

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

In the Matter of:

DETROIT POLICE OFFICERS ASSOCIATION,
Respondent-Labor Organization,

Case No. CU98 C-9

-and-

JOAN MERRIEWETHER,
An Individual Charging Party.

_____ /

APPEARANCES:

Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., by William A. Schimmel, Esq., for the Respondent

Joan Merriewether, in pro per

DECISION AND ORDER

On December 8, 1998, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent did not violate its duty of fair representation under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10). On June 22, 1999 this Commission issued a Decision and Order dismissing the charge in part, and remanding to the Administrative Law Judge that portion of the charge relating to the Union's delay in communicating its decision not to file a grievance on Charging Party's behalf. The order directed the ALJ to make certain credibility resolutions and to prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended order.

On August 16, 1999, the ALJ issued her Decision and Recommended Order on Remand. Addressing the conflict in the testimony, the ALJ credited Charging Party and concluded that Respondent's grievance chairman made false statements which effectively prevented Merriewether from filing a grievance on her own behalf. However, the ALJ held that Respondent did not breach its duty of fair representation because there was no evidence that Barr was personally hostile toward Charging Party or that his ultimate decision not to file a grievance was based on reasons other than his good faith opinion that the grievance was without merit. Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order on Remand on September 8, 1999.

Upon careful review of the exceptions, we conclude that they fail to comply with the General

Rules of the Employment Relations Commission. Pursuant to Rule 66, R423.466, exceptions must set forth with specificity the question of procedure, fact, law, or policy at issue, identify that portion of the ALJ's decision to which objection is made and state the ground for the exceptions, including citation of authority, if any. Any exception which fails to comply with this rule may be disregarded. R 423.466(3). In the instant case, Charging Party merely reiterates the allegations set forth in the original charge and exceptions and makes no attempt to explain why the Decision and Recommended Order on Remand is erroneous. For this reason, we hereby dismiss the exceptions and adopt as our order the order recommended by the Administrative Law Judge on remand. See *City of Detroit Building and Safety Engineering*, 1998 MERC Lab Op 359.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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Joan Merriewether, *in pro per*

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE
ON REMAND

On December 8, 1998, I issued a Decision and Recommended Order in the above case pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 & 423.216, MSA 17.455(10) & 17.455(16). In this decision, I recommended dismissal of all allegations contained in the charge filed by Joan Merriewether, an individual, against her bargaining representative, the Detroit Police Officers Association. Merriewether filed timely exceptions to certain of my finding and conclusions. On June 22, 1999, the Employment Relations Commission issued an order dismissing the charge in part, and remanding to me "that portion of the charge relating to the Union's delay in communicating its decision not to file a grievance for the limited purpose of making credibility resolutions concerning the conflict in the testimony of Charging Party and its grievance chairperson." The order also directed me to "prepare and serve on the parties a supplemental decision containing findings of fact, conclusion of law, and a recommended order in light of the . . . remand."

In her charge, Merriewether asserted that the Detroit Police Department failed to include her in a group of officers transferred to its aviation section in December 1997 because of her sex. There is a conflict in the record between the testimony of Merriewether and that of John Barr, Respondent's grievance chairman, with respect to whether Barr told Merriewether and he had filed, or would file, a grievance on her behalf. This is the conflict in testimony which I am directed to

resolve. I am also directed to make conclusions of law and a recommended order based on my resolution of the conflict in testimony. That is, if I find that Barr told Merriewether that he had filed, or would file a grievance, when in fact, he did not, I am to determine whether under the facts of this case this conduct violated Respondent's duty of fair representation.

