

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TROY EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION,
Respondent – Labor Organization in Case No. CU02 D-019,

-and-

MICHIGAN EDUCATION ASSOCIATION,
Respondent – Labor Organization in Case No. CU02 D-020,

-and-

KENNETH FARHAT,
An Individual Charging Party.

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APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by William F. Young, Esq., for Respondents

Vitale, Flemming & Crosby, P.C., by Richard Rockwood, Esq., for Charging Party

DECISION AND ORDER

On May 28, 2004, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Harry W. Bishop, Commission Member

Nino E. Green, Commission Member

Dated: _____

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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, *et seq.*, these cases were heard in Detroit, Michigan on December 16, 2003, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. This proceeding was based upon unfair labor practice charges filed against Respondents Troy Educational Support Personnel Association (TESPA) and the Michigan Education Association (MEA) by Charging Party Kenneth Farhat. Based upon the record and post-hearing briefs filed by February 17, 2004, I make the following findings of fact, conclusions of law and recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charges:

In his unfair labor practice charges filed on April 20, 2002, Charging Party alleges that Respondents breached their duty of representation by “withdrawal of representation” and conspiring to deny his rights under PERA and the United States constitution that resulted in unwarranted discipline and his eventual firing. Respondents filed an answer and affirmative defenses on May 20, 2002.

Findings of Fact:

The Troy Public Schools employed Charging Party as a custodian in March 1985. Initially, the American Federation of State, County and Municipal Employees, Council 25 was the bargaining representative for custodians and other support staff. In 1998, AFSCME was replaced by TESSA, an MEA affiliate. While represented by AFSCME, Charging Party was a steward and local vice president. He assisted in organizing employees to join MEA, ran for president in September 1998 and was elected MEA representative in 1999.

During Charging Party's fifteen-year career, he was disciplined several times: in 1987, for his role in a disturbance with another employer; in January 1997, for allegedly threatening now-Assistant Superintendent Maureen Kelly; on April 30, 1998, for allegedly threatening the assistant superintendent of elementary education; and on April 17, 2000, for threatening Pam Hood, a bus driver and TESSA officer. After the April 2000 incident, Charging Party was suspended for fifteen days. Six months later, in September 2000, Charging Party was terminated.

TESSA filed grievances challenging Charging Party's suspension and termination. Two MEA Uniserv Directors, Gerry Haymond and George Trudell, were appointed to represent Charging Party in processing his grievances to arbitration. Steve Amberg of the law firm of Amberg, Firestone & Lee, P.C., was authorized by MEA's General Counsel to provide legal assistance to the Uniserv directors. Legal services are provided to bargaining unit members pursuant to MEA's Legal Representation Policy. Pertinent parts of Policy read:

The Association may decline to provide representation in cases where the member does not fully cooperate and freely assist the Association or its representative in the handling of his or her case. (Paragraph B)

The Association may decline to provide further representation in the case where the representative employed by the Association to assist the member advises a settlement or particular disposition of a member's case and the member rejects that settlement proposal or recommended position. (Paragraph D)

At the onset of Charging Party's January 21, 2001 five-day suspension arbitration hearing, Troy Public Schools proposed to settle both grievances by providing Charging Party with two years' salary (\$52,000) and benefits, among other things, in exchange for his resignation. Charging Party testified that Trudell, Haymond, MEA Staff Attorney Jeff Nyquist and Attorney Amberg advised him to accept the settlement. Charging Party was told that the offer was better than the Employer had previously offered to employees in professional classifications. Initially, Charging Party expressed a willingness to accept the offer, but he later proposed and withdrew a \$100,000 salary counter-offer. Charging Party testified that he repetitively told Trudell and Haymond that he did not want a settlement and wanted to proceed to arbitration because he did not want to give up his employment.

On February 15, 2001, Charging Party met with Amberg, Nyquist, Trudell and Haymond to discuss his rejection of the proposed settlement and to review arbitration strategies. Charging Party was informed that he would not be permitted to make an opening statement or to introduce evidence regarding the professionalism and/or character of Troy School District's superintendent or staff members as outlined in memoranda that Charging Party sent to Amberg on February 3, 5 and 6, 2001. In the February 3, 2001, memorandum to Amberg, Charging Party indicated that he wanted copies of Kelly's medical records so that he could expose her "menace."

