STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ZEELAND EDUCATION ASSOCIATION
Labor Organization-Respondent,

MERC Case No. 21-C-0534-CU

-and-

JASON JALONSZYNSKI,
An Individual- Charging Party.
____/

Appearances:

Kalniz, Iorio & Reardon, LPA, by Fillipe S. Iorio, for Respondent

Jason Jaloszynski, Charging Party

AMENDED DECISION AND ORDER

Pursuant to MCL 423.216(c), the Commission issues the following Amended Decision and Order which shall replace in its entirety the prior Decision and Order issued on October 12, 2021.

Jason Jaloszynski (Charging Party) filed this unfair labor practice charge against the Zeeland Education Association (Union or Respondent) alleging that he was denied representation by the Union because of his non-member status, in violation of Sections 10(2)(a) of the Public Employment Relations Act (PERA). During the hearing, upon motion by Respondent for summary disposition, and after hearing the oral statements made by Charging Party and Respondent, but prior to the receipt of any record evidence, Administrative Law Judge (ALJ) David M. Peltz orally granted Respondent's motion, and subsequently issued a written Decision and Recommended Order dismissing the charge[1].

In his exceptions, Charging Party asserts that the ALJ erred when he failed to find that the Union's October 16, 2020, response to his prior email constituted a breach of the duty of fair representation, and further erred when he failed to find that the Union did not act in good faith in representing nonunion members. Charging Party further asserts that the ALJ erred when he failed to find a breach of the collective bargaining agreement by the Employer.

Respondent contends that based on the "undisputed facts", the ALJ properly determined that Charging Party had failed to provide any facts which could support a claim of the breach of

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[1] MOAHR Hearing Docket 21-005312

duty of fair representation by the Union, and, as such, had failed to state a claim for relief under PERA.[2]

Contrary to the ALJ, based upon the reasons set forth below, we find that there exist material issues of fact, the determination of which may require credibility resolutions, and which, depending on the ALJ's findings, could support a claim of breach of the duty of fair representation, and unlawful restraint and coercion, in violation of Section 10(2). As such, we find that Charging Party is entitled to an evidentiary hearing. Accordingly, we reverse the ALJ's summary dismissal and remand this matter to him for that purpose.

Procedural History:

The charge was filed on March 8, 2021, and alleged:

> On October 16th 2020 via an email from Angela Lloyd, the ZEA Grievance Chair, I was refused fair representation based solely my on union status. I am not in the union however I am a compelled rider in the Master Agreement between Zeeland Public Schools and the ZEA.

Attached to the charge was a copy of Charging Party's October 15, 2020 email to the Union's Grievance Committee and of the Union Grievance Chair's October 16, 2020 response.

On March 29, 2021, the Union filed a Motion for a More Definite Statement, Motion for Adjournment and Objection to a Zoom Hearing. On March 30, 2021, the ALJ denied the Motion for a More Definite Statement and Objection to a Zoom Hearing but granted the Motion for Adjournment.

A hearing was held on April 20, 2021, during which the ALJ verbally granted Respondent's motion and dismissed the case on summary disposition. On May 24, 2021, the ALJ issued a Decision and Recommended Order on Summary Disposition, confirming his prior verbal ruling in which he found that Charging Party failed to set forth any factually supported claims which, if true, would establish a violation of the duty of fair representation by the Union.

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[2] Respondent also asserts that Charging Party's exceptions should be rejected pursuant to R 423.176(7) for failure to comply with R 423.176(4) which, in part, requires that the exceptions: (a) Set forth the specifically the question or procedures, fact, law, or policy to which exceptions are taken; (b) Identify that part of the administrative law judge's decision and recommended order to which objection is made, and; (c) Designate, by precise citation of page, the portions of the record relied upon. We agree that Charging Party's exceptions fail to comply with the foregoing requirements. We have held in prior cases however, primarily involving laypersons acting *pro se,* that we would consider non-compliant exceptions to the extent we were able to discern the issues on which the excepting party had requested review. *Detroit Transportation Corp., 28 MPER 64 (2015); City of Detroit, 21 MPER 2008*). Here, we are able to discern the issues on which Charging Party has requested review, and we further take notice of the fact that he is a layperson appearing before the Commission *pro se.* Accordingly, we will accept his exceptions.

On June 16, 2021, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. Respondent submitted a brief in support of the ALJ's Decision and Recommended Order on July 29, 2021.

Purported Facts[3]:

Jason Jaloszynski is employed as a teacher by Zeeland Public Schools (Employer) and is a member of a bargaining unit represented by Zeeland Education Association. Jaloszynski is not a member of the Union.

The collective bargaining agreement between the Union and the Employer provides that a grievance may be filed by either the Union or an individual employee. However, only the Union has the right and ability to appeal a grievance to arbitration.

