STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EATON COUNTY BOARD OF COMMISSIONERS
and EATON COUNTY SHERIFF,
Respondents-Public Employers,

-and- Case No. C03 D-090

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Keller Thoma, by Gary King, Esq., for Respondents

Wilson, Lawler & Lett, P.L.C., by R. David Wilson, Esq., and Steven T. Lett, Esq. for Charging Party

DECISION AND ORDER

On October 14, 2004, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondents have engaged in and were engaging in certain unfair labor practices, and recommending that they 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

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Harry W. Bishop, Commission Member

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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 Lansing, Michigan on August 1, 2003, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and briefs filed by the parties on or before September 26, 2003, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On April 22, 2003, Charging Party Capitol City Lodge No. 141 of the Fraternal Order of Police (Charging Party or the Union) filed this unfair labor practice charge against Respondents Eaton County Board of Commissioners and Eaton County Sheriff. The charge alleges that Respondents violated Section 10(1)(a) and (b) and Section 15 of PERA by having the chief deputy, a bargaining unit member, respond to grievances filed by the Union, and by repudiating a written agreement entered into on December 13, 2001, to refrain from utilizing the chief deputy as a management representative with respect to grievances filed by Charging Party.

Findings of Facts:

The facts in this case are not materially in dispute. Charging Party is the collective bargaining representative for a supervisory unit of approximately 25 command officers employed by the Eaton County Sheriff and the Eaton County Board of Commissioners. The bargaining unit consists of the chief deputy, captains, lieutenants and sergeants. The chief deputy is the third highest ranking member of the sheriff's department, below only the sheriff and the undersheriff.

At the time of hearing in this matter, the parties were operating under the terms of a collective bargaining agreement which expired on September 30, 2002. The contract contains a grievance procedure culminating in final and binding arbitration. At Step I of the procedure, a grievance is submitted to "the Sheriff or his designee," who must then hold a meeting or give a written answer within five days. If the answer is unsatisfactory to the Union, it may advance the grievance to Step II, which involves a presentation to the Grievance Board comprised of the county controller and two members of the Board of Commissioners. The final step of the grievance procedure is arbitration pursuant to the rules of the American Arbitration Association.

On September 10, 2001, the Union filed an unfair labor practice charge against the Sheriff and the Board of Commissioners pertaining to the utilization of the chief deputy as a management representative during the course of a grievance hearing conducted in March of 2001 (MERC Case No. C01 I-185). The case was settled prior to hearing and the charge was withdrawn. The settlement agreement entered into by the parties on December 13, 2001, provides, in pertinent part:

> 1. The grievance and demand for arbitration . . . are withdrawn, and will not be refiled, and no grievance or unfair labor practice charge will be filed relating to the evaluation of the Grievant dated February 1, 2001, or its removal from the Grievant's personnel record.
>
> 2. The performance evaluation of the Grievant dated February 1, 2001 shall be removed from the Grievant's personnel record, and will be destroyed.
>
> 3. The unfair labor practice charge in MERC Case No. C01 I-185 is withdrawn, and will not be re-filed.
>
> 4. The County and Sheriff agree that the Chief Deputy will not be utilized as a representative of the County or the Sheriff at either Step I or Step II of the grievance procedure of the collective bargaining agreement to which the Union is a party, or as a representative of the County or the Sheriff in collective bargaining negotiations for such a contract. The parties also agree that the Chief Deputy will not be the individual assigned to assist the County's/Sheriff's legal counsel in the presentation of arbitration cases involving contract interpretation to which the Union is a party. The Chief Deputy may be the individual assigned by the County/Sheriff to assist the County's/Sheriff's legal counsel in the presentation of arbitration cases involving discipline to which the Union is a party, provided that

the Chief Deputy does not function as an advocate. It is expressly understood that the foregoing does not prohibit the use of the Chief Deputy as a witness in any proceeding.

On August 6, 2002, Charging Party's director, Steven Jackson, filed a grievance concerning the effective date of promotion for two bargaining unit members. That same day, the Union received a response to the grievance in the form of a memo from the chief deputy, Mark O'Donnell. In the memo, O'Donnell wrote that the "Department will grant the remedy [requested by the Union] as it would be counter-productive and fiscally irresponsible to take this issue further in the Arbitration process."

