STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

FERNDALE FIREFIGHTERS ASSOCIATION,
LOCAL 812, I.A.F.F,
Labor Organization-Respondent,

MERC Case No. CU14 L-054
-and- Hearing Docket No. 14-038809

RICHARD KELLY,
An Individual Charging Party.
_____/

APPEARANCES:

Helveston & Helveston, P.C., by Ronald R. Helveston and Michael D. McFerren, for Respondent

Law Office of Eric I. Frankie, PLC, by Eric I. Frankie, for Charging Party

DECISION AND ORDER

On March 29, 2016, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in the above matter finding that Respondent, Ferndale Firefighters Association, Local 812 I.A.F.F. (Union), did not violate § 10(2)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, as alleged by Charging Party Richard Kelly. The ALJ concluded that Charging Party did not establish that the Union breached its duty of fair representation when it refused to arbitrate the grievance it had filed over Kelly's August 6, 2014 reprimand and suspension or when it failed to file a grievance over the December 19, 2014 reprimand issued to Kelly. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Charging Party filed exceptions and a brief in support of his exceptions to the ALJ's Decision and Recommended Order on May 23, 2016. Respondent filed its brief in support of the ALJ's Decision and Recommended Order on June 3, 2016.

In his exceptions, Charging Party contends that the ALJ erred by failing to examine whether Respondent breached its duty of fair representation by not exercising its discretion in good faith towards the handling of Charging Party's grievance of the August 6, 2014 discipline. Charging Party argues that the ALJ failed to examine whether Kelly's employer actually breached the collective bargaining agreement by its discipline of Kelly. Further, Charging Party asserts that the ALJ erred by finding that Respondent did not retaliate against him by refusing to file a grievance of

the December 19, 2014 reprimand after it learned that he had filed an unfair labor practice charge against it.

We have reviewed the exceptions filed by Charging Party, and find them to be without merit.

Factual Summary:

After a complete review of the record in this matter, we adopt the findings of fact set forth by the ALJ. We will not repeat the facts, except as necessary.

Charging Party Richard Kelly has been employed by the Ferndale Fire Department as a firefighter and paramedic since September 7, 2003. Kelly's bargaining unit is represented by Respondent Ferndale Firefighters Association.

Ferndale has two fire stations, one on each side of Woodward Avenue. When a call comes in from the police department for a medical emergency, the call goes to both fire stations simultaneously. Typically, both stations answer the call, but only someone from the headquarters station, Station 1, talks on the phone. If Station 2 is to respond to the call, the person from Station 1 who answered the phone ensures that someone from Fire Station 2 was also on the call. If no one from Fire Station 2 was on the call, it is the responsibility of the person from Fire Station 1 to immediately contact Fire Station 2 and pass on the information. The responsibility for answering the telephone line on which emergency calls are received belongs to the person on watch.

The March 31, 2014 Incident

On March 31, 2014, the person on watch was Lieutenant Ron Makowski. Kelly was in or near the watch room when both the emergency phone line and the business phone line rang. Since Makowski wasn't present, Kelly answered the emergency line. Kelly identified himself by saying "Ferndale Fire Headquarters." Just after he did so, Kelly heard Fire Marshal Brian Batten, pick up the phone, and say "Ferndale Fire Department." Kelly heard the caller report that assistance was needed for someone having a seizure. Kelly, assuming that Batten would handle the matter, turned his attention to the other call. He picked up the business phone line and discovered that the caller on that line had hung up.

Kelly then went back to the emergency line. At that point, Batten asked if Station 2 had the call. According to Kelly, he then heard someone say "Yep," and assumed that it was someone from Station 2. Then, with his hand covering the mouthpiece of phone, Kelly remarked sarcastically to Chris Iverson, "Yeah, we do." Batten, hearing the "Yeah, we do" comment, believed that it was made by someone from Station 2. From that, he assumed that Station 2 would handle the call and send a fire engine to support the ambulance that was to be sent by the City of Royal Oak.

Shortly thereafter, Makowski directed Kelly to find out what Station 2's "on the scene time" was. Kelly contacted Station 2 and learned that no one from Station 2 went on the call because they were unaware of the call. The fact that no one from the Ferndale Fire Department had gone on the call was considered to be a significant error. Typically, for a call of that nature, the fire department would send an ambulance, as well as an engine that carried personnel to back up the ambulance crew.

The Employer required Kelly, Makowski, and Batten to prepare written statements about the incident and obtained a recording of the telephone conversation. The recording does not support Kelly's testimony that he heard someone say "Yep" in response to Batten's question as to whether Station 2 had the call. Kelly listened to the recording of the conversation and acknowledged that "Yep" cannot be heard on the recording. However, the comment "Yeah, we do" can be heard on the recording immediately after Batten's question of whether Station 2 had the call. Batten identified the voice as Kelly's, and Kelly subsequently acknowledged that his comment "Yeah, we do" could be heard on the recording.

Kelly contended that he made the "Yeah, we do" comment as part of a conversation with his coworker, firefighter Chris Iverson. He also testified that he made the comment in response to what he believed was someone from Station 2 saying "Yep." Kelly also admitted on cross-examination that he told the Union that he and Iverson were talking about starting pitchers on the Tigers baseball team and he may have made the "Yeah, we do" comment in response to Iverson saying that the Tigers had a good group of starting pitchers. However, he subsequently testified that he did not say, "Yeah, we do" in response to Iverson's comments about the Tigers. His final explanation for the comment was that two employees at Station 2 had complained about going on a lot of runs, so he was making a sarcastic comment with respect to the fact that Station 2 was going on another run.

Kelly testified that later that day, he recalled that he had not mentioned the conversation with Iverson it in his written statement, so he telephoned Makowsk and reported it. Makowski was not questioned about the telephone conversation at the hearing.

In his testimony, Iverson denied that he and Kelly talked to each other while Kelly was on the emergency phone line. Iverson testified that he and Kelly were talking before the phone rang, but they did not talk after it rang. He testified that after the call ended, he asked Kelly whether the call was for the east side of town (Station 2) or the west side of town (Station 1). Iverson specifically denied that Kelly placed his hand over the phone's receiver while saying, "Yeah, we do."

The May 9, 2014 Notice of Discipline

On May 9, 2014, Fire Chief Kevin P. Sullivan issued a Notice of Discipline to Kelly concluding that Kelly was responsible for the failure to dispatch the Station 2 fire engine on March 31, 2014. Sullivan found that Kelly responded to Batten's question "OK, number two, you got that?" by saying, "Uh, yeah we do." Sullivan found that this response led Batten and Makowski to believe that personnel at Station 2 would respond to the dispatch request. Sullivan also found that Kelly had violated fire department rules by making the inappropriate response and by failing to immediately correct the situation. Sullivan concluded that Kelly had made a false report when, in his written statement, Kelly stated that he heard a third voice say, "Yah" in response to Batten's question. The notice also informed Kelly that there would be a disciplinary hearing regarding the matter.

Sullivan believed that during the phone conversation, Kelly momentarily forgot that he was at Station 1 (headquarters) and thought he was answering on behalf of Station 2. Sullivan considered that the problem was that Kelly did not immediately correct his mistake. However,

Kelly identified himself as being at fire department headquarters (Station 1) when he answered the phone.

