STATE OF MICHIGAN

COURT OF APPEALS

POLICE OFFICERS ASSOCIATION OF MICHIGAN,

Respondent-Appellant,

v

TODD E. HATFIELD,

Charging Party-Appellee.

UNPUBLISHED
July 22, 2021

No. 354627
MERC
LC No. 18-000005

Before: BORRELLO, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Charging party, Todd E. Hatfield, initiated unfair-labor-practices charges against his former employer, City of Grayling ("the City"), and respondent-appellant, Police Officers Association of Michigan (POAM).[1] Administrative Law Judge (ALJ) Travis Calderwood issued an opinion and recommended order finding that the City did not commit unfair labor practices and that respondent did not violate its duty of fair representation by failing to file grievances regarding charging party's loss of seniority and termination. The Michigan Employment Relations Commission (MERC) issued an opinion and order adopting the ALJ's recommendation that the City did not commit unfair labor practices, but rejecting the ALJ's determination that respondent did not breach its duty of fair representation. MERC accordingly dismissed the charges against the City, but found that respondent breached its duty of fair representation by failing to file charging party's grievances. MERC further ordered the City and respondent to arbitrate the merits of charging party's termination, and ordered that if the City refused to consent to arbitration, respondent would pay charging party's damages. Respondent appeals as of right MERC's order. We affirm MERC's finding that respondent breached its duty of fair representation, but vacate MERC's award of damages and remand for further proceedings.

[1] Charging party's former union, Fraternal Order of Police Labor Council (FOPLC), was also named in the petition, but charging party later withdrew these charges.

I. FACTUAL BACKGROUND

Charging party was hired as an on-call firefighter by the City of Grayling in 1997, and in 2013 was hired full-time as the Assistant Fire Chief of the Grayling Department of Public Safety. Charging party completed his police academy training and was certified by the Michigan Commission on Law Enforcement Standards (MCOLES) on May 21, 2014, although he continued to work primarily as a firefighter and filled in for police duties as needed. Charging party was part of a bargaining unit under the Fraternal Order of Police Labor Council (FOPLC), which had a collective-bargaining agreement with the City effective from July 1, 2014 to June 30, 2017. In May 2017, before the collective-bargaining agreement expired, the union members voted for respondent to become their new union. In June 2017, the union members voted to remove command positions from the bargaining unit, which affected charging party's position as Assistant Fire Chief. On August 2, 2017, the City signed a tentative agreement with respondent, which excluded the Assistant Fire Chief position from the union. Charging party discussed forming a command union, but on October 10, 2017, charging party was informed that because of department restructuring, his position as Assistant Fire Chief had been eliminated. Charging party verbally accepted a position as a patrol officer and began on October 16, 2017.

On November 6, 2017, Baum informed charging party that because of his new position, charging party was now the lowest in seniority. Charging party disagreed with the decision, and argued that under the FOPLC collective-bargaining agreement, seniority was based on when an officer's MCOLES status was activated, and charging party had an earlier certification than two of the other full-time police officers. Charging party testified that he verbally requested that respondent's business agent, Paul Postal, file a grievance on his behalf, and even provided Postal the section of the FOPLC contract that he believed was breached. Charging party testified that Postal told him that he "couldn't do anything" because respondent did not have a signed collective-bargaining agreement with the City.

On November 28, 2017, the Deputy Police Chief gave charging party a letter of employment for the patrol officer position, which stated that charging party would serve a 12-month probationary period from the position start date of October 16, 2017. Charging party again contacted Postal and explained that he did not feel comfortable signing the employment letter. Postal suggested that he sign the letter, come to work, and "fly under the radar" for the remaining 11 months of the probationary period.

On November 16, 2017, a Department of Natural Resources (DNR) Conservation Officer contacted charging party regarding an illegal bait pile on his property. The officer explained that he had given a citation to charging party's brother the day before. Charging party told the officer that if he got a citation, he would lose his job. The conservation officer allowed charging party to clean up the bait pile and did not issue him a citation. Charging party testified that he did not feel a need to report the incident to his employer.

On December 6, 2017, Baum interviewed charging party about the incident. Charging party initially denied having any encounter with law enforcement because he thought that Baum meant police contact, but eventually explained his interaction with the DNR. Baum testified that charging party did not disclose the truth until he was prompted with specific questions. Charging

party testified that during the meeting, Baum also told him to sign the November 28 employment contract or be out of a job, so charging party signed it.

