

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

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN/
WAYNE COUNTY DEPUTY SHERIFF'S' ASSOCIATION,
Labor Organization-Respondent,

-and-

GARY MCDUGAL,
An Individual-Charging Party.

Case No. CU13 B-004
Docket No. 13-000195-MERC

APPEARANCES:

Martha M. Champine, Assistant General Counsel, for Respondent

Gary McDougal, appearing on his own behalf

DECISION AND ORDER

On December 6, 2013, 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

_____/s/_____
Edward D. Callaghan, Commission Chair

_____/s/_____
Robert S. LaBrant, Commission Member

_____/s/_____
Natalie P. Yaw, Commission Member

Dated: January 23, 2014

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

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN/
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Case No. CU13 B-004
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-and-

GARY MCDOUGAL,
An Individual-Charging Party,

Martha M. Champine, Police Officers Association of Michigan, for Respondent

Gary McDougal, appearing for himself

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 in Detroit, Michigan on May 20, 2013, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the testimony and exhibits presented at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The unfair labor practice charge was filed on February 20, 2013 by Gary McDougal against the Wayne County Deputy Sheriffs' Association. McDougal is a deputy sheriff employed by Wayne County and the Wayne County Sheriff (the Employers). The bargaining unit of which McDougal is a part is represented by the Police Officers Association of Michigan (POAM or Respondent). The Wayne County Deputy Sheriffs' Association (the Association) is a separate organization within the POAM of deputy sheriffs employed by the Employers.

The collective bargaining agreement between the Employers and Respondent requires members of the bargaining unit, as a condition of employment, to be members of the POAM or pay a service fee to that organization. The Association also collects membership dues. However, members of the bargaining unit are not required to be members of the Association to retain their employment. McDougal is a member of the POAM, but is not a member of the Association.

McDougal alleges that the Association/Respondent violated its duty of fair representation toward him by blocking his attempts to transfer to a different position within the unit because McDougal was not a member of the Association and/or because of Association President Greg Hattaway's personal animosity towards him.

Findings of Fact:

The exact relationship between Respondent and the Association is not reflected in the record. The Association's officers consist of a president, currently Greg Hattaway, vice-president, second vice-president, and secretary-treasurer. The Association has an executive board that is made up of these officers and the chief union stewards of five of the six divisions within the Wayne County Sheriff's Department.

Job Bidding Under the Collective Bargaining Agreement

Members of the bargaining unit are employed in six divisions within the Wayne County Sheriff's Department and in the Wayne County Executive's Office. The six divisions within the Sheriff Department are: jail-1, jail-2, and jail-3 (each representing a different jail facility); field services/road patrol; court services; and executive. Divisions are subdivided into units.

The collective bargaining agreement provides unit members with several types of job bid opportunities. One is shift bid. Pursuant to Article 14.01(A) and Article 14.01(B) of the collective bargaining agreement, employees working in divisions where unit employees work more than one shift, primarily the jails, are allowed to select shift assignments based on their seniority twice each year. All shift assignments are open for rebid between February 1 and February 28, and again between August 1 and August 15, each year. Per Article 14.01(A), the shift rebid within a division is limited to officers already assigned to that division. That is, officers from outside a division cannot use the shift rebid to transfer into a different division.

Some, but not all, vacant assignments are also filled by seniority bid. Per Article 14.03 of the collective bargaining agreement, all job assignments within the unit are classified as regular, discretionary, "equal balance", or "qualification board." Discretionary positions are filled by officers selected by the Sheriff and are not open to bid. Qualification board assignments are also not filled by bid. In an "equal balance" assignment, one half of the positions are filled at the Sheriff's discretion and one half the positions are filled by seniority bid; all officers assigned to equal balance positions may be removed at any time at the Sheriff's discretion.

For assignments that are subject to filling by seniority bid, Article 14.01(D) states:

D. Vacant positions shall be filled:

1. First by shift from those employees assigned to that unit.
2. Second by bid from those employees outside the unit.

In addition, Article 14.02 of the collective bargaining agreement, entitled "Permanent

Transfers,” provides as follows:

A. Employees may apply for transfer to any vacant position within their classification in the same or different division, as indicated in Section 14.03(A) of this Article, with the exception of those exempted as discretionary.

B. The Union shall make applications for transfer to seniority-bid positions available to employees in the bargaining unit. Employees shall return the transfer applications to the Union for processing. A transfer shall be defined as an interdepartmental, interdivision or intra-divisional transfer to a vacant position. *The employee is limited to one (1) transfer during a twelve (12) month period.* [Emphasis added].

...

F. Transfer shall be determined on the basis of an objective review of an employee’s qualifications, ability, seniority, and disciplinary record, with seniority controlling when the other factors are relatively equal.

