STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION,
Labor Organization-Respondent,

-and-

MERC Case No. CU16 G-041
Hearing Docket No. 16-021564

TAMMY DENSON,
An Individual Charging Party.
_____/

Appearances:

White, Schneider, PC, by Colline DeVries-Burd and Jeffrey S. Donahue, for Respondent

Tammy Denson, appearing on her own behalf

DECISION AND ORDER

On March 23, 2017, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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 either 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: April 25, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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MICHIGAN EDUCATION ASSOCIATION,
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TAMMY DENSON,
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Appearances:

White, Schneider, PC, by Colline DeVries-Burd and Jeffrey S. Donahue, for Respondent

Tammy Denson, appearing for herself

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 October 6, 2016, 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 a post-hearing brief filed by Respondent on November 7, 2016, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On July 28, 2016, Tammy Denson, formerly employed as a secretary by the Beecher Community School District (the Employer), filed this unfair labor practice charge against her collective bargaining representative, the Michigan Education Association, alleging that it violated its duty of fair representation under §10(2)(a) of PERA by failing to file a grievance over money the Employer owed her after her job was outsourced to a private company on February 1, 2016. Denson asserts that after her termination, the Employer refused to pay her certain monies she was owed under the terms of the collective bargaining agreement, and that it improperly deducted money from her last paycheck. She alleges that members of the unit asked Respondent's UniServ Director, Bruce Jordan, to file a grievance and Jordan assured them that he would look into it but did nothing. Denson alleges that Jordan violated Respondent's legal

duty toward her, and other members of the unit, by failing to file the grievance in a timely fashion.

Findings of Fact:

Denson's Unit and the Employer's Outsourcing of Work

At the time her work was outsourced, Denson was a member of a bargaining unit that included seven clerical/secretarial and about sixteen paraprofessional employees. In July 2015, Denson was elected vice-president of the Respondent affiliate representing this unit. The previous April or May, Sheila Thorn, who, like Denson, was a secretarial employee, had been appointed acting president. Thorn was elected to this office in the July 2015 election. Thorn, who appeared as a witness on Denson's behalf, testified that two grievances were filed by the unit during the period she was president. For both, Thorn began the process of filing a grievance by discussing the matter with UniServ Director Jordan. Jordan then drafted the written grievance and showed it to Thorn. Once Thorn and Jordan had agreed on the language, Thorn signed the grievance and filed it with the Employer. Thorn testified that on one occasion, Jordan told her that the Employer had the right to take the action which she wanted to grieve, and that he showed her language in the contract that permitted the Employer to act as it did. No grievance was filed over that action.

On January 6, 2016, Employer Superintendent Josha Talison held a meeting with representatives of the Employer's unions. In addition to the paraprofessional and secretaries unit, Respondent at that time also represented a bargaining unit of teachers and another unit of custodial, maintenance and transportation employees. Denson, Thorn, and Jordan attended the meeting. Also present were Ron Avery, then the president of the Respondent affiliate representing the custodial, maintenance and transportation unit, and the president of the teachers' affiliate. At the meeting, Talison explained that the Employer had been in contact with the Michigan Department of Education (MDE) regarding the Employer's plan to eliminate its operating deficit for the 2015-2016 school year. He said that the MDE had directed the Employer to cut its budget for the current year by about $700,000, and that the Employer was seeking concessions from its unions to reach this figure. Talison gave the union representatives documents with dollar figures representing the amount in concessions the Employer wanted from their units. The amount for the paraprofessional and secretaries' unit was in the neighborhood of $60,000.[1] According to Jordan, Talison explained that the Employer had already received proposals from private entities to take over the Employer's custodial maintenance, transportation, and secretarial functions. The amounts the Employer was demanding in concessions from these three groups was based on the amounts the Employer expected to save from outsourcing their services. Talison told Denson and Thorn, and also Avery, that unless their units agreed to the concessions listed, he would recommend to Respondent's Board of Education that it enter into contracts to outsource their work.

