STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WEST BLOOMFIELD TOWNSHIP,
Public Employer-Respondent,

Case No. C08 L-265

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN (POAM),
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Richard W. Fanning, Jr., for Respondent

Martha M. Champine, Assistant General Counsel, for Charging Party

DECISION AND ORDER

On February 3, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, West Bloomfield Township (Employer), did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ found no unfair labor practice occurred from the Employer directly contacting a bargaining unit member to inquire into his interest in moving into a vacant lateral position in the detective bureau. The ALJ rejected the allegation of "direct dealing" made by Charging Party, the Police Officers Association of Michigan (Union). The ALJ reasoned that Respondent had unfettered discretion to ascertain which options would best suit the employee's own needs and no offer was ever made. The ALJ also concluded that no change in the existing conditions of employment occurred from Respondent's actions. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA.

After requesting and receiving a time extension, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on March 28, 2011. On May 4, 2011, Respondent filed a response and brief supporting the ALJ's conclusions.

In its exceptions, Charging Party argues that the ALJ erred by concluding that (1) no improper "direct dealing" occurred from Respondent's direct contact with its

bargaining unit member, and that (2) Respondent's contact did not constitute a change in a condition of employment.

In its support of the ALJ's findings, Respondent concurs that no direct dealing occurred from its inquiry with Charging Party's member since no substantive change to the promotional process resulted, and that the Union's bargaining role was not undetermined.

After carefully considering the record in this case including arguments made in the parties' respective pleadings, we find Charging Party's exceptions to be without merit as discussed below.

Factual Summary:

We adopt the factual findings contained in the ALJ's Decision and Recommended Order, except as otherwise noted. Charging Party is the exclusive bargaining representative for a group of non-supervisory police officers employed by Respondent. In December, 2006, Respondent established a promotion list to fill future sergeant vacancies. The list contained the names of several bargaining unit members and had an initial expiration date of June 21, 2008 that was later extended to December 21, 2008, at the discretion of the police chief. Pursuant to a "rule of three" provision in the parties' collective bargaining agreement, Respondent maintained sole authority to promote from the list by selecting any one of the top three names on the list notwithstanding that employee's actual rank order in that cluster. Once a candidate's name was removed, the list re-sorted creating a slightly different list of three candidates in the top cluster.

Between 2007 through mid-2008, Charging Party's member, Officer Cupp remained on the list but was not selected for any of the three sergeant openings that occurred during that time period. In November, 2008, while ranked as number one on the list, Cupp alleged that his command officers (including the deputy police chief) inquired into his desire to transfer to another departmental assignment in exchange for voluntarily removing his name from the sergeant's promotion list. Cupp declined the transfer offer concluding that Respondent's underlying intent was to fill the next sergeant's opening with a candidate positioned in a lower cluster of the promotional list.

Charging Party filed a charge asserting that Respondent's discussions with its bargaining unit member constituted improper "direct dealing" in violation of PERA. The charge alleged that Respondent's improper contacts were designed to unilaterally change a component of the promotional process under the parties' collective bargaining agreement. Respondent denied the claim asserting that the contacts with Cupp were consistent with its discretionary authority to ascertain the career interests of its employees.

Discussion and Conclusion:

The central issue here is whether the discussions between Respondent's command officers and Officer Cupp violated PERA. Charging Party contends that Respondent engaged in prohibited "direct dealing" with its bargaining unit member in order to circumvent the promotional process of the collective bargaining agreement. It asserts that the ALJ erred in his conclusions based on several contentions outlined in its exceptions. We disagree and concur with the ALJ.

As the ALJ correctly denotes, PERA prohibits public employers from negotiating directly with individual employees who are represented by an exclusive bargaining agent. *City of Dearborn*, 1986 MERC Lab Op 538, 541. Also, an allegation of "direct dealing" against an employer must involve a change in the terms and conditions on mandatory subject of bargaining. *City of Grand Rapids*, 1994 MERC Lab Op 1159, 1162. Mere discussions between an employer and employee to ascertain an employee's interest in a position that is not subject to the promotional process of the parties' collective bargaining agreement does not constitute a direct dealing violation. *City of Detroit (Water and Sewerage)*, 1983 MERC Lab Op 603.

