members that he was not scoring until after the interviews had been completed. Each of the other panel members testified that they scored each response on a scale from one to five. They testified that at the end of the interviews, they handed over their scores to Furton to be tabulated.

On January 7, 2003 Respondent announced that it would recommend to the City Council that Hubert and Barrette be promoted to sergeant. After the promotions were announced, Respondent told Hansen that he had not received the promotion because he lacked experience. Charging Party asked to meet with Respondent to discuss why Porath had not been promoted. At this meeting, Charging Party asked for the scores from the interviews. According to Berg, Jones said that no numbering system had been used in the interviews, and that there were no scores to give her. Jones denied saying that there were no scores, although he admitted telling Berg that there was no uniform scoring system. According to Jones, he meant that there were no criteria for scoring a five, for example, on question number seven, but that the interviewer was to use his subjective judgment to determine how well the candidate had answered the question. Charging Party asked why Porath was not promoted. Respondent said the promotion decision was based solely on the interviews. However, Furlong also said that Porath lacked maturity, and he described his conversation with Porath about his failure to receive the lieutenant promotion.

At the hearing, Respondent introduced as an exhibit a sheet of paper that, according to Furton, showed the scores that Furton, Jones and the two Council members had given to Hubert, Barrette and Porath during their interviews on January 3. The sheet did not show Hansen's scores. According to this exhibit, Hubert's composite score was 266.05. Barrette's score was 256 and Porath's was 254.

Discussion and Conclusions of Law:

The elements of a prima facie case of unlawful discrimination under Section 10(1)(c) are: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity, (3) union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Detroit Bd of Education*, 2003 MERC Lab Op _____ (Case Nos. C02 D-077 and CU02 D-017, issued May 19, 2003); *Rochester School Dist*, 2000 MERC Lab Op 38. 42; *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 706. If a prima facie case is established, the burden shifts to the employer to produce evidence that the same action would have taken place even in the absence of the protected conduct. If the employer, by credible evidence, balances the employee's prima facie case, the employer's burden of proof is met and the duty of producing further evidence shifts back to the employee. *MESPA v Evart Public Schools*, 125 Mich App 71, 74 (1982); *City of Saginaw*, 1997 MERC Lab Op 414, 420; *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

Andrew Porath engaged in activity protected by the Act when he spoke to Furlong on behalf of other officers about changing to a system of permanent shifts, when he and Charging Party representatives Berg and Furmanski met with Respondent representatives to discuss Charging Party's proposal on this issue, and when he and Charging Party representatives appeared before Respondent's City Council to advocate the scheduling change. Porath's filing of grievances over comp time, vacations, and Respondent's failure to pay him for performing the duties of a sergeant also constituted union activity protected by Section 9 of PERA. See *Michigan Employment Relations Commission v Reeths-Puffer School Dist*, 391 Mich. 253, 261 (1974). Respondent's knowledge of these activities is not in dispute.

The record establishes that beginning in January 2002, relations between Respondent and Charging Party's representatives were strained. Charging Party representatives and members of its bargaining unit, including Porath, were annoyed at Respondent's response to Charging Party's scheduling proposal, and at the delay in filling the sergeant vacancies. Respondent representatives were convinced that Charging Party's members were deliberately refusing to write traffic tickets. Respondent's hostility toward Charging Party representatives may have had its origins in Respondent's conviction that its members were engaging in an unlawful strike.² However, Respondent representatives also directed their anger at Charging Party's lawful activities, including Charging Party's representatives' appearance before the City Council on March 18, and Charging Party's attempts to investigate and process grievances. On April 4, 2002, less than three weeks after the City Council meeting, Furlong issued four memos announcing that work rules would be more stringently enforced, including one reminding officers to wear their uniform hats. I find that Furlong did not adequately explain his reasons for issuing these memos. I agree with Charging Party that the timing of these memos and their nature indicates that Furlong was retaliating against the officers for their union's attempt to bring the City Council into the scheduling dispute.³ I conclude that these memos are evidence of Respondent's animus toward Charging Party's lawful activities. I also conclude that Respondent's animus was established by Furton's telling Nelson in a grievance meeting that he was an outsider who came to town only to cause problems, Jamo's demand that Nelson leave Respondent's premises in the middle of a grievance discussion, and Jamo's decision to inform an arbitrator in July 2003 that Charging Party might soon be replaced as the bargaining representative.