Respondent's Handling of the March 31, 2014 Incident

Respondent's president, Patrick Sheehan, spoke with those involved in the March 31, 2014 incident and requested copies of the witness statements from Sullivan. Sullivan would not give the witness statements to Sheehan while the matter was still under investigation. Kelly emailed a copy of the recording of the March 31, 2014 telephone conversation with the police dispatcher to Sheehan on May 13, 2014. In the email, Kelly acknowledged that the recording did not sound good and stated that the voices he heard in the background, that he thought were from Station 2, were actually the voices of Makowski and Batten.

Kelly, Sheehan, Sullivan, and the human resources director, Jennifer Walewski, met on May 19, 2014, for the disciplinary hearing. At the hearing, Kelly read a letter that he had written regarding the incident and denied responsibility. In the letter, Kelly asserts that what Batten interpreted as Station 2's confirmation of their responsibility to send a fire engine to support the Royal Oak ambulance staff was actually Batten overhearing Kelly's conversation with Chris Iverson about baseball. Sheehan and Kelly had discussed the conversation with Iverson previously. However, when Sheehan spoke with Iverson, Iverson denied that he and Kelly had a conversation while Kelly was on the phone.

Kelly heard nothing further about the discipline until he received the written reprimand and suspension from Chief Sullivan on August 6, 2014. Kelly called Sheehan after receiving the written reprimand. Sheehan told him not to worry about it and that they would take care of it.

On August 11, 2014, the Union timely grieved the discipline on Kelly's behalf. The Employer denied the grievance on August 14, 2014. Because Sullivan had determined the matter to be an economic grievance, the next step was to take the matter to the city manager, April Lynch. The Union had five business days to appeal to Lynch. On August 22, 2014, Sheehan sent an email to Lynch appealing the denial of the grievance. Lynch responded on August 27, 2014, denying the grievance based on her finding that the deadline for appealing the grievance to her was August 21, 2014. Sheehan testified that he argued that they should have a decision on the merits and Lynch ultimately agreed to waive the deadline and to hear the grievance on the merits.

Between August 7, and August 28, 2014, Sheehan talked to Kelly several times and spoke with Sullivan in an attempt to settle the grievance. Sullivan offered to waive the suspension if Kelly would admit what he had done. Sheehan discussed Sullivan's offer with Kelly and told Kelly that he could try to get the two-day suspension expunged. On August 28, 2014, Kelly, Sheehan, and Union Vice President Larry Mercer met to discuss the matter. At the meeting, Sheehan informed Kelly that based on the facts regarding the incident, the Union's attorney and executive board recommended that Kelly provide Sullivan with a letter in which he admitted to the infractions with which he had been charged and include the explanation that he had previously provided to the Union. Sheehan believed that by the end of the meeting, Kelly understood what he needed to do and that the matter could be settled. However, Kelly never wrote the letter recommended by the Union.

On September 2, 2014, Sheehan sent a letter to Kelly setting forth the terms of the potential settlement, and attached documents from Kelly's file, including the August 27, 2014 letter from Lynch denying the grievance. On September 4, 2014, Kelly wrote back to Sheehan pointing out that Sheehan had failed to timely file the notice necessary to move the grievance to the next step. Kelly's letter also noted that Sheehan had received correspondence from Lynch on August 27, denying the grievance because it was untimely. Kelly then refused to accept the Union's settlement recommendation. At that point, Sheehan believed he already had an agreement with the city manager to go to Step 4 of the grievance process, and therefore, had not mentioned the timeliness issue to Kelly.

The Step 4 meeting with the city manager took place on October 28, 2014. Sheehan, Kelly, Mercer, Sullivan, Lynch, and Walewski were present. Mercer and Sheehan spoke on Kelly's behalf and Kelly was given an opportunity to personally plead his case. On October 30, 2014, Lynch denied the grievance on its merits. In Lynch's letter denying the grievance, she explained that there were two charges – one charge regarding Kelly's participation in the phone call, and one charge regarding Kelly's lack of truthfulness in the investigation of the phone call. She found that the facts regarding Kelly's participation in the phone call were not disputed. She stated that during the October 28 meeting she found inconsistencies in Kelly's explanation of his participation in the phone call. On that basis, she questioned Kelly's candor and upheld the discipline.

Respondent's attorney, Ronald Helveston, considered that there was little likelihood of succeeding at arbitration and provided a letter to the Union advising that it would not be in the best interest of the Union to pursue the matter. The Union's executive board considered the matter and unanimously voted not to take the grievance to arbitration. On November 7, 2014, Sheehan sent a copy of the letter from Helveston to Kelly, along with a letter that Sheehan wrote on behalf of the Union. Sheehan's letter explained that the Union had attempted to reach a settlement to reduce the discipline, but the only remedy Kelly was willing to accept was to be cleared of the offenses with which he had been charged. Sheehan's letter opined that it was unrealistic to expect Kelly to be cleared of the charges and, therefore, the Union would not take the matter to arbitration.

The December 19, 2014 written reprimand

In early December, Kelly learned that a citizen had filed a complaint about him. The complaint was related to his treatment of a patient a month or so earlier. He was asked about the incident in front of Captain Theut and Sergeant Light and explained to them what had happened. Theut told Kelly that he had already talked to Mike Szymanski, a firefighter and paramedic who was Kelly's partner that day and Lieutenant Kazee, the officer on duty that day. Kelly was ordered not to talk to anyone about the incident that led to the complaint. Kelly questioned the order because it was unusual. The day of his conversation with Theut, he was working with Szymanski. Kelly asked Szymanski about the procedure and whether the Employer could perform an investigation that way. Kazee approached him about the complaint, but Kelly told Kazee that he could not discuss it.

Kelly sent an email to Sheehan around December 10, 2014, requesting legal representation from the Union regarding the patient complaint. Sheehan was on vacation at the time and did not receive the email for several days. However, he contacted Kelly after he received the email and discussed the matter with him. Sheehan told Kelly that he would look into the matter and instructed

Kelly not to say anything more. Sheehan also sent Kelly text messages on December 17 and 18 asking him to "stay 'tight lipped'" until Sheehan could get an opinion from the Union's labor attorney the next day and telling him to follow Theut's order. Sheehan discussed the order with Theut, but Theut told Sheehan that he was following orders from Sullivan.

Sheehan subsequently learned that Kelly had already spoken with someone in violation of Theut's order. On December 19, 2014, Kelly was given a written reprimand by Captain Theut for failure to follow a direct verbal order. Theut found that Kelly was given a direct order on December 5, 2014, not to speak to witnesses during the investigation into a patient complaint. Theut found that Kelly "repeatedly attempted to speak with FF. Szymanski and Lt. Kazee after [being] given the order." Kelly was not disciplined regarding the patient complaint.

On December 18, 2014, Kelly filed an unfair labor practice charge against the Union regarding its refusal to take the grievance over the August 6, 2014 reprimand and suspension to arbitration. Sheehan received the unfair labor practice charge a short time later.

When Kelly inquired about filing a grievance regarding the December 19, 2014 reprimand, Sheehan talked to him and explained that whether Theut's order was a good order was immaterial. Sheehan said that Kelly was obliged to follow the order and had not done so. Sheehan explained that merely disagreeing with the order was not a basis for disobeying it, and that Kelly should have followed the order and grieved it later.

