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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT TRANSPORTATION CORPORATION,
Public Employer-Respondent in Case No. C18 F-058

-and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Respondent in Case No. CU18 F-022

-and-

DEREK TURNER,
An Individual Charging Party.
_____/

APPEARANCES:

Pepper Hamilton LLP, by Robert C. Ludolph, for the Public Employer

Brendan J. Canfield, Staff Attorney, for the Labor Organization

Derek Turner, appearing on his own behalf

DECISION AND ORDER

On July 8, 2019, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondents 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.

[1] MOAHR Hearing Docket Nos. 18-014019 & 18-014020

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

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: AUG 21 2019

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT TRANSPORTATION CORPORATION,
Respondent-Public Employer in Case No. C18 F-058; Docket No. 18-014019-MERC,

-and-

POLICE OFFICERS LABOR COUNCIL,
Respondent-Labor Organization in Case No. CU18 F-022; Docket No. 18-014020-MERC,

-and-

DEREK TURNER,
An Individual Charging Party.
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APPEARANCES:

Pepper Hamilton LLP, by Robert C. Ludolph, for the Public Employer

Brendan J. Canfield, Staff Attorney, for the Labor Organization

Derek Turner, appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from unfair labor practice charges filed on June 26, 2018, by Derek Turner against his Employer, Detroit Transportation Corporation (DTC), and his Union, Police Officers Labor Council (POLC). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charges were consolidated and assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), formerly the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

In the identically-worded charges, Turner alleges that he was discharged from his position with the DTC on December 9, 2016. According to the charges, the POLC grieved the discharge and an arbitrator ordered the Employer to reinstate Turner with a make-whole remedy. Turner contends that the Employer has failed or refused to comply with the arbitration award and

that the POLC refuses to enforce the award or the terms of the parties' collective bargaining agreement. The charges further allege that on May 2, 2018, Turner filed a new grievance which the Employer has not answered and which the Union has refused to advance.

On July 30, 2018, the POLC filed a motion for more definite statement asserting that Turner had been reinstated in full compliance with the arbitration award and that the DTC issued him a check in the amount of $61,543. The Union contends that it has continually addressed Turner's concerns regarding implementation of the arbitration award and that the charges fail to identify which items in the award he believes have not been enforced, the dates of his demands to the Union or the identities of the specific Union agents to which those demands were directed.

On August 1, 2018, I issued an order directing Charging Party to file a response to the Union's motion for more definite statement. In his response, filed on August 15, 2018, Turner asserts that the DTC violated the arbitration award by withholding too much in taxes from the back pay amount paid to him and that the POLC refused to address that issue when Turner brought it to the Union's attention. In addition, the response asserts that the Employer has retaliated against Charging Party for insisting that the Union enforce the arbitration award by issuing him frivolous write-ups and giving him the least favorable assignments.

The DTC filed an answer to the charge on August 1, 2018. In its answer, the Employer concedes that after the arbitration award was issued, a dispute arose as to the proper remedy. The Employer asserts that it negotiated with the POLC and that the parties ultimately reached an agreement on the appropriate back pay amount. According to the Employer, this agreement was confirmed in an email dated April 24, 2018, in which the Union asserted that the issue of remedy had been "fully resolved."

A hearing was held before the undersigned in Detroit, Michigan on October 18, 2018. At the start of the hearing, I indicated that I would not allow Charging Party to present evidence on his allegations of retaliation by the Employer because that issue was not raised in the unfair labor practice charge against the DTC and Turner never filed a motion seeking to amend his charge against the Employer. I advised Turner that if he wanted to pursue the retaliation claim, he should attempt to do so by filing a new charge with the Commission.

Findings of Fact:

I. Background

The following facts are derived from the transcript of hearing and the exhibits submitted by the parties, including the arbitration award issued by John A. Obee on December 22, 2017. The DTC provides police services to the City of Detroit's mass transit system. Throughout the events giving rise to this dispute, Turner was a sergeant with the DTC and a member of a bargaining unit represented by the POLC. The Employer and the Union are parties to a collective bargaining agreement covering the period January 31, 2015, through June 30, 2019. Article 5 of the agreement, Management Rights and Responsibilities, gives the DTC the right to "determine reasonable schedules of work and to establish the method and processes by which such work is to be performed, provided that they do not conflict with the terms of this Agreement." Article 10

of the agreement sets forth a multi-step grievance procedure culminating in final and binding arbitration.

