STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY (JUVENILE DETENTION FACILITY),
Respondent-Public Employer in Case No. C96 C-42,

-and-

GOVERNMENT ADMINISTRATORS ASSOCIATION (GAA),
Respondent-Labor Organization in Case No. CU96 B-5,

-and-

SYLVIA WILLIAMS-MCLEOD, JOMIL A. FERGUSON, ET AL.,
Individual Charging Parties.
_____/

APPEARANCES:

John L. Miles, Esq., for the Public Employer

Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., by Gordon A. Gregory, Esq., for the Labor Organization

Finkel, Whitefield, Selik, Raymond, Ferrara & Feldman, P.C., by Gary D. Strauss, Esq., for the Charging Parties

DECISION AND ORDER

On August 28, 1998, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 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

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Date: _____

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SYLVIA WILLIAMS-MCLEOD, JOMIL A. FERGUSON, ET AL.,
Individual Charging Parties[1]
_____/

APPEARANCES:

John L. Miles, Atty, Labor Relations, for the Public Employer

Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., by Gordon A. Gregory, Atty, for the Labor Organization

Finkel, Whitefield, Selik, Raymond, Ferrara & Feldman, P.C., by Gary D. Strauss, Atty, for Charging Party Ferguson

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

The hearing in the above cases was held at Detroit, Michigan on September 26, 1997, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission, pursuant to a consolidated complaint and notice of hearing dated March 11, 1996, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, and 1973 PA 25, as amended, MCLA 423.216, MSA 17.455(16). This decision is based upon the transcript of the hearing, and the pleadings and attached exhibits filed by the various parties, including the

[1]Ferguson appeared at the hearing for the Charging Parties, along with her attorney, Ms. McLeod being incapacitated due to health problems. The remaining individuals signing the charge were Bruce M. Smith, Deborah J. Logan, Keith McKenzie, Harvest Webster, Tonie Dance, and Penney Frazier, with one unsigned, Eva P. Spivey, noted as "on vacation" or "retired."

answer of the Union, the motions to dismiss of both Respondents, a brief in support of the motion to dismiss filed by the Union, and a brief in opposition to the motion to dismiss of the Union submitted by Charging Party Ferguson, all filed prior to the hearing. Pursuant to letters dated January 26, and February 3, 1998, the record in this matter was closed effective February 3, 1998, and based thereon the undersigned makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA, and Section 81 of the Administrative Procedures Act (APA) of 1969:

Charges and Motions to Dismiss:

On February 15, 1996, the individual Charging Parties filed the charge in Case No. CU96 B-5 against their bargaining representative, the GAA, and on March 6, 1996, they filed the same charge against their Employer, the County of Wayne. The charge alleges that the County violated the collective bargaining agreement with the Union, the civil service rules, and EEOC regulations regarding the promotion of Stanley M. Daniel on February 24, 1995 to the position of operations manager (Department Manager III) at the Juvenile Detention Facility (JDF). The charge contended that Daniel did not possess the minimum requirements for the position, including the requisite degree, and that the County was keeping him in the position long enough to make it a "tenured status" position. The reference to the EEOC in the charge relates to allegations in the record of gender and racial bias and the use of affirmative action by the County.

The charge further alleged that the Union breached its duty to represent the membership, and that it condoned the promotion of Daniel notwithstanding his lack of qualifications. Attached to the charge was a copy of a grievance dated October 17, 1995, with supporting documentation; a November 17, 1995-letter by Daniel to the Union protesting the attacks on him and his new position by the Union's area representative;[2] the Union's disposition of the grievance, finding no contract violation, dated November 27, 1995; a "Statement of Complaint" dated January 9, 1996, signed by Union members, most of them the parties who signed the unfair labor practice charge, protesting the appointment of Daniel; the Union's January 15, 1996-letter to the Employer in response; and the January 31, 1996 discrimination charges filed by Ferguson with the EEOC, alleging gender discrimination by the appointment of Daniel. On March 20, 1996, the Union filed an answer to the charge denying any breach of its duty to represent its membership.

These cases were originally assigned to ALJ Bert H. Wicking, and at the request of the parties were consolidated for hearing with five other charges filed by another employee in the GAA unit employed at the same facility, Lawrence A. Fields; namely, Case Nos. C96 B-41, CU96 B-11, CU96 E-20, C96 L-292, and CU96 L-46. Upon the illness of ALJ Wicking, all of these charges were reassigned to the undersigned and noticed for separate hearings. By letter dated July 10, 1997 the undersigned refused the request of Charging Party Fields, with the agreement of the Respondent Union, to again consolidate the cases, based on the fact that they involved separate issues.

[2]Daniel had held the same position for the Union until his February 1995 reassignment as operations manager when he chose to resign "to avoid any conflict or impropriety."