On December 14, 2017, Baum offered charging party a choice between resignation and termination because of charging party's dishonesty and insubordination during the December 6 interview. Charging party again contacted Postal, who unsuccessfully attempted to negotiate with Baum. Charging party chose to accept the termination so he could file a grievance. Charging party testified that he e-mailed Postal the next day and requested that he file a grievance, but was told that it was an FOPLC issue, so Postal could not help. Charging party e-mailed another POAM business agent requesting to file a grievance, and the business agent advised him to hire an attorney.

On March 16, 2018, charging party filed charges of unfair labor practices against the City and respondent[2] under the Public Employment Relations Act (PERA), MCL 423.201 *et seq*., asserting, relevant to this appeal, that respondent breached its duty of fair representation by failing to grieve his demotion and termination. On August 29, 2019, an ALJ issued a decision and recommended order finding that charging party's charges against the City were unsupported because charging party had not established that any of the City' actions were prompted by anti-union animus. With respect to respondent, the ALJ found that charging party had not shown respondent's actions were unreasonable, arbitrary, or unlawful. The ALJ reasoned that because the FOPLC contract had expired and a tentative agreement between the City and respondent was signed in August 2017, the decision to reduce charging party's seniority and place him on probation was supported. The ALJ concluded that the evidence did not establish that charging party had requested to file a grievance regarding his termination, and that the failure to file a grievance alone did not establish unfair labor practices.

Charging party filed exceptions to the ALJ's decision and on August 11, 2020, MERC issued an order affirming in part and reversing in part the ALJ's decision. MERC agreed that charging party's charge against the City was unsupported and should be dismissed because charging party had not demonstrated that the City acted with anti-union animus, but MERC determined that respondent breached its duty of fair representation by failing to file a grievance regarding charging party's loss of seniority or his termination. MERC concluded that charging party should not have lost his seniority or been placed on probation because the tentative agreement was not legally enforceable and the City was still bound by the FOPLC collective-bargaining agreement. MERC concluded that charging party would likely be able to show that the City did not terminate him for cause and that charging party clearly communicated his desire to file a grievance. Therefore, MERC reversed the ALJ's decision and remanded the case to the ALJ for issuance of a cease and desist order. Regarding damages, MERC remanded the case to the ALJ to issue an order recommending that the City and respondent arbitrate the merits of charging party's termination, and should the City fail to consent to arbitration, respondent would be required to pay charging party's damages (back-pay minus mitigation). A MERC Commission Chair filed a dissenting opinion, opining that the damages were an improper remedy under *Iron Workers Local*

[2] Charging party also filed charges against FOPLC, alleging that it breached its duty of fair representation, but later withdrew his petition against FOPLC.

Union 377, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (Alamillo Steel), 326 NLRB 375 (1998). MERC disagreed and concluded that *Alamillo Steel* conflicted with other precedent and should be overturned.

II. ANALYSIS

A. FAIR REPRESENTATION

Respondent first argues that MERC erred by concluding that respondent breached its duty of fair representation by failing to pursue charging party's requested grievances. We disagree.

We review MERC's decisions pursuant to Const 1963, art 6, § 28 and MCL 423.216(e). *St Clair Co Intermediate Sch Dist v St Clair Co Ed Ass'n*, 245 Mich App 498, 512; 630 NW2d 909 (2001). MERC's "factual findings are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Id.* (quotation marks and citation omitted). The MERC's legal determinations may not be disturbed unless they "violate a constitution, a statute, or are grounded in substantial and material error of law." *Id.* at 513 (quotation marks and citation omitted). "[A]lthough MERC's interpretation of PERA is entitled respectful consideration, we review de novo legal issues such as statutory interpretation." *Technical, Prof & Officeworkers Ass'n of Mich v Renner*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351991); slip op at 4 (quotation marks and citation omitted).

A union owes those employees it represents a duty of fair representation. *Goolsby v City of Detroit* (*Goolsby I*), 419 Mich 651, 664; 358 NW2d 856 (1984). To prevail on a claim of unfair representation, a charging party must first establish a breach of the collective-bargaining agreement, then establish that the union breached its duty of fair representation. *Goolsby v City of Detroit (Goolsby II)*, 211 Mich App 214, 223; 535 NW2d 568 (1995).

> [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 with complete good faith and honesty, and (3) to avoid arbitrary conduct. A union's failure to comply with any one of those three responsibilities constitutes a breach of its duty of fair representation. [*Goolsby I*, 419 Mich at 664 (quotation marks and citation omitted).]

A union's conduct is arbitrary if it is: impulsive, irrational, or unreasoned conduct; inept conduct undertaken with little care or with indifference to the interests of those affected; a failure to exercise discretion; or extreme recklessness or gross negligence. *Id.* at 679.