On August 12, 2002, Jackson filed a grievance concerning the posting of reimbursed overtime. Two days later, O'Donnell denied the grievance by written memorandum. Thereafter, the Union complained to the county controller, James Stewart, about O'Donnell's participation in the grievance process. Stewart suggested that Jackson take the grievance responses to the sheriff so that his signature could be included on the documents, and he assured the Union that there would be no further violations of the December 13, 2001, settlement agreement. The Sheriff subsequently added his signature to the grievance responses.

On February 26, 2003, Charging Party's president, Lieutenant John Rojeski, filed a grievance concerning a counseling memo which had been issued to Lieutenant James Welbes. The grievance was denied by the undersheriff that same day. At a Step II meeting before the Grievance Board on March 7, 2003, Chief Deputy O'Donnell appeared as a management representative and presented the case for the sheriff's department. At the conclusion of his presentation, O'Donnell indicated that he intended to rescind the discipline in recognition of the "fiscal responsibility of the County." A memo formally withdrawing the counseling memo was issued by the County on March 3, 2003.

On March 5, 2003, Jackson filed a grievance challenging the amount of vacation time which the sheriff's department had credited to Lieutenant Rojeski. Later that day, the grievance was returned to the Union with a handwritten note from O'Donnell indicating that the grievance had been denied. The Union then complained to Stewart, who once again suggested that the grievance be taken to the sheriff so that his signature could be included on the document.

Ultimately, the parties agreed to extend the deadline for processing the vacation time grievance to Step II of the grievance procedure in order to give Rojeski time to locate documentation supporting the Union's position. At the time of hearing in this matter, the parties were still in the process of attempting to resolve the issue, and Charging Party retains the right to advance the grievance to arbitration if a settlement is not reached.

Positions of the Parties:

Charging Party argues that the chief deputy's participation in the grievance process interfered with its function as the exclusive bargaining representative for its members and diluted and denigrated its role as the elected bargaining representative of the unit. The Union also contends that the use of the chief deputy to answer and litigate grievances filed on behalf of unit

members constitutes an unlawful repudiation of the settlement agreement entered into between the parties on December 13, 2001.

Respondents argue that their use of the chief deputy in grievance processing was authorized by Section 10(3)(a)(ii) of PERA, which makes it unlawful for a labor organization or its agents to restrain or coerce a public employer in the selection of its representatives "for the purpose of collective bargaining or the adjustment of grievances" and by the parties' contract, which states that grievances can be processed by the "Sheriff or his designee." Respondents also deny that the chief deputy's involvement in grievance processing constituted a repudiation of the December 13, 2001, settlement agreement since, according to the Employers, the contract breach had no significant impact upon the bargaining unit.

Discussion and Conclusions of Law:

Charging Party contends that the use of the chief deputy, a bargaining unit member, to answer grievances filed by the Union and to make grievance presentations on management's behalf itself constitutes a PERA violation. I disagree. Under the Act, supervisory units are expected to be all-inclusive and to include all levels of supervision up to the executives of the employer. See e.g. *Marquette Bd of Light and Power*, 1983 MERC Lab Op 814; *Sanilac County Road Comm'n*, 1972 MERC Lab Op 785; *City of Hazel Park*, 1970 MERC Lab Op 973.[1] In these multi-level supervisory units, employees such as the chief deputy are often expected to wear two hats, acting as both agents of management as well as union members. This juxtaposition of roles is inherent in a multi-level unit of supervisors and, absent evidence of an abuse of power, no PERA issue is presented. See *Wayne County Juvenile Detention Facility*, 1998 MERC Lab Op 578, 585-586 (no exceptions) and cases cited therein.

With respect to grievance processing, the Commission has specifically rejected the argument that an employer violates PERA merely by using a unit member to answer allegations of contract violations brought by that individual's bargaining representative. In *City of Detroit*, 1999 MERC Lab Op 218, the employer assigned police lieutenants the task of responding to grievances brought by members of the charging party's unit of inspectors, sergeants and lieutenants. The charging party asserted that the use of lieutenants to respond to its grievances violated PERA because it encouraged dissension and confusion within the unit. Finding no evidence that unit members were required to act against the interest of their union, or that the use of lieutenants to answer grievances negatively impacted the unit, the Commission dismissed the charge. *Id*. at 222. In so holding, the Commission relied on the fact that one of the lieutenants in question had granted the relief sought by the charging party at the first step of the grievance procedure, although that decision was ultimately rejected by management. *Id*. See also *City of Muskegon Heights*, 1979 MERC Lab Op 1013 (charge withdrawn) and *City of Pontiac*, 1981 MERC Lab Op 57 (no exceptions).

