STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT POLICE OFFICERS ASSOCIATION,
Labor Organization-Respondent,

Case No. CU10 G-031

-and-

ROBERT BOROSKI et al,

Individual-Charging Parties.
_____/

APPEARANCES:

Gregory, Moore, Jeakle and Brooks, P.C., by James M. Moore, for Respondent

Law Office of Eric I. Frankie, by Eric I. Frankie, for Charging Parties

DECISION AND ORDER

On October 7, 2011, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent, Detroit Police Officers Association (Union or DPOA), did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ held that the charge filed by Charging Parties, Robert Boroski and others, failed to support the contention that Respondent breached its duty of fair representation by not apprising them of a grievance action that resulted in the loss of their promotions to the position of sergeant. The ALJ concluded that the allegations did not support that Union had acted arbitrarily or in bad faith in its filing and handling of the grievance. The ALJ also rejected Charging Parties' contention of discriminatory conduct when compared to one bargaining unit member whose promotion was not rescinded by the grievance outcome. Following oral argument and the parties' resolution of several claims contained in the initial and amended charges, the ALJ issued an interim order[1] on December 28, 2010 indicating grounds for dismissal on all but one of the outstanding claims. On September 23, 2011, the ALJ held an evidentiary hearing on that pending claim. Subsequently, the ALJ issued her final conclusions in her Decision and

[1] Pursuant to Rule 161 (6) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, 423.161(6).

Recommended Order which was served upon the interested parties in accordance with Section 16 of PERA.

On October 31, 2011, Charging Parties filed exceptions to the ALJ's Decision and Recommended Order. On November 9, 2011, Respondent filed a combined brief opposing the exceptions and supporting the ALJ's conclusions.

In the exceptions, Charging Parties argue that the ALJ erred by concluding that (a) no breach occurred from Respondent's actions that led to the loss of their promotions, as well as (b) the Union's failure to challenge the one mid-2008 promotion because it feared a possible discrimination claim from that member. Conversely, in its brief supporting the ALJ's conclusions, Respondent rejects the arguments contained in Charging Parties' exceptions. After carefully considering the arguments made in the pleadings of each party, we find Charging Parties' exceptions to be without merit for the reasons stated below.

Factual Summary:

We adopt the ALJ's factual findings as outlined in her Decision and Recommended Order and will only repeat them here as necessary. We also review the record before the ALJ in a light most favorable to Charging Parties to determine the appropriateness of summary dismissal.

Charging Parties are non-supervisory police officers employed by the City of Detroit (Employer) and members of the bargaining unit represented by Respondent. In mid-2008, Charging Parties were promoted to the position of sergeant pursuant to an eligibility list created in 2004. A short time later, Respondent filed a grievance with the Employer challenging these mid-2008 promotions as being contrary to an agreement reached between the parties in 2003. Specifically, the Union contended that the 2004 promotional list had expired prior to making the mid-year promotions in 2008. In response, the Employer claimed that the 2004 list had not expired at the time of making those promotions. The grievance was processed through arbitration and resulted in a ruling in favor of the Union. Subsequently, Charging Parties' promotions were rescinded, except for one member who, but for maternity leave status at the time, would have received her promotion in 2007 rather than in mid-2008.

Charging Parties filed initial and amended unfair labor practice charges alleging, in sum, that Respondent breached its duty of fair representation by (1) filing the grievance action that caused the loss of their promotions; (2) failing to consult and include them in the grievance action and (3) not providing them with the arbitrator's decision on the grievance. The charge further alleged that Respondent acted discriminatorily against Charging Parties by allowing one member's promotion in mid-2008 to stand. Following a review of Charging Parties' responses to a show cause order, the ALJ held oral argument on a motion for summary dismissal filed by Respondent.

Discussions and Conclusions of Law:

Charging Parties except to the ALJ's recommendation for summary dismissal of their charge. They assert that Respondent violated its duty owed to them by not apprising them in advance of its intent to challenge their promotions and not including them in the process along the way. They also allege biased treatment by Respondent in light of the one member who was allowed to keep her mid-2008 promotion after the conclusion of the grievance. We disagree.