Article 11 of the contract governs seniority and distinguishes between "company seniority" and "bargaining unit seniority." Article 11, Section 1, defines company seniority as "the date the employee was last hired-in by the DTC, less any adjustment(s) for breaks in service" while bargaining unit seniority is defined as "the effective date the employee was hired-in/promoted into a position represented by the POLC, less any adjustment(s) for breaks in service." Pursuant to Article 11, Section 4, the order of seniority for employees is determined as follows:

> Both Bargaining Unit Seniority Date and Company Seniority Date used to determine Order of Seniority shall be amended for breaks in service and other losses of seniority as provided for in Section 3 of this Article. The ranking of bargaining unit members by Seniority, from higher to lower, shall be in the following order:
>
> First – Bargaining Unit Seniority Date
> Second – Company Seniority Date
> Third – Alphabetical Order, last names first

Seniority is a factor in determining shift assignments for members of the bargaining unit. With respect to shift selection, Article 14, Section 7 provides, in part:

> Under current operating conditions, management will make every effort to assign seniority employees to a designated shift based on available positions, manpower need, training needs and performance requirements. When shift rotation is required, employees will be given as much advance notice as possible.
>
> Employees in the classification of Field Operations Supervisors/Sergeant shall be given the opportunity to bid for shift assignments (days, afternoon, midnights, split or rotating) based upon seniority every six months.
>
> a. Employees shall be placed in their requested shift preference in order of highest to lowest seniority permissible within the confines of shift manpower limits designated by the DTC.
>
> b. Employees in the Field Operations Supervisors/Sergeant shall be given the opportunity to bid for leave days by using eight (8) seniority days for leave days and eight (8) non seniority leave days based upon seniority every fifty-six (56) days.

Pursuant to Article 12 of the collective bargaining agreement, new employees are subject to a six-month probationary period which may be extended by the DTC for up to three months for the purpose of additional training and "other appropriate performance considerations." The agreement provides that the POLC shall represent probationary employees in negotiating rates of

pay, wages, hours of employment and other terms and conditions of employment "except separation from DTC service or reversion to the formerly held title for reasons other than Council activities."

Charging Party was one of three individuals hired by the DTC as a sergeant on April 4, 2016. Based upon his last name, Turner had less seniority than Sergeant Garrison, one of the other sergeants hired on that day. However, at or around the time they started working for the DTC, the three newly-hired sergeants pulled names out of a hat to decide their seniority at the direction of one of the lieutenants. As a result of that process, Turner was determined to have the highest seniority. On that basis, he was given preference in picking his shift and job assignments from the date of hire until the week of November 25, 2016, when the DTC altered the seniority ranking to conform to the requirements of the collective bargaining agreement. At that time, Turner was assigned to work a desk assignment during the afternoon shift which runs from 3 p.m. to 11 p.m.

II. Termination, Reinstatement and Backpay

Charging Party's six-month probationary period was scheduled to expire on September 7, 2016. By letter dated September 13, 2016, the DTC extended his probationary period for sixty days or until November 7, 2016. On December 9, 2016, Charging Party's employment with the DTC was terminated.[1] Turner filed a grievance challenging the termination and the Union advanced the grievance to arbitration. A hearing was held before Arbitrator Obee in 2017 at which Turner was represented by Mike Akins, a staff attorney with the POLC. On December 22, 2017, Obee issued an award in which he concluded that the DTC had denied Turner procedural and substantive due process with respect to his termination. Specifically, Obee determined that the DTC had falsely claimed that Turner was still a probationary employee at the time of his discharge and that the Employer had failed to provide Turner notice that he was being terminated for cause. Obee ordered the DTC to reinstate Turner "with full back pay and benefits, minus any compensation received subsequent to his removal."