Kelly's Relationship with Sheehan

In January 2014, Kelly and Sheehan had run for union president; Kelly lost to Sheehan by one vote. Kelly believed that he lost the election at least in part because a rumor was being spread that he had made negative comments about a councilperson. Kelly believed that Sheehan had been responsible for spreading the rumors.

Sheehan had been approached by a councilman who indicated that he had had problems with certain union members. The councilman didn't give any names but referred to an incident at the Elks Club. At a Union meeting, Sheehan addressed the membership, told them about the councilman's complaint without mentioning any names, and told them that they needed to stay focused. When Kelly approached Sheehan about the matter, Sheehan told Kelly that he didn't know who the councilman had been referring to, but since Kelly had approached him about the matter, he believed that it was Kelly who had been involved in the incident.

Discussion and Conclusions of Law:

Charging Party contends that the ALJ erred by not finding that Respondent breached its duty of fair representation. A union's duty of fair representation requires it to serve the interests of all members without hostility or discrimination toward any and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 661 (1984) citing *Humphrey v Moore*, 375 US 335, 34 (1964). In *Goolsby* at 664, the Court explained, "it must be kept in mind that: '[t]he major goal of the duty of fair representation is to identify and protect individual expectations as far as possible without undermining collective interests. Where the individual and collective group interests clash, the former must yield to the latter,'" quoting *Tedford v Peabody Coal Co*, 533 F2d 952, 956-957 (CA 5, 1976). Thus, an individual union

member does not have the right to demand that the union take his grievance to arbitration, and the union is not required to pursue every grievance to the highest level but must be permitted to assess each with a view to individual merit. See *Wayne Co Cmty Coll*, 2002 MERC Lab Op 379, 381; *Grosse Ile Office & Clerical Ass'n*, 1996 MERC Lab Op 155, 159-160; *Gunkel v Garvey*, 45 Misc 2d 435 (1964).

A union breaches its duty of fair representation if its conduct toward a member is arbitrary, discriminatory, or in bad faith. *Vaca v Sipes*, 386 US 171, 177 (1967). Arbitrary conduct has been defined as "impulsive, irrational, or unreasoned conduct." See *Goolsby* at 678. It is the union's responsibility to act "without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process a member's grievance." *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 487 (1993), citing *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 146-147 (1973).

On exceptions, Charging Party contends that the ALJ failed to examine whether Kelly's employer actually breached the collective bargaining agreement by its discipline of Kelly. To establish that Respondent breached its duty of fair representation by not arbitrating the grievance of the August 6, 2014 reprimand and suspension or by failing to file a grievance over the reprimand issued on December 19, 2014, Charging Party must show that his employer breached the collective bargaining agreement by issuing the discipline in question. As the Court of Appeals explained in *Martin v East Lansing Sch Dist*, 193 Mich App 166, 180–81 (1992):

> The duty of fair representation by a labor organization is an implied duty that requires the labor organization to fairly and impartially represent *all* members of the bargaining unit. *181 *Humphrey v Moore*, 375 US 335, 342, 84 S Ct 363, 367–68, 11 L Ed 2d 370 (1964); *Goolsby v Detroit*, 419 Mich 651, 661, 358 NW2d 856 (1984). To prevail on a claim of unfair representation, the employee must establish not only a breach of the duty of fair representation but also a breach of the collective bargaining agreement. See *Pearl v Detroit*, 126 Mich App 228, 238, 336 NW2d 899 (1983), and *Hines v Anchor Motor Freight, Inc*, 424 US 554, 570–571, 96 S Ct 1048, 1059–1060, 47 L Ed 2d 231 (1976).

Kelly failed to produce evidence sufficient to establish that his employer's issuance of either the August 6, 2014 reprimand and suspension or the December 19, 2014 reprimand breached the collective bargaining agreement.

With respect to the March 31, 2014 incident, Kelly was disciplined for his apparent mistake in speaking during the telephone conversation with the police dispatcher. Kelly's actions in saying "Yeah, we do" in response to Batten's query as to whether Station 2 had the information to handle the emergency call are not contested. Kelly admitted that it was his voice saying, "Yeah, we do" in response to Batten's question. It is also undisputed that Kelly's response caused Batten to believe that someone from Station 2 was on the phone and ready to take responsibility for handling the emergency call. Kelly sought to dispute the Employer's finding that he had not been truthful in his responses during the Employer's investigation of the incident. However, Kelly gave so many different explanations for making the "Yeah, we do" comment that it would have been

extraordinarily difficult, if not impossible, for the Union to establish that the Employer had disciplined Kelly without just cause for his lack of truthfulness. Kelly testified at one point that he made the comment in response to what he believed was someone from Station 2 saying "Yep." He testified that two employees at Station 2 complained about going on a lot of runs, so by saying, "Yeah, we do" he was making a sarcastic comment with respect to the fact that Station 2 was going on another run. That explanation is not consistent with the recording of the telephone conversation, nor is it consistent with Kelly's other explanation for his comment. Kelly told the Union that he and Iverson were talking about starting pitchers on the Tigers team and he may have made the "Yeah, we do" comment in response to Iverson saying that the Tigers had a good group of starting pitchers. That rationale for making the "Yeah, we do" comment was contradicted by Iverson. Moreover, Kelly subsequently testified that he did not say, "Yeah, we do" in response to Iverson's comments about the Tigers. According to Kelly, he had his hand over the receiver when he made the comment. However, that was also contradicted by Iverson's testimony and is inconsistent with the volume and clarity of his comment on the recording.

Kelly's own testimony, especially when compared to the recording of the phone call and the testimony of Batten, Makowski, and Iverson indicates that the Union reasonably determined that Kelly had little likelihood of success at arbitration.

With respect to the December 19, 2014 written reprimand, Kelly was told that he was being investigated as the result of a patient complaint. He was directed not to discuss the incident that led to the complaint with his coworkers. Before discussing the matter with his Union representative, Kelly was observed by his superior officer discussing the matter with at least one of the coworkers, contrary to the officer's order. These facts are not disputed. Thus, there is no evidence that the discipline for disobeying the order was not for just cause.

Where the Union has reasonably determined that it would not be able to establish that the Employer's actions constitute a breach of the collective bargaining agreement, the Union has no obligation to pursue the grievance. *Park Mgt Ass'n, City of Detroit*, 1988 MERC Lab Op 1023, 1026; *Detroit Bd of Ed*, 16 MPER 29 (2003); *Detroit Bd of Ed*, 1986 MERC Lab Op 74, 77 (no exceptions). In both instances, it would have been difficult, if not impossible, for the Union to establish that Kelly was not disciplined for just cause.

As the Michigan Court of Appeals explained in *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 486 (1993):

> A union has considerable discretion to decide which grievances shall be pressed to arbitration and which shall be settled, and must be permitted to assess each grievance with a view to individual merit. The union may consider the good of the general membership and has discretion to weigh the burden on the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the desirability of winning the award against considerations that affect the membership as a whole.