[1] The Commission has held that the position of chief sheriff's deputy is generally not excludable from a supervisory unit as an executive. See e.g. *Berrien County*, 1999 MERC Lab Op 177, 186; *Lake County*, 1999 MERC Lab Op 107, 113-114; *Shelby Township*, 1997 MERC Lab Op 469, 473. In this case, Respondents do not contend that O'Donnell is an executive as the Commission defines that term.

Similarly, there is nothing in the record here to suggest that the chief deputy's involvement in the grievance process had any negative impact upon Charging Party's bargaining unit. Although the Union alleges that the use of the chief deputy to answer and litigate grievances created a conflict of interest and interfered with its function as exclusive bargaining representative for its members, it failed to provide any evidence to support these assertions. In fact, the record belies any suggestion that the chief deputy was required to respond to grievances in a manner which benefited Respondents. O'Donnell decided in the Union's favor with respect to two of the four grievances with which he became involved. A third grievance, pertaining to vacation time credits earned by Union president Rojeski, was still pending at the time of hearing, and the Employer had agreed to waive the time limits set forth in the contract in order to give Rojeski time to find documentation to support his position. I find that Charging Party has failed to establish that Respondents' use of the chief deputy to answer and litigate grievances brought on behalf of members of the Union violates Section 10 of PERA.

I do, however, agree with Charging Party's contention that Respondents' continued use of O'Donnell as a management representative in the grievance procedure constituted a repudiation of the parties' December 13, 2001, settlement agreement. In *Plymouth Canton Community Schools*, 1984 MERC Lab Op 894, 897, the Commission stated that it will find repudiation of a contract only when the (1) the contract breach is substantial and has a substantial impact on the bargaining unit; and (2) no bona fide dispute over contract interpretation is involved. Repudiation has also been defined as an attempt to rewrite a contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Wayne County Juvenile Detention Facility*, 1997 MERC Lab Op 108, 115; *Central Michigan University*, 1997 MERC Lab Op 501. See also *Oak Park Public Safety Officers Ass'n*, 2001 MERC Lab Op 267 (no exceptions); *Highland Park School District*, 1998 MERC Lab Op 288 (no exceptions).

The facts of this case clearly support a finding that Respondents did not honor the commitment made to the Union. Pursuant to the December 13, 2001 settlement, Respondents agreed not to utilize the chief deputy as a representative of the County or the Sheriff at either Step I or Step II of the grievance procedure of the collective bargaining agreement to which the Union is a party. As consideration for that promise, the Union agreed to withdraw the unfair labor practice charge which it had initially filed concerning this issue, as well as a related grievance. Despite that clear and unambiguous agreement to exclude the chief deputy from the grievance process, Respondents continued to require or allow O'Donnell to answer and litigate grievances on management's behalf. This flagrant disregard for the terms of the settlement agreement continued even after the matter was brought to the attention of the county controller, who assured the Union that there would be no further violations of the agreement. On these facts, I conclude that the continued utilization of the chief deputy as a management representative in the grievance process constitutes a violation of Respondents' duty to bargain under Section 15 of PERA.

In accord with the above discussion, it is recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the Eaton County Board of Commissioners and Eaton County Sheriff:

1. Cease and desist from repudiating the December 13, 2001 settlement agreement entered into with Capitol City Lodge No. 141 of the Fraternal Order of Police by utilizing the chief deputy as a representative of the County or the Sheriff at either Step I or Step II of the grievance procedure of the collective bargaining agreement to which the Union is a party.

2. Post copies of the attached notice to employees in conspicuous places where notices to employees are customarily posted for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, EATON COUNTY BOARD OF COMMISSIONERS and EATON COUNTY SHERIFF, public employers under the PUBLIC EMPLOYMENT RELATIONS ACT, have been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

> **WE WILL** cease and desist from repudiating the December 13, 2001 settlement agreement entered into with Capitol City Lodge No. 141 of the Fraternal Order of Police by utilizing the chief deputy as a representative of the County or the Sheriff at either Step I or Step II of the grievance procedure of the collective bargaining agreement to which the Union is a party.

EATON COUNTY BOARD OF COMMISSIONERS

By: _____

Title: _____

EATON COUNTY SHERIFF

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.