Following the issuance of the arbitration award, Akins began negotiating with the DTC regarding the amount of back pay to which Charging Party was owed. The Union took the position that Turner was entitled to his base wage, as well as overtime and compensation for leave time. Akins made an initial offer to the DTC based upon an estimated amount of back pay. Thereafter, Akins received Charging Party's end of the year pay stub from the Employer for 2016 which showed exactly how much overtime Turner had worked prior to his termination. Based upon that pay stub, Akins determined that the Union's initial offer was $4,000 too high. As a show of good faith, Akins and Turner agreed to go back to the Employer with a new offer which amounted to $65,000 in gross back pay and 96 hours of vacation time. The DTC made a counteroffer of $51,962 which included vacation time, sick leave and personal time, but omitted any overtime. Akins shared the Employer's offer with Turner and they discussed how to respond.

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[1] Turner filed unfair labor practice charges against both the DTC and the POLC alleging various PERA violations arising from his termination. Case No. C17 D-034; Docket No. 17-008319-MERC and Case No. CU17 D-015; Docket No. 17-008320-MERC. Turner subsequently withdrew the charge against the Union. His charge against the Employer was dismissed in a Decision and Order issued on June 22, 2017. *Detroit Transp Corp*, 31 MPER 22 (no exceptions).

Akins "worked with the numbers a little bit" and came up with what he believed was a reasonable counteroffer of $62,000. When Akins notified Charging Party of the counteroffer, Turner responded, "62K is right." The Employer rejected that offer, with the main point of dispute being Turner's continued demand to include overtime in the back pay calculation.

Turner returned to work for the DTC on or about February 19, 2018. With respect to the issue of back pay, however, Akins felt that the parties were at impasse. He reached out to the Employer's attorney to discuss how to return the matter to the arbitrator for a ruling on the appropriate amount of back pay. After some delay due, in part, to issues involving the arbitrator's schedule, Obee held a conference call with the parties on March 28, 2018. After listening to arguments from counsel, the arbitrator determined that the back pay award should include six hours of overtime which was equal to the average number of hours that Turner had worked during the period prior to his termination. Thereafter, Akins notified Turner of the arbitrator's decision and resumed negotiations with the Employer.

The remaining point of contention between the Union and the DTC was the appropriate number of weeks for which Charging Party was entitled to back pay. Akins proposed that Turner should receive back pay in an amount equivalent to 61 weeks of work. The Employer, however, rejected that offer, insisting that Turner had contributed to the delay in his reinstatement and that, therefore, he was only entitled to 59 weeks of back pay. Akins contacted Turner and asked him whether he would be willing to "split the difference" and accept 60 weeks in order to expedite a settlement agreement. Turner responded by email dated March 26, 2018, writing "60 weeks is fine . . . when will they pay the money?" Akins then communicated the proposal to the DTC which held firm at its offer of 59 weeks.

By email dated April 2, 2018, Charging Party asked Akins how much money he would receive based upon the DTC's offer of 59 weeks. Akins responded by informing Turner that the Employer would remit to him back pay in the amount of $61,543 after interim earnings were deducted and before taxes. In responding to Akins, Turner did not state any objection to that specific amount. Rather, after ascertaining that the $61,543 included overtime, he wrote to Akins, "Ok the other issue is [my] vacation, sick and personal days."

Akins contacted the DTC on April 10, 2018, and signified that the Union would accept $61,543 in back pay, with 42 hours of sick time, 30 hours of personal time and 96 hours of vacation time added to Turner's leave bank. Akins requested that the Employer indicate when Turner should expect the check and when the time would be added to his leave banks. The Employer agreed to the terms set forth by Akins and stated that a check would be issued to Turner within seven to ten days. Akins then notified Turner by email that the agreement on back pay had been finalized. Turner did not raise any objection to Akins in response to this information.

While waiting to receive the check from the DTC, Turner notified Akins that the Employer had not yet replenished his leave banks. Akins attempted to raise this issue with the Employer but got no response. After ten days had passed and the Employer still had not issued a check to Turner, Akins concluded that the DTC was ignoring the settlement agreement. He and

Turner worked together to formulate a plan to deal with the Employer's apparent non-compliance. Akins sent an email to the arbitrator requesting that he issue a comprehensive decision regarding remedy. At the hearing in this matter, Akins described his strategy. "I went for the whole enchilada," Akins testified. "[I] asked for everything, all the weeks, all the time, and as well as four percent interest on back pay per the OPM's standards. And I said if the Employer continues to ignore this matter than I wanted a timely ex parte ruling on remedy so that we could go to the courts to seek enforcement."