Charging Party asserts that a direct dealing violation occurred notwithstanding Respondent's authority to promote any one of the top three candidates on the promotional list. However, the ALJ determined that the parties' promotional process made it possible for Cupp to never advance to sergeant, even while continually ranked in first position on the list. This outcome was possible as Respondent could always select one of the other two candidates in the top cluster of three, or merely allow the promotional list to expire. Either way, in doing so, Respondent would be operating within the parameters of the parties' contractual terms. Under this set of facts, we find it too tenuous to assume that a PERA violation occurred solely from Respondent's inquiry into Cupp's interest in a discretionary assignment coupled with its failure to promote Cupp into a sergeant's opening.

Charging Party also contends that Respondent sought to have Cupp's name removed from the promotional list in order to select a candidate outside of the "rule of three" requirement. In doing do, the Union alleges that Respondent attempted to unilaterally change a condition of employment on a mandatory subject of bargaining. Again, we find nothing in the record to reasonably support this claim. On at least two occasions, Cupp had been overlooked on promotions to sergeant in favor of other candidates in the top cluster of three candidates. At the time this charge was filed, the latest promotion to sergeant had occurred on June 20, 2008, one day before the initial expiration date of the list, and six months prior to the list's actual expiration. Most persuasive is the factor noted in the record by Respondent that Charging Party rejected an offer to further extend the promotional list beyond the December 21, 2008 end date. Extending the promotional list would have continued Cupp's ranking at the top of the promotional list, and further hindered any perceived attempts to select a candidate from a lower cluster. We find that this effort by Respondent reasonably contradicts the Union's assertion that Respondent wanted Cupp's name off the promotional list for some ulterior

purpose. Therefore, we agree with the ALJ that the record is insufficient to support Charging Party's contention of an underlying motive by Respondent to thwart the "rule of three" requirement of the parties' contract.

Finally, we have considered the remaining arguments contained in the parties' filings and conclude they would not affect the outcome here. We conclude, as did the ALJ, that Charging Party has made no reasonable showing that Respondent's discussions with Officer Cupp violated PERA. We adopt the ALJ's factual findings and legal conclusions as our own and issue the following order:

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge become the order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WEST BLOOMFIELD TOWNSHIP,
Public Employer-Respondent, Case No. C08 L-265

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Martha Champine, for the Charging Party

Richard Fanning, for the Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based on the entire record, including the trial transcript and timely post-hearing briefs by the parties.

The Unfair Labor Practice Charge:

On December 23, 2008, a Charge was filed against West Bloomfield Township (the Employer) by the Police Officers Association of Michigan (POAM or the Union). The Union alleged that the Employer, acting through several command officers, violated the Act by negotiating directly with a bargaining unit member in an effort to alter the handling of a promotion to a vacant and desirable position. The Employer did not dispute that conversations had been initiated by the Employer with the individual in question, but denied that any impropriety occurred in those discussions.

Findings of Fact:

Police Officer Michael Cupp is a long time employee of the Employer's police department and, at the time of the dispute was, pursuant to an examination process, on the promotional roster for sergeant. Under the system used by the parties, if a sergeant vacancy

occurred, the chief of police could, at his sole discretion, select from among the top three ranked officers on the promotional roster. Cupp had already been passed over for prior promotional opportunities for sergeant. Cupp or anyone else on the list could, without any violation of the rules, have been passed over for promotion repeatedly. The existing promotional roster was due to have expired in June 2008, but was held open for an additional six months, again, at the sole discretion of the chief of police.

On November 24, 2008, Cupp was called in to headquarters for what turned out to be a brief meeting with Deputy Chief Joseph Chapin and Lt. Michael Turner. He was assured that he did not need a Union representative, so that he was aware that the meeting was not disciplinary. He was not told he could not have a Union representative and he did not request one.[1] During the discussions, the command officers inquired, in somewhat oblique terms, about Cupp's preferences and interests in future assignments, in particular regarding his possible interest in a transfer to the detective bureau. Transfers to detective assignments are strictly discretionary on the part of management. After discussing such career options, Deputy Chief Chapin told Cupp he could not make him any promises, but would get back to him within the next week.

