STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY AND WAYNE COUNTY SHERIFF,
Public Employers – Respondents,

Case No. C07 C-055

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU),
LOCAL 502
Labor Organization – Charging Party.
_____/

APPEARANCES:

James Oleksinski, Esq., Wayne County Labor Relations Division, for Respondents

Akhtar & Ebel, by Jamil Akhtar, Esq., for Charging Party

DECISION AND ORDER

On February 25, 2008, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were 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

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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James Oleksinski, Esq., Wayne County Labor Relations Division, for Respondents

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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, this case was heard at Detroit, Michigan on July 27, 2007, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before October 3, 2007, and a supplemental brief filed by Respondent on January 14, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Service Employees International Union (SEIU), Local 502 filed this charge against Wayne County and the Wayne County Sheriff on March 22, 2007. Charging Party represents nonsupervisory deputies employed in Respondents' sheriff's department (the department). The charge alleges that on or about March 19, 2007, Respondent violated Sections 10(1) (a) (c) and (d) of PERA when it terminated Charging Party steward Kevin McGuckin because Charging Party refused to withdraw a pending unfair labor practice charge.

Findings of Fact:

Corporal Kevin McGuckin was hired as a sheriff's deputy in 1985. During the course of his employment, McGuckin held numerous union offices. The department has a progressive

discipline system under which subsequent offenses of the same type result in more severe discipline, with the final step being termination. In 2004, McGuckin was terminated after being repeatedly disciplined for tardiness, being absent without leave, and poor performance. At the time of his termination, McGuckin also had two recent misdemeanor convictions for driving while intoxicated (OUIL). Charging Party filed a grievance over McGuckin's termination. An arbitrator ordered McGuckin reinstated without back pay on the condition that he sign a last chance agreement. The agreement required McGuckin to undergo a drug screen before being reinstated and to participate in an employee assistance program. It also allowed the department to terminate him if he violated the department's tardiness policy, was absent without leave, or failed to call in when absent during the twenty-four month period following the signing of the agreement. McGuckin signed the agreement and returned to work in about November 2005.

On October 27, 2006, after multiple days of hearing, Administrative Law Judge (ALJ) Doyle O'Connor issued a decision and recommended order based on an unfair labor practice charge (Case No. C02 J-217) filed by Charging Party against Respondents in 2002. He found that Respondents had repeatedly retaliated against Charging Party steward Thomas Browne because of his union activities and had attempted to discourage him from continuing as a union officer. The ALJ's order included a recommendation that Browne be awarded back pay. Respondents filed timely exceptions to the administrative law judge's decision with the Commission. In early 2007, these exceptions were pending before the Commission.

In November or December 2006, McGuckin was elected chief steward for one of the department's divisions. While driving his personal vehicle on January 26, 2007, McGuckin struck another car when he attempted to turn right from a left hand lane. No one was injured. However, the driver of the other vehicle reported to local police officers called to the scene that McGuckin appeared to be drunk, that he tried to pull her from her car and that when she threatened to call the police he showed her his badge and said that he was the police. The officers gave McGuckin field sobriety tests and arrested him. McGuckin admitted to the officers that he had had too much to drink. After more tests were administered at the police station, he was charged with OUIL. McGuckin did not immediately notify his command officer of this incident. After the incident was reported to the department by the local police, the department initiated an internal investigation.

If the department concludes, after completing an internal investigation, that a deputy should be disciplined, it is required by its disciplinary policy to serve the deputy with a formal statement of charges. The department then conducts an administrative hearing at which the deputy and his union representative are allowed to present evidence. When a deputy is charged with criminal conduct, the department decides on a case-by-case basis whether to complete its investigation and proceed with the administrative hearing or wait for the disposition of the criminal charges. Charging Party second vice president Gregory J. Hattaway testified without contradiction that when a deputy is charged with a misdemeanor OUIL, the department's standard practice is to wait to schedule an administrative hearing until after the deputy has had his day in court.