It was not clear from the testimony whether Talison made it clear at the January 6, 2016, meeting that the Employer was not considering outsourcing the work of the paraprofessionals. Thorn testified that Talison did not make this clear, and that she and Denson did not realize that

[1] The figure was given, at different times during the hearing, as $60,000, $62,000 and $64,000.

only the clerical/secretarial work might be outsourced until late January, just before their unit voted on whether to accept concessions. Denson, who testified first, did not address this point in her testimony. However, it appears that she did realize, at some point while she and Thorn were discussing the concessions with their unit members, that only the clerical/secretarial jobs were at risk. According to Jordan, he understood that Talison was not proposing to outsource paraprofessionals because Jordan knew that school districts had the right to outsource noninstructional staff, and the paraprofessionals were considered instructional. However, Jordan testified that a "week or two later… it went on the record that parapros could not be outsourced." He did not explain what he meant by this.

After the early January meeting, Denson and Thorn asked Jordan if the Employer's demand for concessions violated the contract and if a grievance could be filed. They also asked Jordan if the Employer could be persuaded to reduce the amount it was demanding from their unit. It is unclear from the record how Jordan responded to these requests, but no grievance was filed and the Employer did not reduce its demand. Jordan and Thorn, with information supplied by the Employer's business office, created a spreadsheet with a list of concessionary options for the unit, along with the amount of money each option would generate. These included a wage decrease of 16% that, according to the spreadsheet, would produce $59,348 in savings for the Employer if taken by the entire unit. The list also included a number of other items that could be combined to satisfy the Employer's demand for concessions. Denson and Thorn discussed these options with their membership but were unable to come up with a satisfactory proposal.

Respondent representatives were asked by the Board to appear at the Board's January 24, 2016, meeting and present their concessionary proposals. On the day of the meeting, the secretarial/clerical and paraprofessionals unit held a membership meeting at which a majority of the members voted to reject concessions. At the Board meeting that evening, the Board went into closed session to allow union representatives to present their proposals. The Board asked everyone but Jordan and the union presidents to leave the room. Thorn told the Board that she had no proposal to present, but attempted to explain to the Board why her unit could not come up with the concessions. After going back into public session, the Board approved a contract with a private company to provide it with clerical/secretarial services.

Denson left the meeting at the beginning of the closed session and waited outside in the hallway. Denson testified that while the closed session was still taking place, Jordan came out of the room, walked up to Denson, and told her that Thorn was doing a good job of explaining why the unit could not come up with the concession figure. Denson asked Jordan what they were going to be able to do if the Board voted to privatize the secretaries. According to Denson, Jordan said that he wasn't sure, and that this was something he would have to check into. Jordan testified that he had no recollection of having any conversation with Denson after the Board meeting began that day.

Denson testified that she personally had no other conversations or communications with Jordan about the outsourcing or related issues after their exchange in the hallway on the day of the Board meeting. Thorn, however, testified that she repeatedly asked Jordan after this meeting to file a grievance over the outsourcing of the secretaries' work. According to Thorn, Jordan replied that the Employer could outsource, and that it happened all the time. According to Thorn,

she told Jordan that therefore their contract was not "worth the paper it is printed on." Jordan agreed that Thorn more than once asked him to file a grievance over the outsourcing.

Admitted into the record as an exhibit were a series of text messages between Thorn and Jordan between January 27 and January 29, 2016. These included a text from Thorn to Jordan stating that she had the number of a lawyer to call and asking him to call her. This, according to Thorn, was a reference to a lawyer that Denson had called to ask about "us being outsourced and having a contract, needing a grievance filed, questions, what all of our options were." Thorn testified that she talked to Jordan about the lawyer, but Jordan told her that he had spoken to Respondent's legal department who told him not to talk to the lawyer. There were also texts between Thorn and Jordan on January 29 about whether secretaries could bump paraprofessionals.

The record also included copies of several emails exchanged between and among Thorn, Jordan, and Talison between January 27 and January 29, 2016. In these emails, Thorn asked Talison when the outsourcing would take effect, which secretarial positions were eliminated, and when unit employees would find out what the contractor was offering them as a wage and benefit package. Talison replied, in an email copied to Jordan, that the outsourcing was to take effect on Monday, February 1. He said that the secretaries' wages would remain the same, and that the contractor's representatives would be there on Friday, January 29 to explain the benefit package. Talison also appears to have answered Thorn's question about eliminated secretarial positions, although part of his response was cut off in the document admitted into the record and his response to this question is not legible. In a separate email exchange, Jordan sent Talison an email asking when the secretaries' last official day as public school employees would be, and, if they chose not to accept the contractor's offer, what their effective layoff date would be. Talison replied that in both cases it would be January 29.

