STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

FLINT FIRE FIGHTERS UNION, LOCAL 352,
Respondent-Labor Organization in Case Nos. CU03 E-025 & CU03 G-032

-and-

ANDREW GRAVES,
Individual Charging Party in Case No. CU03 E-025

-and-

MICHAEL ANTHONY KEAHEY,
Individual Charging Party in Case No. CU03 G-032.
_____/

APPEARANCES:

Sachs Waldman P.C., by George H. Kruszewski, Esq., for the Respondent

Andrew Graves and Michael Anthony Keahey, *In Propria Persona*

DECISION AND ORDER

On January 20, 2005, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent Flint Fire Fighters Union, Local 352 did not breach its duty of fair representation. The ALJ found that Respondent had not violated Section 10(3)(a) or (b) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(3)(a) or (b), as alleged in the charges, and recommended that the charges be dismissed. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On March 14, 2005, Charging Parties, Andrew Graves and Michael Anthony Keahey, filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions after requesting and receiving an extension of time. Respondents did not file a response.

Charging Parties' exceptions dispute the accuracy of a footnote on the last page of the ALJ's

Decision and Recommended Order, which states "as relief in this matter, Charging Parties request that the Commission reinstate the results of the first vote on changes to the promotional system." Charging Parties contend that they made no such request. This raises no material issue of fact or law, and Charging Parties acknowledge that they do not seek reversal or alteration of the ALJ's Decision and Recommended Order. Accordingly, the Commission adopts as its Order the Order recommended by the ALJ.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch, Commission Chairman

_____

Nino E. Green, Commission Member

Dated: _____

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APPEARANCES:

Sachs Waldman P.C., by George H. Kruszewski, Esq., for the Respondent

Andrew Graves and Michael Anthony Keahey, *in propria persona*

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 at Detroit, Michigan on November 6, 2003, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and briefs filed by the parties on or before January 14, 2004, I make the following findings of fact, conclusions of law and recommended order.

I. Overview:

Charging Parties are firefighters employed by the City of Flint and members of a bargaining unit represented by Respondent. The collective bargaining agreement between Respondent and the City governs promotions for unit members. Charging Parties contend that the City violated the promotional eligibility requirements set forth in the contract, and that the Union mishandled grievances which were filed by unit members relating to that issue. Charging Parties further contend that members of the Union's executive board manipulated the results of a Union election to ratify changes to the current promotional system.

I conclude that Respondent did not breach its duty of fair representation with respect to its handling of grievances relating to the promotional issue. Respondent investigated the alleged contract breach and processed the grievances to arbitration. There is no evidence that any Union officer delayed the grievance process or otherwise acted in bad faith in responding to the concerns of its members. Similarly, I find nothing in the record to suggest that any Union officer deliberately attempted to affect the outcome of the contract ratification process.

II. The Unfair Labor Practice Charges:

On May 7, 2003, Andrew Graves, a lieutenant with the Flint Fire Department, filed an unfair labor practice charge against his collective bargaining agent, Flint Fire Fighters Union, Local 352. The charge, which was assigned Case No. CU03 E-025, alleged that the Union violated PERA by failing to ensure that job promotions within the department were made in compliance with Article 59 of the contract between Respondent and the City.1

On July 17, 2003, Lieutenant Michael Keahey filed a charge against Respondent in Case No. CU03 G-032. That charge alleges "misrepresentation" by the Union "due to the lack of action in upholding [A]rticle 59 of the collective bargaining agreement between Local 352 and the City of Flint." The Graves and Keahey charges were subsequently consolidated.

On August 8, 2003, Graves filed an amended charge against Respondent, alleging that the Union breached its duty of fair representation in responding to a breach of contract by the City, the facts of which the Union revealed to Graves on December 6, 2002. The amended charge further alleges that the Union improperly prevented the City from receiving the results of a legitimate vote by the membership on changes to the current promotional system, and that the Union unlawfully threatened to retaliate against Graves for instituting proceedings under PERA.