First, respondent argues that it owed charging party no duty of fair representation because charging party was removed from the bargaining unit. We disagree. Regardless of whether charging party's position as Assistant Fire Chief was properly removed from POAM representation, when charging party began working as a patrol officer, his position was included in union membership under both the FOPLC collective-bargaining agreement and the tentative contract between respondent and the City, and began paying union dues to respondent. Therefore, when the incidents at issue occurred—charging party's loss of seniority, probationary status, and

termination—charging party was a member of the union and respondent owed him a duty of fair representation.

Respondent next argues that charging party failed to establish that the City breached the collective-bargaining agreement by changing his seniority. We disagree. Although the ALJ concluded that the City could change the seniority requirements because the FOPLC collective-bargaining agreement expired and a tentative agreement had been signed, MERC has recognized that a tentative agreement is not a legally enforceable collective-bargaining agreement under PERA. See e.g., *Family Serv and Children's Aid of Jackson Co v AFSCME*, 1 MPER 19044 (1988). Therefore, the City had an obligation to continue enforcing the terms of the FOPLC collective-bargaining agreement until a new collective-bargaining agreement was signed.[3] Charging party established that the City's decision to change charging party's seniority was a breach of the FOPLC collective-bargaining agreement. The FOPLC collective-bargaining agreement explicitly stated that an employee's seniority for purposes of layoff and recall was based on his MCOLES activation date. Therefore, the City's decision to lower charging party's seniority status below two officers who had later MCOLES activation dates breached the FOPLC collective-bargaining agreement. Further, the tentative agreement did not make any substantial changes to the language of the collective-bargaining agreement regarding seniority for transfers or layoffs, so there is no indication that a change in seniority was authorized under either agreement.

Next, we agree with MERC that charging party established that the City's decision to put him on a probationary status was a breach of the FOPLC collective-bargaining agreement. As previously discussed, because the tentative agreement was not legally binding, the City was obligated to follow the FOPLC collective-bargaining agreement. Regardless, neither the FOPLC collective-bargaining agreement nor the tentative agreement imposed a probationary period on transferred employees. The FOPLC collective-bargaining agreement provided that an employee could be placed on probation either as a newly hired employee after quitting, retiring, or being discharged, or when an employee's MCOLES status is activated. Neither applied to charging party, who was simply transferred to a new position within the department.

Charging party also established that respondent breached its duty of fair representation by failing to file a grievance regarding the loss of seniority. In *Goolsby I*, 419 Mich at 657-658, the Michigan Supreme Court held that the charging parties did not have to show bad faith on the part of the respondent union to establish a breach of the duty of fair representation on the basis of arbitrary conduct. *Id.* at 659, 678. The Supreme Court noted that the union's inexplicable failure to comply with a grievance procedure's time limits indicated "inept conduct undertaken with little care or with indifference to the interests of those affected, an extreme recklessness or gross negligence which could reasonably have been expected to have had an adverse effect on the

[3] See *Nexstar Broadcasting, Inc*, 369 NLRB No 61 (2020) ("[A]fter a labor contract expires, an employer has a duty to maintain the status quo. Although the status quo is ascertained by looking to the substantive terms of the expired contract, the obligation to maintain the status quo arises out of the Act, not the parties' contract. After a contract expires, terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law.").

grievants." *Id.* at 680. In this case, despite charging party's directing Postal to the portion of the FOPLC collective-bargaining agreement that was violated by his loss of seniority, Postal refused to investigate the grievance or advise charging party, and simply told charging party that he "couldn't do anything." Just like in *Goolsby*, this failure to comply with the grievance procedure indicated inept conduct undertaken with little care or with indifference to the interests of charging party, which foreclosed the further pursuit of a grievance by charging party. *Id.* As a result, charging party established that respondent violated its duty of fair representation by failing to file a grievance or investigate the issue of charging party's loss of seniority.

Charging party also established that respondent breached its duty of fair representation with respect to his probationary status. Charging party testified that he explained to Postal that he felt uncomfortable signing the employment agreement that put him on the probationary status and waited for several days for Postal to investigate the matter. However, the record shows that Postal did not investigate charging party's concerns and did not attempt to determine whether the City could require charging party to have a probationary period for a transfer in position. Postal's actions again demonstrated "inept conduct undertaken with little care or with indifference to the interests" of charging party, *Goolsby I*, 419 Mich at 679, because charging party's probationary status allowed the City to terminate him and preclude him from filing a grievance. Therefore, MERC did not err by determining that charging party should not have been on probationary status and that respondent breached its duty of fair representation by failing to investigate charging party's concerns.

Respondent argues that MERC erred by finding that respondent breached its duty of fair representation by failing to pursue charging party's requested grievance regarding his termination. We disagree. The FOPLC collective-bargaining agreement provided that a probationary employee does not have the right to grieve his or her termination, but a non-probationary employee may only be terminated for just cause. Respondent first argues that because charging party voluntarily signed the employment agreement that made him a probationary employee, he did not have any right to grieve his termination. However, as previously discussed, charging party should not have been placed on probationary status because there was no provision in the FOPLC collective-bargaining agreement or the tentative agreement that allowed for such a status on a position transfer. Further, contrary to respondent's assertion that charging party voluntarily signed the employment agreement, the record indicates that charging party refused to sign the agreement until he was threatened with termination. Because charging party should not have been a probationary employee, he had a right to pursue a grievance.

Next, respondent argues that charging party has not shown that the City violated any collective-bargaining agreement. However, Article 5, § 1 of the FOPLC collective-bargaining agreement stated that a non-probationary employee could not be terminated except for just cause. MERC concluded that the record established that charging party was not discharged for just cause under the collective-bargaining agreement, and MERC's findings of fact "are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *St Clair Co Intermediate Sch Dist*, 245 Mich App at 512; MCL 423.216(e). The record supports MERC's conclusion because charging party testified that he responded to all questions at the December 6 interview truthfully, he disclosed the DNR contact at the interview, he had no discipline on his record prior to his discharge, and Baum referred to him as an excellent employee.

Therefore, MERC did not err by concluding that charging party established that the City breached the collective-bargaining agreement by terminating his employment without cause.

Charging party also established that respondent breached its duty of fair representation by failing to pursue a grievance regarding charging party's termination. The record clearly established that charging party requested to file a grievance because charging party testified that he sent e-mails to another POAM business agent about the issue, which were copied to Postal, and the e-mails explicitly stated that he wanted to file a grievance. Although Postal did attempt to negotiate charging party's termination with Baum, there is no indication that Postal ever followed up with charging party or even investigated the potential of filing a grievance despite charging party's specific requests. Postal's dismissal of charging party's requests was "inept conduct undertaken with little care or with indifference to the interests" of charging party. *Goolsby I*, 419 Mich at 679. Therefore, MERC did not err by determining that respondent breached its duty of fair representation by failing to file grievances on behalf of charging party regarding his termination.

B. DAMAGES

Respondent argues that MERC erred by ordering POAM to potentially pay a full back-pay remedy. We agree that MERC erred by concluding that *Alamillo Steel* conflicted with precedent and agree that MERC's award of full back-pay damages was unsupported by law.

MCL 423.216(b) provides that, when MERC finds that a person has committed an unfair labor practice, it "shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act." MCL 423.216(b) also provides that MERC may not "require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause." It is also settled that affirmative relief that National Labor Relations Board (NLRB) orders must be remedial, not punitive. *Alamillo Steel*, 326 NLRB at 376.

First, respondent argues that MERC erred by concluding that *Alamillo Steel* conflicts with other precedent. We agree. In *Alamillo Steel*, 326 NLRB at 375, the ALJ determined that the respondent union violated its duty of fair representation by failing to honor an employee's request to file a grievance. The ALJ followed the make-whole remedial formula outlined in *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988), and ordered the union to either request the employer to pay for lost wages and benefits or attempt to initiate and pursue a grievance against the employer seeking such relief, and if it was not possible to pursue the grievance, then the union was required to make the employee whole for the loss of pay and benefits. *Alamillo Steel*, 326 NLRB at 375. The NLRB concluded that the *Mack-Wayne* formula did not "allocate evidentiary burdens appropriately among the parties and therefore [ran] the risk of imposing essentially punitive liability on the union and granting a windfall to the grievant . . . ." *Id.* Therefore, the NLRB concluded that (1) a party must establish the merit of the grievance before the NLRB can order the union to pay back-pay, (2) the union's liability was limited to the portion of damages caused by the union's mishandling of the grievance, and (3) the merits of the grievance should be

litigated in the initial stage of the unfair labor practice proceeding only if all parties and the judge agreed. *Id*.