Kelly contends that the ALJ failed to examine whether Respondent breached its duty of fair representation by not exercising its discretion in complete good faith and honesty in its handling of the grievance of the August 6, 2014 reprimand and suspension. On the contrary, it is Charging

Party's burden to show that Respondent breached its duty by failing to act in good faith. *Vaca v Sipes*, 386 US 171, 177 (1967); *Ann Arbor Pub Sch*, 16 MPER 15 (2003); *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131, 134; 14 MPER 32040; *Michigan Council 25, AFSCME, Local 3308*, 1999 MERC Lab Op 132; *Wayne Co, Dep't of Pub Works*, 1994 MERC Lab Op 855, 858. With respect to the August 6, 2014 reprimand and suspension, the Union's representatives investigated the matter, sought legal counsel, and tried to persuade the Employer to change its decision. The Union filed a timely grievance, which was denied. The Union then attempted to appeal the denial of the grievance to the fourth step of the grievance process. Its appeal was untimely. However, the Union was successful in its efforts to have the Employer waive the timeliness issue, and the grievance was taken to the fourth step. Moreover, between the date that the reprimand and suspension were issued and the date the Employer issued its decision at the fourth step, the Union attempted to reach a settlement with the Employer to reduce the discipline. During this period, the Union came to recognize that there was little likelihood of showing that the Employer lacked just cause to discipline Kelly and attempted to persuade him to accept the Employer's settlement offer. Ultimately, the Union's executive board, based on the advice of its attorney and the evidence regarding the incident, determined that it would not be in the best interest of the Union to proceed to arbitration.

Kelly further contends that the ALJ erred by finding that the Union did not retaliate against him by refusing to file a grievance of the December 19, 2014 written reprimand, because it learned that he had filed an unfair labor practice charge against it. Kelly does not deny that he was ordered not to discuss the patient complaint with his coworkers. He admitted that Szymanski was one of the coworkers with whom he was directed not to discuss the matter. He also admitted that he spoke with Szymanski about the procedure the Employer was using to investigate the patient complaint, after he had received the order not to discuss the matter with Szymanski. In this case, the Union's president, Sheehan, investigated the issue, sought legal counsel, and discussed it with the officer who issued the order. Sheehan subsequently learned that Kelly had violated the order before Kelly told him about it. There is no evidence that the Union's decision against filing a grievance over the discipline for Kelly's refusal to follow the direct order of a superior officer was motivated by anything other than an assessment of the facts and the general requirement that orders of superior officers that do not affect safety must be followed even if the employee disagrees with them.

The Union had no duty to take the grievance to arbitration once it had determined that it would be futile to pursue that grievance. The Union also had no duty to grieve the reprimand issued to Kelly for disobeying the order of his superior, when Kelly had already disobeyed the order at the time that he notified the Union of the issue. See *Wayne State Univ*, 18 MPER 32 (2005); *Park Mgt Ass'n, City of Detroit*, 1988 MERC Lab Op 1023, 1026.

In the absence of a showing of bad faith, gross negligence, or arbitrary or capricious action by the union, an employee's dissatisfaction with his union's decisions does not establish a breach of the duty of fair representation. *Ann Arbor Pub Sch*, 16 MPER 15 (2003); *Michigan Council 25, AFSCME, Local 3308*, 1999 MERC Lab Op 132.

It is evident that Kelly lost faith in his union representation when he learned that the Employer had initially denied the Union's request to take the grievance to the fourth step on the grounds of untimeliness. At that point, he refused to accept the proposed settlement. Clearly, the Union erred by failing to promptly advise Kelly of the untimeliness issue and its resolution.

However, Kelly learned of the untimeliness issue because Sheehan provided Kelly with the city manager's August 27, 2014 letter denying the grievance on that basis. Also, in light of the fact that Sheehan was able to quickly persuade the city manager to change her decision and permit the grievance to proceed to Step 4, we cannot find that the Union's error evinces bad faith.

While there may have been some reason for Sheehan to feel animosity towards Kelly as the result of the Union election and Kelly's accusation that Sheehan had spread rumors about him, there is no evidence that Sheehan or other decision-makers in the Union were motivated by animosity, bad faith, arbitrariness, or capriciousness in determining that the Union should not arbitrate the grievance regarding the August 6, 2014 reprimand and suspension. We agree with the ALJ's finding that the Union could have rationally concluded that arbitration of the grievance would have been unsuccessful because the arbitrator would not credit Charging Party's testimony. Moreover, while the Union's decision-makers may have been upset by Kelly's filing of the unfair labor practice charge against the Union, there is no evidence that it affected the Union's decision to refuse to file a grievance over the December 19, 2014 discipline. Charging Party has not shown that the facts of either incident could persuade an arbitrator that the Employer did not act with just cause in disciplining him. In both incidents, the Union had a rational basis for not proceeding further.

For the foregoing reasons and those set forth in the ALJ's decision, we find that Charging Party failed to establish that Respondent breached its duty of fair representation. We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. The ALJ's decision is affirmed.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 18, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

FERNDALE FIREFIGHTERS ASSOCIATION,
LOCAL 812, I.A.F.F,
Labor Organization-Respondent,

Case No. CU14 L-054
Docket No. 14-038809-MERC

-and-

RICHARD KELLY,
An Individual-Charging Party.
_____/

APPEARANCES:

Helveston & Helveston, P.C., by Ronald R. Helveston and Michael McFerren, for Respondent

Eric I. Frankie, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard on June 30 and August 13, 2015, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on October 5, 2015, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On December 18, 2014, Richard Kelly, employed by the City of Ferndale (the Employer) as a firefighter and paramedic in its Fire Department, filed this unfair labor practice charge with the Commission against his collective bargaining representative, the Ferndale Firefighters Association, Local 812, I.A.F.F. Kelly amended his charge on January 14, 2015.

On August 6, 2014, the Employer gave Kelly a written reprimand and a 48-hour unpaid suspension arising from an incident that occurred on March 31, 2014. Respondent filed a grievance over the discipline. However, on or about November 7, 2014, it notified Kelly that it had decided not to arbitrate the grievance.

Kelly alleges that Respondent violated its duty of fair representation under §10(2)(a) of PERA by its handling of the grievance and its refusal to arbitrate. According to Kelly, after Respondent missed the deadline for appealing his grievance under the collective bargaining agreement, it attempted to cover up its mistake by claiming, contrary to its earlier position, that Kelly's grievance lacked merit. Kelly also asserts that Respondent's decision not to arbitrate was improperly influenced by a history of animosity between himself and Respondent President Patrick Sheehan, including the fact that the two men had recently been opponents in an election for union president.

On December 19, 2014, after Kelly's December 18, 2014, unfair labor practice charge had been served on Respondent, the Employer gave Kelly a second disciplinary reprimand. This reprimand was for violating an order given by his supervisor, a Captain Theut (no first name in record). On or about December 16, 2014, Sheehan informed Kelly that Theut's order was "bullshit," and that if anything happened as a result of the order, Respondent would file a grievance and "take care of it." However, after the reprimand was issued, Respondent failed to file a grievance. In his amended charge, Kelly alleges that Respondent's failure to file a grievance over this discipline was based on the fact that Kelly had filed an unfair labor practice charge against Respondent and on the history of animosity between Sheehan and Kelly.