As noted, an evidentiary hearing was held in this matter on November 6, 2003. On June 25, 2004, more than seven months later, Charging Parties submitted several documents which had not been introduced into evidence at the hearing. In a letter dated June 30, 2004, I indicated to Graves and Keahey that in order for these documents to be considered, Charging Parties must make a formal motion to reopen the record and, pursuant to Rule 166 of the Commission's general rules, demonstrate that (1) the moving party could not with reasonable diligence have discovered and produced the evidence at the original hearing; (2) the evidence sought to be introduced and not merely its materiality, is newly discovered; and (3) the additional evidence, if adduced and credited, would require a different result. Charging Parties did not file such a motion. Accordingly, none of the documents submitted by Charging Parties after the close of hearing will be considered in this Decision and Recommended Order.

III. Findings of Fact:

1 Graves also filed an unfair labor practice charge against the City of Flint alleging a breach of the collective bargaining agreement. That charge, Case No. C03 E-098, was withdrawn by Graves on or about July 23, 2004.

Background

Respondent is the collective bargaining representative for all firefighters employed by the City of Flint. Article 59 of the contract between the Union and the City governs the issue of promotions. Under that provision, employees must meet specific certification and educational requirements, and have the proper number of years of seniority, in order to be eligible for promotion. For example, to be promoted to the classifications of fire sergeant and lieutenant, an employee must have at least five years of seniority in the department's fire suppression division and have successfully completed Fire Officer I and Fire Officer 2 courses or fifteen hours of job-related college courses. The contract contains a grace period giving employees three years from the date of its ratification, January 23, 1995, to meet the educational requirements set forth therein, and provides that failure to do so will result in the demotion of the employee to his or her previous position.

At a special meeting on June 21, 2000, the Union resolved to follow the language of the contract with respect to "promotion and education." At around that same time, firefighter Greg Dubay filed a grievance alleging that the City had violated Article 59 by promoting a number of employees, including current Local 352 vice president Lieutenant Thomas Agle, to positions for which they were not qualified. Although the Dubay grievance was entered into a logbook maintained by the fire department, the Union has no record of its existence. Current Union president Mark Kovach, who was vice president of Local 352 when the Dubay grievance was filed, first learned of the grievance when it was mentioned at a Union meeting in 2003. Dubay never approached Kovach to inquire about the status of his grievance.

The Mynsberge Grievance and Immediate Aftermath

On June 10, 2002, firefighter Dan Mynsberge filed a grievance alleging that the City had failed to meet its obligation to ensure that all promotions were made in compliance with the educational requirements set forth in Article 59 of the contract. As a remedy, the grievance requested that "any employee who was unjustly passed over for promotion be awarded all lost seniority, wages, and be made whole, to within seven days of the date the vacancy occurred." Thereafter, the Union filed a request under the Freedom of Information Act (FOIA) in October of 2002 seeking data from the City concerning the educational background of current and past firefighters within the department. The information which was provided to the Union pursuant to that FOIA request revealed that 33 out of the 60 employees surveyed had not met the educational requirements corresponding to their positions. This information was conveyed to the membership of Local 352 at a meeting in December of 2002. In August of 2003, Respondent appealed the Mynsberge grievance to arbitration. The grievance was still pending at the time of hearing in this matter.

In late 2002 or early 2003, Graves had a discussion with Kovach regarding how the Union intended to deal with the breach of Article 59. Kovach indicated to Graves that the Union favored the creation of an "A/B" list. Under this plan, no individuals would be demoted or deemed ineligible to test for promotion with respect to future vacancies. However, those firefighters who were properly credentialed on the date a particular position became open would have priority over those individuals who did not have the requisite educational background. All employees would be expected to have met the requirements set forth in Article 59 upon the effective date of promotion.

Several weeks after his conversation with Kovach, Graves learned that the Union was considering options other than the "A/B" list for resolving issues relating to the City's breach of Article 59. On February 4, 2003, Graves filed a grievance seeking to require the City to implement the "A/B" list as settlement for the contract breach. At some point thereafter, Keahey and three other Union members were added to the grievance. Respondent ultimately processed the Graves grievance to arbitration on May 5, 2003. The grievance was apparently still pending as of the date of hearing in this matter.

