

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

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Respondent,

-and-

NANCY NEWFER,
An Individual Charging Party.

MERC Case No. CU17 C-007
Hearing Docket No. 17-007355

Appearances:

Nancy Newfer, appearing on her own behalf

DECISION AND ORDER

On June 1, 2017, Administrative Law Judge Julia C. Stern issued her 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 either 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: July 27, 2017

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

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Respondent-Labor Organization,

Case No. CU17 C-007
Docket No. 17-007355-MERC

-and-

NANCY NEWFER,
An Individual-Charging Party.

Appearances:

Nancy Newfer, appearing for herself

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

On March 31, 2017, Nancy Newfer, who is employed by Wayne County and the Wayne County Sheriff (the Employers), filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against her collective bargaining representative, the Police Officers Association of Michigan, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. As set forth below, Newfer alleged that Respondent violated its duty of fair representation toward her under Section 10(2)(a) of PERA by the questions it directed to her during an arbitration hearing at which Newfer was called to testify as a witness for the Employers, and by its failure to defend or protect her rights during this hearing. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

On April 17, 2017, pursuant to Rule 165 of the Commission's General Rules, 2002 AACRS, R 423.165, I issued an order to Newfer to show cause why her charge, as filed, should not be dismissed or to set forth additional facts to support her claim. On May 3, 2017, Newfer filed a response which I have quoted in full below. Based on the facts set out in Newfer's charge, I make the following conclusions of law and recommend that the Commission issue the following order.

The Charge and Pertinent Facts:

The facts as alleged in the charge are as follows. Newfer is a corporal in the Wayne County Sheriff's Department. Newfer is not regularly assigned to the Wayne County Jail, but works there occasionally on overtime. On November 12, 2016, Newfer and another officer were involved in an incident at the jail. Newfer was interviewed by internal affairs division employees about this incident and signed a statement. The other officer was later discharged; his conduct during the incident played at least some role in his discharge. Newfer was not disciplined.

Newfer and the disciplined officer are both part of a bargaining unit represented by the Respondent. Respondent filed a grievance on behalf of the disciplined officer and advanced the grievance to arbitration. On March 14, 2017, Newfer received a call from the undersheriff directing her to report immediately to a Wayne County office in the Guardian Building in Detroit. Newfer was met there by representatives from the Wayne County Office of the Corporation Counsel and the Wayne County Labor Relations Office. They explained to her that an arbitration hearing was taking place over the discipline issued to the other officer involved in the November 12 incident. They told her that Respondent representatives, representing the disciplined officer, had objected to the admission of her statement at the hearing and asked that she be called as a witness so that they could cross-examine her. Although the Employers had not initially planned to call her, Newfer was now required to testify as a witness for the Employers.

According to Newfer, she had never before participated in an arbitration hearing and did not know what to expect. None of the Respondent representatives, which included its attorney and three local officers, approached Newfer before she was required to take the stand to explain to her what rights she had as a witness or whether there were questions that she should be hesitant to answer in order to protect her own interests.

During the hearing, the Corporation Counsel representative first asked Newfer questions about the incident. She was then cross-examined by Respondent's attorney in a way which Newfer characterized as hostile. Specifically, Newfer was asked a series of questions suggesting that she had violated department policy during the incident and that she was at least partially responsible for the incident for which the other officer had been disciplined. Newfer was greatly upset by Respondent's attempt to cast blame on her. When asked at the end of her testimony if she had anything else to say, Newfer told the arbitrator that she was offended by the way she had been treated by her own union.

After Newfer had left the hearing room, she was approached by Latayna Enochs, Respondent's second vice-president. Enochs told Newfer not to take the questioning personally. Newfer replied that she did take it personally when her integrity was questioned. Enochs told her, "You get to go back to your courtroom job, and this poor man doesn't have a job and we have to fight for him." Enochs also said, "If you get in trouble we would fight for you too." Newfer found Enochs' explanation unacceptable. According to Newfer, she felt that she had not done anything wrong and that she had been punished because of another officer's questionable choices by being made a "sacrificial lamb."

As noted above, Newfer was not disciplined by the Employers for her actions on November 12, 2016, and the Employers made no attempt to discipline her after the March 14, 2017, hearing.