A major responsibility under Section 10 of PERA placed on each exclusive bargaining representative is the duty of fair representation owed to the members of its collective bargaining unit. As the ALJ correctly indicates this duty consists of several key components outlined by the Michigan Supreme Court in *Goolsby v Detroit*, 419 Mich 651, 679 (1984), and requires that a union: (1) serve the interests of all members without hostility or discrimination toward any; (2) exercise any discretion in complete good faith and honesty and (3) avoid arbitrary conduct. Significantly, a union is permitted to exercise wide latitude in determining whether to pursue a grievance based on what it perceives, in good faith, is in the best interest of the entire membership, even though that decision may conflict with the wishes of an individual member. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131, 134. A union has final authority to decide what grievances to file and is not required to follow the directives of individual members in conjunction with any particular grievance. *AFSCME Council 25*, 1992 MERC Lab Op 166. Further, a union is not expected to always make the right or best decisions, so long as it acts in good faith and avoids being arbitrary. *City of Detroit*, 1997 MERC Lab Op 31.

We agree with the ALJ that the record in this matter is insufficient to support a charge that Respondent violated the duty of fair representation by filing the grievance that resulted in Charging Parties losing their mid-2008 promotions. We also concur with the ALJ's conclusion that Respondent was not required to confer with Charging Parties on the grievance as they were not direct parties. Further, their likely opposition to the grievance made it understandable that Charging Parties were not contacted before or during the stages of the grievance process. Instead, the record reasonably supports the conclusion that Respondent acted in the good faith belief that the mid-2008 promotions violated the terms of its 2003 agreement with the Employer. While Respondent's efforts resulted in an outcome that was contrary to the interest of the individual Charging Parties, we find the overall intent was to enforce the bargaining obligations made in 2003 on behalf of the overall bargaining unit. Nothing in the record points to an ulterior motive by Respondent that was purposed to undercut those protections afforded under section 9 of the Act. Charging Parties, at best, have expressed their discontent with Respondent's efforts and the outcome of the grievance, which alone, do not indicate a breach of the Union's duty of fair representation. *American Federation of Teachers, Local 2000*, 22 MPER 21 (2009).

Charging Parties next allege that Respondent engaged in discriminatory conduct by not challenging the one mid-2008 promotion not rescinded by the grievance decision. However, the record before the ALJ adequately distinguishes this promotion from the others in that this member's upgrade to sergeant was delayed from 2007 due to a

maternity leave. We view the reasoning relied upon by Respondent in deciding not to seek rescission of this single promotion as appropriate in light of the vast discretion given to a union to determine the best strategies to undertake when enforcing its obligations in its bargaining agreements. Further, this Commission lacks authority to regulate or monitor a union's internal decisions on which grievances to file or process, absent a showing that the decisions were arbitrary, capricious, biased or made in bad faith. *Detroit Ass'n of Educational Office Employees*, 1984 MERC Lab Op 947. Since we can find no showing in the record to adequately support Charging Parties' assertions that Respondent failed to carry out its statutory duty, summary dismissal of the charge in this matter is appropriate under Rule 165.

Finally, we have carefully examined all other claims and issues remaining in the exceptions and find that they would not impact the outcome of this decision. For all of the aforementioned reasons, this Commission dismisses the exceptions and adopts the Decision and Recommended Order of the Administrative Law Judge.

ORDER

The unfair labor practice charge against Respondent is dismissed in its entirety.

