STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HENRY FORD COMMUNITY COLLEGE
SUPPORT STAFF ASSOCIATION (SSA),
Labor Organization-Respondent,

MERC Case No. CU17 A-004
-and- Hearing Docket No. 17-002527

RANDALL GRAY,
An Individual Charging Party.
_____/

Appearances:

Joe Zitnik, President HFCC-SSA, for Respondent

Randall Gray, appearing on his own behalf

DECISION AND ORDER

On April 26, 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: June 9, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

HENRY FORD COMMUNITY COLLEGE SUPPORT STAFF ASSOCIATION (SSA),
Respondent-Labor Organization,

Case No. CU17 A-004
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-and-

RANDALL GRAY,
An Individual-Charging Party.
_____/

Appearances:

Joe Zitnik, President, HFCC-SSA, for Respondent

Randall Gray, appearing for himself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On January 25, 2107, Randall Gray, an employee of Henry Ford College (the Employer), filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his collective bargaining representative, the Henry Ford Community College Support Staff Association (SSA), pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

On February 9, 2017, I scheduled a hearing on the charge for March 28, 2017. I also directed the Respondent Union to file a position statement responding to Gray's allegations. Respondent filed its position statement on March 9, 2017. On March 13, 2017, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, I issued an order to Gray directing him to identify the facts as set out in Respondent's position statement with which he disagreed and to set out in detail the basis for his allegation that Respondent's refusal to pursue his grievance violated PERA. The order stated that if Gray's response did not indicate that there were material issues of fact or other reasons why the charge should not be dismissed without a hearing, I would issue a decision

recommending to the Commission that the charge be dismissed. The hearing scheduled for March 28, 2017, was adjourned without date. Gray filed a timely response to my order on April 3, 2017.

Based on facts not in dispute as set out in the charge and in the position statement, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Gray is employed by the Employer as a custodian in its Facilities Services Department. On October 10, 2016, Gray called in before the beginning of his shift to request to use a personal business day on that day. Gray's request was denied, and the Employer did not pay him for that day. Gray asked Respondent to pursue a grievance over the Employer's refusal to pay him. Respondent refused to do so. Gray alleges that Respondent's refusal to pursue his grievance violated its duty of fair representation toward him under Section 10(2)(a) of PERA.

Facts:

Respondent represents a bargaining unit of full and regular part-time maintenance and operations, clerical, technical support, and food service employees of the Employer. Respondent and the Employer are parties to a collective bargaining agreement expiring on June 30, 2020. The accumulation and use of personal business leave by unit employees is covered by Article 15(C) of that agreement, which reads as follows:

> Effective July 1, 2016, employees who work fourteen (14) or more hours per week shall earn five (5) days off per year with pay for personal business, which days shall not be accumulated. Employees must notify their supervisor in advance of taking personal business leave.
>
> a. Requests for personal business shall be in units of no less than fifteen (15) minutes.
>
> b. Personal business days not used prior to the end of the fiscal year shall be added to the employee's accumulated sick leave bank.
>
> c. Personal business hours are provided to take care of important personal matters that cannot be taken care of outside of the regular assigned shift of the employee.
>
> d. Personal business time may not be used the day preceding or following a holiday.

The collective bargaining agreement also contains a management rights' clause, Article 4. Article 4(A) reads, in pertinent part:

> Subject to the terms of this Agreement, and except as modified by the specific terms of this agreement, the Employer retains all rights and powers to manage the Henry Ford College, and to direct its employees. The Association recognizes these management rights and responsibilities as conferred by the Laws and Constitution of the State of Michigan and as are inherent in the rights and responsibilities to manage the College, including, but not limited to: … to establish, change and abolish its policies, work rules, regulations, practices and standards of conduct (including dress codes and substance abuse rules) and to adopt new policies, work rules, regulations, practices, and standards of conduct…

On September 27, 2016, the Employer's Manager of Facilities Services sent a letter to Facilities Department employees, with a copy to a Respondent representative, its vice-president for facilities services, stating that, effective immediately, personal business leave requests would have to be made in writing to the appropriate shift leader, and that requests would require a minimum of 24 hours' notice. The letter noted that shift leaders would continue to limit approved absences, including those for vacation and personal business, to two per shift. The letter also stated that the policy limiting approved absences to two per shift would not apply to employees requesting personal business leave in small increments who would be working part of the shift. It was clear from the letter that 24 hour written notice requirement would apply only to employees in the Facilities Services Department and not members of the bargaining unit employed in other departments.

The Employer explained to Respondent that the 24 hour notice policy was implemented for the Facilities Services Department because that department, and only that department, was experiencing problems with inadequate staffing on some shifts, particularly on Mondays and Fridays. The Employer explained that the purpose of the 24 hour notice requirement was to allow it to call in additional employees from a temporary service agency when needed.

Respondent President Joe Zitnik is employed as a systems analyst in the Employer's Information Technology Department. He was instrumental in the creation of the support employees bargaining unit of which Gray is now a member. Sometime in 2016, Zitnik nominated Dr. Cynthia Glass, the Employer's vice-president for Human Resources, to receive an award from the American Society of Employers. The Employer, in its press release announcing that Glass had received the award, quoted Zitnik praising Glass for acting as a mentor and colleague, even when bargaining on the opposite side of the table. According to the press release, Zitnik also said that he had always felt that "above everything else, Dr. Glass [had] the best interests of employees in mind." Shortly before the events covered by this charge, Zitnik was promoted to a position managing ten employees in the Information Technology Department.

As noted above, on October 10, 2016, Gray called in before the start of his shift to request a personal business day. Gray did not report to work and was not paid for the day. Gray complained to Zitnik and indicated that he wanted to file a grievance. Zitnik explained to Gray the procedure adopted by Respondent for processing grievances. Grievances are handled by the member of Respondent's Executive Board representing the area of the college in which the member works.

Zitnik, as President, is not involved in the grievance procedure, and it is not clear from the facts whether he expressed an opinion regarding the merits of the grievance. Under Article 24(B) of the collective bargaining agreement, step one of the grievance procedure begins with the completion of a complaint investigation form by the employee wishing to grieve. The employee's supervisor is contacted first to determine if the matter can be resolved at that level. If the grievance is not resolved with the employee's supervisor, the executive board member assigned to the grievance appoints a Grievance Committee made up of four unit members. These members volunteer to review the grievance. The Grievance Committee evaluates the grievance and determines whether Respondent should pursue it. While an individual may initiate a grievance, step four, which is mediation, and step five, which is binding arbitration, can only be initiated by Respondent.

Harold Kelley was the Executive Board member with responsibility for the Facilities Services Department and was therefore assigned to handle Gray's grievance. Kelley assembled a Grievance Committee. None of the four employees on the Committee were employed in the Facilities Services Department. The Committee, with one member not present, voted unanimously not to pursue the grievance. It concluded, based on Article 15(C) and the language in Article 4(A) quoted above, that the Employer was within its rights under the collective bargaining agreement to require employees to make requests to use personal business leave in writing at least 24 hours before using the leave.

In January 2017, the 24 hour notice requirement for Facilities Department employees was discussed in a union meeting. During that meeting, Gray asked Zitnik whether he had to give 24 hours' notice to use personal business leave. Zitnik replied, "What does that have to do with anything?"

Discussion:

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty toward the employees it represents 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. Also see *Vaca v Sipes*, 386 US 171 (1967). A union is guilty of bad faith when it acts with improper intent, purpose, or motive; this encompasses fraud, dishonesty, and other intentionally misleading conduct. *Spellacy v Airline Pilots Ass ' n*, 156 F3d 120, 126 (CA 2, 1998). A union's conduct is "arbitrary" if it can fairly be characterized as so far outside a wide range of reasonableness that it is wholly irrational, or if the union fails to exercise its discretion or is guilty of gross negligence. *Merritt v Int'l Ass'n of Machinists & Aerospace Workers*, 613 F3d 609 (CA 6, 2010); *Goolsby*. A finding that a union has breached its duty to avoid discriminatory conduct requires evidence of discrimination by the union that is "intentional, severe, and unrelated to legitimate union objectives." *Merritt*, at 617; *Vaca*, at 177.

Although a union owes a duty of fair representation to each member of its bargaining unit, its ultimate duty is to its membership as a whole. Accordingly, a union, as long as it acts in good faith

and without discrimination as defined above, 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 and to weigh the likelihood of success against the burdens on the union of pursuing the grievance. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. In deciding whether a union is guilty of arbitrary conduct in its handling of a grievance, the Commission is not to substitute its judgment for that of the union.

Rather, a union's decisions, if made in good faith, are 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.

Here, Gray argues that Respondent President Zitnik did not act in good faith with respect to his grievance. Rather, Gray alleges, Zitnik "sided with management," as he typically does, in order to curry favor with the administration. Gray points to Zitnik's recent promotion, and his favorable public statements about the Employer's vice president for human resources, as evidence that Zitnik's interests are more aligned with management than with the employees he represents. Gray also asserts that Zitnik now has a conflict of interest, and should not even be Respondent's President, because he is now a supervisor.

However, Gray does not dispute Respondent's account of how Respondent handled Gray's grievance or that Zitnik himself was not involved in the procedure used to decide whether Respondent would pursue his grievance. According to this account, the grievance was assigned to the Respondent Executive Board member responsible for the Facilities Services Department. That Executive Board member then appointed a Grievance Committee, which made the actual decision. Thus, Zitnik's motive for opposing the grievance, if he in fact did so, is not relevant since he did not personally make the decision not to pursue it. Gray does not assert that the vote of the Grievance Committee was influenced by its members' desire for promotion, although he points out that they were not personally affected by the 24 hour notice rule since they did not work in the Facilities Department. However, this fact, by itself, does not raise an inference that the members of the Grievance Committee acted with improper intent or motive when they decided not to pursue Gray's grievance.

As noted above, a union's decision not to pursue a grievance is "arbitrary" if it can fairly be characterized as so far outside a wide range of reasonableness that it is wholly irrational, or if the union fails to exercise its discretion or is guilty of gross negligence. In this case, Respondent exercised its discretion in deciding not to pursue the grievance, and its decision was based on the language of the contract. Article 15(C) of the collective bargaining agreement stated that employees must notify their supervisors in advance of taking personal business leave. However, that provision did not explicitly state how much advance notice was required. The contract also contained management rights clause that gives the Employer the right, *except as modified by the specific terms of the agreement*, to unilaterally establish or change "policies, work rules, regulations, practices and standards of conduct." [Emphasis added]. As noted above, a union's good faith, deliberate decision

not to pursue a grievance does not violate its duty of fair representation unless that decision is so outside the range of reasonableness as to be considered irrational. That was not the case here.

Finally, Gray complains that "the revision of the contract was unfair and discriminatory," i.e., that Respondent's decision that the Employer had the right to impose the 24 hour notice a requirement on some unit employees and not others was discriminatory. As noted above, however, in order to violate a union's duty of fair representation, the discrimination must be "severe" and "unrelated to legitimate union objectives." In this case, Respondent merely concluded that the Employer had the right under the collective bargaining agreement to impose the 24 hour notice requirement, even if the Employer chose not to impose it on the entire bargaining unit.

I find that Respondent's decision not to pursue Gray's grievance was not made in bad faith and was neither arbitrary nor discriminatory as those terms are used in the context of the duty of fair representation. I conclude, therefore, that Respondent did not breach its duty of fair representation toward Gray and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 26, 2017