Robert Dickerson, chief of administrative operations for the department, handles its labor relations. He testified that shortly after McGuckin's arrest, he received a phone call from Patrick

Melton, Charging Party's recording secretary. According to Dickerson, Melton asked, "What can we do to save McGuckin?" According to Dickerson, he replied, "The guy's on a last chance agreement. I don't know what we can do." Dickerson testified that Melton then said, "What if we agree to set aside the Browne unfair labor practice [charge]?" Dickerson replied, "Well, that's a start." According to Dickerson, he told Melton to talk it over with the rest of Charging Party's executive board and get back to him. Melton was called by Charging Party as a rebuttal witness after Dickerson testified. Melton initially claimed not to recall the circumstances surrounding his conversation with Dickerson, and appeared uncomfortable on the witness stand. Melton did not remember in what month his conversation with Dickerson took place or why McGuckin was in trouble at the time. Melton admitted that he asked Dickerson if there was anything that the Union could do to help McGuckin. However, according to Melton, Dickerson, and not he, suggested that Charging Party agree to withdraw the Browne charge. Melton testified that he said he could not do anything, but that he agreed to take this proposal to Charging Party's president. Based on Melton's demeanor and the evasiveness of his testimony, I credit Dickerson that Melton, and not Dickerson, first suggested that the Union agree to drop the Browne charge in exchange for leniency for McGuckin.

On February 7, Dickerson stopped Charging Party president Michael Royal after a grievance meeting. According to Dickerson, he asked Royal if he had spoken to Melton about the McGuckin matter. Dickerson testified that Royal replied, "Yeah, we can't do that. We just can't do that." According to Dickerson, he said that this was fine with him, that it was the Union that was trying to resolve the issue. Dickerson testified that Royal also said, "You guys can't really do anything right now because he hasn't even had his trial yet." Dickerson did not report what, if anything, he said to Royal in response.

Royal had a different version of the February 7 conversation. Royal testified that when everyone else had left the grievance meeting, Dickerson asked him what "they were going to do with Kevin." Royal asked Dickerson what he meant. Dickerson said, "Well, are you going to drop the unfair labor practice [sic] from Tom Browne? If you do that, we won't fire Kevin." Royal told Dickerson that McGuckin had just been arrested and hadn't even been to court yet. Dickerson replied, "No, we have enough evidence on him now, and if you don't drop this unfair labor practice we are going to proceed with terminating him." According to Royal, Dickerson gave him a "sales pitch" lasting about ten minutes, telling him that the Browne decision did not do anything for the Union, and that the Union should "just get rid of it." Royal testified that, to stall him, he told Dickerson that he (Royal) would have to look into the matter.

On February 9, Royal sent Dickerson a letter stating that his "threat to fire McGuckin unless the MERC charge involving Thomas Browne is withdrawn constitutes a separate violation of the Public Employment Relations Act." Royal told Dickerson that he planned to file an unfair labor practice charge with the Commission unless he withdrew his threat to discharge McGuckin.[1] Dickerson wrote Royal on February 12 denying that he had told him that the department was going to fire McGuckin, and asserting that the sheriff would make the decision on whether to terminate McGuckin after the administrative hearing. Dickerson also told Royal that their conversation was merely a follow up to a similar conversation initiated a few days earlier by another member of Charging Party's executive board. On February 14, Royal received

[1] The charge in this case, filed after McGuckin was terminated, alleged only that the discharge itself was unlawful.

a letter from Wayne County Sheriff Warren Evans stating that Dickerson denied threatening to fire McGuckin and pointing out that Dickerson did not have the authority to make termination decisions.

Both Royal's and Dickerson's versions of their February 7 conversation are plausible. I credit Royal's version based on his frank demeanor on the stand, the completeness of his account, and the fact that Royal was evidently bothered enough by the conversation to write the February 9 letter.

McGuckin's court date on his OUIL was scheduled for April 2007. The department completed its internal investigation and served McGuckin with formal charges on March 13. Dickerson admitted that the department's internal affairs office may have put the McGuckin investigation ahead of other pending matters, including other OUIL charges. According to Dickerson, this was because a witness had complained that McGuckin had behaved unprofessionally, because McGuckin had previous OUIL convictions, and because of McGuckin's egregious disciplinary record. The administrative hearing on McGuckin's charges was held on March 19. After the hearing, McGuckin was given a notice signed by the sheriff stating that his employment would be terminated based on his disciplinary history and on the current charges. Charging Party filed a grievance over the discharge. The discharge was upheld by an arbitrator in a decision issued after the hearing in this case.