On February 1, 2016, Denson received a letter from the Employer dated January 27, 2016, notifying her that the Employer's Board of Education had approved a contract outsourcing clerical services to a third party contractor. The letter notified her that her employment was being terminated and informed her of her right to continue her insurance coverage under the COBRA law.

The Collective Bargaining Agreement and Denson's Claims

A collective bargaining agreement for the clerical/secretarial and paraprofessional unit covered the period 2013-2016 and had an expiration date of June 30, 2016. Denson, along with two other unit members, was on Respondent's negotiating team for this agreement.

The contractual grievance procedure was set out in Article V of the contract. Section A defines a grievance as "a violation of a specific provision of this Agreement." It also states that a grievance must be raised with a supervisor "no later than twenty-nine (29) calendar days following the occurrence giving rise to the grievance and is known to the Union or the employee." Section B states that an employee or a member of a group having a grievance can take the grievance up with the immediate supervisor or may request the union to represent them in presenting the grievance to the immediate supervisor. Section C states that if the grievance is

not satisfactorily adjusted during the verbal discussion with the immediate supervisor, it shall be reduced to writing and presented to the supervisor, and the supervisor is to answer it. If either the employee or the union does not accept the supervisor's answer, the grievance may be appealed to the Employer's superintendent.

Article XXV, Section D of the collective bargaining agreement read as follows:

> An employee shall be entitled to receive a pro rata portion of his/her unused vacation credit upon termination of employment with the Board, providing he/she has worked at least six (6) months of the current vacation credit period.

The vacation credit period for secretarial/clerical employees ran from July 1 to July 1.

Article XII, Section 1(C), applicable to secretarial/clerical employees, stated:

> The Board shall notify the Union of any proposed reduction in hours, proposed layoff, or elimination of position, ten (10) calendar days prior to the effective date of the change. In the event of a teacher strike, twenty (20) hours' notice of a change in work schedule shall be required.

A separate provision, Article XII, Section 2(B), required that the Employer give employees ten calendar days' prior written notice of layoff or elimination of position. However, this section applied only to paraprofessionals.

Article XVII, Section 3(A) of the contract read:

> Each employee shall be entitled to use sick days as needed during the current year, accumulative to ninety (90) days. Employees will be given the option, on an annual basis, to accumulate sick days for the current year or the employer will purchase the unused annual sick days for the current year. The employee will be compensated Forty Dollars ($40) for each unused annual sick day for the current year. Sick days from the current year will be used first.

Article IX, Section 1, which applied to secretarial/clerical employees, designated twelve holidays, including an additional day to be taken sometime during Christmas recess, as paid holidays. However, the section also stated that the Employer would be permitted to eliminate one of these paid holidays effective July 1, 1997, a second paid holiday effective July 1, 1998, and two more paid holidays effective July 1, 2003. Denson testified employees continued to have the additional paid holiday for the Christmas recess in 2016. She also testified that if the additional day could not be taken during the Christmas recess because of the way the calendar fell, employees were allowed to take another day sometime during the school year as a paid day off. According to Denson, this was referred to as a "floating holiday." Article IX, however, does not make reference to this practice.

On February 3, 2016, the Employer sent Denson the following letter:

> Being that you were a salaried Beecher employee, you received advance pay on your salary beginning July 1, 2015. As a result of the Beecher Board of Education outsourcing your position as of February 1, 2016, you now owe monies back to the school district. Please reference the enclosed final contract adjustment.
>
> The following constitutes the "true-up" employee obligation of the health insurance premium which will be deducted on Pay #16 (February 5, 2016).
>
> $310.94
>
> Your last check issued by the school district will be February 5, 2016. Please make arrangements with the Business Office of how you will repay the balance owed to the school district.
>
> We apologize in advance for any inconvenience this may cause you.

Denson was hired by the contractor and, as an employee of the contractor, resumed providing secretarial services to the Employer. She received her last paycheck from the Employer on February 5, 2016. This paycheck included a $310.94 deduction for "MESSA Sect 125 Employee Obligation." According to her January 22, 2016, pay stub from the Employer, as of that pay period Denson had 68 hours of accrued vacation time, 72 hours of accrued sick time, and 8 hours of available paid time off. Denson's February 5 pay stub showed no accrued hours of any type.

On April 2, 2016, Denson received a letter from the Employer stating that it would not be seeking reimbursement for the "advance pay" referred to in the Employer's February 3, 2016, letter. On April 4, 2016, on the advice of a lawyer, Denson filed a claim with the Wage and Hour Division of the Department of Licensing and Regulatory Affairs seeking reimbursement from the Employer for the following items.