On April 23, 2018, Akins received a phone call from DTC attorney Robert Ludolph who, according to Akins, was apologetic. Akins indicated to Ludolph that if the Employer cut a check by the end of the following day, Charging Party might agree not to move forward with enforcement proceedings before the arbitrator. Thereafter, Ludolph contacted the arbitrator by email and indicated that Turner would receive a check for $61,543 in back pay, minus taxes, by direct deposit on April 27, 2018. Based upon that correspondence, Akins believed that the best course of action was for Turner to accept the payment and forgo seeking any further action by the arbitrator. He advised Turner by email that the arbitrator was likely to consider the matter resolved despite the delay and that continuing to fight would "be for naught." Akins instructed Turner to let him know if he did not receive the funds via direct deposit on or before the date specified by Ludolph and to check with Human Resources to ensure that his leave time had been restored. Turner responded, "I will let you know sir. Thank you."

Brenda Walker, the Employer's Director of Human Resources, became aware of the settlement agreement on or about April 24, 2018. She presented the terms of the agreement to her general manager and then contacted the payroll department to have the funds issued to Charging Party as soon as possible, along with the restoration of his leave time. Both actions were accomplished by April 27, 2018. According to Walker, taxes were withheld from the payment by the DTC's payroll department in accordance with their procedures and the relevant tax requirements. Although neither party submitted documentation regarding the specific amount of the deposit, Turner testified that approximately $29,000 in taxes were withheld from the total agreed upon back pay amount of $61,543.

Charging Party notified Akins on April 27, 2018, that he had received his money and that his leave banks had been replenished. Three days later, Turner contacted Akins by email once again and indicated that he had just learned that $32,000 in taxes had been deducted from the back pay award. Turner asserted that the amount withheld was "unacceptable" and asked Akins if the Union would file an unfair labor practice charge or whether he should file one himself. Akins responded that same day in an email in which he advised Turner that tax deductions are "a matter for the IRS, not MERC" and that he should consult with a tax professional. Akins instructed Turner that he was free to file an unfair labor practice charge himself, but that it would not be successful. Nevertheless, Akins promised to try to get some information for Turner regarding tax withholding for large back pay amounts.

On or about May 1, 2018, Akins sent an additional email to Charging Party regarding the issue of tax withholdings which stated, in pertinent part:

> As I am not a tax attorney or other tax professional, I cannot advise you on exactly what the proper amount of withholdings are for a large back pay payout. You should speak with a tax professional for additional information. However, it is the Union's understanding that back pay is considered Special Wages by the IRS and the tax rate is often much higher than with regular wages. [Links to IRS web pages omitted]. It also appears that employers have the option to withhold at a set rate of 22% or 25%, or to tax at the normal withholding rate. It looks like the DTC chose the latter, which resulted in higher withholdings. They have the option under IRS rules. There is nothing in the CBA, PERA, or the arbitration award that requires them to withhold at the lower rate. As such, the Union cannot do anything to force DTC to choose a lower withholding rate. Chet is going to ask Brenda Walker if they will agree to adjust it to the lower rate. It's possible that they just did it the normal way without understanding that they could withhold at the lower rate. If they refuse, there is nothing more the Union can do on this issue.