In this case, MERC concluded that the burden-shifting framework established in *Alamillo Steel*, 326 NLRB 375, conflicted with *Goolsby I*, 419 Mich 651, as well as *Mack-Wayne*, 200 NLRB 817, and *POLC*, 12 MPER 30039 (1999). We disagree. First, regarding *Goolsby*, MERC did not explain how *Amalillo Steel* conflicted with *Goolsby* in its opinion, and we have found no evidence that the cases conflict. The Michigan Supreme Court in *Goolsby I*, 419 Mich at 682, remanded the case to MERC for a determination of the relief due to the plaintiffs and stated in a footnote: "We have held that sufficient evidence was introduced at the hearing for plaintiffs to prevail on the merits. Nevertheless, the MERC must determine whether the city's actions regarding plaintiffs were proper and what, if any, relief is due plaintiffs." *Id.* at n 14 (citation omitted). On remand, this Court determined that the charging parties did not establish a breach of the collective-bargaining agreement, so they were not entitled to damages from the respondent union. *Goolsby II*, 211 Mich App at 223. *Goolsby's* footnote is consistent with *Alamillo Steel's* holding that a party must establish the merit of a grievance before NLRB will assess back-pay liability against a union. *Alamillo Steel*, 326 NLRB at 376-377. Therefore, there is no indication that *Alamillo Steel* conflicts with *Goolsby*.

Next, regarding *Mack-Wayne*, 290 NLRB 817, the NLRB in *Alamillo* overtly overruled portions of *Mack-Wayne*, and explained that *Mack-Wayne*'s formula did not "allocate evidentiary burdens appropriately among the parties and therefore [ran] the risk of imposing essentially punitive liability on the union and granting a windfall to the grievant . . . ." *Alamillo Steel*, 326 NLRB at 376. Therefore, *Alamillo* explicitly conflicts with *Mack-Wayne* because it overruled the decision. Finally, *Alamillo Steel* does not conflict with *POLC*, 12 MPER 30039 (1999), in which the MERC determined that a back-pay remedy from the respondent union was not a possibility because "a remedial order of wages to victims of a failure to represent is improper unless a breach of contract by the employer is found," and there had been no breach of contract in the case. *Id.* This case does not conflict with the holding of *Alamillo Steel*, 326 NLRB at 375, that a party must show a breach of the collective-bargaining agreement to establish that a union breached its duty of representation.

MERC also cited the June 26, 2020, NLRB General Memorandum GC 20-09, which urged the Board to reverse *Alamillo Steel*'s "unduly high and difficult standard." However, NLRB's memorandum is not binding authority, and it is not particularly persuasive considering that no other NLRB decision or MERC decision reverses *Alamillo Steel*'s holding. Further, MERC has not explained why the *Alamillo Steel* standard would be unduly high or difficult for charging party to satisfy, particularly because MERC already determined that charging party's grievances against respondent regarding both his loss of seniority and termination had merit. Although *Alamillo Steel* is not binding precedent on this Court, see *Associated Builders & Contractors, Saginaw Valley Area Chapter v Dir, Dept of Consumer & Indus Servs*, 267 Mich App 386, 395; 705 NW2d 509 (2005), because it has not been overruled by this Court's decision in *Goolsby II*, 211 Mich App at 223, we find *Alamillo Steel* persuasive and find that MERC erred by declining to follow the decision.

Respondent also argues that MERC erred by entering a provision requiring respondent to pay back-pay to charging party if the City fails to consent to arbitration. We agree. MERC's order

requiring POAM to automatically pay charging party's damages should the City decline arbitration was exactly the type of remedy that the NLRB concluded was inappropriate in *Alamillo Steel*, 326 NLRB at 375, because the remedy did not "allocate evidentiary burdens appropriately among the parties and therefore [ran] the risk of imposing essentially punitive liability on the union and granting a windfall to the grievant . . . ." *Id.* In this case, MERC's order essentially eliminated the requirement that charging party must establish that his grievance had merit for POAM to pay back-pay, because, should the City choose not to arbitrate the issue of charging party's termination, respondent would be responsible for damages without a definitive determination that charging party's grievance had merit. This also gives the City enormous incentive to place all the damages on respondent by simply refusing to arbitrate the grievance. Such an outcome contradicts *Alamillo Steel*'s holding that a union should only pay for the portion of damages caused by its failure to represent, not the employer's wrongdoing. *Alamillo Steel*, 326 NLRB at 378. Such an outcome is punitive to the union, rather than restorative to charging party, particularly because it assumes that charging party was entitled to back-pay, when MERC determined that the issue of whether his termination was for cause was subject to arbitration. Although we find that respondent did breach its duty to fairly represent charging party and find that charging party was improperly terminated without just cause, respondent should only be responsible for its own portion of damages. *Alamillo Steel*, 326 NLRB at 378. Because MERC established that charging party's grievance had merit, the only remaining issue is for the ALJ to determine what portion of damages respondent owed charging party. Therefore, we remand this case to the ALJ determine the portion of damages that resulted from respondent's failure to represent charging party and to order respondent to pay those damages.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens