STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25, LOCAL 1999,
Labor Organization-Respondent,

MERC Case No. 20-L-1834-CU

-and-

EDWARD KEITH BOWIE,
An Individual Charging Party.
____/

APPEARANCES:

Carlotta M. Jones, Staff Attorney, for Respondent

Edward Keith Bowie, appearing on his own behalf

DECISION AND ORDER

On August 5, 2021, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] 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.

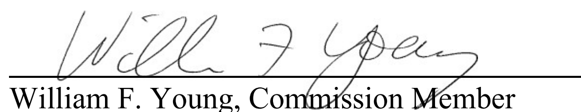
The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

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

Tinamarie Pappas, Commission Chair


William F. Young, Commission Member

Issued: October 6, 2021

---

[1] MOAHR Hearing Docket No. 20-027404

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

AFSCME COUNCIL 25, LOCAL 1999,
Respondent-Labor Organization,

Case No. 20-L-1834-CU
Docket No. 20-027404-MERC

-and-

EDWARD KEITH BOWIE,
Individual Charging Party.
____/

Appearances:

Carlotta M. Jones, Staff Attorney, for the Respondent-Labor Organization

Edward Keith Bowie appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On December 14, 2020, Edward Keith Bowie (Charging Party) filed the present unfair labor practice charge against his bargaining representative, AFSCME Council 15, Local 1999 (Union or Respondent). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

Charging Party's filing alleges that his Union violated its duty of fair representation by way of its refusal to advance an employee filed grievance. More specifically, according to Charging Party, in early June he filed four grievances on his own against his employer, Oakland Community College (Employer or College). Charging Party claims that following the College's denial of those grievances, the Union chose to advance only three of the grievances to the next level of the contractual grievance procedure while informing the Employer it was abandoning or rescinding the fourth grievance.

On February 2, 2021, the Union filed a Motion for Summary Disposition pursuant to Rule 165(2)(d) of the Commission's General Rules, R 423.165(2)(d), claiming that the Charging

Party had failed to state a claim upon which relief could be granted under PERA. That same day Charging Party filed his response to the Motion.

Factual Background:

The following factual background is derived from the parties' pleadings where not in dispute. On or around March 23, 2020, the College's Director of Physical Facilities Department, Dan Cherewick sent an email instructing certain members of the staff, including Charging Party and other custodians, that because of the COVID-19 orders then recently enacted by Governor Gretchen Whitmer, they were temporarily off work and were to shelter in place at home. On April 9, 2020, in an email sent on behalf of the College's Vice Chancellor of Human Resources, Karen Bathani, indicated that as of April 14, 2020, the college's maintenance staff would be categorized as essential workers and would be permitted to return to work. That email went on to instruct workers to look for follow-up communication regarding the return to work.

It appears from the materials submitted by Charging Party that beginning on April 21, 2020, some workers, including some custodians were permitted to begin working again; Charging Party was not one of the custodians that returned at that time. Instead, Charging Party remained off work and had to use vacation days to cover those days, until around May 17, 2020.

As stated above, in early June, Charging Party filed four grievances on his own without assistance from the Union. One of those grievances, M-1-20-AH, filed on June 5, 2020, challenged the Employer's decision regarding which custodial personnel to bring back beginning in April. That grievance stated:

> Based on but not limited to Maintenance Master Agreement, Article 13 Seniority, Paragraph D which indicates shift preference and work week preference shall be granted to the most senior employee on campus for each job classification based upon his/her total seniority collegewide. John Nagalski offered Chantell Hickman and Gary Vickers the work week schedule once the governor, Gretchen Whitmer, lifted her stay at home order. They were offered the opportunity to return to campus on April 21, 2020. Edward Bowie was forced to use vacation days from March 24, 2020 through May 17, 2020 without being afforded the opportunity to return to work.

Article 13 of the contract between the Union and the Employer does contain the parties' agreed upon provisions regarding bargaining unit seniority. Subsection D of that article, the only portion thereof that is remotely relevant to this proceeding, is entitled "Shift Preference" and states:

> Shift preference and work week preference shall be granted to the most senior employee on the campus for each job classification, based upon his/her total seniority College wide, except that the Supervisor shall have the right to assign a shift for up to one hundred twenty (120) calendar days to a new employee or to an employee new to his/her classification, due to his/her lack of experience on the campus or in that classification.

Article 14 of the contract is entitled "Vacancies and Transfers". Subsection (A) of that article sets forth the contract's procedure to vacancies and states in the relevant portion, "[p]rior to posting a vacancy, bargaining unit members will have shift preference and work week preference for a vacancy at their campus within their classification. Preference will be granted based on Article 13(D)."

On June 8, 2020, at the direction of Frank Zechmeister, Charging Party's direct supervisor, the grievances were advanced to Step 2 of the grievance procedure. On July 1, 2020, Cherewick denied Grievance M-1-20-AH. In issuing the denial, Cherewick wrote, in a memo addressed to Matthew Meixner, Union President, the following:

> I received the Step 2 Grievance request on June 17, 2020, from Ed Bowie.
>
> During our current Covid 19 situation, the Auburn Hills Campus was requested to provide some minimal, essential custodial support for the CREST students and staff at the CREST site including buildings H, J and K. The supervising Operating Engineers Frank Zechmeister and John Nagalski determined this essential support would be best provided by the afternoon shift. I agreed with their recommendation.
>
> John Nagalski queried his afternoon shift looking for two volunteers. Chantell Hickman and Gary Vickers accepted the responsibility. Ed Bowie was not asked as he is currently assigned to the day shift.
>
> After Ed Bowie discovered the situation and knowing he had more seniority than Chantell and Gary he felt that he should have been asked to do the work.
>
> I believe that John Nagalski acted in good faith with the AFSCME Local 1999 Master Agreement and was not required to offer work based on seniority without shift considerations.
>
> This grievance is denied.

Although not specifically stated, it appears from the information provided that Charging Party's other three grievances were also denied at or around this same time.

On July 2, 2020, in an email addressed to Charging Party, Meixner indicated that he would move three of the four grievances to the next step. Meixner stated that he was not moving M-1-20-AH to the next step because "it was an afternoon shift and you are a day custodian" and therefore "[t]here was no violation of the contract…" Charging Party and Meixner exchanged several more emails regarding M-1-20-AH.

Charging Party, as part of his response to the Union's motion, included several past grievances as "past precedence" as demonstrations of how "Local 1999… has not acted in all cases with a level hand." Those past grievances ranged from 2019 to 1999. However, from the

materials provided my Charging Party, none of those grievances were similar to the grievance at issue herein. Moreover, Meixner, the current Union president does not appear to have had any role in those prior matters.

Discussion and Conclusions of Law:

The Commission does not investigate charges filed with it. Charges filed with the Commission must comply with the Commission's General Rules. More specifically Rule 151(2)(c) of the Commission's rules, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include:

> A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act, the names of the agents of the charged party who engaged in the violation or violations and the sections of LMA or PERA alleged to have been violated.

Under Commission Rule 165(2), summary disposition is appropriate where there is no genuine issue of material fact. Relying on *Smith v Lansing Sch Dist*, 428 Mich 248 (1987), the Commission has consistently held that an evidentiary hearing is not warranted where no material factual dispute exists. *AFSCME Council 25, Local 207*, 23 MPER 101 (2010). Where, however, a material factual dispute exists, summary disposition is not appropriate. *Saginaw Cnty Sheriff*, 1992 MERC Lab Op 639 (no exceptions).

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 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). Within these boundaries, 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 Employee*s, 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union' s ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. To this end, the union is not required to follow the dictates of any individual employee, but rather it may investigate and handle the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. Poor judgment, or ordinary negligence, on the union's part, is not sufficient to support a claim of unfair representation. *Goolsby* at 672.

Our Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. It is not the Commission's role to second-guess Respondent's judgment or strategy. In *Airline Pilots Assn v O'Neil*, 499 US 65 (1991), the Supreme Court held that unions have broad discretion in administrating their collective bargaining agreements and that their decisions are not actionable unless their judgment is "wholly irrational" and outside the "wide range of reasonableness" accorded to unions. Moreover, the mere fact that a member is dissatisfied with their union's

efforts or ultimate decision, is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131; *Wayne Co DPW*, 1994 MERC Lab Op 855. Importantly, to prevail on a claim of unfair representation, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby*, supra; *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993). Moreover, in order to survive a motion for summary disposition predicated on the premise that Charging Party has failed to state a claim of a breach of the duty of fair representation, Charging Party's allegations "must contain more than conclusory statements alleging improper representation." *AFSCME, Local 2074*, 22 MPER 83 (2009), citing *Martin v Shiawassee County Bd of Commrs*, 109 Mich App 166, 181 (1981).

Here, Charging Party claims that the Union's decision to single out Grievance M-1-20-AH from the other three grievances he filed violated PERA. Respondent claims that the Charging Party did not allege any facts that could establish that the Union's decision not to pursue M-1-20-AH violated the Act. Moreover, the Union also claims that the employer's conduct relative to the issues contained in M-1-20-AH did not violate the collective bargaining agreement.

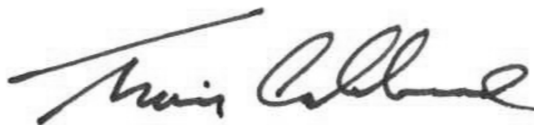
I first note that while Charging Party provided "past precedence" in support of his claim that the Union breached its duty under PERA by failing to advance M-1-20-AH, none of those examples involved Meixner, the current President of the Union and the person who made the decision Charging Party is complaining off.[1] Simply put, Charging Party has not alleged any facts, that the undersigned could rely upon in order to determine that the decision not to advance M-1-20-AH was arbitrary under *Goolsby*, supra, or otherwise discriminatory and/or unlawful as defined within *Vaca*, supra.

I have considered all other arguments as set forth by the parties and conclude such does not warrant any change in my conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following recommended order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated August 5, 2021

[1] I also note that Meixner made the decision to advance Charging Party's other grievance filed with or around the same time as M-1-20-AH.