> $1460 – for failing to provide her with 10 days advance notice per Article XII, Section 1(C) of the collective bargaining agreement.
>
> $310.94 – for the unauthorized deduction from her February 5, 2016 paycheck.
>
> $1314.72 – reimbursement for unused vacation credits per Article XXV, Section D of the contract.
>
> $340.00 - reimbursement for unused sick days per Article XVII, Section 3(A) of the contract.
>
> $146.08 – reimbursement for paid time off. As Denson explained at the hearing, this was the "floating holiday."

Denson's claims were denied on the basis that they were subject to an arbitration agreement, i.e., the arbitration clause in the collective bargaining agreement. Therefore,

according to the denial, the Wage and Hour Division lacked statutory jurisdiction to pursue them. Denson's unfair labor practice charge lists the items above as issues that should have been grieved.

Communications between Thorn and Jordan after January 29, 2016

As noted above, Denson testified that she did not have any conversations with Jordan after the January 26, 2016 Board meeting. She did, however, continue to talk with Thorn, who had also been hired by the contractor. Thorn received a letter from the Employer similar to Denson's February 3, 2016, letter. Thorn testified that she called Jordan to tell him about the letters. According to Thorn, she asked him how the Employer could say that the secretaries owed it money, and asked Jordan what could be done about it. Thorn testified that Jordan replied that he would get back to her. She also testified that, apparently sometime later, he told her that "the Employer could do this." Jordan testified that he did not recall any such conversation with Thorn and that he did not learn of the February 3 letters until he was shown a copy of Denson's unfair labor practice charge.

At the hearing, Denson asked Thorn if Thorn notified Jordan that the secretaries were not paid for their accrued vacation and sick time. Thorn's response was that she could not say specifically that she told him that. Denson did not ask Thorn if she and Jordan discussed whether the secretaries received adequate advance notice of the elimination of their positions or whether they talked about reimbursement for the floating holiday. Thorn testified that after the Board meeting she had numerous questions, and that these questions included how the Employer could outsource them "and not follow our contract," including the contract language stating that the Employer had to provide ten day notification, and the contract provisions requiring the Employer to pay employees for unused vacation and sick days. However, Thorn did not say that she had any conversations with Jordan about money the Employer may have owed the secretaries after they were outsourced. Jordan insisted at the hearing that he was not aware that there were issues of this nature until he received Denson's charge and that he was not asked to file a grievance over these issues.

On August 26, 2016, after Denson had filed her charge, Respondent filed a grievance on behalf of all the secretaries whose work was outsourced seeking reimbursement of their accrued vacation credits and sick time under Article XVI, Section 3(A) and Article XXV, Section D. According to Respondent, it concluded that the Employer did not fail to provide the advance notice of the terminations that the contract required, and that there was no contractual basis for seeking reimbursement for "paid time off." With respect to the deduction made from Denson's paycheck for a health care premium contribution, Respondent could find no evidence that the money was actually deducted. When presented at the hearing with Denson's February 5, 2016, pay stub showing that a deduction had been made, however, Jordan said that he was familiar with the term "true-up," and that when employees are terminated or resign, they sometimes owe their employer money for benefits received and sometimes are due a refund from the employer. Jordan explained that since he had not seen Denson's pay stub before the hearing, he had not investigated the matter and therefore did not know whether the amount deducted from Denson's check was correct.

The August 26, 2016, grievance was rejected by the Employer on the grounds that it was not filed within 29 days of the date of the occurrence was "known to the Union or the employee" as the contractual grievance procedure required. Respondent acknowledged the merit of this argument and did not move the grievance to the next step of the grievance procedure.

Discussion and Conclusions of Law:

The charge in this case alleges that Respondent violated its legal duty of fair representation by failing to file a grievance over the Employer's refusal to pay Charging Party Denson certain monies she alleges that it owed her, and its unauthorized deduction from her paycheck of money she allegedly owed the Employer as a health care premium contribution, after Denson's job was outsourced and she was terminated. During the course of the hearing, it became clear that both Denson and Thorn believed that Jordan had not done all he could to challenge the Employer's outsourcing of their work. However, the charge as filed did not allege that Respondent violated its legal duty of fair representation with respect to the outsourcing itself. Moreover, Denson never attempted to amend her charge to allege that Respondent's failure to file a grievance over the outsourcing violated PERA. Accordingly, whether Respondent's failure to file a grievance challenging the outsourcing itself violated its duty of fair representation is not properly before me.

