

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF DETROIT,

Respondent-Appellant,

v

DETROIT POLICE LIEUTENANTS &
SERGEANTS ASSOCIATION,

Charging Party-Appellee.

UNPUBLISHED

February 6, 2007

No. 265325

MERC

LC No. 04-000085

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Respondent City of Detroit (“the City”) appeals as of right from a decision of the Michigan Employment Relations Commission (MERC), which found that respondent violated § 10(1)(e) of the public employment relations act (PERA), MCL 423.210(1)(e), by failing to give the Detroit Police Lieutenants & Sergeants Association (LSA) notice and the opportunity to request bargaining concerning the criteria for promotion to the rank of sergeant. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The decisions of the MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28, and MCL 423.216(e); MSA 17.455(16)(e). The commission’s findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. The MERC’s legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. MCL 24.306(1)(a), (f); MSA 3.560(206)(1)(a), (f). [*Grandville Muni Executive Ass’n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996) (citation omitted).]

On March 2, 2004, the City issued Personnel Order 04-13, “Notice of Promotional Examination for the Rank of Sergeant.” A formula for the “weighting factors” was included in the notice and differed from that which had previously been in effect. LSA President Sergeant Gawlowski testified that the parties negotiated the prior promotions policy, but that the City did not negotiate with the LSA with respect to the rank of sergeant before issuing the March 2, 2004, policy. The City and the LSA negotiated with respect to the criteria for promotion to the rank of lieutenant, but the LSA was not concerned at that time with the criteria for promotion to the rank

of sergeant because it relied on the validity of an act 312¹ award that required the promotion of all investigators to the rank of sergeant.

The City argues that the MERC's finding of an unfair labor practice is not supported by competent, material, and substantial evidence on the whole record. The City primarily relies on a Memorandum of Understanding (MOU), which states that "[a]ll those promoted pursuant to the Award shall attend a promotional assessment course." The City claims that by this agreement, the LSA waived its right to bargain with respect to the use of an assessment center. But the MOU unambiguously states that the language in the act 312 award "shall mean that the Department shall promote all current Investigators to the rank of Sergeant." Although the MOU states that those promoted "shall attend a promotional assessment course," the MOU does not indicate that the mandated promotion is conditioned on attendance of a promotional assessment course or a particular result from the course. Contrary to the City's contention, the LSA did not waive its bargaining rights by agreeing to this provision.

The City argues that through the MOU, the LSA preserved only the right to confer, not the right to bargain, over the assessment center and that the City satisfied its obligation to confer on February 10, 2004. The premise of the City's argument is faulty. The portion of the MOU on which the City relies is an amendment to a paragraph of Exhibit 111, which concerned the promotional criteria for lieutenants only. The agreement between the LSA and the City concerning Exhibit 111 has no bearing on negotiation with respect to promotion to the rank of sergeant.

The City agrees with the determination of the Administrative Law Judge that the LSA had ample opportunity to bargain but failed to do so because it believed that investigators would be promoted to sergeant based on the act 312 award. According to the City, the MERC's finding that the City failed to bargain over the standards for promotion to the rank of sergeant is not supported by the record.

The City's argument fails to address the basis of the MERC's decision. The MERC's decision states in part:

We conclude that at the time of the February 10 conference, the [LSA] had a basis to rely on the Act 312 award. Despite the long delay in implementation, the City gave no indication to the [LSA] that it would not honor the award. To the contrary, the City signed a Memorandum of Understanding with the [LSA] to this effect in June of 2003, and promoted ten investigators pursuant to the award in February of 2004. However, on March 12, 2004, to comply with the ALJ's recommended order in Case No. CO2 K-249, the City rescinded the promotions of investigators, an indication that it no longer intended to comply with the Act 312 award. Since this change would obviously have an impact on the [LSA] bargaining unit, we find that at that time, the City had a duty to inform the [LSA] of its change in position and give the [LSA] notice and the opportunity to request

¹ 1969 PA 312, MCL 423.240.

bargaining over the promotional criteria for the rank of sergeant. By its failure to do so, we find that the City violated Section 10(1)(e) of PERA. *City of Jackson*, 1985 MERC Lab Op 138.

Thus, the MERC's finding of an unfair labor practice is based on the City's conduct *after* it rescinded the promotions of the investigators, when it failed to give the LSA an adequate opportunity to request bargaining. The City has not shown that this determination is factually unsupported or legally unsound.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio