

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

In the Matter of:

LEELANAU COUNTY AND LEELANAU COUNTY SHERIFF,
Public Employer-Respondents,

-and-

Case No. C11 H-134

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.

APPEARANCES:

Cohl, Stoker & Toskey by Peter A. Cohl, for the Respondent

Frank A. Guido, General Counsel, for the Charging Party

DECISION AND ORDER

On February 16, 2012, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

Edward D. Callaghan, Commission Chair

Nino E. Green, Commission Member

Christine A. Derdarian, Commission Member

Dated: _____

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

LEELANAU COUNTY AND LEELANAU COUNTY SHERIFF,
Public Employers-Respondents,

Case No. C11 H-134

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by Peter A. Cohl, for Respondents

Frank A. Guido, General Counsel, Police Officers Association of Michigan

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION**

On August 10, 2011, the Command Officers of Michigan filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against Leelanau County and the Leelanau County Sheriff alleging that Respondents violated their duty to bargain under Sections 10(1)(a) and 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

On December 7, 2011, Respondents filed a motion for summary disposition pursuant to Rule 165 of the Commission's General Rules, 2002 AACCS, R 423.165. On December 29, 2011, Charging Party filed a response to the motion. Based on the facts as set out in the charge and in Charging Party's response, and the arguments made by both parties in their pleadings, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of supervisory employees of the Respondents. On March 24, 2011, the Commission issued a decision in *Leelanau Co and Leelanau Co Sheriff*, 24 MPER 18 (2011) clarifying the unit represented by the Charging Party to include a newly created position, law enforcement commander. The charge alleges that after the Commission issued its decision, Respondents failed and refused to bargain in good faith over

the wages, hours and terms and conditions of employment of the law enforcement commander position, including the entitlement of the individual placed in the position by the Respondent to retain that position. Charging Party alleges that Respondents' refusal to remove this individual from the position pending agreement by the parties on how the position should be filled violated its obligation to bargain in good faith. It also alleges that Respondent violated PERA by refusing, after July 1, 2011, to meet and bargain with Charging Party over the terms and conditions of employment of the law enforcement commander on the asserted grounds that Respondent was prohibited from bargaining over these issues because a petition for a representation election was filed on June 23, 2011.

Facts:

In 2009, Charging Party's bargaining unit consisted of regular full-time law enforcement sergeants in Respondent's Sheriff's department. The two positions above the sergeants in the hierarchy of the department, sheriff and the undersheriff were excluded from the unit. The collective bargaining agreement in effect at that time did not include any provision relating to promotions. In April 2009, Respondents created a new position, law enforcement commander, to supervise the two law enforcement sergeants.

On April 15, 2009, Charging Party made a demand to bargain over the wages, hours and terms and conditions of employment of this position. On April 20, 2009, after Respondent refused to recognize Charging Party as the bargaining agent for the position, Charging Party filed a petition for unit clarification with the Commission. The law enforcement commander position was filled on or about May 1, 2009. The individual appointed to the position was selected by the Sheriff and was not promoted from the rank of sergeant. As noted above, on March 24, 2011, after conducting a hearing, the Commission issued a decision clarifying Charging Party's unit to include the law enforcement commander position.

On April 5, 2011, Charging Party sent Respondent a letter renewing its demand to bargain over the hours, wages and terms and conditions of employment of the commander position. The letter stated that until the bargaining was completed, Charging Party would not recognize, nor take dues from, anyone occupying the commander's position. On April 28, Charging Party sent Respondent another letter stating that since Respondent had not appealed the Commission's decision, Charging Party expected and demanded that the law enforcement commander position be vacated, and the incumbent removed, until good faith bargaining took place and a "conclusion has been reached."

On May 6, 2011, Respondent County Administrator Eric Cline asked Charging Party for an explanation of why Respondent should remove the incumbent from the position. Charging Party responded in a letter dated June 6. The letter asserted that if Respondents had acted appropriately and recognized Charging Party as the bargaining agent for the law enforcement commander position in 2009, Respondents would have "filled the position in accord with existing promotional policy and [sic], to the extent none existed applicable to the position, not filled the position until the terms and conditions for a promotional process associated with the Law Enforcement Commander position could be completed." Charging Party asserted that since the Commission had determined that the position was properly part of its unit, the individual then

holding the position had been improperly appointed. Charging Party again demanded that this individual be removed and the position left vacant until the parties reached agreement on the appropriate process for filling the position. Charging Party threatened to file an unfair labor practice charge if its demand was not met.

On June 20, 2011, Respondents' legal counsel sent Charging Party a letter stating that Respondents would not remove the incumbent from the position while negotiations took place. On June 30, Leelanau County Sheriff Michael Oltersdorf sent Charging Party a letter taking issue with a statement made by Charging Party that the incumbent was a temporary employee. The Sheriff admitted that whether the incumbent remained in the law enforcement commander position was an issue to be bargained between the parties. However, he would not demote the incumbent until there was "negotiated contract language" that would prohibit the individual from continuing to serve as law enforcement commander.

Meanwhile, on June 23, 2011, Teamsters Local 214 filed a petition for a representation election seeking to represent Charging Party's bargaining unit. On December 20, 2011, the Commission issued a decision directing an election in a unit of all regular full-time command officers, including sergeants and commanders, in the law enforcement division of the Leelanau County Sheriff's Department, excluding the sheriff and undersheriff and command officers in the corrections division. *Leelanau Co and Leelanau Co Sheriff*, 25 MPER _____ (Case No. R11 F-050).