G. An employee transferred pursuant to the criteria set forth in the preceding paragraph shall be entitled to a thirty (30) day trial period during which the employee may elect to return, or may be returned, to his or her former job assignment, provided that, if returned by the Sheriff, written reasons for such action shall be given the employee at the time of return.

Temporary transfers, i.e., transfers to positions held by officers on a long-term leave, are covered by Article 14.06. This article states:

A. Employees may apply for transfer to any temporary vacant position within their classification in the same or different division, as indicated in section 14.03 of the article, with the exception or those exempted as discretionary or governed by qualification board. Such requests for transfers shall be handled by the Union in the same manner as requests for permanent transfers, except that separate lists shall be maintained.

B. The Sheriff shall notify the Union of the need to fill a temporary vacancy in a nondiscretionary position. The notice shall state the division, unit and shift in which the said vacancy exists or will exist.

C. The Union shall forthwith submit to the Sheriff the names of the employees with the highest seniority who have submitted bids for temporary transfers to such vacancy. The most senior such employee submitting a bid who would be eligible for permanent transfer to this vacancy shall be selected for the assignment.

D. All employees selected for temporary assignments shall remain in these positions for the duration of the assignment.

E. Persons transferred to temporary positions shall be returned to their regular assignments when the temporary transfer terminates.

Association President Hattaway, Respondent's only witness, described the process of filling temporary vacancies as follows. When the Association learns that an employee in a position subject to filling by bid is going to be off work for more than 30 days, the Association posts the position as a temporary vacancy. After the posting period, the temporary vacancy is filled by the most senior qualified employee responding to the posting. Permanent vacancies, according to Hattaway, are generally filled by looking at employee bid sheets. According to Hattaway, all unit employees are given the opportunity once a year to submit a bid sheet to the Association listing all the assignments, including shifts, in which they have an interest. Hattaway testified that when a permanent vacancy opens up, the Association reviews the bid sheets and recommends to the Employers that the transfer go to the most senior qualified applicant from the same division, if there are interested applicants from within that division. If not, the transfer goes to the most senior employee interested in the position.

Hattaway testified that when a unit employee submits a request for a transfer to a vacant position, the employee's chief steward brings the request to the Association's executive board. The executive board then reviews it in light of the contract and makes a decision about whether the transfer should be granted.

McDougal's Transfer Requests

McDougal was hired as a deputy sheriff in January 1995. For about the first five years of his employment, he was permanently assigned to a position in a jail division. Beginning in about 2000, he transferred to a position in the court division and was assigned to provide security at the Frank Murphy Hall of Justice, a criminal court in the City of Detroit.

In 2009, McDougal went to Hattaway to file a grievance when the Employers refused to pay McDougal some bonus vacation days he believed he was entitled to under the contract. According to McDougal, after Hattaway told him that the Employers were correct and that he had no right to the bonus days, McDougal asked Association Vice President Brian Earle to help him. McDougal testified that Hattaway became angry at both him and Earle because he had sought help from Earle, and an argument developed between Earle and Hattaway which took on racial overtones. The Association eventually took McDougal's grievance to arbitration, and the matter was settled with McDougal receiving a partial monetary settlement. In 2012, Hattaway was still Association president and Earle was still vice-president. McDougal testified that in October 2012, Earle told McDougal that there continued to be friction between himself and Hattaway.

Sometime in 2011, McDougal bid for and was awarded an assignment to fill a temporary vacancy in the jail transportation unit at the Dickerson jail facility. As provided in Article 14.06(D) of the contract, McDougal was to return to his court assignment when his temporary assignment ended in June 2012. However, before the temporary assignment ended, McDougal submitted a request to the Association to transfer to a floor security position at the Dickerson jail.

McDougal was told by an Association steward who McDougal knew as Martin that he could not transfer. McDougal then contacted Earle, who also told him that he could not transfer. McDougal did not receive an explanation for why his transfer request was denied and Respondent did not explain on the record why McDougal could not transfer at this time.

After telling McDougal that he could not transfer to a floor security position, Earle offered him a position in registry (jail intake) at the Dickerson jail. The registry position is listed as an "equal balance" assignment in the contract, but the parties agree that the position McDougal was offered was a discretionary position not subject to bid. McDougal told Earle that he was concerned that if he took the registry position he would lose his bid rights. Earle told him that if he did not like the registry assignment he could return to the court. McDougal accepted the registry assignment, but soon decided that he did not like it. For about two weeks, McDougal worked floor security at the Dickerson jail. On July 3, 2012, he was directed to report back to the court.