I note, however, that Section 15 of PERA includes the following language

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> ** *
>
> (f) The *decision of whether or not to contract with a third party for 1 or more noninstructional support services*; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders. [Emphasis added.]
>
> (4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are *prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.* [Emphasis added.]

The above sections of PERA, and others, were added to the statute in 1995. When the constitutionality of the amendments was challenged, the Court of Appeals construed the phrase "prohibited subject" to be synonymous with "illegal subject." The Court explained that while

public school employers and unions could discuss prohibited topics, a public school employer has no obligation to bargain or discuss them with a union. The Court also held that any agreement or contract provision between a public school employer and union on a prohibited subject is not enforceable. See *Michigan State AFL-CIO v Michigan Employment Relations Comm*, 212 Mich App 472, 486-487 (1995), *aff'd* 453 Mich 362 (1996). Under these amendments, therefore, a public school employer does not have to bargain, or even discuss with the union, its decision to outsource the work of its noninstructional support staff. Moreover, because any provision in a collective bargaining agreement prohibiting the outsourcing of this work is legally unenforceable, a union violates PERA if it demands to arbitrate a grievance over the outsourcing. Accordingly, a union representing noninstructional support employees of a school district has limited recourse if the school district decides to outsource their work. [2]

A union representing public employees in Michigan owes its members a duty of fair representation under Section 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). In *Goolsby*, the Michigan Supreme Court described "arbitrary" conduct by a union as (a) impulsive, irrational or unreasoned 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. It also said that, absent a reasoned, good-faith, nondiscriminatory decision not to process a grievance, the unexplained failure of a labor organization to comply with collectively bargained grievance procedure time limits constitutes a breach of the duty of fair representation. *Goolsby*, at 682. On the other hand, a union's decisions regarding the handling of a grievance, including its decision not to file, will be held to be lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O ' Neill*, 499 US 65, 67 (1991); *City of Detroit, Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

Denson claims that the Employer owes her the following: (1) monetary compensation for its failure to provide her with 10 days advance notice of the elimination of her position; (2) $310.94, the amount the Employer deducted from her February 5, 2016, paycheck for health care premium contributions the Employer claimed she owed them; (3) reimbursement for unused vacation credits; (4) reimbursement for unused sick days; and (5) reimbursement for an unused floating holiday.

In the position statement it filed in response to the charge, and at the hearing, Respondent took the position that Denson had no contractual right to most of these items. The exceptions

[2] The union can put in a bid, as a contractor, for the work. However, the union must then become the employer of its members or former members. *Mount Pleasant Pub Sch v. Michigan AFSCME Council 25*, 302 Mich App 600, 610 (2013). Most unions consider this unfeasible.

were reimbursement for her unused vacation credits and reimbursement for unused sick days. This is not, however, a case where a disgruntled member is challenging the reasonableness of a union's decision that the contract was not violated and that no grievance should be filed. Here, there is no dispute that UniServ Director Jordan did not decide, within twenty–nine days of Denson's termination, that any of Denson's claims lacked merit. According to Respondent, Jordan was never asked to file, or assist in filing, a grievance over Denson's claims. Respondent also argues that Jordan's assistance was not necessary and that either Thorn or Denson could have filed the grievance by themselves.

I find that evidence on the record does not indicate that Denson, Thorn, or any other outsourced secretary, asked Jordan for help in filing a grievance seeking monetary reimbursement for the Employer's failure to provide sufficient advance notice of their termination, reimbursement for their accrued vacation credits or sick days, or reimbursement for an unused floating holiday. Denson testified that she had a conversation with Jordan outside the Board meeting room during the Board's January 26, 2016, meeting. According to Denson, she asked Jordan "what they were going to be able to do if the Board voted to privatize the secretaries." Jordan replied, according to Denson, that he wasn't sure and that this was something he would have to check into. Jordan does not recall this conversation. Even if Denson's recollection is correct, however, I find that her question was too general for Jordan to have construed it as a request for assistance in filing a grievance over the monies the secretaries might be entitled to after they were terminated. As Denson admits, she did not have any conversations with Jordan after this one. That is, Denson did not herself complain to Jordan after she received her last paycheck about the money that she had not been reimbursed for her accrued leave. She also did not ask him whether the secretaries had received sufficient advance notice of their termination or whether they were entitled to compensation under the contract for lack of notice.