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:

DETROIT POLICE OFFICERS ASSOCIATION,
Labor Organization-Respondent,

Case No. CU10 G-031

-and-

ROBERT BOROSKI, TISH ROSS, BERNARD BECK-O'STEEN, DERRICK MAYS, KARL LAWSON, KENNETH GERMAIN, SHELLY HOLDERBAUM, ERIC HILL, STACY CAVIN, STACY AMERINE, TAWAINA SNAPES-CRAIG, JOHNELL WHITE AND KRISTIE PURDIE,
Individual Charging Parties.
_____/

APPEARANCES:

Gregory, Moore, Jeakle and Brooks, P.C., by James M. Moore, for Respondent

Eric I. Frankie, for Charging Parties

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On July 15, 2010, Robert Boroski filed the above unfair labor practice charge on behalf of himself and fifteen other individuals employed by the City of Detroit Police Department (the Employer) with the Michigan Employment Relations Commission (the Commission) against the Detroit Police Officers Association (the Union) alleging violations of Section 10(3) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System. The charge was amended on August 3, 2010 and December 7, 2010, but the allegations set forth in the amendments were withdrawn pursuant to a settlement reached by the parties on September 23, 2011. Based on the facts as alleged in the charge and arguments made by the parties in written statements filed in September 2010 and at oral argument held on November 19, 2010, I make the following conclusions of law and recommend that the Commission take the following action.

The Unfair Labor Practice Charge:

The Union represents a bargaining unit of police officers employed by the Employer. On or about July 31, 2008, Boroski and the other individuals named in the charge were promoted by the Employer from police officer to sergeant, a rank represented by another labor organization. The Union filed a grievance asserting that the promotions were improper under its collective bargaining agreement with the Employer. The grievance was arbitrated, and the arbitrator ordered the promotions rescinded. On February 10, 2010, the Employer demoted the Charging Parties to police officer. The charge, as filed on July 15, 2010, alleges that the Union violated its duty of fair representation by causing the demotions. It also alleges that Respondent violated its duty of fair representation by failing to advise Charging Parties that it was filing the grievance, of the date of the arbitration hearing, or of the arbitration decision when it was issued.

After the charge was filed, some individuals withdrew as Charging Parties. The first amended charge, filed on August 3, 2010, named the thirteen individuals listed in the caption above as Charging Parties. The first and second amended charges alleged that after Charging Parties' demotions and their return to its bargaining unit, Respondent unlawfully attempted to coerce them into becoming full union members rather than agency fee payers. As noted above, Charging Parties have withdrawn these allegations as part of a settlement agreement.

On August 12, 2010, I issued an order pursuant to Rule 165 of the Commission's General Rules, 2002 AACS R 165, directing Charging Parties to show cause why their charge, as amended on August 3, should not be dismissed for failure to state a claim under PERA. Charging Parties filed a response to this order on September 1, 2010. On September 20, 2010, the Union filed a position statement arguing that the charge should be dismissed in its entirety.

I held oral argument on November 19, 2010. On December 7, 2010, Charging Parties filed a second amended charge. On December 28, 2010, I issued an interim order. In the interim order, I indicated my intent to recommend that the Commission dismiss the allegations set forth in the original charge, but concluded that the allegations in the amended charge raised questions of fact that required an evidentiary hearing. These allegations are now withdrawn.

Facts:

The facts with respect to the allegations remaining in the charge, as alleged in the charge and pleadings, are as follows. Charging Parties are employed by the Employer as police officers. As noted above, on or around July 31, 2008, they were promoted from police officer, a position in the Union's bargaining unit, to sergeant, a position represented by another labor organization.

Sergeant positions are filled from the ranks of police officers and the collective bargaining agreement between the Employer and the Union contains provisions

governing these promotions. Pursuant to the agreement and the City charter, a roster is maintained ranking police officers in order of their eligibility for promotion. In 2003, after a dispute over earlier promotions, the Union and the Employer entered into a detailed settlement agreement covering promotions past and future. Per the agreement, the Employer gave a written promotional examination on April 18, 2004. Shortly thereafter, a new eligibility roster was prepared based on this examination. The 2003 agreement required the Employer to pay all police officers on the April 2004 list a two-percent salary premium until they were promoted to sergeant or until the April 2004 roster expired, whichever came first. A new roster was to be prepared in 2006. However, this did not occur. Promotions were made in 2006 and in March 2007 from the April 2004 list without objection from the Union. In February 2008, the Employer began the process of establishing a new roster. As part of that process, interviews of police officers were held on May 18, 2008. On July 31, 2008, however, the Employer announced the promotion of seventeen police officers to sergeant. Most of the promotions were purportedly made from the April 2004 roster, although the Union alleged that some police officers were passed over without reason. Four officers, including Robert Boroski, were "charter promoted." [2]