Eventually, Case Nos. C96 B-41 and CU96 B-11, and CU96 E-20, were withdrawn by Fields, and C96 L-292 and CU96 L-46 are awaiting decision based upon a motion to dismiss and a stipulated record.

At the September 26, 1997 hearing, after argument by the parties the undersigned granted the motions to dismiss filed the Employer and the Union, on the ground that the charges did not state a claim cognizable under PERA. *Smith v Lansing School Dist.*, 428 Mich 248, 257-259, 126 LRRM 3169, 3172-3173 (1987). The essential facts set forth in the various pleadings and clarified at the hearing are not in dispute. Since this decision is based upon the motions to dismiss of the Respondents, after a hearing limited to argument, any well-pleaded allegations must be accepted as true and construed in a light most favorable to the Charging Parties. *Senior Accountants, Analysts and Appraisers Ass'n*, 1997 MERC Lab Op 436, 437; *Detroit Bd of Ed., Westside Bus Terminal*, 1996 MERC Lab Op 449, 451, and cited cases.

Factual Findings:

The initial assignment of Daniel as manager in charge of operations at the County Juvenile Detention Facility was made on February 24, 1995, and eventually the assignment was made on a permanent basis. Prior to his appointment, Daniel had been a supervisor at the JDF and an area representative of the GAA, the collective bargaining representative of a broad unit of County supervisory employees. Though the position of operations manager is included in the Union's bargaining unit, Daniel resigned as an area representative at the JDF when he became operations manager. A class action grievance was filed by the supervisory employees of the JDF on October 12, 1995, contending that Daniel did not meet the minimum requirements for the position, including the requirement of a bachelor's degree. The requirement of a degree is contained in an undated job description for department manager, which required at least a bachelor's degree and four years of experience. In the meantime, Daniel wrote the Union president on November 17, 1995, complaining that he was being harassed and vilified by the new area representative and member Fields, despite the fact that he was a GAA member in good standing.

On November 27, 1995, the Association Executive issued a letter to the JDF area representative giving the Union's disposition on five grievances. The class action grievance involving Daniel's promotion, and a second one asking for his removal were dropped by the Union on the basis that it could find no violation of the contract or the County's civil service rules. The letter indicated that if there was any disagreement with the denials for advancement of grievances, an appeal could be made to the Union's grievance steering committee within five days. There is no record of any appeal. In the same letter the Union advanced two grievances to step three of the contract procedure, and one grievance filed by Fields was pending further review by the Union.

The JDF supervisors then drew up the January 9, 1996 "Statement of Complaint" to the Union, stating that Daniel did not possess a degree, and that there were GAA members who had the requisite degree or degrees who were passed over for the operations manager position. The statement also complained that as an area representative Daniel violated his duty to the membership

by not "informing the County of his ineligibility and advancing the rights of his membership to the position." The statement requested that the position be posted, and threatened to present the issue to this Commission if no answer was received within 10 working days.

The Union responded with a letter to the County personnel director asking that the position in issue be posted under contract procedures. The letter expressed the belief that the last posting of the position that the Union was aware of required the applicant to have a degree, and if that was true then Daniel was ineligible for the position. The Union received no written response to this letter, but its investigation revealed that the qualifications for the position had been changed by the Employer, which it was permitted to do, and there was no restriction on accepting experience as equivalent to a degree. The Union, therefore, decided not to proceed further on the matter.

Discussion and Conclusions:

There are no factual allegations of misconduct in this case that raise any triable issue of a breach of contract by the County, or a breach of the duty of fair representation on the part of the Union. *Merdler v Detroit Bd of Ed.*, 77 Mich App 740, 746-747, 96 LRRM 3264, 3266 (1977). The actions of the GAA relative to the Charging Parties' complaints do not rise to the level of being "arbitrary, discriminatory, or in bad faith" as required by *Goolsby v City of Detroit*, 419 Mich 651, 661, 120 LRRM 3235, 3238 (1984), and the multitudinous body of case law dealing with fair representation. See also *Zeeland Ed. Ass'n*, 1996 MERC Lab Op 499, 508-509; *Grosse Ile Office & Clerical Ass'n*, 1996 MERC Lab Op 155, 158-161; and *Ypsilanti Public Schools*, 1994 MERC Lab Op 234, 239. As noted in the case law relative to hybrid breach of contract/breach of the duty of fair representation actions, without at least a prima facie case of the breach of the duty of fair representation against the labor organization involved there can be no viable claim against the employer for breach of the contract. *Knoke v E. Jackson Sch. Dist.*, 201 Mich App 480, 485, 145 LRRM 2246, 2248 (1993); *Martin v E. Lansing Sch. Dist.*, 193 Mich App 166, 181 (1992); see also the decision on remand of the *Goolsby* case, *Detroit Environmental Protection and Maintenance*, 1993 MERC Lab Op 268, 272.