On June 12, 2020, Jaloszynski filed a grievance over the change in his teaching assignment from Chemistry to Geophysical Science as part of what he perceived to be a pattern of alleged harassment and discrimination by the administration. He alleged that the Employer violated Article I, Section B of the contract which, in part, acknowledges that the quality of education provided depends, among other things, on the "morale of the teaching staff." Zeeland Principal Greg Eding denied Charging Party's grievance asserting that the collective bargaining agreement had not been violated.

On July 30, 2020, Jaloszynski notified Eding and others that the Employer had failed to timely respond to his June 12 grievance within the ten-day period required by the agreement. He further asserted that Eding had provided him with an "ambiguous process" concerning the filing of grievances which, coupled with the Employer's alleged failure to adhere to the contractual time limits, had "added to [his] feeling of a hostile work environment." Eding disagreed with these assertions.

Jaloszynski then appealed the grievance to Superintendent Cal De Kuiper, and subsequently to the Board of Education, both of whom also denied the grievance.

Thereafter, Jaloszynski requested that the Union's Grievance Committee take his grievance to arbitration. Grievance Chair Angela Lloyd responded via email that the Grievance Committee

[3] As noted, the ALJ granted summary disposition based on the charge and attachments thereto, and the opening statements and oral arguments made by Jaloszynski and counsel for the Union. We rely upon, and recite, relevant portions of these verbal assertions, as well as proffered documents identified and referred to in the parties' verbal statements, not as official "record evidence", but solely for the purposes of evaluating the case in the light most favorable to the non-moving party, in order to assess the appropriateness of the ALJ's summary dismissal of the charge. *Michigan State Univ. Admin-Professional Assoc.*, 25 MPER 30 (2011)(On review of summary dismissal in favor of Respondent, the Commission stated: "We also review the record before the ALJ in a light most favorable to the Charging Party to determine the appropriateness of summary dismissal"); *Smith v. Lansing School Dist.*, 428 Mich 248, 406 N.W. 2d 825 (1987)(MERC has the procedural authority to dismiss a claim on summary disposition, where all alleged facts [asserted by the non-moving party] are taken as true, and "the parties are afforded the opportunity to present oral arguments on issues of law and policy and in support of the legal and factual sufficiency of their claims.")

had refused his request, stating "we do not believe that there has been a contract violation. We do understand the issues you raised in our contract language regarding the grievance process and procedures. Since I hold both roles of ZEA Grievance Chair and ZEA Lead Negotiator, I plan on bringing this to the bargaining table. Currently, we do not have a settled contract so this conversation will occur within a reasonable time."

Jaloszynski replied to the Grievance Committee by expressing disappointment in the Committee's decision not to advance his grievance based on the reasons he had previously articulated. He also requested an explanation for the Committee's decision, and asked for the Union's assistance in writing a grievance or grievances for several other contractual violations, including the failure "to investigate [his] claims of systemic problems of discrimination, retaliation, intimidation, and harassment." On October 16, 2020, Grievance Chair Lloyd sent Jaloszynski the following email:

> You have elected to not become a member of the Zeeland Education Association. As a nonmember, we have no duty to prepare or advance a grievance on your behalf. You have a copy of the grievance form, and the contract allows you to file a grievance.

Thereafter, on October 22, 2020, Jaloszynski filed a new grievance containing multiple allegations including: His personnel file contained information which was false; that a complaint was used for disciplinary action which was not called to his attention within ten (10) work days from the receipt of said complaint in accordance with the terms of the contract; and that the Zeeland Board of Education and administration failed to effectively investigate his claims of systemic problems of discrimination, retaliation, intimidation, and harassment. He alleged that such conduct violated Article I (B); Article III (B), and Schedule A-3. Schedule A-3 provides that "a complaint against a teacher may not be used as a basis for disciplinary action unless such complaint was called to the attention of the teacher within ten (10) work days from the receipt of said complaint." It further provides that "if the teacher believes that the personnel file contains information which is false, the teacher may utilize the contractual grievance procedure to have said material removed and destroyed."

Eding denied the grievance asserting, in relevant part, that no false information existed in Jaloszynski's file, and that the discipline was not based on a "complaint." He further asserted that the agreement did not obligate the Employer to investigate Jaloszynski's claims of "discrimination, retaliation, intimidation and harassment," but that he believed those matters had been investigated effectively.

Jaloszynski appealed this new grievance to De Kuiper, and then to the Board of Education, both of whom denied it.

On January 11, 2021, the Union responded via email to an apparent request from Jaloszynski to arbitrate the grievance, stating:

> The letter you want removed from your personnel file is clearly disciplinary, and discipline is a prohibited subject of bargaining. Even though teacher discipline has

> been removed from our contract, we are allowed to grieve it, but only through the School Board level. Currently it is an Unfair Labor Practice, or ULP to advance a grievance based on teacher discipline to arbitration.
>
> Also, the committee does not feel that your grievance is timely. You were notified last June 2020 that the letter was going into your file, and by contract you have 20 teacher attendance days to file, or your grievance is waived. Based on the above reasons, the ZEA Grievance Committee has determined not to advance your grievance.