In August 2012, McDougal made another request to transfer to a floor security position at the Dickerson jail. McDougal's transfer request was again denied. Sometime between August and October 2012, according to McDougal's testimony, McDougal and Association chief steward Angela Givan had a conversation about his transfer request. As a chief steward, Givan was at that time a member of the Association's executive board. Givan told McDougal that Hattaway had told her that since McDougal was not in the Association, the Association "wasn't going to allow him to transfer." Givan also told McDougal that Hattaway had said that he had helped McDougal when the Employers refused to credit him with bonus vacation days several years before, that McDougal didn't join the Association after that, and that the Association wasn't going to do anything for him this time. Hattaway admitted that he and Givan had conversations about McDougal's transfer request, but denied that he said anything to her about McDougal not being a member of the Association during these conversations.

As discussed above, the record indicates that about three years earlier, McDougal was the center of an ugly dispute between Association officers Hattaway and Earle when McDougal went to Earle with a grievance that Hattaway had told him lacked merit. McDougal impressed me as a credible witness. Given McDougal's demeanor on the stand and the history between McDougal and Hattaway, I find McDougal's testimony regarding what Givan told him to be credible.

In November 2012, McDougal submitted a third request to the Association to transfer to a floor security assignment at the Dickerson jail. This request was also denied. In January 2013, he submitted a fourth request. In his January request, he stated that he would accept a floor security assignment at either the Dickerson facility or the downtown Detroit facility, which is jail division-1. When McDougal gave his January transfer request to Earle, Earle told him that he would see what he could do. Earle later phoned him and said that he, Earle, would submit the transfer request to the board and that Larry Napier, chief steward for the court division, would talk to the executive board about McDougal's request at the February 2013 board meeting. Earle warned McDougal that Hattaway had talked to Givan to try to persuade her not to vote to approve his transfer.

McDougal testified that after the February executive board meeting, Napier approached him at work and told him that his transfer request had been denied again, but that the board had said that if he was willing to join the Association they would approve his transfer. McDougal then talked to Earle on the phone, and told Earle what Napier had said, including that he had to join the Association. According to McDougal, “Earle told me the same thing that Larry Napier told me, that they told me that I couldn’t transfer. I told him what Larry Napier told me, that they told me that I had to join the Association, and Brian Earle told me that they told me that I couldn’t move for a year.” McDougal then filed the instant charge.

Although I find McDougal to be a credible witness, I conclude that either he did not understand Napier correctly, or, more likely, Napier did not accurately relay to him what happened at the executive board meeting. In making this finding, I note that McDougal identified Association vice president Earle as being on his side in this dispute, that McDougal had gone to Earle to get help, and that Earle had promised to help him. When McDougal talked to Earle about what had happened at the executive board meeting, Earle confirmed that the board had decided that he could not transfer. However, according to McDougal’s testimony, Earle did not confirm Napier’s statement that McDougal would be allowed to transfer if he joined the Association. Instead, according to McDougal, Earle told McDougal that he could not transfer for a year. This was consistent with Hattaway’s explanation of why McDougal was not allowed to transfer, as discussed below.

Hattaway testified that under the collective bargaining agreement, McDougal should have returned to his permanent court position after his temporary assignment in the jail transportation unit in the Dickerson jail ended in June 2012. Before that assignment ended, as set out above, he requested a permanent transfer to a floor security position at that jail. At about the time McDougal made this request, the Employer notified Respondent that there was a discretionary registry position open at the Dickerson jail. According to Hattaway, the Association worked out an agreement with the Employers to offer the position to McDougal. McDougal accepted the registry position, but then gave it up to return to his court assignment. Hattaway did not explain why McDougal was not allowed to transfer to the floor security position when he made his initial request in June 2012. However, Hattaway testified that the Association’s executive board concluded that when McDougal left the discretionary registry position to return to the court in July 2012, his return under these circumstances was a “transfer” under Article 14.02 (B) of the contract. Since Article 14.02 (B) limits employees to only one transfer per 12 month period, after McDougal “transferred” back to his court assignment on July 3, 2012, according to Hattaway, he was not eligible for a transfer to another position for one year from that date. Hattaway testified that he did not personally vote on any of McDougal’s requests because as Association president he votes only when there is a tie. However, Hattaway understood the above to have been the basis for the executive board’s decision.

McDougal testified regarding other unit members he knew who had been permitted to transfer. Hattaway disagreed that the circumstances were similar. One was a deputy who had a permanent position in the jail transportation unit at Dickerson when McDougal was assigned there. According to McDougal, the deputy transferred from the transportation unit to a floor security position in the Downtown jail, and then was allowed to transfer back to the transportation unit. As Hattaway recalled it, the deputy took a temporary floor security position

and then returned to the transportation unit after it ended, although there was some delay in processing his return. Hattaway admitted that the floor security position might have been a permanent position, but pointed out that the deputy would, in any case, have a right to return to the transportation unit. Another example offered by McDougal was a deputy with a temporary assignment at Dickerson; when that deputy's temporary assignment ended, she received the same position on a permanent basis. According to Hattaway, in this case the temporary vacancy turned into a permanent vacancy, and the deputy with the temporary assignment was allowed to stay in the job – although she was reassigned to afternoons – because at that time no one had a pending request to transfer to that jail.