The record establishes that the Union promptly responded to the grievance submitted on October 17, 1975 by its letter of November 27, finding no violation of the collective bargaining agreement or civil service rules. When the grievants persisted with their complaint by signing the September 9, 1996 petition, a letter was sent by the Union to the personnel director of the County advancing the position of the grievants that past postings of the department manager III position had required at least a bachelor's degree. The advancement with the Employer of the position of the grievants in no way estops the Union from taking a contrary position on further processing of the grievance. *Detroit Ass'n of Educational Office Employees (DAEOE), Local 4168*, 1997 MERC Lab Op 475, 479; see also *Wayne County Sheriff*, 1998 MERC Lab Op 101, 105. There is no evidence herein of any bad faith or other arbitrary conduct on the part of the Union that would elevate this case to an unfair labor practice, or that would establish a wrongful failure to pursue a grievance. *Leider v Fitzgerald Ed. Ass'n*, 167 Mich App 210, 215 (1988). The fact that the Union decided to accept the Employer's position that the qualifications for department manager III had been modified to

substitute an experience factor for the degree does not establish any breach of the Union's duty of fair representation. *Lowe v Hotel & Restaurant Employees, Local 705*, 389 Mich 123, 145-152, 82 LRRM 3041, 3048-3050 (1973). The purpose of the bargaining relationship is to reach agreement on issues raised by unit employees, even though the employees may not always be happy with the accommodation made by their bargaining agent. *Detroit Bd of Ed.*, 1997 MERC Lab Op 394, 398.

The argument by Charging Parties that it was improper or a conflict of interest for Daniel to accept a promotion while serving as the area representative for the Union, and that the Union violated its duty of fair representation by its approval of the promotion is nonsense.[3] The unit in this case is a multilevel supervisory one, wherein the membership, as supervisors, are agents of the County and part of management, as well as being Union members. This often requires the membership to wear two hats, especially in the case of a higher level supervisor dealing with a lower level supervisor in the same unit. Such juxtaposition of roles is inherent in a multilevel unit of supervisors, just as it is in the units of fire fighting employees established under Section 13 of PERA, but absent evidence of an abuse of power no PERA issue is presented. See *Bloomfield Hills Ass'n of Paraprofessionals*, 1997 MERC Lab Op 221, 223-224, in which the Commission found no conflict of interest where the same labor organization and grievance representative represented in separate units both teachers and the paraprofessionals who worked under their supervision; *Tuscola County Sheriff*, 1990 MERC Lab Op 815, 820-821; see also in fire fighting units, *Flint Fire Dep't*, 1971 MERC Lab Op 467, 474-475, and the discussion of ALJ Lynch in *Grand Rapids Fire Dep't*, 1998 MERC Lab Op __ (Case No. C97 C-65, issued 7-14-98, and pending exceptions).

In the area of promotional policy, where bargaining agents traditionally have little input, any settlement is likely to be unpopular with at least those employees who did not make the grade. Nevertheless, where a labor organization and an employer agree as to the construction of their collective bargaining agreement, such interpretation is given great deference. *Merdler, supra*, 77 Mich App at 744, 96 LRRM at 3265; *DAEOE, Local 4168, supra*, 1997 MERC Lab Op at 480. The fact that the Charging Parties were not happy with the resolution by the Employer and the Union does not raise any fair representation issue, absent a showing of bad faith, gross negligence, or arbitrary conduct on the part of the Union. *MESPA (Kalkaska Public Sch.)*, 1989 MERC Lab Op 403, 409-410; *Wayne County Comm. College*, 1985 MERC Lab Op 1169, 1173; *Detroit Dep't of Corrections*, 1981 MERC Lab Op 1072, 1075. The essence of labor relations is compromise and settlement. A labor organization is not prevented from taking a flexible position on the enforcement of its contract, where it in good faith believes the alleged violation of the contract should either be compromised in some fashion or pursued no further. To hold otherwise would unduly burden the grievance-arbitration procedure under collective agreements and cause unnecessary financial expenditures by the parties to a contract.

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[3]Charging Parties' reference to Daniel as an "officer" of the Union seems to be stretching the point in this particular instance, but even if Daniel's Union position were considered to be an officer it would not affect the decision herein.

There being no substantial allegation or evidence of a failure by the Union of its duty of fair representation, and no PERA-related violation on the part of the Employer, the undersigned recommends that the Commission issue the following order:

ORDER DISMISSING CHARGES

Based upon the discussion and conclusions set forth above, the unfair labor practice charges filed in this matter are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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James P. Kurtz,
Administrative Law Judge

Dated: _____