At the hearing, Charging Party asserted that based upon the October 16, 2020 communication from Angela Lloyd, he believed the Union had refused to advance his grievances to arbitration due to his non-member status.

The ALJ requested that counsel for the Union "explain" the email's meaning and intent. The attorney for the Union asserted that viewing the email "in context", there was no breach of the duty of fair representation; that the Union made the decision not to advance the grievances based on a determination that the contract had not been violated, and not on Jaloszynski's non-member status; that the subjects of one or both of the grievances involved prohibited subjects; and that Lloyd's reference to Jaloszynski's non-member status related solely to his request for the Union's assistance in writing or filing the grievances. As we noted earlier, Union counsel's assertions concerning the meaning and intent of the Union's October 16 email were not supported by any record testimony or exhibits received into evidence.

<u>The Administrative Law Judge's Decision:</u>

The ALJ acknowledged that because Charging Party's claims stemmed from the October 16, 2020 email from Lloyd, in which the Union stated it had no obligation to either help prepare or advance a grievance for Jaloszynski due to his non-member status, that the recent Court of Appeals decision in *TPOAM v. Renner*, ______Mich App_____ (Docket No. 341991, January 7, 2021) was both relevant and applicable to a determination of this matter. The ALJ noted that in *Renner,* employee grievances must be pursued by the union through the grievance process, and that the Court found the union's pay for services procedure imposed as a condition to processing grievances on behalf of non-members, violated Section 10(2)(a) of PERA by discriminating against nonunion employees, and, as a result, that the union had breached its duty of fair representation by refusing to assist a non-member employee in filing a grievance.

However, the ALJ distinguished the present case from *Renner*, on the basis that here, "individual employees have the right to file and pursue grievances on their own behalf and, in fact, Charging Party exercised that right several times during the months preceding the filing of the charge." (ALJD p. 4).

The ALJ further concluded that pursuant to Section 15(3)(m) of PERA, and relevant case authority concerning prohibited subjects of bargaining, Charging Party had set forth no facts arguably supporting a determination that the Union had violated the Act by refusing to arbitrate his grievances, finding as follows:

> Although Respondent's grievance committee ultimately decided not to advance either of Jaloszynski's grievances to arbitration, Charging Party has failed to assert any facts which, if true, would establish that the Union's decisions were arbitrary, discriminatory, or made in bad faith in violation of the Act. Both grievances raised issues concerning the written reprimand issued by the school district on June 30, 2020. As noted, the first grievance filed by Charging Party alleged that the Employer breached the contract by failing to allow Jaloszynski to address the complaint which led to the disciplinary action, while the second grievance sought removal of the written reprimand from Charging Party's personnel file on the basis that it contains false information.

The ALJ also relied on the premise that "to prevail upon 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" (ALJD at p.3). On that basis, he determined that the Union's refusal to arbitrate Jaloszynski's grievance over the Employer's investigation of systemic harassment and retaliation could not constitute a breach of the duty of fair representation and a violation of Section 10(2)(a), because the Charging Party had failed to identify any provision of the collective bargaining agreement that the Employer had violated, either in engaging in such conduct, or in failing to "effectively" investigate Jaloszynski's claims.

Based on the above analysis and conclusions, the ALJ granted summary disposition to the Union and dismissed the charge. We disagree with the ALJ's factual determinations and legal conclusions.

<u>Discussion and Analysis:</u>

<u>The Standard for Summary Disposition</u>

Under General Rule 165 (2), summary disposition is appropriate where a charge fails to state a valid claim under PERA or where there is no genuine issue of material fact. In such instances, the ALJ is authorized to issue an order requiring a party to assert facts and arguments of law in support of its contention to avoid the grant of summary disposition in the opposing party's favor. *Wayne Cnty*, 24 MPER 25 (2011). Relying on *Smith v Lansing Sch Dist*, 428 Mich 248 (1987), we have consistently held that an evidentiary hearing is not warranted where no genuine material factual dispute exists. *AFSCME Council 25, Local 207*, 23 MPER 101 (2010); *Muskegon Hts Pub Sch Dist*, 1993 MERC Lab Op 869, 870; *Police Officers Labor Council*, 25 MPER 57 (2012). Where, however, a genuine material factual dispute exists, summary disposition is not appropriate. *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016).

<u>The Duty of Fair Representation</u>

The duty of fair representation is a judicially created doctrine founded on the principle that a union's status as exclusive bargaining representative carries with it the obligation and duty to fairly represent all employees in the bargaining unit. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651, 358 NW2d 856 (1984). The elements of a union's duty of fair

representation include: (1) serving the interests of all members of the bargaining unit without hostility or discrimination; (2) exercising its discretion with complete good faith and honesty; and (3) avoiding arbitrary conduct.