Lieutenant Agle was the Union officer primarily responsible for handling grievances. In the spring of 2003, battalion chief Robert Christenson, a former Union officer, approached Kovach and asked him to take over the handling of all grievances relating to the promotional eligibility issue. According to Christenson, Agle was one of the employees who had previously been promoted in violation of Article 59 and, therefore, had a conflict of interest which might prevent him from carrying out his duties fairly. Christenson noted to Kovach that it would be in Agle's best interest to attempt to delay testing for vacant positions so as to give him time to meet the eligibility requirements set forth in the contract. Kovach declined to take over responsibility for the handling of the grievances on the ground that he too had a personal stake in the outcome of the matter.

Development of Proposals to Modify Promotional Eligibility Requirements

In early 2003, Respondent formed a committee to consider possible changes to the contract's promotional eligibility language. Article 15 of Respondent's constitution and by-laws governs the establishment and conduct of Union committees. That provision states that all committees shall consist of three or more members appointed by the president unless otherwise ordered by the Union. Under Article 15, committees are required to verbally report their proceedings at each meeting and transmit their final report in writing. Article 15 further provides that "[a]ny report needing approval by the membership shall be posted in all work areas ten (10) days prior to a regular meeting."

Keahey was a member of the newly formed committee to discuss changes to the current promotional system, as was battalion chief Christenson. Over the course of several meetings during the spring of 2003, the committee developed three proposals. Proposal A would require the establishment of two eligibility lists governing testing for all currently vacant positions. One list would include those employees who had met the requirements for promotion as of the date of vacancy for the position sought. The other list would be made up of those employees who had satisfied the criteria on or before a specific date prior to testing for the position. The first eligibility list was to be exhausted before selections were made from the second list. Proposal B was identical to Proposal A except that there was no requirement that individuals on the second list become properly credentialed by a date certain; i.e. all employees would be eligible to test regardless of whether they had met the criteria for promotion at the time of testing. With respect to testing for any "subsequent examination," Proposals A and B both specified that only those employees with the proper certification and educational requirements "as of the list's expiration or exhaustion (whichever occurs first) shall be deemed eligible." Proposal C would have left the existing language of Article 59 unchanged.

Because the City's concurrence was necessary for any modification of the contract, the Union first

discussed the committee's recommendations with the employer's human resources division before announcing its recommendations to the membership at large. After obtaining the City's approval, the Union disseminated the proposals to the members of Local 352 on or about May 16, 2003. Upon examining the various options under consideration, Keahey became concerned over the limitation on testing for any "subsequent examination" contained within Proposals A and B. Keahey interpreted such language as preventing employees who lacked the proper credentials from testing for currently vacant positions. Keahey expressed this concern to Kovach several times, including at a Union meeting in July of 2003 and, in response, Kovach promised to remove the phrase "subsequent examination" from the proposals. However, Kovach later discussed the matter with the City's personnel director, who assured him that Keahey's interpretation of the phrase "subsequent examination" was erroneous and that such language was intended to govern eligibility for future vacancies only. For this reason, the phrase about which Keahey had complained remained part of the proposals.

Some time after the proposals were announced, Christenson had a conversation with Kovach concerning the potential impact that the vote might have on Kovach. According to Christenson, Kovach stated that Proposal A was not in his own best interest. However, Kovach, who had a better and more detailed recollection of the conversation, testified that he described Proposal A at that time as "not bad" and "middle of the road" in terms of its affect on his prospects for promotion to the position of sergeant. Kovach admitted that Proposal C would have been the best option for him personally, as it would have limited testing to a defined group of employees and guaranteed that he would be promoted to sergeant if he succeeded in passing the examination. Proposal B was the worst option for Kovach, since it would have allowed for the largest field of potential candidates against whom he would be competing. With respect to vice president Agle, Proposal A was the option least favorable since Agle would not have met the educational requirements for promotion to captain by the specified deadline and, therefore, would have been excluded from testing for that position.

First Vote on Contract Modification Proposals

Pursuant to Article 16 of the Union's constitution and by-laws, all contracts pertaining to hours, wages, and working conditions must be ratified "by membership present at two (2) meetings by secret ballot before becoming effective." Article 4, Section 5 of the Union's constitution and by-laws provides that ten members or more excluding the executive board shall constitute a quorum for the transaction of the business at any special or regular meeting.