Within a few hours, Cupp was called back in again, this time for what turned out to be a meeting with the Deputy Chief, Lt. Turner and Lt. Curt Lawson. He did not seek Union representation at that second meeting. At this meeting, there was discussion of the sergeant's vacancy and an offer was made to Cupp that he could have a position in the detective bureau if he wanted it, but that the Employer needed a response before the end of December, when the sergeants promotion roster would expire. As Cupp recalls it, the Deputy Chief made clear that Cupp would not be promoted to sergeant, but offered him the transfer to the detective bureau. Cupp understood that the offer of the transfer to the detective bureau was contingent on his withdrawing his name from consideration for the sergeant promotion. Cupp understood the offer to be also contingent on his acting quickly, before the promotional roster for sergeant expired.[2] Cupp's contemporaneous notes support a conclusion that his understanding of the alleged *quid pro quo* was honestly and contemporaneously held. All present give descriptions of the several meetings which make clear that the discussions were not coercive or threatening in any way. In the past, Cupp had similar, unobjected to, discussions with management regarding his career goals, which lead to his similarly discretionary transfer to his current position of evidence technician. Cupp did not take up the offer and did not request transfer to the detective bureau.

The command officers present at the second meeting deny that there was any such express *quid pro quo*, but acknowledge that Cupp was told he would not be promoted to sergeant, and that he could have the position in the detective bureau, if he wanted it. The command officers acknowledge that Cupp was told that a prompt response was necessary; however, they insist that the need for a prompt response was because multiple positions were

[1] At the time of the two discussions Cupp was not a Union official; however, by the time of the hearing, Cupp had been selected as Local Union President.

[2] Cupp expressed the belief that the Employer sought his voluntary removal from the promotional list so that the Employer could reach further down the list to select a particular preferred candidate. There was no evidentiary support offered for that belief and the list, in fact, expired and no one was promoted to sergeant.

being shuffled and the Employer needed to know if Cupp wanted to stay where he was or move. The Employer insists that it was merely attempting to reasonably accommodate the career goals of multiple employees and find the best fits for several individuals it anticipated possibly reassigning or promoting.

Discussion and Conclusions of Law:

It is a violation of the Act for an employer to bargain directly with employees regarding any proposed change in conditions of employment, where the employees, as here, have selected an exclusive representative. The Union bears the burden of establishing such direct negotiations and must establish that an actual offer was made. *St. Clair Comm Coll*ege, 21 MPER 12 (2008); *MSU*, 1997 MERC Lab Op 615. Here, the promotional process is a mandatory subject of bargaining. *DPOA v Detroit*, 61 Mich App 487 (1985). The parties in fact have bargained over the terms of the promotional process and it is undisputed that their agreement provides the employer with significant and substantive discretion in granting promotions and in approving transfers to desirable assignments.

I find no improper direct dealing with Cupp. The Employer had the undisputed discretion to never promote Cupp to sergeant, no matter how many times a vacancy occurred. Likewise, the Employer had no obligation to grant Cupp a transfer to the detective bureau, even assuming he wanted it. There was, therefore, no question of a change in any existing condition of employment, even if I credit Cupp's conclusion that a *quid pro quo* exchange had been stated or suggested. Simply, Cupp was entitled to neither position, such that I would find no direct dealing violation even if the Employer was attempting to wheedle Cupp into waiving consideration for the sergeant promotion to ease the Employer's decision-making process, with the detective assignment offered as a sweetener in exchange for his cooperation. Here, the Employer had essentially unfettered discretion, as had the employer regarding overtime assignments in *City of Detroit (Water and Sewage)*, 1983 MERC Lab Op 603. Therefore, as in *City of Detroit*, direct discussions with an employee about that employee's preferences regarding a discretionary assignment do not constitute improper direct dealing. Moreover, I would not find a direct dealing violation on such a singular, non-coercive discussion with a single employee regarding his intentions related to several discretionary promotion or transfer possibilities.

Further, even a successful non-coercive effort by an employer to persuade a single employee to waive discretionary consideration of a promotion would not effectuate any substantive change in the promotion process. There was no suggestion that any employment benefit to which Cupp was entitled would be withheld, nor that Cupp would be improperly advantaged to the detriment of some other employee. Were this a situation where the Employer was significantly restricted in its ability to bypass Cupp on the promotional roster, then a direct effort to secure his agreement to yield that entitlement might have been improper direct dealing. Those are, simply, not the facts here. Similarly, had the Employer sought such concessions from multiple employees in a fashion which would then have had a significant impact on the promotional process, the proper course would have been to involve the Union, and a failure to do so might have violated the Act. Again, those are not the facts here. Rather, the Employer had discretion as to both the sergeant promotion and the detective

bureau assignment and was entitled to attempt to ascertain which options would best suit its own needs while attempting to reasonably maintain workforce morale.

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The Charge in this matter is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: February 3, 2011