Findings of Fact:

Background

Kelly was hired by the Employer as a fire fighter and paramedic in 2003 and is a member of a bargaining unit represented by Respondent. In January 2014, Kelly and Sheehan, also a fire fighter and paramedic, were opponents in an election for the office of union president. Sheehan defeated Kelly by one vote. Shortly after this election, according to Kelly, he was told by other fire fighters that they had not voted for him because of a story that Kelly, several years before, had "badmouthed" an Employer councilperson. The fire fighters told Kelly that because of the alleged bad blood between Kelly and the Employer's City Council, they felt he would not be an effective union representative. Kelly testified that he had first heard the story, which was false, about two years before when it was being spread by Sheehan. Kelly confronted Sheehan, and Sheehan told Kelly that Sheehan had heard it from the councilperson. Although the fire fighters with whom Kelly spoke after the election in 2014 said that they had heard the story from former Respondent President Dennis Barr, Kelly believed that Sheehan was responsible for reviving the rumor.

Sheehan's version of these events was as follows. In 2008 and 2009, Respondent and the Employer were in the middle of contentious contract negotiations. Sometime during this period, Sheehan appeared at a City Council meeting to address the Council. After the meeting, a councilperson approached him and complained about negative things that some of Respondent's members had allegedly said about councilmembers. The councilperson mentioned an incident that had allegedly taken place at the local Elks Club lodge. At a union meeting shortly after his conversation with the councilperson, Sheehan told Respondent's members that they should watch what they said in public so that Respondent did not lose its good working relationship with the Council. Sheehan mentioned the alleged Elks Club incident as an example.

After the union meeting, Kelly approached Sheehan and angrily accused him of spreading false rumors about him. Sheehan told Kelly that the councilperson had not mentioned the name of the fire fighter involved in the Elks Club incident and that Sheehan had not known until then that it was Kelly. According to Sheehan, he never told any of Respondent's members that Kelly was the fire fighter involved.

Kelly's August 6, 2014, Discipline and Grievance

The incident that led to Kelly's August 6, 2014, suspension and written reprimand occurred on March 31, 2014. The Employer has two fire stations, Station 1 and Station 2, located in different areas of the City. The Employer's dispatch center is located in its police department. When the dispatch center puts through an emergency call to the fire department, the call rings in both stations. According to the Fire Department's standard operating procedures, the fire fighter designated for that shift as the "watchman" at Station 1 is supposed to answer the call. The watchman then states on the line the unit or units to respond, the address of the alarm and the type of the alarm. If Station 2 fire fighters are to be dispatched, the watchman at Station 1 is supposed to call Station 2 and confirm that the alarm was received.

On March 31, 2014, Lieutenant Ron Makowski was the assigned watchman at Station 1. Makowski was away from the first floor watch desk and was upstairs having a discussion with Fire Marshal Brian Batten in Batten's office when the emergency line rang indicating a call from the emergency dispatch center. At this time, Kelly and another fire fighter, Chris Iverson, were doing inventory near the watch desk on the first floor. Seeing that Makowski was away from the desk, Kelly picked up the line. Upstairs, Batten, at the request of Makowski, also picked up the line. According to the Employer's recording of the call, Kelly answered the call, "Ferndale Fire Headquarters," and, immediately thereafter, Batten answered "Ferndale Fire Department."

Recordings are made of all emergency calls received by the department. On the recording of this call, voices can be heard in the background, but the dispatcher can clearly be heard explaining that a woman was having a seizure on the street. For this type of call, the Employer would typically send an ambulance and an engine to back up the ambulance crew. The location of the emergency was an area that was closer to Station 2 than Station 1. After the dispatcher conveyed the information, Batten said, "Okay, Number 2, you got that?" On the recording, a voice is heard immediately after Batten's saying, "Yeah, we do." According to the explanation Batten later provided to the Employer, Batten believed that this was someone from Station 2. As was later discovered, however, no one was on the line from Station 2 since all the fire fighters at that station were out on runs. The person making this remark was later identified as Kelly.

According to the explanation Kelly provided to the Employer and Kelly's testimony at the hearing, Kelly thought he heard someone say, "Yeah," to Batten's question, although the recording of the call did not pick this up. According to Kelly, after he heard the "Yeah," he turned his head toward Iverson, covered the mouthpiece of the phone so (he thought) he could not be heard, and said, "Yeah, we do." Kelly testified that this remark was a sarcastic comment related to the fact that Station 2 firefighters had been complaining that they had too many runs.

After the "Yeah, we do," the dispatcher is heard on the recording asking Batten whether he should dispatch a private ambulance or an ambulance from the City of Royal Oak, an entity with which the Employer has a mutual aid pact. Batten told the dispatcher to send an ambulance from Royal Oak. Believing that Station 2 had received the information and would send the backup engine, both Kelly and Batten then hung up the phone.

About thirty minutes later, Makowski asked Kelly if he had heard a report from Station 2 about the run. Makowski then asked Kelly to call Station 2 to check on the call, and they learned that Station 2 had not gone out on the run. After it was confirmed that the ambulance from Royal Oak had transported the patient to the hospital, Kelly went upstairs to talk to Batten and told him that he had been listening in on the call. Batten and Kelly both agreed that they had heard someone that they assumed was from Station 2 confirm that the call was being handled.

Batten told Makowski to prepare a statement regarding the incident and to have Kelly prepare one. Makowski apologized to Kelly for not answering the call himself and told Kelly that because it had been Makowski's responsibility as watchman to answer the call, Makowski would take responsibility for the error.

Kelly and Makowski both prepared written statements before leaving work on March 31. In his statement, Kelly reported that he heard someone say "Yeah," after Batten asked if Station 2 was on the line. However, he did not include the fact that he had said, "Yeah, we do," to Iverson and his statement did not mention Iverson at all. After Kelly had left for the day, however, it occurred to him that he should tell Makowski about his remark to Iverson during the phone call. According to Kelly's testimony, he phoned Makowski at home and told him about the remark and that he had had his hand over the phone. Kelly testified that Makowski told him not to worry about it. Although Makowski appeared as a witness at the hearing, he was not questioned about this conversation or whether, if it took place, he reported it to his superiors.

Meanwhile, a Lieutenant Whiting from the police department listened to the recording of the call. He telephoned Batten and told Batten that he believed the person who said "Yeah, we do," in response to Batten's question was Kelly. After calling Fire Chief Kevin Sullivan and leaving him a message about the incident, Batten listed to the recording of the call. Batten agreed, after listening to the recording, that it was Kelly speaking.

On April 1, 2014, Batten submitted his own written statement. Batten stated that after hearing the information from dispatch and asking Station 2 "if they had it," he heard someone respond "Ah, we got it." Batten also said in his statement that when he listened to the recording of the call, it was clear to him that it was Kelly speaking.

On or around April 16, 2014, Sullivan brought Kelly into his office to talk about the statement Kelly had written on March 31. Kelly was not provided, and did not ask for, union representation at this meeting. Kelly had not yet heard the recording of the March 31 call, and Sullivan did not play it for Kelly in this meeting although, according to Sullivan, he told Kelly that there was a recording and Kelly's statement did not match it. The two men also did not discuss the March 31 call itself. According to Kelly, Sullivan asked Kelly if he had anything else to add to his statement.

Kelly told Sullivan that he had not mentioned that the nonemergency line was also ringing at the time. Kelly did not tell Sullivan at this meeting that he had said "Yeah, we do," when he believed he could not be heard on the line.

On April 28, 2014, Makowski received a written verbal reprimand for his role in the March 31, 2014 incident.