Discussion and Conclusions of Law:

A union's duty of fair representation 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. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). “Discriminatory” conduct, in this context, has been defined as “discrimination that is intentional, severe, and unrelated to legitimate union objectives.” *Merritt v International Ass'n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010); *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v Lockridge*, 403 US 274, 301 (1971). “Arbitrary” conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682. Union conduct is not arbitrary unless it is so far outside the range of reasonableness that it can be considered irrational. *Air Line Pilots Ass'n Int'l Union v O'Neill*, 499 US 65, 67 (1991).

The evidence established that Respondent's role is not limited to deciding, when the Employers have denied a unit member's request for transfer, whether a grievance filed over the denial would be likely to succeed. Instead, the Employers have ceded to Respondent control over the process of filling permanent and temporary vacancies designated as open to seniority bid under the collective bargaining agreement. In exercising this responsibility, of course, Respondent must act in good faith and avoid discriminatory or arbitrary conduct.

It has long been established that when a union is selected as the statutory exclusive bargaining representative for a unit of employees, it becomes the agent of all employees and acquires the responsibility to represent the interests of all members of the unit fairly and impartially, and not merely members of its own group, *Wallace Corp v Labor Board*, 323 US 248, 255-256 (1944). I find that refusing to allow McDougal to transfer to a vacant seniority bid position to punish him for failing or refusing to become a member of the Association would not constitute a “legitimate union objective,” and would violate Respondent's duty of fair representation. Refusing to allow McDougal to transfer because of personal hostility toward him would also violate Respondent's duty of fair representation, because Respondent's representatives have the obligation to exercise their authority in good faith. Based on the evidence, however, I conclude that neither McDougal's failure to become an Association member or Hattaway's hostility toward him was the reason his transfer requests were denied.

As discussed above, there is no explanation on the record for why McDougal's June 2012 transfer request was denied. However, Hattaway testified that the reason the Association's executive board denied McDougal's subsequent transfer requests was that his return to his court assignment in July 2012, after giving up the registry position, constituted a "transfer" under Article 14.02(B) of the collective bargaining agreement. Under that section, a unit employee is allowed only one transfer per 12 month period. Under Article 14.02(G), an employee who is awarded a seniority bid transfer under Article 14 has the right to return to his or her former position within 30 days of the transfer. Obviously, the exercise of that right would not normally itself be considered a "transfer." However, the registry position McDougal accepted in June 2012 was not a seniority bid position covered by Article 14, but a discretionary position. Because McDougal arguably had no right to abandon a discretionary position and return to the court, McDougal's return was also arguably a "transfer." Had McDougal transferred to a seniority bid position in June 2012 and then decided to return to the court, he would, of course, been barred by Article 14.02(B) from transferring to any other seniority bid position for a year.

That McDougal's return to his court assignment constituted a "transfer" within the meaning of Article 14.02(B) was not the only possible interpretation of the contract language. As noted above, an employee's decision to return to his former position after transferring to a seniority bid position would not be a "transfer." However, I find this interpretation to be within the range of reasonableness.

The most important question in this case is whether, in light of the evidence presented, Hattaway's testimony about why McDougal was denied a transfer should be believed. As discussed above, I credit McDougal's testimony that Association chief steward Givan told him, in the fall of 2012, that Hattaway had said that McDougal would not be allowed to transfer because he was not a member of the Association. I do not credit Hattaway's testimony that he did not discuss McDougal's Association membership with Givan. The views expressed by Hattaway to Givan, I find, were Hattaway's views. However, Hattaway testified without rebuttal that decisions regarding transfers were made by the Association's executive board as a body. The executive board consisted of Hattaway and eight other members including, between August 2012 and February 2013, both Givan and Earle. There is no evidence that any other member of the executive board shared Hattaway's view that McDougal's failure to join the Association should influence the board's decision as to whether McDougal had the right to transfer to another assignment. To the contrary, the behavior of Earle, both before and after the February 2013 board meeting suggests that the executive board may initially have been divided over whether the collective bargaining agreement barred McDougal's transfer, but that it eventually concluded that it did. I conclude that the evidence, taken as a whole, does not support the conclusion that Respondent refused to allow McDougal to transfer because he was not a member of the Association or because Hattaway bore him personal animosity. I conclude, therefore, that McDougal did not establish that Respondent violated its duty of fair representation, and I 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: December 6, 2013