Voting on the proposals to modify the promotional eligibility requirements was originally scheduled to begin on June 2, 2003. Prior to that date, the City made revisions to the certification requirements for several positions affected by the proposals. However, the City was unable to provide Respondent with documentation concerning those changes prior to the commencement of voting. When Graves and other Union members expressed concern about the missing language at the June 2nd meeting, Respondent agreed to postpone the vote and repost information concerning the proposals. Thereafter, the Union announced that a vote on the proposals would occur on June 23 and 24, 2003.

When members of Local 352 arrived at the polling place for the meeting on June 23, 2003, they were informed by Kovach that a vote could not be held that day because there was no quorum present as

required by the Union's constitution and by-laws. The following day, 42 members of the unit voted on the proposals by secret ballot. After the ballot box had been sealed, Kovach issued a memo addressed to all members of Local 352 announcing that additional voting on the promotional eligibility requirements would occur at a Union meeting on July 1, 2003, to make up for the voting session which had been cancelled on June 23rd. However, Respondent ultimately decided against holding any additional voting sessions.

Aftermath of the June Election

On July 10, 2003, Respondent posted the results of the June election in a memorandum addressed to its members. Proposal A passed with 22 votes. Proposal C was second with 15 votes, while Proposal B received 5 votes. Kovach notified the City of the results of the election but did not immediately forward a signed copy of the new agreement to the human resources division. Typically, the signatures of two Union officials are required for such an agreement. When questioned by Graves several weeks later, Kovach indicated that other Union officials were available at the time to sign the agreement, but that he was waiting for Agle to return from out of town and add his signature to the document before forwarding a copy to the City. Before that could occur, however, the Union received a petition for reconsideration dated July 12, 2003 and purportedly signed by more than 25 percent of the bargaining unit requesting that a special meeting be convened to revisit the promotional eligibility issue and hold another vote on the proposals.

In response to the petition, the Union scheduled a special meeting for July 28, 2003. On that date, Kovach announced that the petition for reconsideration had been denied because it had not been presented to the Union on the initial day of voting as required by Robert's Rules of Order. However, Kovach declared the results of the June vote null and void on the ground that dispatchers assigned to the 911 center's evening shift had undergone a schedule change just prior to the election which had prevented them from taking part in the voting. In addition, Kovach indicated that there may have been other members who were misinformed of the times and dates of the election. Kovach announced that the promotional eligibility proposals would be reposted and that a new election would be scheduled at a time which could accommodate the dispatchers and afford all members of Local 352 an equal opportunity to vote.

At the hearing in this matter, Graves took issue with Respondent's rationale for declaring the initial election invalid. Graves testified that the participation of the dispatchers was not required since the proposals being voted upon did not affect those employees. Graves asserted that when the dispatchers voted on changes to their own work schedules, other members of the bargaining unit were not allowed to take part in the election. However, Kovach testified credibly that it is the standard practice of the Union to allow the entire unit to participate in all elections, and his claim that there was a scheduling problem which prevented members from voting in the June election appears truthful given the disparity in the number of total voters between the June election and the election which was subsequently held in August as discussed below. With respect to the modification of the dispatcher work schedule, Kovach explained that the "vote" referred to by Graves was merely an informal poll to determine whether the dispatchers were in favor of participating in a shift change on a trial basis. According to Kovach, shift supervisors merely walked up to each dispatcher and asked if they were in favor of taking part in the trial program. Kovach indicated that a formal vote on the shift change would occur in the near future and that the entire bargaining unit will be eligible to participate in that election. Kovach was a believable witness with a good recall of events and I credit his testimony with respect to the Union's reasons for nullifying the June election.

Summer 2003 Committee and Second Vote

At the conclusion of the Union meeting on July 28th, Respondent's executive board granted a motion, seconded by Keahey, concerning the establishment of a committee to study changes to the promotional system. At the hearing in this matter, there was some dispute as to what exactly was required of this committee. In an e-mail from Respondent's executive board to the membership dated July 30, 2003, the Union indicated that the motion was "to establish a committee to reexamine the posting agreements and submit the potential changes to the Human Resources Director for consideration." The official minutes of the July 28, 2003 meeting state that the motion was "[t]o reestablish a committee of approximately 5 people, appointed by the President, to make recommendations for any new changes to the posting agreements." Charging Parties Graves and Keahey, along with witness Theresa Root, testified that the motion was to "reconvene" the earlier committee. Although Keahey indicated on direct examination that the motion called for the committee to submit its recommendations to the membership of Local 352 prior to consulting with the City, he later conceded that the only direction given at the July 28th meeting was that the committee would "talk about the promotional wordings."