Discussion and Conclusions of Law:

In order to establish a prima facie case of unlawful discrimination under Section 10(1) (a) or 10(a) (c) of PERA based on an adverse employment action, a charging party must establish: (1) union or other protected concerted activity; (2) that the employer had knowledge of that activity; (3) union animus or hostility towards the protected activity; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006); *City of St Clair Shores*, 17 MPER 76 (2004); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 706; *Univ of Michigan*, 1990 MERC Lab Op 272, 288. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive, and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Schs*, 125 Mich App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc.*, 662 F2d 899 (CA 1, 1981). Ultimately, however, the charging party bears the burden of proof. *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

Section 9 of PERA protects the rights of public employees to organize; to form, join or assist labor organizations; and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection. Sections 10(1) (a) and (c) prohibit public employers from retaliating against employees because of the exercise of their Section 9 rights and from discriminating against employees to encourage or discourage membership in a labor organization. When a union or other group of employees files an unfair labor practice charge against an employer to enforce rights guaranteed by PERA, the filing of the charge constitutes concerted activity for mutual aid or protection under Section 9. I find that a public employer violates Sections 10(1) (a) and (c) if it discharges or otherwise retaliates against an employee

because his or her union has filed, prosecuted, or refused to withdraw an unfair labor practice charge.

According to the credible testimony of Charging Party president Royal, on February 7, 2007, Respondent representative Dickerson said that the department would not discharge McGuckin if the Union withdrew an unfair labor practice charge then pending before the Commission. Dickerson pressed Royal hard to accept this deal. Charging Party refused, and McGuckin was discharged about a month later. Respondents do not dispute that they might not have terminated McGuckin if Charging Party had agreed to withdraw the Browne charge. However, they assert that they terminated McGuckin not because the Union refused to withdraw the Browne charge, but because of his conduct on January 26, 2007, his poor disciplinary record, his previous termination, and that fact that he was subject to the terms of a last chance agreement. As evidence that Respondents' actual motive was retaliation against the Union for refusing to withdraw the Browne charge, Charging Party points to the fact that the department's internal affairs office investigated McGuckin's January 26, 2007 driving offense out of order, and that it deviated from its usual practice in OUIL cases by conducting investigating, charging, and terminating McGuckin before he had even had his court date. In response, Respondents assert that the January 26 incident was not a simple OUIL violation, since it involved allegations that McGuckin had behaved unprofessionally at the accident scene. According to Respondents, this allegation, and the fact that McGuckin was on a last chance agreement, was why the department made McGuckin's case a priority.

As noted above, Respondents admit that they might not have discharged McGuckin had Charging Party agreed, in exchange, to withdraw the Browne unfair labor practice charge. Charging Party's exercise of its protected rights was, therefore, a cause of McGuckin's termination. However, I find it unnecessary to determine in this case whether union animus or hostility toward Charging Party's exercise of its right to refuse to withdraw the charge was a motivating factor in Respondent's decision to discharge McGuckin because I conclude Respondents met their burden of showing that they had lawful motives for discharging McGuckin and that they would have terminated McGuckin even if there had been no conversation between Royal and Dickerson on February 7. McGuckin had a problematic disciplinary history before the January 26, 2007 incident. Respondents had terminated him previously and reinstated him only when ordered to do so by an arbitrator under a last chance agreement. Given McGuckin's background and the allegations against him, it was virtually certain that Respondents would terminate him again after the January 26 incident. I believe that the Union was aware of this and that this is why Melton asked Dickerson if withdrawing the Browne charge would help McGuckin, and why the Union tried to buy him time by arguing that Respondents could not terminate him until after his court date. Royal's testimony indicates that after Melton suggested that the Union might trade the pending Browne charge for leniency for McGuckin, Dickerson tried hard to convince Royal to accept this deal. However, the fact that Respondents were willing, even anxious, to use McGuckin as a bargaining chip to obtain withdrawal the Browne charge does not mean that McGuckin was terminated for unlawful reasons. I conclude that the evidence in this case does not establish that McGuckin's termination constituted unlawful retaliation against him because of the Union's protected refusal to withdraw its unfair labor practice charge. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____