The Union filed a grievance asserting that the July 31, 2008 promotions violated the parties' 2003 agreement. The Union did not consult with Charging Parties before it filed the grievance. In the grievance, the Union argued that, under that agreement, the April 2004 roster expired when the Employer conducted interviews on May 18, 2008 as part of the process for preparing a new eligibility roster. The Employer, citing different language in the agreement, asserted that the April 2004 list had not expired when it made the promotions. It also argued that the charter promotions were valid, even if the list had expired.

The effective date of the July 31 promotions was September 10, 2008. On September 9, 2008, an arbitration hearing was held on the Union's grievance. The Union did not notify the Charging Parties of this hearing and none of them were present. On October 24, 2008, the Employer published a new promotional eligibility roster. On or about November 19, 2008, the arbitrator ruled in favor of the Union's position on the grievance, and ordered the July 31, 2008 promotions rescinded. The arbitrator concluded that it was unnecessary for him to decide the merits of the Employer's charter promotion argument. [3] The Union did not notify Charging Parties of the arbitration award, although they all heard about it from other sources.

The Employer filed suit in Wayne County Circuit Court challenging the arbitrator's award. After the issuance of the award, the Employer attempted to collect the two percent salary premium it had paid police officers not promoted from the April 2004

[2] The Detroit City Charter requires that promotions be made from lists based on competitive exams. It also prohibits the police department from passing over employees with higher scores, except when the police chief submits a statement of written reasons for the bypass to the board of police commissioners and at least four members of the board approve the promotion. The agreement between the Union and Employer recognized the right of the City to "charter promote."

[3] The arbitrator did not explain his reasoning. Presumably, he assumed that the Employer could repromote the four charter-promoted police officers if it wished to do so.

roster between May 18 and October 24, 2008. The Union filed a grievance over this action, and the Employer agreed to permit the officers to keep the money.

On or around December 30, 2009, the Employer withdrew its lawsuit challenging the arbitration decision. On about February 15, 2010, Charging Parties were demoted from sergeant to police officer.

Velma Hampton was among the seventeen police officers promoted to sergeant on July 31, 2008. However, the Employer did not rescind Hampton's promotion. The Union did not grieve this action. According to the Union, Hampton's circumstances were different from those of the officers whose promotions were rescinded. The Union asserts, and Charging Parties do not dispute, that Hampton's position on the April 2004 eligibility roster was high enough for her to have been promoted to sergeant in March 2007, when the April 2004 roster was clearly still in effect. The only reason Hampton was not promoted in March 2007 was that she was on maternity leave at that time. [4]

Discussion and Conclusions of Law:

A union representing public employees in Michigan owes its members a duty of fair representation under Section 10(3) (a) (i) of PERA. The union's duty is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651,679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. In other words, a breach of the union's duty of fair representation occurs only when the union's conduct is arbitrary, discriminatory, or in bad faith. See *Vaca v Sipes*, 386 US 171, 177,190 (1967). The *Goolsby* Court, at 679, defined "bad faith" conduct as "intentional acts or omissions undertaken dishonestly or fraudulently," and "arbitrary" conduct as "impulsive, irrational or unreasoned conduct, or inept conduct undertaken with little care or with indifference to the interests of those affected." A union satisfies the duty of fair representation as long as its decision is within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35; *Ann Arbor Pub Schs*, 16 MPER 15 (2003).