III. Job Assignments

As noted above, Charging Party was working desk duty when he was terminated on December 9, 2016. He was given the same assignment upon his return to work on or about February 19, 2018. At that time, Turner contacted Akins and asserted that he should be able to select a different job assignment based upon his seniority. After examining the collective bargaining agreement and finding no support for Turner's claim, Akins asked Turner to provide more information. Turner responded that there was a past practice which existed through November of 2016 pursuant to which he was able to select his assignments. Based upon that representation, Akins filed a grievance on Turner's behalf on or about March 6, 2018, asserting that the Employer was violating Article 14, Section 7 of the contract by refusing Turner his preferred job assignment. At the same time, Akins submitted to the Employer a request for information under PERA. The information request sought records showing "which Field Operations Supervisors worked each shift since March 7, 2016, the jobs/duties/details to which each Supervisor was assigned during each of those shifts (e.g. desk, DPM foot patrol, DDOT patrol, swing, etc.), and each Supervisor's date of hire." Akins also requested copies of all written rules, policies, or directives describing "the manner in which jobs/duties/details are assigned per shift." Akins provided Turner with a copy of the grievance and information request.

On March 19, 2018, Charging Party notified Akins that he was being called in for a *Garrity* interview.[2] Akins appeared at the interview on Charging Party's behalf. At the start of the meeting, Akins was informed by Lieutenant Hart that Charging Party had filed his own grievance over various issues, including the DTC's refusal to allow him to select his preferred job assignment, and that the meeting was not in fact a *Garrity* interview but rather was for the purpose of discussing Turner's grievance. Hart informed Akins that it was the Employer's position that job assignments were at management's discretion and were not governed by seniority.

[2] *Garrity v New Jersey*,385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), protects an employee of a police department from prosecution for statements he or she was compelled to give under a threat of discipline.

The Employer responded to the information request sometime in August or September of 2018 by providing the Union with copies of seniority lists and job schedules. On September 26, 2018, the POLC's grievance screening committee met and voted unanimously to deny the grievance. Charging Party was informed of the committee's decision by letter dated October 1, 2018, which stated, in pertinent part:

> We have reviewed relevant facts and documents related to your grievance. Based on our review, it is clear that an arbitrator would find no contract violation occurred regarding your job assignment. The collective bargaining agreement does not provide for seniority selection of duty assignments to support your assertion of a past practice.
>
> Therefore, your grievance will not be advanced to arbitration. If you wish the Committee to reconsider, you have twenty-eight (28) days from the date of this letter to submit a written request. Any new or additional information for the Committee to consider would be helpful.

IV. Shift Selection

Upon his return to employment with the DTC in February of 2018, Charging Party was assigned to work afternoons, the same shift he was working at the time of his termination. Turner complained to Atkins that he should be allowed to exercise his seniority rights and select a different shift. The Union initially took the position that Turner should indeed be allowed to bid on a shift of his choosing. In an email to Turner dated March 26, 2018, Akins indicated that he was waiting for a ruling from the Employer on whether Turner would be allowed to bump someone from a shift and raised the possibility of bringing the issue to the attention of Arbitrator Obee. However, Akins ultimately decided not to address the matter with the arbitrator because Obee had just recently ruled in Turner's favor regarding overtime and Akins was concerned that the Union would lose if it returned to the arbitrator on another issue. In addition, Akins was hopeful that the dispute over shift selection would be resolved as part of the ongoing negotiations regarding back pay. At some point, Akins suggested to Turner that he hold off pursuing the matter until the next shift bidding cycle because the Union was concerned about bumping other sergeants who had already set their schedules. On April 2, 2018, Turner sent an email to Akins indicating that he wanted to remain on the afternoon shift for the time being. At no point thereafter did Turner notify Akins that he had changed his position regarding remaining on the afternoon shift.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to form, join or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. The types of activities protected by PERA include filing or pursuing a grievance pursuant to the terms of a union contract, participating in union activities, joining or refusing to join a union, and joining with other employees to protest or complain about working conditions. Sections 10(1)(a) and (c) of the Act prohibit a public

employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities described above. PERA does not, however, prohibit all types of discrimination or unfair treatment by a public employer, nor does the Act provide a remedy for a breach of contract claim asserted by an individual employee. The Commission's jurisdiction with respect to claims brought by individual employees against public employers is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in, or refusal to engage in, union or other concerted activities protected by PERA.