Various members of Local 352 were chosen by Kovach to serve on the committee. This time, Keahey and Christenson were not asked to participate. The committee met on several occasions during the summer of 2003 and, after conferring with the City's human resources division, presented its final report to the members in an e-mail dated August 4, 2003. The committee recommended that an election be held on essentially the same three contract modification proposals which were under consideration by the membership in June. The only significant change was that members would now have the opportunity to vote on the promotional eligibility requirements for each position separately as opposed to simply choosing one proposal which would universally govern all promotions. The committee also recommended that all promotional examinations be postponed pending resolution of the Mynsberge grievance. A vote on the contract modification proposals was scheduled for August 14 and 15, 2003.

On August 11, 2003, Respondent received a petition purportedly signed by over 25 percent of the membership of Local 352 seeking to have the upcoming vote cancelled and the results of the June election reinstated. A letter accompanying the petition asserted that the Union had violated Roberts Rules of Order, as well as its constitution and by-laws, in failing to present the recommendations of the second committee to the membership. Kovach refused to accept the petition, explaining that he could not honor the results of the June election because that vote was invalid due to the problem with the 911 dispatchers.

At the beginning of the scheduled meeting on August 14, 2003, a motion was made to prevent the election from being held on the ground that the second committee had not brought its recommendations to the membership. Kovach denied the motion as being "out of order." Thereafter, another motion was made, this time seeking to delay the vote so as to give the members additional time to consider the committee's findings. This motion failed by a vote of 13 to 4 and voting on the proposals to modify the promotional system commenced by secret ballot. Approximately 60 members of the bargaining unit participated in the two-day election. This time, voters chose Proposal C to govern the promotional eligibility requirements for the positions of captain and battalion chief, while Proposal B garnered the most votes for the sergeant position. Following the election, the Union posted the results and forwarded them to the City's human

resources division. Approximately two months later, in a posting dated October 23, 2003, the City announced that a promotional examination would be held for the fire battalion chief position.

Alleged Threats Against Graves

In the spring of 2003, Kovach and Graves had two meetings at which the instant charge was discussed. During these meetings, Kovach indicated to Graves that the Union would attempt to recoup any costs related to its defense of the charge. Kovach also told Graves that the charge was frivolous and predicted that it would be dismissed.

IV. Arguments of the Parties:

Charging Parties contend that Respondent did not fairly represent the members of Local 352 in responding to the City's breach of Article 59. According to Charging Parties, Kovach and Agle were acting in their own interest, as opposed to the best interests of the membership as a whole, with respect to the issue of promotions, and the Union's handling of this matter unlawfully discriminated against all properly credentialed officers. Specifically, Charging Parties assert that Respondent ignored the breach of contract when that issue was first raised by Dubay in 2000, and that the Union improperly handled the grievance which was later filed by Mynsberge. Charging Parties also raise numerous issues relating to the Union's handling of the contract ratification elections. For example, Charging Parties contend that Respondent manipulated the ratification process by arbitrarily voiding the results of the June election; delayed promotional testing; reneged on a promise to remove the word "subsequent" from the contract modification proposals; ignored provisions in the Union's constitution and by-laws; disregarded the will of its members to withdraw the petition for reconsideration; failed to promptly forward the results of the June election to the City; and refused to allow members the opportunity to review the recommendations of the second committee.

Respondent argues that the unfair labor practice charges should be dismissed because all of the allegations set forth therein pertain to internal union matters which do not state a claim under PERA. Respondent further contends that defects in the ratification process do not form a basis for attacking a contract where, as here, there is no evidence that the Union was acting in bad faith.

V. Discussion and Conclusions of Law:

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty; and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). "Arbitrary conduct" includes (a) impulsive, irrational, or unseasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby*, *supra* at 679. See also *Detroit Fire Fighters Ass'n*, 1995 MERC Lab Op 633, 637-638. A union satisfies the duty of fair representation as long as its decision was within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67; 136 LRRM 2721 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35.