Although a union owes a duty of fair representation to each of its members, its first duty is the welfare of the membership as a whole. *Lowe* v *Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145 (1973). In a recent opinion, *Merritt et al v International Association of Machinists* 613 F3d 609, 619 (CA 6, 2010), the Sixth Circuit Court of Appeals, citing *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v Lockridge*, 403 US 274, 301 (1971), held that in order to demonstrate that a union has violated its duty to avoid unlawful discrimination, the plaintiff or charging party must produce evidence of discrimination that is "intentional, severe, and unrelated to legitimate union objectives." The Commission has consistently

[4] Except for Beck-O'Steen, all the Charging Parties were below Hampton on the roster when it was issued in April 2004. It is not clear why Beck-O'Steen was not promoted in 2007.

held that a union has the discretion to make judgments concerning the general good of the membership and to act on these judgments even though its actions conflict with the desires or interests of certain members. See, e.g., *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218. In *Lansing*, the Commission held that a union did not violate its duty of fair representation by negotiating the termination of a longstanding agreement with the employer under which certain employees were grandfathered from paying union dues.

Here, the Union filed a grievance objecting to Charging Parties' 2008 promotions on the basis that the eligibility list used to select them for promotion had expired. It argued that the promotions were improper under its agreement with the Employer and that a different group of its members should have been promoted instead. Charging Parties take issue with the Union's argument that the April 2004 list had expired. They also complain that, as members in good standing, they did not deserve to have the Union act against their interests. In addition, they argue that the Union was guilty of unlawful discrimination by challenging their promotions, while not objecting to the promotion of Velma Hampton. The Union did pursue a grievance which was contrary to Charging Parties' interests, although of benefit to other members of the unit to whom the Union owed an equal duty. The Union decided to challenge Charging Parties' promotions, but not that of Hampton. However, the facts as alleged by the Charging Parties do not suggest that in making these decisions the Union was motivated by factors other than the best interests of their members as a whole and their judgment that Hampton's situation was different from that of the Charging Parties. The facts as asserted by the Charging Parties also do not indicate that the Union was guilty of gross negligence or that their actions were so far outside the range of reasonableness that they could be considered arbitrary. While the duty of fair representation requires a union to serve the interests of all members without discrimination, this does not mean that a union is prohibited from taking any action which benefits some of their members at the expense of others. As the Court in *Merritt* noted, to constitute unlawful discrimination under this standard, the discrimination must be both intentational and unrelated to legitimate union objectives. That was not the case here. I conclude that, based on the facts as alleged in the charge, the Union did not violate its duty of fair representation toward Charging Parties by pursuing the grievance which caused them to be demoted.

Charging Parties also allege that the Union violated its duty of fair representation by failing to advise them that it was filing the grievance, of the date of the arbitration hearing, or of the arbitration decision when it was issued. The Commission has consistently held that a union's failure to communicate with a member about even the member's own grievance is not in itself a breach of the union's duty of fair representation. See, e.g., *Wayne Co (Sheriffs Dep't)*, 1998 MERC Lab Op 101, 105 (no exceptions); *Southeastern Michigan Transportation Authority*, 1988 MERC Lab Op 191, 196 (no exceptions); *AFSCME Local 1600*, 1981 MERC Lab Op 522, 527 (no exceptions). In this case, the Union understood that Charging Parties would be opposed to the grievance, but it was not obligated to consult with Charging Parties before deciding to file it. Moreover, since the grievance arbitration was a proceeding involving the Employer and the Union, Charging Parties had no right to participate in the arbitration hearing. Since the Union's failure to communicate with Charging Parties about the

grievance did not cause them to give up their rights, I find that this failure did not constitute a breach of the Union's duty of fair representation.

As discussed above, I conclude that the Union did not violate its duty of fair representation by the conduct alleged in the charge as filed on July 15, 2010, including pursuing the grievance that caused them to be demoted, failing to challenge the promotion of Velma Hamption, and failing to advise them that it was filing the grievance, of the date date of the arbitration hearing, or of the November 19, 2008 arbitration decision after it was issued. 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
Michigan Administrative Hearing System

Date: _____