In the instant case, the gravamen of Charging Party's claim against the DTC is that the Employer has not complied with the award issued by arbitrator John A. Obee on December 22, 2017. Specifically, Turner asserts that the Employer withheld too much in taxes from the back pay award and that it refused to reinstate his seniority-based right to select shifts and job assignments. Arbitration is an extension of the collective bargaining process. As noted, the Commission has no jurisdiction over breach of contract claims brought by individual employees. Although Turner referenced instances of alleged retaliation by the DTC in his response to the Union's motion for more definite statement, he did not move to amend his charge against the Employer. Accordingly, I find no basis upon which to conclude that the DTC violated PERA in connection with this matter. In so holding, I note that at least some of the allegations of retaliation set forth by Turner in his response to the motion for more definite statement would be untimely under Section 16(a) of the Act which requires that a charge be filed within six months from the date of the occurrence of the unfair labor practice. For example, it is undisputed that the Employer began prohibiting Charging Party from making job assignment and shift selections in accordance with his seniority in November of 2016, almost two years before Turner filed his charge against the DTC. For these reasons, I conclude that the charge against the Employer in Case No. C18 F-058; Docket No. 18-041019-MERC must be dismissed.

Charging Party has also failed to establish that the POLC violated his rights under PERA. 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). The Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. A labor organization has the legal discretion to make judgments about what will serve the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218, citing *Lowe v Hotel and Restaurant Employees Union, Local 705*, 389 Mich 123 (1973). The mere fact that a member is dissatisfied with their union's efforts is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855. Moreover, to prevail on a claim of unfair representation in a case involving the handling of a grievance, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer.

Goolsby v Detroit, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993).

In the instant case, Charging Party asserts that the POLC violated its duty of fair representation by failing or refusing to enforce the terms of the collective bargaining agreement and the arbitration award. Specifically, Turner asserts that the Union failed to ensure that he received the proper amount of back pay. The evidence, however, establishes that the Union's representative, Mike Akins, worked diligently on Turner's behalf to negotiate a financial settlement which comported with the arbitrator's decision. Immediately after Obee issued the award, a dispute arose between the Union and the DTC regarding whether Turner was entitled to overtime as part of the payout. Akins made several offers to the Employer and continually kept Turner abreast of the status of the negotiations. When Akins believed that the parties were at impasse, he took the dispute back to the arbitrator and received a ruling in Turner's favor. Thereafter, Akins continued to negotiate with the DTC over the remaining issue involving the number of weeks of back pay to which Turner was entitled. The Union eventually reached agreement on a settlement pursuant to which the DTC would remit to Turner $61,542 in gross back pay. Akins promptly notified Turner of the settlement and Turner raised no objections as to the amount of back pay agreed to by the DTC and the Union. When the Employer delayed in paying Turner and replenishing his leave banks, Akins threatened to go back to the arbitrator for an "ex parte ruling" so that the Union could go to court and seek enforcement. Ultimately, the DTC paid Turner the agreed upon amount of $61,543, before taxes, and properly replenished his leave banks. Under such circumstances, I conclude that there is no basis upon which to conclude that the Union failed to properly represent Turner with respect to ensuring that he received the appropriate amount of back pay. To the contrary, the record establishes that Akins was a thorough, attentive and effective representative.

Charging Party contends that the back pay award was "inappropriate" because the Employer withheld too much in taxes and that the Union failed to take action on his behalf to rectify the problem. However, Turner did not present any evidence in support of his contention the amount deducted from the backpay award was inconsistent with federal income tax requirements or that the percentage at which he was taxed was too high. In any event, the record establishes that Akins responded promptly to Charging Party's concerns regarding the amount of taxes withheld by the Employer. Akins properly advised Charging Party that tax deductions are a matter for the IRS, not MERC, and he recommended to Turner that he consult with a tax professional. Despite having determined that this was not an issue for which the Union could provide assistance, Akins nevertheless promised to conduct research on Turner's behalf. A few days later, Akins provided additional information to Turner, including links to various IRS webpages purportedly addressing the tax implications of a large back pay award. Based upon that research, Akins concluded that the DTC likely acted in compliance with federal regulations. Charging Party provided no evidence to suggest that the advice Akins gave him was erroneous or inappropriate, nor is there anything in the record which would even suggest that the Union acted arbitrarily, discriminatorily or in bad faith in responding to Turner's complaints. Finally, this issue is likely moot since any overage in withholdings would presumably be returned to Charging Party upon the filing of his 2018 tax return.