A union has considerable discretion to decide which grievances shall be pursued to arbitration and is permitted to assess each grievance based upon its individual merit. It may consider the burden on the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the desirability of winning an individual award versus considerations that affect the membership as a whole. *Lowe v Hotel & Restaurant Employees Union,* 389 Mich 123, 146; 205 NW2d 167 (1973). However, the union must act without fraud, bad faith, hostility, discrimination, arbitrariness, gross nonfeasance, collusion, bias, prejudice, willful, wrongful and malicious refusal, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process a member's grievance. *Id.* at 146-147; *Goolsby* 419 Mich at 663-664. When a union's conduct toward a bargaining unit member is arbitrary, discriminatory, or in bad faith, the Union has breached its duty of fair representation and violated Section 10(2)(a) of PERA. *Id.*

It is likewise well established that a labor organization is the exclusive representative of all employees in a bargaining unit and, under PERA, has a concomitant duty to represent all such employees, regardless of their union membership status.

In *Lansing School District*, 1989 MERC Lab Op 210, we relied on the United States Supreme Court's decision in *Steele v. Louisville and Nashville Railroad Company*, 223 US 192 (1944), to hold that the duty of fair representation under PERA extends to all employees within the bargaining unit, regardless of their union affiliation.

In *Hunter v. Wayne-Westland Cmty. Sch. Dist*., 174 Mich App 330, 335-337 (1989), the Michigan Court of Appeals upheld our determination that a union breached its duty of fair representation and violated Section 10 of PERA when it failed to properly represent a bargaining unit member due to her nonunion status. In affirming our decision, the Court held that an exclusive representative has a duty to represent all members of the bargaining unit and that discrimination based on nothing other than union membership violates the union's duty of fair representation. *Id.* See also, *Government Employees Labor Council*, 27 MPER 18 (2013) (Union's status as exclusive bargaining representative carries with it the obligation to fairly represent all employees in the bargaining unit, members and nonmembers alike, and a union's failure to properly represent a nonmember violates Section 10 of PERA); *SEIU, Local 517M*, 27 MPER 47 (2014).

In 2012, the Michigan Legislature adopted 2012 PA 349 which amended Section 9 of PERA to provide that public employees have a right to refrain from the activities protected by that Section, including the right to form, join, or assist in labor organizations, and added a new Section 9(2) that prohibits "any person from, by force, intimidation, or unlawful threats, compelling or attempting to compel any public employee" to financially support a labor organization or bargaining representative. Section 10(2) provides that it is unlawful for a labor organization to "restrain or coerce public employees in the exercise of the rights guaranteed in Section 9."

Recently, in *Technical Professional and Officeworkers Association of Michigan (TPOAM)*, 33 MPER 40 (2019), affirmed *Technical, Professional and Officeworkers Association of Michigan v Renner*, 34 MPER 32 (2021), we found that the Respondent Union's "Nonmember Payment for Labor Representation Services" Operating Procedure violated Section 10(2)(a) of PERA because it unlawfully discriminated against nonunion members and restrained employees from exercising their Section 9 right to refrain from joining or assisting a labor organization. Additionally, we found that the Respondent Union breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party Renner in the exercise of his Section 9 rights by refusing to file or process his grievance unless he paid the Union a fee for its services.

The fact that individual employees may have the contractual right to file an appeal on a grievance does not relieve a union from the duty to represent those employees if only the union can advance a grievance to arbitration.

In *Goolsby v Detroit*, 419 Mich 651, the charging parties filed unfair labor practice charges alleging that the union had breached its duty of fair representation when it failed to properly and timely appeal their grievances, resulting in the grievances not being arbitrable. The Supreme Court reversed the dismissal by both MERC and the Court of Appeals and held that the inexplicable failure of union officials to process the Charging Parties' grievances within the time limits imposed by the collective bargaining agreement was a breach of the duty of fair representation. *Goolsby* at 680-682. Although the collective bargaining agreement allowed an individual to file a grievance on his own behalf, only the union could process the grievance to arbitration. The Court noted in relevant part:

> . . .[T]he collective bargaining agreement provides that only the union can file for arbitration on behalf of the employee with the employer; the employee himself cannot file. . .This provision. . . places an imposing duty upon the union to file notices of arbitration without mistake. With such a weighty duty, lesser conduct than is required in other circumstances can constitute arbitrary conduct violating the duty of fair representation owed to the employee-union member. (Quoting, *Dutrisac v. Caterpillar Tractor Co.,* 511 F.Supp. 719, 728 (N.D.Cal., 1981).

The Claims Involved in This Matter

In the present case, the terms of the contract ostensibly allow a grievance to be filed by either the Union or an individual employee. Only the Union, however, has the right to appeal a grievance to arbitration. Consequently, Charging Party could not arbitrate his own grievance and, like the employees in *Goolsby* and *Renner*, was forced to rely upon the Union for arbitration.

Under *Goolsby* and *Renner*, the Union's refusal to arbitrate one or more of Jaloszynski's grievances due to his non-member status could constitute restraint and coercion, as well as arbitrary and discriminatory conduct. By stating that "as a nonmember, we have no duty to prepare or advance a grievance on your behalf," the face of the Union's October 16, 2020 email could be construed to mean that it would not "advance" grievances to arbitration for non-members.