On May 9, 2014, the Employer served Kelly with charges alleging that he had engaged in conduct unbecoming a fire fighter and interfered with an investigation by failing to admit his mistake immediately after it occurred. The charges referenced the fact that the recording indicated that Kelly had said, "Yeah, we got it," after Batten asked if Station 2 had the call. Sullivan testified at the hearing that he believed, and continues to believe, that Kelly answered Batten's question because he momentarily forgot that he was at Station 1 instead of Station 2, but then tried to conceal his mistake by deliberately omitting the fact that he had spoken.

Kelly was informed that he was to appear before a disciplinary committee to answer the charges. Sheehan told Kelly that the Employer's case was based on assumptions, not on facts, and that the Employer could not prove it. Sheehan also said that the union would either take care of it or grieve it.

After Kelly was served with the charges, Sheehan asked Sullivan for copies of the statements made by the witnesses, but Sullivan told him he could not have them because the Employer was in the middle of an active investigation. However, sometime between April 1 and the middle of August – the witnesses differ on the dates - both Makowski and Batten gave Sheehan their versions of the March 31 event. Makowski's and Batten's oral versions of the event did not differ in any substantial way from their written statements.

At some point around this time, Kelly told Sheehan that he had said, "Yeah, we do," before hanging up the phone but that his remark had been directed at Iverson and Kelly had covered up the phone so he should not have been heard on the line. According to Sheehan, Kelly initially told him that when Kelly answered the phone, he and Iverson had been in the middle of a conversation about the Tigers baseball team. Kelly said that his remark, "Yeah, we do," was in response to a comment by Iverson about the pitching rotation.

After hearing Kelly's story, Sheehan spoke to Iverson. According to Iverson's testimony at the hearing and Sheehan's testimony about what Iverson told him at the time, Iverson and Kelly were talking about the Tigers when the emergency line rang. Iverson testified that, in accord with protocol, Iverson and Kelly stopped their conversation while Kelly answered the phone. After Kelly hung up, Iverson asked him what side of town the call was for, and Kelly said it was for the other side of town. According to Iverson, Kelly did not put his hand over the receiver or turn to speak to Iverson while he was on the line.

On May 13, 2014, Kelly sent Sheehan the recording of the March 31, 2014, call. Kelly admitted that the recording did not sound good for him. Kelly told Sheehan that he had since

learned that because the phone he had been using was a conference phone, covering up the mouthpiece was ineffective.

Around this time, Sheehan had a conversation with Respondent's labor counsel about Kelly's situation. The attorney's advice was for Kelly to admit that he had forgotten that he was at Station 1 instead of at Station 2. Sheehan passed along this advice to Kelly, who said he could not admit this because it was not true. Sheehan continued to assure Kelly that the charges would not stick because the Employer did not have proof.

Kelly's disciplinary hearing was held on May 19, 2014, before Chief Sullivan and a representative of the Employer's human resources department. Kelly read a prepared statement in which he stated that his "Yeah, we do," had been part of a conversation taking place between himself and another fire fighter in the background. He said that he had his hand over the receiver and had not known that his voice could be heard on the line. He denied hiding the fact that he had said, "Yeah, we do." He stated that it had not occurred to him to include this in his original statement, but that he had reported it to Makowski later that same day and Makowski told him not to worry about it. Sullivan told Sheehan and Kelly at the hearing that the Employer had statements from everyone and that these statements did not match Kelly's. The Employer told Kelly and Sheehan that it would issue a decision on the charges by May 23, 2014.

Chief Sullivan testified that the May 19, 2014, disciplinary hearing was the first time he learned that Kelly claimed to have made the "Yeah, we do," remark to Iverson. After that hearing, Sullivan directed Iverson to write a statement. Iverson's May 30, 2014, statement conforms to his testimony at the hearing.

When May 23, 2014 passed and nothing more was heard about the matter, Sheehan told Kelly that it appeared that the Employer had dropped the matter. Between March 31 and August 6, 2014, Sheehan and Kelly had a number of conversations in which Sheehan assured Kelly that if he was disciplined, Respondent would pursue the matter.

On August 6, 2014, the Chief issued Kelly a written reprimand and 48-hour unpaid suspension for "failing to effectively perform his duties as firefighter and for failing to be truthful and factual to his superiors." Sullivan testified that the severity of the discipline was based on Sullivan's conclusion that Kelly had been deliberately untruthful about his role in the March 31 incident. Sullivan admitted that in issuing this discipline the Employer failed to comply with Article 8.4 of the contract which states that, "any complaints involving discharge or discipline must be filed in writing within two consecutive calendar days … and the Fire Chief shall render a decision within two consecutive calendar days … of its receipt."

Sheehan reassured Kelly that there was no merit to the charges and that Respondent would take care of this. Kelly assumed that this meant that Sheehan would file a grievance. However, several days went by and no grievance was filed. Sheehan told Kelly that Sheehan needed to talk to Respondent's counsel.

Shortly after Kelly received the reprimand and suspension, Sheehan spoke to Sullivan to try to work out a settlement. Sheehan argued to Sullivan that the discipline was too severe for a simple mistake, but Sullivan insisted that Kelly had been untruthful.

Sullivan told Sheehan that he would rescind the time off without pay if Kelly submitted a statement admitting that he had mistakenly answered as if he were at Station 2 and also that he had not been truthful in the investigation. Around the time of this conversation, Sullivan gave Sheehan copies of the written statements submitted by Makowski, Kelly, Batten, and Iverson.

After his conversation with Sullivan, and before Respondent filed a grievance, Sheehan called Kelly and attempted to persuade him to accept the Chief's offer. Sheehan told Kelly "he didn't know what was going to happen until we actually do the fight," but that Sheehan thought that they did not have a good case. He told Kelly that he should consider admitting what he did in exchange for removal of the suspension without pay. Kelly said that he could not admit to what was not true and that he would not admit to being untruthful.

Respondent filed a grievance, dated August 11, 2014, on August 12, 2014. August 12, 2014 was the last day the grievance could be filed under the contract. According to Sheehan, before filing the grievance he reviewed all the witness statements and listened to the audiotape. He testified that he still felt that the discipline was too severe and that a grievance was warranted.

Chief Sullivan denied the grievance on August 14, 2014. The grievance procedure in the collective bargaining agreement states that any "economic" grievance not submitted to the City Manager in writing within five calendar days after being denied by the Chief will be considered closed on the basis of its last disposition. Kelly's grievance was deemed an "economic" grievance. Sheehan emailed Employer City Manager April Lynch on August 22, 2014, to appeal Chief Sullivan's denial of Kelly's grievance. On August 27, 2014, Lynch replied that the grievance had been appealed one day too late under the terms of the contract, and that the matter was closed.

According to the testimony of both Sheehan and Lynch, Sheehan then contacted Lynch by phone and asked her to waive the contractual time limits. Sheehan told Lynch that the grievance should be looked at on its merits and that it was a poor decision to base the result on the appeal being one day late. He also pointed out that the deadline had fallen on the same date as a major flood in the City of Ferndale, and that he had been on duty all that day even though his own house was flooded. According to Lynch, Sheehan wanted her to meet to hear Kelly's side of the story, "with an assumption that there potentially could be new information." After several conversations, Lynch agreed to meet on the grievance. There was no written agreement between Lynch and Sheehan to waive the time limits. However, Lynch testified at the hearing that she understood that by agreeing to meet she was waiving the Employer's right to raise the untimeliness defense in an arbitration proceeding. She also added that in her experience, an untimeliness defense was not always successful in any case.