Among other things, according to Charging Party, he intended to show that Kelly was a sick human being who was corrupt; dishonest; incompetent; a bigot, racist and sexist of the most gigantic proportions; a liar; a coward; and a mentally ill despot who was completely insane in her hatred for him. In his February 5, 2001 memorandum, Charging Party included a draft of his proposed opening statements. He emphasized to Amberg that he would consider any interference with his reading the statements to be collusion. Moreover, Charging Party wrote to Amberg that, "I am not asking your permission, I am telling you this."

In a February 19, 2001 letter, Amberg informed Charging Party that his proposed statements supported the Employer's case and would undermine his defense. In subsequent memoranda, Charging Party made clear that he was rejecting the arbitration strategies outlined by the Association and he was interested in vindication and restitution and not settlement.

Thereafter, in a March 20, 2001, nineteen-page letter to the MEA, Amberg set forth reasons why Charging Party's legal representation should be discontinued. Among other things, Amberg stated that Charging Party's "rejection of the strategies developed by the Association, and his insistence on representing himself during the arbitration proceeding and presenting issues and offering proofs as he unilaterally determines establish violations of his obligation to cooperate with the Association required by the Legal Representation Policy."

On March 29, 2001, MEA's General Counsel advised Charging Party of Respondents' decision to terminate further legal representation. Thereafter, in accordance with Respondents' internal appeal procedures, Charging Party appealed the General Counsel's decision. At every stage, including a February 2002, appeal to the MEA's national office, the General Counsel's decision to withdraw legal representation was upheld. The unfair labor practices charges were filed on April 4, 2002.

Conclusions of Law:

Charging Party argues that Respondent violated its duty to fairly represent him because, contrary to MEA's Legal Representation Policy, he was not advised by his representatives to accept the Employer's proposed settlement and it cannot be said that he was uncooperative with his purported representation. According to Charging Party, although at times he voiced an intention to take steps that his representatives considered to be imprudent, he did not actually take any such steps.

The duty of fair representation requires a union to (1) serve the interest of all members without hostility or discrimination, (2) exercise discretion with complete good faith and honesty, and (3) avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 664. However, a union has considerable discretion to decide how or whether to proceed with a grievance and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-146 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1; *Garcia v Eaton Rapids Education Association and Michigan Education Association*, Court of Appeals Docket No. 234584 (unpublished, May 27, 2003). Because the union's ultimate duty is to the membership as a whole, the union may consider such factors as the likelihood that an arbitrator would rule in the union's favor and the cost of an arbitration proceeding. *Lowe, supra*; *Ann Arbor Public Schools*, 2003 MERC Lab Op ___ (March 5, 2003). A union's decision not to arbitrate a grievance is not "arbitrary" as long as it is within the range of reasonableness. *Airline Pilots Assn v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Department)*, 1997 MERC Lab Op 31, 34-35.

The record does not support Charging Party's assertion that Respondents did not advise him to accept the Employer's settlement proposal. His own evidence refutes this contention. He testified unequivocally that he was advised by the Uniserv Directors and attorneys Nyquist and Amberg to accept the Employer's proposed settlement. Charging Party also testified that he repetitively told Trudell and Haymond that he did not want a settlement and that he wanted to proceed to arbitration.

Moreover, the record establishes that Charging Party did not cooperate with Respondent's representatives in developing an arbitration strategy. Among other things, he vehemently insisted on making opening statements that focused on matters that were not germane to the merits of his case and raising issues that Respondents' representatives believed were detrimental to his chance for success. Despite being told that his tactics would undermine his case, in his February 5, 2001 letter to Attorney Amberg, Charging Party emphatically stated that he could consider any interference with his plans to be collusion and that he was not asking permission to follow his own course of action. Considering Charging Party insistence of doing things his way, I find that Charging Party was uncooperative and Respondent did not violate its duty to fairly represent him by withdrawing its legal representation as permitted by the Legal Representation Policy. Respondents' conduct was well within the range of reasonableness and was not arbitrary or in bad faith. I, therefore, recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated: _____