Charging Parties argue that Respondent breached its duty of fair representation by failing to properly respond to the City's breach of Article 59 of the contract. I find nothing in the record to support this contention. To the contrary, the evidence overwhelmingly establishes that the Union acted reasonably and in good faith in attempting to address the concerns of its members with respect to the promotional process. Upon receipt of the Mynsberge grievance, the Union promptly investigated the allegations set forth therein by filing a FOIA request with the City. The data provided to Respondent pursuant to that request disclosed the full nature and scope of the contract breach, and the Union responded to that information by processing Mynsberge's complaint through the contractual grievance process up to and including arbitration. Similarly, the grievance filed by Graves and Keahey seeking implementation of the "A-B" list was taken to arbitration by the Union in May of 2003. Although these grievances raised issues of personal concern to both Kovach and Agle, there is nothing in the record to prove that either individual acted improperly or out of self-interest in connection with their representation of the grievants, nor is there any evidence to support Charging Parties' contention that the Union attempted to delay the processing of the Mynsberge grievance.

Charging Parties suggest that Respondent actually became aware of the breach of contract issue as early as 2000 when Dubay filed a grievance challenging the promotional process. Charging Parties insinuate that the Union failed to take action to remedy the issue at that time because doing so would have been contrary to the interests of Agle and other Union officers. However, these allegations amount to nothing more than mere speculation on the part of Graves and Keahey. Although the Dubay grievance was apparently noted in a logbook maintained by the fire department, there is nothing in the record to establish that Respondent itself was ever made aware of that document. In fact, Kovach testified credibly that the Union never received a copy of the Dubay grievance and that he did not learn of its existence until he attended a Union meeting in 2003 at which it was discussed. Similarly, there is no record evidence to support Charging Parties' contention that the Union "mishandled" the Mynsberge grievance by failing to pursue the remedy sought therein. Charging Parties allegations in this regard are based upon facts which are not part of the record and, therefore, may not be considered by the undersigned in this Decision and Recommended Order. See e.g. *Garden City/Dearborn Pub Schs Adult Education Consortium*, 1994 MERC Lab Op 1.

Next, Charging Parties contend that Respondent acted unlawfully with respect to its handling of the contract ratification elections. A union's duty of fair representation extends to union conduct in representing employees in their relationship with their employer, such as negotiating a collective bargaining agreement or resolving a grievance, and in related decision-making procedures. See *West Branch-Rose City Education Ass'n*, 17 Mich Pub Employee Rep. ¶ 25, and cases cited therein. The duty does not embrace matters involving the internal structure and affairs of labor organizations which do not impact upon the relationship of bargaining unit members to their employer. *West Branch*, *supra*; *SEIU, Local 586*, 1986 MERC Lab Op 149. Internal union matters are outside the scope of PERA, but are left to the members themselves to regulate. *AFSCME Council 25, Local 1918*, 1999 MERC Lab Op 11; *MESPA (Alma Pub Schs Unit)*, 1981 MERC Lab Op 149, 154. This principle is derived from Section 10(3)(a)(i) of the act, which states that a union may prescribe its own rules pertaining to the acquisition or retention of membership. See e.g. *Organization of Classified Custodians*, 1993 MERC Lab Op 170; *Service Employees Int'l Union, Local 586, supra*. With respect to otherwise internal decision-making procedures, including contract

ratification elections, the Commission has held that the duty of fair representation applies only to those policies and procedures having a direct effect on terms and conditions of employment. See e.g. *Organization of Classified Custodians, supra*; *Service Employees Int'l Union, Local 586, supra*.

The record does not support a finding that Respondent acted in bad faith in connection with its handling of the contract ratification elections, or that its conduct during that process had any discernable impact on the employment relationship between Charging Parties and the City. Members of Local 352 were presented with a choice of three options developed by a Union committee for changing the promotional eligibility process and, in June of 2003, given the opportunity to vote by secret ballot on those proposals. When an issue arose as to whether certain employees were able to attend that election due to a shift change, the Union decided to hold a new election so that all members could participate in the voting process. Although there may have been other ways in which the Union could have chosen to remedy that situation, it is not the Commission's role under such circumstances to second-guess Respondent's judgment. See e.g. *United Steelworkers of America, AFL-CIO, CLC*, 2002 MERC Lab Op 162 (no exceptions). There is nothing in the record to suggest that Charging Parties were in any way prevented from voting in either election, nor is there any evidence that Graves and Keahey themselves were denied promotions to which they otherwise would have been entitled but for Respondent's conduct in this matter.