Newfer alleged that Respondent did not act in good faith, and thereby breached its duty of fair representation toward her under Section 10(2)(a) of PERA, by failing to defend or protect her rights during the arbitration hearing. She also alleged that Respondent discriminated against her by favoring another officer over her, as indicated by Enochs' comments to her after the hearing. Finally, she alleged that the questions Respondent's attorney asked her during the hearing constituted arbitrary conduct.

Newfer's Response to Order to Show Cause:

Newfer's response to my order read as follows:

I am not going to go any further with this complaint. I have come to the conclusion that POAM will not admit that their actions were wrong on how they treated me in the arbitration hearing. I had asked through my union steward if POAM could at least explain to me why they treated a paying union member like that. POAM declined to have a conversation with me. My only concern is that if I am involved in an off duty incident, I am to contact the POAM office for legal advice. I have lost all my trust in POAM even though I have continued to pay union dues to them. I have to wonder will I even have representation from POAM, and can I trust what they tell me. It is very disappointing that POAM did not think it was important enough to have a conversation with a paying union member on actions they took on this officer. I have realized that my belief that a union should represent all members equally was incorrect.

Discussion and Conclusions of Law:

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty toward the employees it represents 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. Also see *Vaca v Sipes*, 386 US 171 (1967). A union is guilty of bad faith when it acts with improper intent, purpose, or motive; this encompasses fraud, dishonesty, and other intentionally misleading conduct. *Spellacy v Airline Pilots Ass'n*, 156 F3d 120, 126 (CA 2, 1998). A union's conduct is "arbitrary" if it can fairly be characterized as so far outside a wide range of reasonableness that it is wholly irrational, or if the union fails to exercise its discretion or is guilty of gross negligence. *Merritt v Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609 (CA 6, 2010); *Goolsby*. A finding that a union has breached its duty to avoid discriminatory conduct requires evidence of discrimination by the union that is "intentional, severe, and unrelated to legitimate union objectives." *Merritt*, at 617; *Vaca*, at 177

Although the union owes a duty of fair representation to every employee it represents, its relationship to each individual employee is not a “fully fiduciary one,” such as that between an attorney and a client. *Lowe v Hotel Employees*, 389 Mich 123 (1973). As the *Lowe* Court explained, a union owes a duty to each member, but its first duty is toward the entire membership as a whole. Because a union’s paramount duty is to the interests of the unit as a whole, a union must sometimes have to put the interests of one member over another. For example, two unit members may both assert, based on differing interpretations of the contract, that each is entitled to a job or promotion. As long as it acts in good faith the union has considerable discretion to decide how best to serve the interests of the unit as a whole, including how or whether to proceed with a grievance. The union may take a position in the grievance procedure that favors one member over another, as long as the union acts in good faith and does not have an improper motive, e.g., personal hostility toward one member that has nothing to do with the merits of the grievance. If the union’s decision is made in good faith and is not arbitrary, the Commission and the Courts do not have the authority to override that decision.

According to the facts as alleged in the charge, the Employers investigated the November 12, 2016, incident and determined that the other officer was guilty of misconduct that justified, at least in part, his discharge. The Employers did not discipline Newfer or criticize her conduct on that date. Respondent filed a grievance over the discharge and advanced the grievance to arbitration. Respondent then made a decision to cross-examine Newfer during the arbitration hearing in a way that attempted to place at least partial responsibility on Newfer and away from the grievant in order to persuade the arbitrator that grievant’s discipline either was not warranted or was too severe. The facts as alleged by Newfer do not suggest that that Respondent’s decision to question her in this fashion was based on personal hostility toward Newfer, or that Newfer suffered any actual injury as a result of this questioning. Respondent did explain to Newfer why it chose to question her in this way. However, a union’s failure to communicate with a member is not a breach of its duty of fair representation unless that failure results in some actual harm to the member. *Detroit Police Officers Assoc.*, 1999 MERC Lab Op 227, 230. *See also Wayne Co. (Sheriff’s Dep’t)*, 1998 MERC Lab Op 101, 105 (no exceptions). I conclude, based on the facts as alleged in Newfer’s charge, that Respondent’s decision to cross-examine Newfer at an arbitration hearing in a way that attempted to cast blame on her for an incident that occurred on November 12, 2016, was not arbitrary, discriminatory, or made in bad faith. I also conclude that even if Respondent might have done a better job of explaining its purpose to Newfer before she took the witness stand, any failure of communication did not breach its duty of fair representation toward her because she did not suffer any actual injury as a result. 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

Dated: June 1, 2017