According to Charging Party, Respondent determined long in advance of the January 3, 2003 interviews that it would not promote Porath because of his protected activities and association with the Charging Party. Charging Party maintains that the sergeant interviews were a sham. It asserts that the applicants' answers were not scored during the interviews, and that the exhibit allegedly showing the scores

² MCL 423.202 prohibits public employees from striking. MCL 423.201(j) defines a "strike" as the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or *the abstinence in whole or in part from the full, faithful and proper performance of the duties of employees* for the purpose of inducing, influencing, or coercing a change in employment conditions, compensation, or the rights, privileges or obligations of employment. [Emphasis added]

³ Charging Party did not allege that Furlong violated Sections 10(1)(a) and (c) by issuing these memos. Furlong issued these memos nine months before the charge was filed. While MCL 423.216(a) restricts the Commission's authority to issue remedial orders to conduct occurring within six months of the filing and service of the charge, events occurring outside the six-month period may be considered as background evidence to show a pattern of discrimination or anti-union animus. *City of Detroit (Housing Dep't)*, 1989 MERC Lab Op 547,550

that the three candidates received was a fake document put together for the purpose of the hearing. Alternatively, it argues that Respondent manipulated the interview results by holding the interviews on a day when one of the public safety committee members was unavailable, and by eliminating Furlong's scores from consideration. In support of the first scenario, Charging Party points to Jones' statement to Berg after the promotions had been announced that no uniform scoring method had been used and that there were no scores.

I credit Berg's testimony that during their meeting after the promotions Jones told her that there were no scores to give her. However, I credit the testimony of the members of the interview panel that, with the exception of Furlong, all the interviewers scored each question and turned their scores over to Furton. I find the two council members, who both testified that the January 3 interviews followed the same procedure as past interviews, particularly credible. Furton did not testify that he prepared the tabulation document immediately after the interviews, but only that it accurately represented the scores he received from each interviewer for Porath and the two successful candidates. I credit his testimony. I conclude that Jones' statement to Berg after the promotions had been announced indicated only that Respondent did not want to give her the scores because it did not want them made public. I also find nothing in the record to suggest that Porath would have had a higher score if Furlong or the absent council member had scored his interview responses. In sum, I find that the evidence as a whole does not support Charging Party's claim that the January 3, 2003 interviews were a sham or that Respondent manipulated them so that Porath would not receive the promotion.

Charging Party also asserts that Respondent's decision not to promote Porath had to be based on his union activities because Porath was so clearly better qualified than Hubert or Thomas Barrette. However, I find that the evidence does not support this assertion. Porath, Hubert and Barrette had all served as field training officers, had similar educational qualifications, and had joined the department within two years of each other.

I also find no indication that Respondent continued to have animus toward Porath because of his protected activities in January 2003. I find it significant that in September 2002, Respondent acceded to its officers' demand for a system of permanent shifts. By January 2003, the dispute in which Porath had played a prominent part had been resolved. Porath did not hold a union office. After September 2002, Porath's only protected concerted activity was filing a grievance on November 15 seeking backpay for his work as sergeant. The two patrol officers who received the sergeant promotions, Hubert and Thomas Barrette, also participated in this grievance, and there is no evidence that Respondent held Porath's participation in this grievance against him. I note that after Brian Barrette was promoted to lieutenant in mid-2002, Furlong specifically suggested to Porath that they try to repair their relationship. Porath responded by blaming Furlong for Porath's failure to receive that promotion. This conversation evidently made a lasting impression on Furlong. Furlong brought up this conversation when Berg asked him in January 2003 why Porath had not been promoted to sergeant, and Furlong also asked Porath how he felt about not receiving the lieutenant promotion during Porath's interview for sergeant. The evidence suggests that Furlong spoke to Porath in December 2002 about continuing as field training officer because he was concerned that Porath was still angry over his failure to receive the lieutenant promotion, and not because of his grievances or his role in the

scheduling dispute.

For the reasons set out above, I conclude that despite Respondent's animosity toward the Charging Party, Porath's union and other concerted protected activities in early 2002 were not the "but for" cause of his failure to receive a promotion to sergeant in January 2003, and that Porath would not have been promoted even if he had not engaged in this activity. In accord with this conclusion, and the findings of fact, discussion, and conclusions of law set out above, I conclude that Respondent did not violate Sections 10(1)(a) or (c) of PERA. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____