Next, Charging Party alleges that the Union did not properly enforce the arbitration award with respect to his seniority rights. Turner asserts that the POLC breached its duty of fair representation by failing to ensure that his seniority was restored following his return to work. Turner contends that he should be considered more senior than Sergeant Garrison, one of the other individuals hired by the DTC on April 4, 2016, by virtue of the order in which the sergeants' names were picked out of a hat. While it is apparently true that Turner was initially considered to have greater seniority than Garrison, it is also undisputed that the Employer changed Turner's seniority in September of 2016, several months prior to his discharge. Accordingly, the DTC did not act contrary to the arbitration award by returning Turner to work with the same seniority as before he was terminated. Moreover, the collective bargaining agreement unambiguously provides that when two or more employees are hired by the DTC and join the bargaining unit on the same date, seniority is determined by alphabetical order, last names first. Based upon the explicit language in the contract governing order of seniority, the Union's decision not to file a grievance on Turner's behalf regarding this issue cannot be considered arbitrary, discriminatory or made in bad faith. As noted, a charging party must prove a breach of the collective bargaining agreement in order to prevail on a claim of unfair representation. *Goolsby*, *supra*.

There is also no merit to Charging Party's contention that the Union violated PERA by failing to enforce the shift selection provisions of the collective bargaining agreement. Once again, the Employer properly made Turner whole by returning him to the afternoon shift, the same shift he was working prior to his termination. The Union nevertheless responded to Turner's complaints about not being able to select a different shift following his return to work. The Union initially agreed with Turner that based upon his seniority he should be allowed to select the day shift. In fact, Akins raised the issue with the Employer and also considered bringing the issue to the attention of the grievance arbitrator. However, he decided against contacting Obee because he did not think the Union would be successful and because he hoped that the matter could be resolved as part of the ongoing negotiations on back pay. Later, Akins advised Turner to drop the issue until the next bidding period so as not to bump other sergeants who had already set their schedules. It was not unlawful for Akins to have considered the impact that pursuing a grievance on Turner's behalf would have on other members. As noted, a labor organization has the legal discretion to make judgments about the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218. In any event, the matter effectively became moot when Turner notified Akins that he wanted to remain on the afternoon shift.

Lastly, the record fails to establish that the Union breached its duty of fair representation with respect to its handling of Charging Party's complaints regarding the selection of job assignments. As with the matter of shift selection, the DTC complied with the arbitrator's decision by returning Turner to desk duty, the same job he was working prior to his termination. Contrary to the claims made by Turner at hearing, the arbitrator did not order the Employer to restore his seniority or make any changes to his shift or job assignment. Nevertheless, when Turner contacted the Union about the Employer's refusal to allow him to select a different job, Akins began an investigation by reviewing the collective bargaining agreement. Despite finding no support for Charging Party's position in the contract, Akins not only filed a grievance on

Turner's behalf, he also submitted to the DTC a request for information concerning the Employer's procedure for assigning jobs. He also sent Turner a copy of the grievance and information request. Later, Akins attended a meeting at which he learned that Turner had filed his own grievance over the issue. Ultimately, the grievance went before the POLC's screening committee which voted unanimously to deny the matter on the ground that the contract was silent regarding the selection of job assignments and because there was insufficient evidence of a past practice. The Union notified Charging Party of the committee's decision and provided him with information regarding his appeal rights, including a request for any new or additional information to support his claim. There is no evidence that Turner filed an appeal or followed up on the Union's request for additional information, nor is there anything in the record which would suggest that the committee's determination was erroneous or made in bad faith. Under such circumstances, Turner's duty of fair representation claim against the POLC must be dismissed.

Despite having been given a full and fair opportunity to do so, Charging Party has failed to meet his burden of proving that the DTC and the POLC violated PERA. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Derek Turner against his Employer, the Detroit Transportation Corporation, in Case No. C18 F-058; Docket No. 18-041019-MERC, and Turner's charge against the Police Officers Labor Council in Case No. CU18 F-022; Docket No. 18-014020-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: July 8, 2019