On August 28, 2014, Sheehan and Respondent Vice-President Larry Mercer met with Kelly and told him, essentially, that he had no case. They urged Kelly to accept the Chief's offer to reduce

his discipline to a written reprimand if he admitted both that he had forgotten that he was at Station 1 and that he had been untruthful in failing to admit his mistake. Sheehan did not mention the missed appeal deadline or his agreement with Lynch to either Kelly or Mercer.

According to Kelly, Sheehan told him at this meeting that Batten had said that Kelly was guilty, Sheehan was not sure if they could win, and "they had to throw me under the bus with a statement." Sheehan testified that Kelly did not want to agree to something that was a lie, and that Sheehan told him that Respondent's counsel would draft Kelly's letter so that it was worded the best possible way. Sheehan testified that at the end of the meeting Kelly had reluctantly agreed to take the offer if it was still open. According to Kelly, however, he again told Sheehan that he would not write a statement that contained a lie and would not agree that he had been untruthful.

After this meeting, Kelly contacted an attorney, who advised him to try and get copies of all Respondent's files on his grievance. On September 2, Sheehan wrote Kelly a letter to which he attached his correspondence relating to Kelly's grievance. This correspondence included Lynch's August 27 email stating that the Respondent had missed the appeal deadline for the grievance. Sheehan's September 2 letter stated that Respondent's executive board, based on the facts presented and the advice of its legal counsel, was recommending that Kelly write a letter admitting to both the infractions with which he had been charged, "along with the explanation you have provided us during our meeting."

Kelly received this letter on September 3. After speaking to his attorney, on September 4 Kelly wrote to Sheehan accusing him of breaching Respondent's duty of fair representation by missing the appeals deadline and of attempting to force him into a settlement to cover up Sheehan's negligence.

On September 16, Kelly sent an email to the Employer's human resources office, with a copy to Sheehan, asking about the status of his grievance. Sheehan replied on September 17 stating that he had made attempts to contact him by text and phone, and that the executive board "had made arrangements for you to move forward with your Disciplinary Grievance." Sheehan asked Kelly to contact him to set up a meeting date with Lynch. Sheehan sent Kelly another email asking for dates on September 23, to which Kelly replied that he was available any date that he was not scheduled to work. Kelly also asked for the context of the meeting and "exactly what this discussion will entail."

On October 2, Kelly sent Sheehan an email asking about the status of his grievance. On October 7, Kelly sent a memo asking for Sheehan's complete file on the grievance, the status of the grievance, and if the Union had missed a deadline. Kelly testified that on October 8, Sheehan accosted him at the fire station and began yelling at him that he was a liar and should just take his punishment.

Sheehan responded to Kelly's September 23 email on October 13. He told Kelly that "the mission of this meeting will be to make sure that all of the facts on this issue have been looked at and that any disciplinary action which you received was both fair/equitable and ultimately for just cause."

A meeting with Lynch and a representative from human resources was eventually held on October 28, 2014. At the beginning of the meeting, Sheehan thanked Lynch for meeting and for not holding Respondent to the time limits.

He also told her that Kelly wanted to make sure all the facts were on the table. Kelly said that he was not guilty of any of the things of which he had been accused and had yet to see any proof. He also said that he had been upfront and honest with every statement he had made and had been completely truthful. Lynch asked him if he had any new information, and Kelly said he did not. Respondent Vice-President Mercer told Lynch that the time off without pay in this case was excessive.

On October 30, 2014, Lynch issued a written decision upholding the Chief's denial of the grievance. She said that there was no dispute as to whether or not the incident occurred. Lynch said that the second charge related to Kelly's alleged lack of truthfulness, and that she had noted in their short meeting inconsistencies between Kelly's account and his prior statements that she believed indicated an attempt by Kelly to change his story again.

Respondent asked its counsel to review the grievance and assess the likelihood that it could be won in arbitration. On November 6, 2014, the attorney sent Respondent a letter stating that based on the evidence, including the recording and the statements made by Batten and Iverson, it was his conclusion that it was unlikely that an arbitrator would find either that Kelly was disciplined without just cause or that his penalty should be reduced. Respondent's executive board then voted unanimously not to proceed to arbitration on the grievance and, on November 7, 2014, sent Kelly a memo relating its decision with a copy of its counsel's letter attached.

Kelly's December 19, 2014, Discipline

On October 24, 2014, Kelly and two other firefighter/paramedics responded to a medical call at a bar where a woman was complaining of an asthma attack. Later the woman filed a complaint with the Fire Department about her treatment by Kelly; it is not clear from the record whether she also complained about the other two paramedics. Kelly was advised of the complaint by a Captain Theut (no first name in record) on or about December 5, 2014. Captain Theut told Kelly that he already had statements from the other two paramedics. Kelly told Theut that he wanted to speak to the other paramedics, but Theut told Kelly he was not to talk to them Kelly questioned the reason for this directive, but Theut would say only that Theut had been ordered to tell Kelly this.

Kelly testified that he was nervous about his job because of the previous discipline. On December 9, 2014, Kelly sent an email to Sheehan stating that Kelly was under investigation for a run and requesting legal representation. Sheehan was out of town and did not see the email until December 16. Between December 9 and December 16, Kelly approached one of the other two paramedics who had been at the scene. According to a text Kelly later sent to Sheehan, Kelly asked the paramedic if "he (Kelly) had something to worry about."

On December 16, Sheehan saw the December 9 email and sent a reply asking Kelly to call him. Later that day, Sheehan came to the station and the two men spoke in person. Kelly told

Sheehan that he had been ordered not to talk to either of the other two paramedics even though they had already made statements. Sheehan said that the order was "bullshit," and that "if anything happens we'll grieve it." According to Sheehan, he then spoke to Theut and confirmed that Theut already had statements from the other two paramedics.

Sheehan told Theut that there should not be any problem with the paramedics talking to each other after they had submitted statements. Theut said simply that the order had come from Chief Sullivan. Sheehan went back to Kelly and told him that the order was improper, but that Kelly should obey it anyway until Sheehan got some advice. Over the next two days, Sheehan and Kelly exchanged text messages in which Sheehan advised Kelly not to say anything until Sheehan got an opinion from Respondent's counsel. Kelly replied that he hadn't said anything "for two weeks." However, as noted above, he confirmed in these texts that he had approached one of the other paramedics and asked the other paramedic if Kelly "had anything to worry about."

On December 18, 2014, Respondent was served with a copy of Kelly's unfair labor practice charge. On December 19, 2014, Kelly received a written reprimand from Captain Theut for refusing to follow a direct order not to speak to other witnesses to the complaint incident. According to the reprimand, Kelly had attempted to speak to both paramedics after Theut ordered him not to, an allegation which Kelly denied. Sheehan testified that he discussed the reprimand with Respondent's labor counsel, who said that although the order was questionable, Kelly could be properly disciplined for insubordination for disobeying it. That is, Kelly should have obeyed the order and grieved later. According to Sheehan, for this reason he decided not to file a grievance over the December 19, 2014, reprimand. Kelly was not disciplined as a result of the October 24, 2014, incident.