By letter dated June 23, 1998, I invited the parties to file additional briefs on remand. On June 29, I received a letter from Respondent declining to file a brief, but drawing my attention to the last three paragraphs of my original Decision and Recommended Order. Merriewether did not file a brief. Pursuant to the Commission's June 22, 1999 order, and based on the record as a whole, I find as follows:

Communications Between Merriewether and Barr

Merriewether testified that she spoke to Barr shortly after the list of employees transferred to the aviation section was posted. This was between November 27 and December 1, 1997. According to Merriewether, Barr told her that "he would look into" the facts of her transfer. Merriewether testified that in a later conversation, Barr said that "he would file a grievance on my behalf because they made a mistake and went by seniority, and they were not supposed to do that." According to Merriewether, at some point Barr told her that she was "having a hard time getting to aviation because (she) was a female, and they do not want females down in aviation." According to Merriewether, Barr also told her, at some point, that it was the department's practice to transfer licensed pilots on the aviation section transfer list before transferring any nonpilot on the list. According to Merriewether, after this conversation she repeatedly called Barr and asked him to send her a copy of the grievance. On cross-examination, she said that she talked to Barr "at least twice."¹ According to Merriewether, on each occasion Barr said that he would mail her a copy of the grievance, but she never received it.

Barr was sure that he talked to Merriewether after the transfer list was published. Barr recalled telling Merriewether at some time that it looked like they just didn't want women in the aviation section. Barr also recalled that at some point Merriewether told him that none of the persons transferred were pilots. Other than this, Barr could not recall the specifics of any conversations he may have had with Merriewether before February 18, 1998. He was sure, however, that he did not tell Merriewether that he would file a grievance no matter what his investigation disclosed, and he was also certain that he did not tell her that he had actually filed a grievance.²

¹ It was not completely clear from Merriewether's testimony whether these telephone conversations occurred before January 1, 1998. However, when asked by Respondent's attorney if she had filed her own grievance on this matter, Merriewether replied, "No, because I believe(d) he filed one." This suggests that Merriewether called Barr at least once in December 1997.

²A sergeant and an officer assigned to Merriewether's precinct also testified that Barr told them that the department had "messed up," and that Merriewether deserved the transfer. This

On February 18, 1998, both Barr and Merriewether were present at a union meeting. According to Merriewether, after the meeting she approached Barr and asked him again for a copy of the grievance. According to Merriewether, he said on that time that he would drop it off at (her) precinct. According to Barr, he told Merriewether that “there was a problem,” with her transfer. According to Barr, he tried to explain to Merriewether that, in fact, one of the people actually transferred would have had a grievance if Merriewether had received the transfer instead. Barr testified that “it was obvious that we were not communicating,” and that he decided to put his explanation in a letter. Later that same day, according to Merriewether, she also talked to him on the phone. What Merriewether did receive was a letter, dated March 4, 1998, stating that Respondent had not, and was not going to, file a grievance.

Discussion and Conclusions

Based on Barr’s demeanor while testifying regarding the contract, its interpretation, and the steps Respondent has taken to enforce its terms, I credit his testimony on these issues. However, in contrast to his demeanor when testifying about the contract, Barr displayed nervousness and uncertainty when testifying about the details of his conversations with Merriewether. Merriewether’s demeanor showed her to be an honest and forthright witness. However, the record demonstrated that Merriewether had a misconception about how transfers were handled. I conclude that this misconception affected her memory of certain conversations, as discussed below.

Sometime between November 27, 1997 and January 1, 1998, Merriewether and Barr had either one or two face-to-face conversations about Merriewether’s failure to receive a transfer to the aviation section. Barr told Merriewether that “apparently the aviation section doesn’t want females.” I find that Barr conveyed to Merriewether his personal belief that she was the victim of discrimination, and that the aviation section had done something to keep Merriewether from being transferred because it did not want a woman officer. I find that when Barr promised to look into the transfers he also conveyed to Merriewether his expectation that he would find something wrong in the way the transfers were handled. However, I do not credit Merriewether’s testimony that Barr told her that he would file a grievance on her behalf “because they made a mistake and went by seniority,” or that Barr told her that it was the department’s practice to transfer all licensed pilots on the aviation transfer list before those without licenses, regardless of seniority. I also find that Barr never explicitly told Merriewether that he would file a grievance regardless of what his investigation turned up.

Merriewether testified that she telephoned Barr at least two times after their face-to-face conversation. Each time she asked him for a copy of the grievance that she thought he had filed.

remark was made in a precinct administrative office, in front of a number of other officers. Neither witness recalled Barr saying that he had actually filed a grievance on Merriewether’s behalf. There was no significant difference between the testimony of these witnesses and Barr’s version of this incident.