A negotiation session to discuss the law enforcement commander was scheduled by the parties for July 1, 2011. Respondents cancelled this meeting after they were notified of the filing of the representation petition and subsequently refused to bargain with Charging Party. Respondents take the position that they are prohibited from bargaining with Charging Party while the representation petition is pending, and that this prohibition extends to negotiations over the law enforcement commander position.

Discussion and Conclusions of Law:

In *Paw Paw Pub Schs*, 1992 MERC Lab Op 375, the Commission, with one member dissenting, reaffirmed its rule requiring an employer to cease bargaining with an incumbent union during the pendency of a representation petition. The Commission noted that the rule was originally based on a decision of the National Labor Relation Board (NLRB), *Shea Chemical Corp*, 121 NLRB 1027 (1958), which the NLRB repudiated in *RCA Del Caribe*, 262 NLRB 963 (1982). The Commission stated, however, that it was not convinced by the reasoning of *RCA Del Caribe*. It concluded that its current rule requiring an employer to cease bargaining with an incumbent union during the pendency of a representation petition best comported with the strict employer neutrality required by PERA and best protected the rights of employees under the Act. See also *17th District Court*, 19 MPER 88 (2006).

Charging Party does not dispute that *Paw Paw* is the law. However, it argues that Respondent's motive for refusing to meet is nevertheless suspect. According to Charging Party, Respondent is using the law enforcement commander as a "game piece" in an attempt to have Charging Party replaced as the bargaining representative. Its argument is as follows. First, the

Sheriff's appointment of his chosen candidate to the law enforcement commander position was improper, since promotional procedures should have been negotiated with Charging Party before the position was ever filled. The fact that the Sheriff's chosen candidate occupied the position facilitated the filing of the rival union petition after the Commission held that the position was part of Charging Party's unit. Now, according to Charging Party, Respondents are using the election petition, which Respondents' actions made possible, to refuse to negotiate over promotional procedures which could result in the removal of the improperly appointed commander. According to Charging Party, Respondents' refusal to bargain is not the result of a good faith attempt to remain neutral, but is simply "gamesmanship."

Charging Party does not allege in this case that Respondents instigated the rival union petition or that they provided unlawful support to the Teamsters. Since it is clear under the law as it stands that Respondents had an obligation to cease bargaining with Charging Party after the petition was filed, I conclude that they did not violate their obligations under PERA by doing so.

As Charging Party points out, Respondents motion for summary disposition does not address its allegation that Respondents violated their duty to bargain in good faith by refusing, prior to the filing of the representation petition, to remove the individual appointed by Respondents to fill the law enforcement commander position pending satisfaction by Respondents of their obligation to bargain over the terms and conditions of employment of the position. The Commission has held, however, that an employer has an inherent managerial right under PERA to create a new position within a bargaining unit and establish qualifications for it. After the position has been created, the employer has the obligation, upon demand, to bargain with the union over its terms and conditions of employment. *City of Hamtramck*, 1985 MERC Lab Op 1123, 1125; *Menominee Pub Schs*, 1977 MERC Lab Op 666, 668.; *City of River Rouge*, 1976 MERC lab op 664, 668 (no exceptions). Because the criteria for promotion to a higher position has an impact on unit employees, an employer also has a duty under PERA to bargain with a union representing its employees over standards and criteria for promotion to positions outside the bargaining unit. *Detroit Police Officers Ass'n v City of Detroit, Police Dept*, 61 Mich App 487 (1975).

In the instant case, as the Commission found in its unit clarification decision, Respondents should have recognized the law enforcement commander position to be part of Charging Party's unit when the position was created in 2009. However, the parties' collective bargaining agreement did not contain any language requiring Respondent to fill a new position of higher rank by promotion from within the bargaining unit. Therefore, Respondents did not unilaterally alter an existing term or condition of employment by appointing an individual who was not a member of Charging Party's unit to the law enforcement commander position. Respondents had a duty to bargain with Charging Party over the criteria for promotion to the position after it was created, whether the position was considered to be in or outside the unit. That duty included, I find, an obligation to bargain over whether the individual Respondent appointed to the position should be allowed to remain in the position or whether he should be replaced with someone chosen by a procedure agreed to by the parties. It does not follow, however, that Respondents had a duty to keep the position vacant until it reached agreement or impasse with Charging Party over these issues.

The charge alleges, first, that after the Commission issued its decision in March 2011, Respondents failed and refused to bargain in good faith over the wages, hours and terms and conditions of employment of the law enforcement commander position, including the entitlement of the individual placed in the position by the Respondent to retain that position. The facts as alleged in the charge, however, do not support this allegation. Respondents' communications with Charging Party after the decision was issued indicate their willingness to bargain on all issues relating to the position, including whether the incumbent ultimately remained in the position. They simply refused to remove the incumbent while bargaining took place. I conclude that Respondents' duty to bargain in good faith did not require Respondents to remove the individual currently holding the position while they negotiated over whether he should be permitted to retain it. I find that Respondents did not violate their duty to bargain in this case, and recommend 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
Michigan Administrative Hearing System

Dated: _____