Although the Union's attorney asserted various reasons why the email should not support a finding that the Union failed to arbitrate Charging Party's grievances based on his non-member status, we find that a material issue of fact exists concerning the meaning and intent of the words used by the Union in its email. These issues of fact should be resolved through an evidentiary hearing, in which the parties are afforded the opportunity to present record evidence, and the ALJ is able to evaluate the credibility of witnesses and determine the weight to be given to any documentary or other evidence bearing on the matter.

We further find, contrary to the ALJ, that one or more of the matters covered in the grievances Jaloszynski requested the Union arbitrate did not conclusively involve either prohibited subjects or matters not covered by any contract provision.

We recognize that under Section 15(3)(m) of PERA, decisions concerning the implementation of a policy regarding discharge or discipline of an employee, and decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions are prohibited subjects of bargaining. Further, the prohibitions of Section 15(3)(m) are not limited to decisions concerning whether an employee should be disciplined or discharged, but also include the substantive or procedural issues related to the discharge or discipline of individual employees and decisions regarding the procedures set forth in an employer's discipline policy. *Shiawassee ISD*, 30 MERC Lab Op 13 (2017); *Ionia County ISD*, 30 MPER 18 (2016).

An employer does not commit an unfair labor practice by refusing to bargain over a prohibited subject, and a prohibited topic cannot become an enforceable part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996). Likewise, because arbitration is an extension of the collective bargaining process, a union violates PERA if it seeks to arbitrate a matter concerning a prohibited subject. *Pontiac Sch Dist*, 28 MPER 34 (2014); *Ionia Co Intermediate Ed Assn,* 30 MPER 18 (2016); *Shiawassee Intermediate Sch Dist Ed Assn*, 30 MPER 13 (2016). *Michigan Education Association, MEA/NEA*, 30 MPER 62 (2017), affirmed by *Michigan Education Association v. Vassar Public Schoo*ls, 31 MPER 61 (2018).

Contrary to the ALJ, however, we find that aspects of Charging Party's grievances involved matters extraneous to the disciplinary action he had received, and which were at least arguably addressed by the collective bargaining agreement.

Specifically, the first grievance denied arbitration by the Union was the June 12, 2020 grievance over the change in Jaloszynski's teaching assignment as it related to his assertion that he had become the subject of harassment and gender discrimination. He alleged that such actions violated Article I (B) of the contract which, in part, acknowledges that the quality of education provided depends, among other things, on the "morale of the teaching staff".[4] These issues of alleged harassment and discrimination, in the context raised by Charging Party, do not implicate a

[4] In his exceptions, Charging Party also relies upon Article II (C)- Teachers' Rights under Law, which provides that "Nothing contained herein shall be construed to deny or restrict any teacher rights they may have under any state or federal laws and/or regulations. The rights granted to teachers hereunder shall be applied consistently with state and federal laws, but shall be deemed to be in addition to those provided by law."

prohibited subject of bargaining. Although the Employer took the position that the grievance lacked merit, there remains an issue of fact in light of the language used in the October 16 email concerning the reasons the Union refused to "advance," i.e., arbitrate the matter.

Moreover, following his receipt of the Employer's grievance response, Charging Party asserted that the Employer had further violated the contract by failing to respond to his grievance within the ten-day time period required under the contractual grievance procedure, and he requested that this violation also be addressed. Again, there is specific language in the contract concerning this matter, and no prohibited subjects were involved because the Employer's failure to comply with the contractual timelines did not relate to a grievance over a disciplinary action or to any other prohibited subject.

His next grievance which was denied arbitration post-dated the October 16 email. In that grievance, Jaloszynski asserted that (1) his personnel file contained false information which he demanded be removed and destroyed; (2) a complaint was used for disciplinary action which complaint was not called to his attention within ten (10) days of its receipt by the Employer; and (3) the Employer failed to effectively investigate his claims of systemic discrimination, retaliation, intimidation, and harassment. He alleged that such conduct violated Article I (B); Article III (B), and Schedule A-3. The first allegation involves a contract provision which on its face does not implicate a prohibited subject. Although Charging Party sought the removal of any false information in his personnel file, there appears to be a material issue of fact as to whether such information extended beyond the contents of a disciplinary action he received. Moreover, the grievance on its face did not seek the removal of the disciplinary action.

As regards to the second allegation, Schedule A-3 provides that "a complaint against a teacher may not be used as a basis for disciplinary action unless such complaint was called to the attention of the teacher within ten (10) workdays from the receipt of said complaint." It further provides that "if the teacher believes that the personnel file contains information which is false, the teacher may utilize the contractual grievance procedure to have said material removed and destroyed." Because the required notice contained in this provision relates solely to complaints which are "used as a basis for disciplinary action", we agree with the ALJ that this aspect of Charging Party's grievance likely involved a prohibited subject of bargaining. *Ionia County IEA*, 30 MPER 18; *Shiawassee ISD*, 30 MPER 13.