According to Merriewether, each time Barr told her that he would mail her a copy. I note that Barr testified he had no memory of these conversations. I credit Merriewether's testimony on this point.

Merriewether and Barr also had different versions of the conversation they had after the February 18, 1998 union meeting. I find it unnecessary, however, to determine what Barr said to Merriewether at that time. By this date, any time limits that applied to the filing of the grievance had expired. See discussion, *infra*. It is undisputed that about two weeks later Barr wrote Merriewether a letter clearly indicating that he had not filed a grievance.

In summary, I find that Barr did not explicitly promise Merriewether that he would file a grievance over her failure to receive a transfer to the aviation section. I find, however, that Barr falsely told Merriewether that he had filed a grievance on her behalf in at least two telephone conversations, at least one of which took place before January 1, 1998.

Respondent's Duty of Fair Representation

In my original decision, I held that Merriewether did not have a right to file a written grievance under the contract's grievance procedure. The Commission found that Article 7(E) of the grievance procedure did give her that right. In response to a question from Respondent's counsel, Merriewether responded that she had no reason to try to file a grievance herself, since she believed Barr had filed one for her. I agree, and I find, therefore, that Barr's false statement effectively prevented Merriewether from filing her own written grievance.

As noted above, I was directed by the Commission to make conclusions of law and a recommended order based on my resolution of the conflict in testimony between Merriewether and Barr. For reasons discussed below, however, I conclude that I cannot determine whether Respondent violated its duty of fair representation in this case without also determining whether Barr intentionally gave Merriewether false information regarding the status of her grievance.

Article 7(G) of the contract sets out the time limits for filing grievances under the contract. It states, in part:

Grievances shall be filed within thirty (30) calendar days of the event, occurrence or knowledge of the facts giving rise to the grievance . . .

Barr was still investigating Merriewether's grievance after January 1, 1998. It was not until late January 1998, after he received the department's response to his request for information, that Barr finally concluded that Merriewether did not have a grievance. At the hearing, Barr agreed that the time limit for filing a grievance alleging a violation of the transfer clause, Article 10 of the contract, had expired. However, he maintained that under the contract he could file a grievance asserting that the transfers violated of Article 6(F), requiring the department to provide "equality of opportunity, consideration and treatment," any time he uncovered evidence that this article had been violated. Moreover, as noted above, Barr behaved after January 1 as if a grievance filed then would be timely. For these reasons, I conclude that Barr did not miss the deadline for filing a timely

grievance under the contract. This fact is significant because if Barr had missed the deadline for filing Merriewether's grievance, he would have had a motive - covering up his mistake - for telling her that he had already filed. If Barr was not negligent in his handling of the grievance, however, there is nothing in the record to explain why he would intentionally give Merriewether false information.

A union's duty of fair representation consists 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, 177; 87 S Ct 903 (1967). "Bad faith" indicates an intentional act or omission undertaken dishonestly or fraudulently. *Goolsby v Detroit*, 419 Mich 651, 679 (1984). There is no evidence that Barr was personally hostile toward Merriewether, or that his decision regarding her case was based on reasons other than his good faith opinion of its merits. I find that there is no evidence in this case that Barr intentionally sought to mislead Merriewether when he falsely told her that he had filed a grievance on her behalf. I conclude that the record does not support a finding that Respondent acted in bad faith in this case. There is also no evidence on this record to support Charging Party's initial claim that Respondent discriminated against her because of her sex.

The absence of evidence of bad faith distinguishes this case from *Local 417, UAW(Falcon Industries, Inc.)*, 245 NLRB 527, 102 LRRM 1466 (1979), cited at fn 1 of the Commission's decision. In that case, the union was found to have wilfully failed to pursue an employee's grievance, and also to have repeatedly, and intentionally, misinformed an employee regarding the status of her grievance. See also *Groves-Granite*, 229 NLRB 56, 96 LRRM 1146 (1977).

If Respondent did not act in bad faith or in a discriminatory manner, the only question remaining is whether Respondent violated its duty to avoid "arbitrary conduct" when Barr falsely, but unintentionally, told Merriewether that he had already filed a grievance on her behalf, thereby preventing her from filing her own grievance in a timely fashion. In *Goolsby v Detroit, supra*, the Court extensively discussed the definition of "arbitrary conduct" under PERA. The Court agreed with the majority of other jurisdictions that "mere negligence" does not constitute a breach of the union's duty of fair representation. The Court stated:

In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected. We think the latter includes, but is not limited to, the following circumstances: (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members. *Goolsby*, at 679.