Charging Parties assertion that Kovach and Agle deliberately attempted to affect the outcome of the ratification process is based upon nothing more than speculation. None of the many allegations set forth by Charging Parties in this matter establish that either Union officer acted arbitrarily, discriminatorily or in bad faith with respect to the contract modification proposals. For example, as supposed proof of Kovach's personal bias, Charging Parties repeatedly make the point that his decision to invalidate the results of the June election opened the door for the passage of Proposal C, the option which he found most preferable to his own interests. What Charging Parties apparently fail to recognize, however, is that Kovach had no guarantee that the voters would opt for Proposal C during the next round of voting. It was just as likely that the membership of Local 352 would select Proposal B, the option which was least advantageous to him at the time, and that is in fact what ultimately occurred with respect to the sergeant position as a result of the August election.

Other allegations set forth by Charging Parties are similarly unpersuasive. For example, Charging Parties contend that the October 23, 2003 announcement concerning promotional testing for the battalion chief position was in violation of the second committee's recommendation to delay promotional testing until final resolution of the Mynsberge grievance. The record indicates, however, that the City had sole discretion to decide when promotional testing for a given position would commence, and there is no evidence that Respondent played any role in the October 23rd announcement.

Charging Parties assert that Respondent violated its duty of fair representation by refusing to allow several Union members to withdraw their names from the July 12, 2003 petition seeking reconsideration of the June election. Charging Parties contend that had the Union allowed the removal of those names, the petition "would not have been valid and no reconsideration vote could have been allowed at that time." However, there is no competent evidence in the record establishing the number of unit members who may have wished to have their names taken off the petition or why those individuals allegedly sought to have the petition withdrawn. Even assuming arguendo that the Union did refuse to allow withdrawal of the petition,

that decision could not possibly have resulted in prejudice to Charging Parties or any other unit member given that the petition was ultimately denied on the basis that it was not made in accordance with Robert's Rules of Order.

Charging Parties argue that Respondent violated PERA by failing to consult with the membership before taking the recommendations of the second committee to the City. Charging Parties contend that this was a direct violation of the Union's constitution and by-laws. Even assuming that such a violation occurred, a union's failure to follow its internal rules does not, standing alone, constitute a breach of the duty of fair representation. See e.g. *Registered Nurses and Registered Pharmacists of Hurley Hospital*, 2002 MERC Lab Op 394 (no exceptions). Respondent utilized essentially the same process with respect to the recommendations of the second committee as it did with the earlier one.2 In each instance, the recommendations were initially taken to the City to ensure that any proposal which was ultimately passed would meet the employer's approval. Members were then given the opportunity to vote on which of the recommendations they wished to see implemented. As noted, there is no evidence suggesting that Charging Parties were prevented from taking part in either election. I am unable to conclude based upon these facts that Respondent's actions with respect to the second committee had a direct effect on Charging Parties' terms and conditions of employment or in any way constituted "impulsive, irrational or unreasonable conduct" or "inept conduct undertaking with little care or indifference to the interests of the employee . . . ." *Goolsby*, *supra*.

Finally, I conclude that any allegation concerning unlawful intimidation by Respondent has been abandoned. Although Graves raised this issue in his amended charge and evidence was introduced concerning the alleged threats by Kovach, Charging Parties withdrew this element of the charge by conceding in their post-hearing brief that Kovach's statements "do not constitute a violation of PERA."

I have carefully considered all other arguments raised by Charging Parties and have determined that they do not warrant a change in the result. In accord with the above discussion, I find that Charging Parties have failed to establish that Respondent breached its duty of fair representation under Section 10(3)(a) or (b) of PERA and recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charges be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge

2 It should be noted that Charging Parties raise no objection with respect to how the recommendations of the first committee were dealt with by the Union's executive board. In fact, as relief in this matter, Charging Parties request that the Commission reinstate the results of the first vote on changes to the promotional system.

Dated: _____