The third allegation concerning discrimination, retaliation, intimidation and harassment, is presumably based on Charging Party's assertion that the Employer violated the contract by destroying "morale" through its failure to effectively investigate his claims of discrimination, retaliation, intimidation, and harassment, in violation of Article I (B), and, according to his exceptions, which may also implicate the provisions of Article II (C). The latter article provides teachers assurances that the contract would not be construed to deny or restrict their rights under state or federal laws, and that their rights under the contract would be applied consistently with state and federal laws. Again, these issues do not involve a prohibited subject of bargaining.

Based on the foregoing, we do not agree with the ALJ's conclusions that "Respondent would have been in violation of § 10(2)(d) of the Act had it sought to arbitrate Jaloszynski's grievances, as both of the grievances pertained to the written letter of reprimand issued by the

school district." To the contrary, it appears that Charging Party has raised certain issues separate and apart from the actual disciplinary action he received, and which do not otherwise implicate prohibited subjects of bargaining.

Furthermore, the issue in a case involving alleged union restraint and coercion under Section 10(2) is not whether Jaloszynski's grievances had merit, but rather, the reasons why the Union refused to arbitrate them. In that regard, we disagree with the ALJ's conclusion that in all cases, a contract violation must be established in order for an individual to prevail on a claim under Section 10(2), particularly when the allegation concerns the individual's non-union status and the exercise of rights guaranteed under Section 9.

We have previously determined, with approval from the Court of Appeals, that a union can be found to have violated Section 10(2) notwithstanding the lack of a finding that the collective bargaining agreement has been violated. In *Renner*, a violation was found based on the union's "pay for services" procedure, despite the lack of a determination that the underlying discipline issued to Renner violated the agreement. See also, *Saginaw Education Association v. Eady-Miskiewicz*, 30 MPER 70 (2017)(Union's refusal to allow employees to resign their memberships constituted a breach of the duty of fair representation in violation of Section 10(2)(a), despite the lack of any contract violation by the Employer); *Goolsby v. Detroit*, 419 Mich 651 (1984)(Union's inexplicable failure to comply with the grievance procedure time limits found to constitute a breach of the duty of fair representation, despite no finding of a contract violation).

Accordingly, in certain limited cases, the issue of the existence of a contract violation has been determined not to be dispositive concerning a union's liability for a violation of Section 10(2), but relevant only to the issue of the available monetary and other damages for such conduct. *Goolsby v. City of Detroit*, 211 Mich App. 214, 223, 535 N.W. 2d 568, 573 (1995)(". . .it was established by the Supreme Court's decision in *Goolsby* that the union had breached its duty of fair representation. However,. . .the charging parties have not established a breach of the collective bargaining agreement. Accordingly, the MERC did not err in determining that no damages were due"). See also, *Ironworkers Local 377, International Assoc. of Bridge, Structural and Ornamental Ironworkers (Alamillo Steel)*, 326 NLRB 375 (1988).

Here, if the Union refused to arbitrate Charging Party's grievances based on a good faith determination that the contract was not violated (or for other good faith reasons), then arguably it did not breach its duty of fair representation, or otherwise violate Section 10(2). If, however, its refusal to arbitrate was based on Jaloszynski's non-union status, then the Union arguably engaged in arbitrary and discriminatory conduct in violation of its duty of fair representation, as well as restraint and coercion, all of which could support the finding of a violation of Section 10(2).

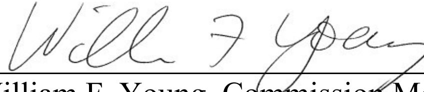
Because we have found that this matter raises genuine issues of material fact, and that the ALJ's basis for summary disposition relied upon legal conclusions with which we disagree, and factual conclusions not supported by the proffered evidence, we find that Charging Party is entitled to an evidentiary hearing on his claims. Accordingly, we reverse the ALJ's Decision and Recommended Order of dismissal on summary disposition and remand this matter for further evidentiary proceedings.

ORDER

IT IS HEREBY ORDERED that the summary dismissal by the Administrative Law Judge of the Charge is reversed, and the matter is remanded for further hearing and the development of relevant record testimony and other evidence consistent with this Decision.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair



William F. Young, Commission Member

Issued: November 12, 2021

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

In the Matter of:

Case No. 21-C-0534-CU
Docket No. 21-005312-MERC

ZEELAND EDUCATION ASSOCIATION,
Respondent-Labor Organization,

-and-

JASON JALOSZYNSKI,
An Individual Charging Party.
_______________________________________/

APPEARANCES:

Kalniz, Iorio & Reardon, Co, LPA, by Fillipe S. Iorio, for the Labor Organization

Jason Jaloszynski, appearing on his own behalf

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed on March 8, 2021, by Jason Jaloszynski against the Zeeland Education Association (ZEA). In the charge, Jaloszynski alleges that the ZEA denied him fair representation based solely upon the fact that he is not a member of the Union. 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 David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (Commission).