In *Goolsby*, the union filed a grievance for the charging parties and then, for reasons unexplained on the record, failed to process it beyond the third step. Negligence in failing to move a grievance to the next step was also the basis of the violation found in *Ruzicka v General Motors Corp(Ruzicka I)*, 523 F2d 306, 90 LRRM 2497 (6th Cir, 1975). In *Ruzicka v General Motors Corp*

(*Ruzicka II*), 649 F2d 1207, 1209 (CA 6, 1981), the Court explained its original holding:

In *Ruzicka I*, we held that, absent justification or excuse, a union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct . . . In (the Court's order denying rehearing) we observed that "our opinion in this action speak to a narrow range of cases in which unexplained union inaction, amounting to arbitrary treatment, has barred an employee from access to an established union-management apparatus for resolving grievances."³

The *Goolsby* Court reviewed other significant federal decisions discussing the meaning of "arbitrary" conduct, including *Ruggirello v Ford Motor Co.*, 411 F. Supp. 758 (ED Mich, 1976), and *Dutrisac v Caterpillar Tractor Co.*, 511 F. Supp 719 (1981), *aff'd*, 749 F2d 1270 (9th Cir, 1983). In *Ruggirello*, the union informed a terminated employee that his grievance was meritorious, but then negligently failed to file the grievance for him. The Court noted that "if a union breaches its duty of fair representation in failing to process a grievance before determining its merit (i.e., as in *Ruzicka*), it is certainly liable for failing to initiate a grievance after acknowledging its merit." In *Dutrisac*, the union decided to take a grievance over an employee's termination to arbitration, and filed a notice with the employer. The union agent believed at the time that his notice was timely, but he actually filed two weeks after the expiration of the time limit. Because of his error, the arbitrator rejected the grievance as untimely. The district court found a breach of the duty of fair representation on these facts.

In affirming the district court, the Court of Appeals in *Dutrisac* considered the degree of harm inflicted on the employee by the union's negligent conduct:

. . . we limit our holding that union negligence may breach the duty of fair representation to cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim.
749 F2d 1270, at 1273

In all these cases, the union either failed to make a good faith determination of the merits of the grievance, or determined initially that the grievance had merit before failing to properly process it. In none of these cases was there a determination by the union, based on a good faith review of the facts, that the employee's grievance had no merit.

In *Robesky v Quantas Empire Airways Ltd*, 573 F2d 1082, 98 LRRM 2090, (9th Cir, 1978),

³ In *Ruzicka II*, the Court held that the union had not violated its duty of fair representation, since its failure to meet the contractual deadline was explained by the employer's practice of regularly ignoring these deadlines.

cited in fn.1 of the Commission's decision, the Court held that a union's unintentional failure to tell an employee that it did not intend to take her grievance to arbitration, leading her to reject an offer of reinstatement from her employer which she otherwise would have accepted, breached the union's duty of fair representation. In *Robesky*, the union concluded that the employee's grievance was not worth taking to arbitration. Nevertheless, after the time period for submitting the employee's grievance to arbitration had expired, the union negotiated a settlement of her discharge involving her return to work. The employer sent the employee a letter offering her reinstatement on the conditions that had been agreed upon with the union. The employee discussed the letter with a union agent who, despite his awareness of the union's decision not to proceed to arbitration, inexplicably failed to tell the employee of that decision. Finding the union to have violated its duty of fair representation, the Court in *Robesky* held that (negligent) acts or omissions by union officials "may be arbitrary . . . if they . . . reflect reckless disregard for the rights of the individual employee . . ." In *Robesky*, the Court found that the union agent's conduct, although apparently unintentional, was grossly unreasonable under the circumstances, and thus manifested "reckless disregard for the rights of the employee."