Unlike Denson, Thorn had a number of conversations with Jordan about the outsourcing, and matters related to it, after the day of the Board meeting. However, none of the emails or texts between them on the days following the Board's vote touch on the subject of what compensation the secretaries might be due from the Employer after they were terminated. As noted above, Thorn testified that she had questions about whether the Employer failed to provide the secretaries with adequate notice of their termination and whether the secretaries were entitled to reimbursement for unused vacation and sick days. She did not, however, testify that she raised these questions with Jordan.

Under Article V of the contract covering the secretaries at the time of their termination, an individual employee or group of employees has the right to file a grievance asserting that a provision or provisions of the contract were breached. I agree with Respondent that Thorn, Denson, and in fact any of the other secretaries whose work was outsourced could have filed a grievance asserting that the Employer did not give them adequate notice of their termination and/or did not properly reimburse them for accrued leave time after they were terminated. Thorn's testimony established that it was her practice not to proceed with a grievance without first receiving Jordan's advice. However, neither Denson nor Thorn testified that Jordan had told them *not* to file a grievance without first consulting with him. Had Jordan promised the women that he would file the grievance, it would have been reasonable for them to rely upon him to do

it. However, the record does not establish that Jordan made this promise. Moreover, as Thorn testified, while Jordan had previously drafted grievances for the unit, it was Thorn who signed and filed them. Of course, after February 1, 2016, Thorn and Denson were no longer employees of the Employer or officers of a Respondent affiliate. Either Thorn or Denson, however, could have asked the Employer (or Jordan), as the 29-day time limit for filing a grievance approached, whether a grievance had been filed with the Employer over inadequate notice and/or failure to reimburse the secretaries' for their accrued leave.

With respect to the money the Employer deducted from Denson's last paycheck for a health insurance premium contribution, Thorn testified that she telephoned Jordan to tell him about the Employer's February 3, 2016, letter informing the secretaries that they owed the Employer for "advance salary" and unpaid health insurance premium contributions, and that the latter would be deducted from their last paycheck. According to Thorn, she asked Jordan "how they could do this," and Jordan eventually told her that "the Employer could do this." Although Jordan denied having this conversation, he agreed at the hearing that employees sometimes owe health insurance premium contributions at the time they are terminated or resign and that an employer is authorized to deduct these premium contributions from the employee's paycheck. There is no evidence in this record that Denson, or anyone else, complained to Jordan that the amount of the contribution the Employer had deducted was wrong.

As noted above, a union's duty of fair representation consists of three elements. I find nothing in the actions of Respondent UniServ Director Jordan in this case that suggests that he bore any hostility toward Denson, Thorn, or the other outsourced employees, or that he was duplicitous or guilty of bad faith in his representation of them. I also find that Jordan's failure to file a grievance or take other action to pursue Denson's claim was not, in these circumstances, "arbitrary" as this term is defined in the context of a fair representation claim. The record indicates that Jordan did not normally file grievances himself. Rather, the process while Thorn was president was for her to bring an issue to Jordan's attention and seek his advice. While Jordan assisted Thorn by drafting the written grievance, the process was collaborative and grievances were signed and filed by Thorn. As I found above, even if the testimony of Denson and Thorn is fully credited, the evidence does not show that Thorn or anyone else asked Jordan for help in filing a grievance over the Employer's failure to pay the outsourced secretaries for their unused vacation credits, sick leave, or holidays, that anyone asked Jordan if a grievance could be filed over the lack of payment or over the adequacy of the notice the secretaries received of their termination, or that anyone complained to Jordan that the amount of the premium contribution deducted from their last paycheck was wrong. In fact, there is no evidence in the record that Jordan even knew that the Employer had not paid the secretaries for their accrued leave. Had any or all of these matters been brought to Jordan's attention, he might have filed, or assisted Thorn in filing, a grievance over some of them. However, I find his failure to do so to be fully explained and justified by his lack of knowledge that these issues existed. In sum, I conclude that the evidence does not establish that Jordan acted in bad faith, was guilty of inept conduct undertaken with indifference to the interests of those affected, or was grossly negligent in failing to file a grievance over Denson's claims. I find that Respondent did not breach its duty of fair representation toward Denson, and 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 23, 2017