An evidentiary hearing was scheduled for April 20, 2021. At the start of the hearing, the Union moved for summary disposition on the ground that the charge failed to state a claim upon which relief could be granted under PERA. Following oral argument, I indicated that I would be granting the motion.

Findings of Facts:

The following facts are based upon the allegations set forth in the unfair labor charge, including the attachments thereto, and Jaloszynski's arguments in response to the Union's motion for summary disposition. Charging Party is employed as a teacher by Zeeland Public Schools and is a member of a bargaining unit represented for purposes of collective bargaining by the Respondent. Jaloszynski is not, however, a member of the ZEA. Pursuant to the terms of the

collective bargaining agreement between the ZEA and the school district, grievances may be filed by the Union on behalf of members of the bargaining unit or by individual employees themselves.

On or about June 30, 2020, the school district issued a written letter of reprimand to Jaloszynski, a copy of which was placed in his personnel file. Jaloszynski filed a grievance asserting that the employer had breached the terms of the collective bargaining agreement by issuing the reprimand without first giving him the opportunity to address the complaint which led to the disciplinary action. The grievance was processed through the contractual grievance procedure, culminating with a request by Jaloszynski that the Union take the matter to arbitration. The grievance was the subject of discussion during a meeting of the ZEA's grievance committee. Jaloszynski addressed the committee at that meeting and presented evidence on his behalf. By email dated October 14, 2020, the Union's grievance chairperson, Angela Lloyd, notified Jaloszynski that the committee had determined that the school district had not breached the collective bargaining agreement and, therefore, the ZEA would not be advancing the grievance to arbitration.

The following day, Charging Party sent an email to Lloyd and other members of the grievance committee requesting assistance in drafting a new grievance for the purpose of forcing the school district to remove the written letter of reprimand from his personnel file. During oral argument in this matter, Jaloszynski explained that Section 3(a) of the collective bargaining agreement gives teachers the right to utilize the contractual grievance procedure to compel the employer to remove false material from a teacher's personnel file. Jaloszynski also wanted the grievance to address claims of systemic harassment and retaliation. The school district had previously used a law firm to investigate such claims, but Jaloszynski believed that the investigation was insufficient and wanted to use the grievance process to compel the employer to procure the services of an "impartial body" to look into his claims.

On October 16, 2020, Lloyd sent an email to Jaloszynski which stated, "You have elected to not become a member of the Zeeland Education Association. As a non-member, we have no duty to prepare or advance a grievance on your behalf. You have a copy of the grievance form and the contract allows you to file a grievance." As suggested by Lloyd, Charging Party filed his own grievance seeking to compel the school district to initiate a new investigation of his harassment claims and remove the written reprimand from his personnel file. Jaloszynski processed the grievance through the contractual grievance procedure and appeared before the Union's grievance committee, where he once again spoke and presented evidence. On or about January 12, 2021, the ZEA notified Charging Party that it had decided not to advance the grievance to arbitration.

Discussion and Conclusions of Law:

Pursuant to Rule 165(1), R 423.165(1), of the General Rules and Regulations of the Employment Relations Commission, which govern practice and procedure in administrative hearings conducted under PERA by MOAHR, the ALJ may "on [his] own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." Among the various grounds for summary dismissal of a charge is a failure to state a claim upon which relief can be granted. See Rule 165(c). After carefully considering the arguments set forth by the parties in this matter, I conclude that dismissal of the charge on summary disposition is warranted.

Charging Party contends that the ZEA violated its duty of fair representation by failing to help him file a grievance based solely upon his nonmember status. 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). The 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. A labor organization has the legal discretion to make judgments about what will serve the general good of the membership and to proceed on such judgments, even though they may conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218, citing *Lowe v Hotel and Restaurant Employees Union, Local 705*, 389 Mich 123 (1973). The mere fact that a member is dissatisfied with their union's efforts 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 County DPW*, 1994 MERC Lab Op 855.

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 v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993). A union's duty of fair representation extends to union conduct in representing employees in their relationship with their employer. *Wayne Co Cmty Fed'n of Teachers, Local 2000*, AFT, 1976 MERC Lab Op 347.