In *Eichelberger v NLRB*, 765 F2d 851, 119 LRRM 3333 (9th Cir, 1985), the Court affirmed the NLRB's finding that the union in that case did not breach its duty of fair representation despite its (according to the Court) negligent failure to inform an employee that it had not or did not intend to file a grievance on her behalf. In that case, the employee had the right under the contract to file a grievance without the union's intervention. The employee sent the union a letter asking it to file a grievance on her behalf. She did not attempt to contact the union again during the time period for filing a grievance, and she did not file a grievance herself. The union reviewed the letter and made a reasonable, good faith determination that the facts did not warrant filing a grievance. However, it unintentionally failed to inform the employee of its conclusion within the time limits provided by the contract for filing the grievance. The Court agreed with the NLRB that the employee had not exercised due diligence, and therefore bore some of the responsibility for the fact that a grievance was not filed. It also noted, however, that the union had expressly concluded that the employee's "grievance" was insubstantial, and that it was not therefore presented with the extinguishment by union negligence of a claim which the union had found meritorious. The *Eichelberger* Court also distinguished *Robesky* on the grounds that the union agent's failure to inform the employee that the union did not intend to file a grievance, caused in that case by the press of work, did not reflect the reckless disregard for the employee's rights manifested in *Robesky*.

None of the cases discussed above hold explicitly that a union violates its duty of fair representation if it makes a good faith determination that a grievance is without merit, but negligently gives the employee wrong information about the status of the grievance, even if the misinformation effectively discourages the employee from exercising his right to file his own grievance. I do not believe that such a principle should be extracted from the holdings of *Eichelberger* or *Robesky*. Both the Court and the NLRB in *Eichelberger* relied in part on the employee's failure to exercise due diligence in finding that the union had not violated its duty of fair representation. However, the employee's failure to exercise her right to file her own grievance was only one of the grounds the Court and Board relied upon to dismiss the charge in *Eichelberger*.

In the instant case, the aviation section was rumored not to want women officers. Barr's initial reaction, when he heard that Merriewether had not been among the officers granted transfers to the aviation section on December 1, 1997, was that Merriewether had been the victim of discrimination based on her sex. Barr initially believed that he would discover some error in the transfer process which would allow him to file a discrimination grievance, although not the violation that Merriewether believed had occurred. In his initial conversations with Merriewether and with others, Barr was enthusiastic about the case. He did not, however, I find, explicitly promise Merriewether that he would file a grievance. Merriewether subsequently called him at least two times on the telephone to ask for a copy of the grievance she believed he had filed. At least one of these conversations occurred before January 1, 1999. During these phone conversations Barr promised Merriewether that he would send her a copy of a grievance which he had not in fact filed. As discussed above, I find that Barr did not intentionally mislead Merriewether. Merriewether did not file her own grievance during the 30 days allowed by the contract for filing a grievance alleging a violation of the transfer clause because she believed Barr had already filed one. Barr continued to investigate the transfers. When Barr finally received all the information he sought, he had learned that (1) a requisition for three pilots and an observer for the aviation section had been approved; (2) the most senior officer on the list, a nonpilot, had been transferred as an observer, and that the three most senior licensed pilots on the list had been transferred as pilots; and (3) the transfer request of the officer whose request had appeared to have been suspiciously expedited was timely filed, but there had been improper delays in processing it. Barr concluded that he had no evidence on which to base a grievance.

As I found in my original decision, the facts do not support a finding that Barr's handled Merriewether's case in a perfunctory fashion, or that his decision not to pursue a grievance was irrational or impulsive. Moreover, this case does not fit in the line of cases, including *Ruzicka I* and *Goolsby*, where access to the grievance procedure was cut off by the union's unexplained failure to process the grievance in a timely fashion. Nor does it fit with those cases where the union failed to process a grievance for reasons other than its merit, and deliberately misled the employee about its actions. Here, Respondent unintentionally gave Merriewether false information, i.e., that a grievance had been filed when it had not. If she had not received this false information, she might have filed an individual grievance. However, I do not believe that Barr's communication of this false information, in the context of this case, constituted "gross negligence," or manifested "reckless disregard" for Merriewether's rights. I conclude that Respondent did not violate its duty of fair representation in this case, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER ON REMAND

The charge in the instant case is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern, Administrative Law Judge

Dated: _____