Discussion and Conclusions of Law:

A union representing public employees in Michigan owes these employees a duty of fair representation under §10(2)(a) of PERA. The union's legal 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. *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See also *Vaca v Sipes*, 386 US 171, 177 (1967). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Merritt v International Ass ' n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass ' n*, 156 F3d 120, 126 (CA 2, 1998).

As the Court noted in *Goolsby,* at 678-679, "arbitrary" in general, means "[W]ithout adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance. . .decisive but unreasoned." The Court also held that, in addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes "inept conduct undertaken with little care or with indifference to the interests of those affected." As examples, the Court held that the duty of fair representation encompasses: (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2)

extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members. In *Goolsby,* the Michigan Supreme Court held that a union's unexplained failure to process a grievance to the next step of the grievance procedure constituted arbitrary conduct and a breach of its duty of fair representation. The Court, however, drew a distinction between the union's conduct in that case and "ordinary negligence." As an example of the latter it cited *Ruzicka v General Motors Co,* 649 F2d 1207, 1209 (CA 6, 1981) (*Ruzicka II*). In that case, a union's failure to meet the contractual deadline for appealing a grievance was held not to constitute a breach of its duty of fair representation where the union had reasonably relied on a past practice, by both the employer and union, of freely granting extensions of the timelines.

A union does not have the duty to take every grievance to arbitration, and an individual member does not have the right to demand that it do so. A union has considerable discretion to decide how or whether to proceed with a grievance and is permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees,* 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274,* 2001 MERC Lab Op 1. In determining whether to proceed to arbitration, the union must consider the good of the general membership. *Lowe,* at 146-147. The union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success at arbitration. *AFSCME Council 25 Local 2394,* 28 MPER 25 (2014). A union's good faith decision not to proceed with a grievance is not arbitrary unless it falls so far outside a broad range of reasonableness as to be considered irrational. *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35, citing *Air Line Pilots Ass'n v O'Neill,* 499 US 65, 67 (1991). The Commission has "steadfastly refused to interject itself in judgment" over decisions made by unions about the handling of grievances despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint,* 1996 MERC Lab Op 1, 11.

Kelly maintains that Respondent's decision not to arbitrate the grievance over his August 9, 2014, discipline was made in bad faith. He asserts that Respondent covered up for missing the August 21, 2014, deadline to appeal the grievance to the fourth step of the grievance procedure by changing its position on the merits of the grievance. He maintains that the real reason that Respondent refused to arbitrate this grievance was that arbitration would expose its negligence in missing the August 21, 2014, appeal deadline. In support of this argument, Kelly points out that prior to August 28, 2014, Sheehan repeatedly told Kelly that the Employer had no case because it could not prove that he had done anything wrong and that the discipline had no merit. This led Kelly to believe that he had a meritorious grievance which the Union would pursue.

There is no dispute that Respondent did miss the August 21 deadline. However, if the testimony of Sheehan and Employer City Manager Lynch is credited, Lynch agreed to waive the Employer's right to raise this as a defense to the grievance. Lynch testified that she agreed to waive the untimeliness defense for several reasons, including that the appeal was filed only one day late and that employees were dealing at that time with the effects of major flooding in the City of Ferndale. It is clear from Lynch's testimony that when Lynch agreed to let the grievance proceed she did not anticipate overturning Sullivan's decision, but was simply ceding to Sheehan's plea to let the grievance proceed on its merits. According to Lynch, however, she clearly understood that by agreeing to meet she was waiving the right to raise the untimeliness issue if, after the fourth step meeting, Respondent made a demand to arbitrate the grievance.

Of course, since Respondent did not in fact demand to arbitrate, the Employer's purported waiver of the time limits was not put to the test.

However, there are other flaws in Kelly's theory that Respondent changed its position on his grievance to avoid exposing the fact that it had missed an appeal deadline. First, although Sheehan took a positive approach when speaking with Kelly about his case, the August 28, 2014, meeting was not the first indication that Respondent had doubts about its merits. After the Employer served Kelly with the charges in May 2014, Respondent's counsel, through Sheehan, advised Kelly to admit that he had forgotten he was at Station 1 instead of Station 2. Then, after Kelly received the discipline in August 2014 but before Respondent filed a grievance, Sheehan called Kelly and tried to convince him to take the Chief's offer to rescind the time off without pay if Kelly would admit both to making a mistake by saying "Yeah, we do," into the phone and to being untruthful about it. Kelly, for obvious reasons, found these suggestions difficult to accept, but the fact that Respondent even offered this advice suggests that it felt that an arbitrator might not accept Kelly's story.

It is also clear from this record why Respondent might have reached this conclusion. The Employer's theory that Kelly said "Yeah, we do," into the phone because he momentarily forgot he was at Station 1 instead of Station 2 has defects; Kelly told Iverson that the call was for Station 2 and he did not prepare himself to go out on the run, so, under the Employer's theory, he must have remembered he was at Station 1 either before or the minute after he hung up the phone. However, Kelly's version of events was not supported by Iverson, who did not recall Kelly speaking to him before Kelly hung up the phone. It was also not supported by the recording of the call. First, Kelly claimed to have heard someone else say "yeah," in response to Batten's question as to whether Station 2 had the run, but this cannot be heard on the recording. Second, on the recording Kelly's "Yeah, we do," comes only a microsecond after Batten's question, suggesting that Kelly would not have had time to hear someone else respond before he spoke. There were also problems with Kelly's explanation for why he did not tell Sullivan earlier that he had said, "Yeah, we do," before hanging up the phone. Kelly claimed that it did not occur to him when he wrote his statement on March 31 that his "Yeah, we do," might have been heard on the line. However, it did occur to him later that same evening because he told Makowski what he had said. Nevertheless, he did not give Batten or Sullivan this information or ask to revise his statement. I find that Respondent could have rationally concluded that Kelly's grievance would not be successful because an arbitrator would not credit Kelly's testimony.

Kelly claims that the history of animosity between Sheehan and himself was why Respondent refused to arbitrate his grievance. The record established that in addition to being opponents in a recent union election, the two men had had conflicts in the past. According to Kelly's testimony, by October 8, 2014, Sheehan was angry enough at him to call him a liar to his face and tell him to "take his punishment." However, Respondent's decision not to arbitrate Kelly's grievance was not made by Sheehan alone, but also by its executive board on the advice of its labor counsel. I find no causal relationship in this case between the bad blood between Sheehan and Kelly and Respondent's decision not to arbitrate Kelly's grievance. I conclude that Respondent did not violate its duty of fair representation under §10(2)(a) of PERA by refusing to arbitrate the grievance it filed over Kelly's August 9, 2014, suspension and discipline.

In his amended charge, Kelly alleges that Respondent failed to file a grievance over Kelly's December 19, 2014, reprimand because Kelly had filed this unfair labor practice charge and because of the personal animosity between Sheehan and himself.

Kelly received the reprimand for violating an order of his superior, Captain Theut, not to speak to either of the two paramedics who had been with him on a run about which the Employer had received a complaint. Respondent agreed that because all three paramedics had already given statements, this was not a legitimate order. However, the record established that Kelly violated the order before he spoke to a union representative about it. Since Kelly admitted that he had violated the order, there was no basis for Respondent to file a grievance. I conclude that Respondent did not violate its duty of fair representation by failing to file a grievance over Kelly's December 19, 2014, reprimand. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 29, 2016