In support of his duty of fair representation claim, Charging Party relies on the October 16, 2020, email in which the ZEA grievance chairperson asserted that Respondent had no obligation to help Jaloszynski prepare or advance a grievance. In *TPOAM v Renner*, __ Mich App ___ (Docket No. 341991, issued January 7, 2021), the Court of Appeals affirmed the Commission's determination that the union's pay-for-services procedure violated § 10(2)(a) of PERA by discriminating against nonunion employees and prevented them from exercising their § 9 right to refrain from joining or assisting a labor organization and that the union had breached its duty of fair representation by refusing to file a grievance on behalf of an employee who had opted out of union membership. In concluding that the union's refusal to assist an employee in filing a grievance constituted a breach of the duty of fair representation, the Court relied, in part, upon the fact that the collective bargaining agreement prohibited individual employees from filing grievances:

> As exclusive representative of Renner's bargaining unit, respondent negotiated a grievance process that governed Renner's employer and all members of the bargaining unit. Although the CBA has not been produced in this case, respondent confirmed that the grievance process must be pursued by the union. An individual employee cannot take advantage of the negotiated process in his or her own right. In other words, respondent secured a valuable right for all members of the bargaining unit including Renner, but through its pay-for-services procedure, effectively foreclosed a nonunion employee's ability to use the grievance process absent payment for services.

In the instant case, access to the contractual grievance process is not limited to Respondent or its officers. The parties agree that individual employees have the right to file and pursue grievances on their own behalf and, in fact, Charging Party exercised that right several times during the months preceding the filing of the charge. In June of 2020, Jaloszynski filed a grievance asserting that the employer had breached the terms of the collective bargaining agreement by reprimanding him without first giving him a timely opportunity to address the complaint which led to the discipline. Charging Party filed a second grievance after he received the October 16, 2020, email in which Llyod asserted that the Union would not aid Jaloszynski in preparing the grievance. Unlike in *Renner*, there is no claim that the school district refused to accept either of Charging Party's grievances because they were filed by an individual employee instead of by the Union or its officers. Moreover, the ZEA provided Jaloszynski an opportunity to attend grievance committee meetings at which the grievances were discussed. At each of those meetings, Jaloszynski was allowed to address the committee and present evidence in support of his requests to have the matters proceed to arbitration.

Although Respondent's grievance committee ultimately decided not to advance either of Jaloszynski's grievances to arbitration, Charging Party has failed to assert any facts which, if true, would establish that the Union's decisions were arbitrary, discriminatory, or made in bad faith in violation of the Act. Both grievances raised issues concerning the written reprimand issued by the school district on June 30, 2020. As noted, the first grievance filed by Charging Party alleged that the employer breached the contract by failing to allow Jaloszynski to address the complaint which led to the disciplinary action, while the second grievance sought removal of the written reprimand from Charging Party's personnel file on the basis that it contains false information.

Pursuant to § 15(3)(m) of PERA, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit are prohibited subjects of bargaining. The Commission has held that § 15(3)(m) is not limited to decisions concerning whether an employee should be disciplined or discharged, but also covers substantive or procedural issues related to the discharge or discipline of individual employees and decisions regarding the procedures set forth in an employer's policy regarding discipline and discharge. *Shiawassee ISD*, 30 MERC Lab Op 13 (2017); *Ionia County ISD*, 30 MPER 18 (2016). The designation of a topic as a prohibited subject forecloses the possibility that a school district can be found to have committed an unfair labor practice by refusing to bargain over a prohibited topic or that a prohibited topic could become part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996).

Because grievance arbitration is an extension of the collective bargaining process, Respondent would have been in violation of § 10(2)(d) of the Act had it sought to arbitrate Jaloszynski's grievances, as both of the grievances pertained to the written letter of reprimand issued by the school district. Under such circumstances, the Union's decision not to advance such grievances to arbitration cannot support a finding of a breach of the duty of fair representation. *Detroit Fed'n of Teachers*, 28 MPER 42 (2014) (charge alleging a breach of the duty of fair

representation dismissed where the union lacked the legal authority to grieve issues because they were prohibited subjects of bargaining).

In addition to seeking removal of the written reprimand from Charging Party's personnel file, the latter grievance raised an issue concerning an investigation conducted by the school district into Jaloszynski's claims of systemic harassment and retaliation. According to Jaloszynski, the grievance asserted that the investigation was faulty and it sought to compel the employer to procure the services of an "impartial body" to examine his claims. During oral argument, Charging Party was repeatedly asked to identify what contractual language was implicated by this portion of the grievance. After initially refusing to answer the question on the ground that it was not relevant to the charge, Jaloszynski cited the preamble to the contract which he claims obligates the employer and the ZEA to create an environment that is "good for the students." Even assuming arguendo that the school district's investigation was not properly conducted, that fact would not be sufficient to establish a viable breach of contract claim based upon the language relied upon by Charging Party. Moreover, Jaloszynski did not cite any provision in the agreement which would have obligated the school district to utilize a different outside entity to conduct such an investigation, which was the relief sought in the grievance. As noted, a charging party must establish a breach of the collective bargaining agreement by the employer in order to prevail on a claim of unfair representation. *Goolsby v Detroit*; *Knoke v East Jackson Public Sch Dist*.

Despite having been given a full and fair opportunity to do so, Charging Party has failed to set forth any factually supported claims which, if true would establish a violation of the duty of fair representation by the ZEA. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Jason Jaloszynski against the Zeeland Education Association in Case No. 21-C-0534-CU; Docket No. 21-005312-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: May 24, 2021