STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES (IATSE), LOCAL 274,
Labor Organization-Respondent,

MERC Case No. CU18 D-008

-and-

JASON ENDRES,
An Individual Charging Party.
_____/

APPEARANCES:

Pinsky, Smith, Fayette & Kennedy, LLP, by Michael L. Fayette, for Respondent

Jason Endres, appearing on his own behalf

DECISION AND ORDER

On September 11, 2018, Administrative Law Judge Julia C. Stern issued her 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 26, 2018

[1] MAHS Hearing Docket No. 18-008996

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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-and- Docket No. 18-008996-MERC

JASON ENDRES,
An Individual-Charging Party.
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APPEARANCES:

Pinsky, Smith, Fayette & Kennedy, LLP, by Michael L. Fayette, for Respondent

Jason Endres, appearing for himself

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

On April 26, 2018, Jason Endres, a member of the International Alliance of Theatrical State Employees (IATSE) Local 274, filed the above unfair labor practice charge against this labor organization pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On May 29, 2018, Respondent filed a motion for summary dismissal of the charge pursuant to Rule 165(2)(d) and (f) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.165(2)(d) and (f). The motion included an affidavit executed by Respondent Business Agent Matthew Woolman on May 23, 2018. Endres filed a response to the motion on June 18, 2018. Respondent filed a reply to the response on July 5, 2018.

Based on facts set out in Endres' charge, his response to Respondent's motion, and documents he attached to those pleadings, as set forth below, I make the following conclusions of law and recommended order.

The Unfair Labor Practice Charge:

Respondent represents stage hands and other stage employees in the Lansing area and operates a hiring hall which supplies employees to venues operated by employers in this area with which Respondent has collective bargaining agreements. Endres is a full-time on-call stagehand who receives

employment referrals from Respondent. The events giving rise to this charge arose from Endres' employment by Michigan State University (the University) at its Breslin Student Events Center Arena (Breslin Center). As explained in more detail below, on October 19, 2017, Endres received a referral to work at an event at the Breslin Center on October 20, 2017. Although Endres was told by Respondent that he was to work as a head carpenter, Mark Dillon, a "house" stage manager at the Breslin Center, assigned Endres to work as a regular stage hand and assigned another on-call stage hand to work as head carpenter.2 After speaking to Respondent's call steward, Endres told Dillon that he was being replaced and that he was leaving. In March 2018, Endres learned that Dillon had banned him from working at the Breslin Center. Respondent refused to file a grievance over the ban and insisted instead that Endres apologize to Dillon for leaving the work site on October 20, 2017. Endres did apologize and was then told that he could return to work and would not be disciplined.

Endres alleges that Respondent violated its duty of fair representation toward him and Section 10(2)(a) of PERA in its handling of his dispute with Dillon, including its refusal to file a grievance over his ban from the Breslin Center.

Facts:

Events on October 20, 2017, and Endres' Ban from the Breslin Center

The following facts are set forth in Endres' charge, response to the motion and attachments to his pleadings. Except as specifically indicated below, they are not disputed by Respondent. As noted above, Respondent operates a hiring hall. Respondent maintains four referral lists for on-call employment, A, B, C, and D. Individuals are placed on a referral list based on their skills, the amount of work they have performed in the past, and their availability. In order to maintain a spot on any referral list, individuals must also pass a test administered by an IATSE local union. The A and B lists are arranged on the basis of years of service as a stage employee within Respondent's jurisdiction, and individuals are referred on a rotating basis beginning with the most senior person.

Endres appears on Respondent's Class B referral list. Endres is eligible for referrals for regular stagehand work for which he is paid the "base stagehand" rate. He is also eligible to work as a head carpenter, a "lead" position for which he is paid a higher hourly rate.

Matt Woolman is Respondent's business agent. He is also employed by the University as house staff. Dan Aguirre is Respondent's call steward. After employers call Respondent to ask for on-call workers, Aguirre makes assignments from the referral lists. He then contacts the individuals, often by text, to ask whether they will accept the referral.3 When an employer indicates that it needs an employee for a specific position, such as head carpenter, Aguirre contacts an individual who is eligible for referral to that position. He also provides the employer with the names of the individuals who have accepted referrals to its event.

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2 House staff at the Breslin Center, who are also included in Respondent's bargaining unit, are full-time employees of the University.

3 Under Respondent's referral procedure, individuals are allowed a certain number of "turn downs." After exceeding that number, they are suspended from the rotation for a period.

On October 19, 2017, Aguirre texted Endres and asked him if he was available to work the following day at the Breslin Center. Aguirre told Endres that he would first work the "load in" as a stage hand and then take over as head carpenter for the "load out." Endres accepted the referral. On October 20, Endres worked the load in. At the start of the load out, Endres signed in as head carpenter and went out to the work area. There he discovered that the crew was short several stage hands. After another employee came up to Endres and told him that he, Endres, needed to sign in, Endres went to the stage office to find out what was going on. When Endres spoke to Dillon, Dillon told him that he was not the head carpenter, but a stage hand on this call. Endres told Dillon, "No, I am the head carpenter. I accepted the call as a head carpenter and not a hand." Endres then showed Dillon his text from Aguirre with his assignment. Dillon replied, "I don't care. You are a hand. Go to work."

Endres left the office and phoned Aguirre. Aguirre said that he already knew about the reassignment and had called Woolman and was waiting for Woolman to call him back. Endres asked Aguirre if he (Endres) "could be replaced." Aguirre said yes, but asked Endres if he wanted to stay since he was already there. Endres said that he wanted to leave. He told Aguirre that he was not feeling well because of a sinus headache and that the only reason he did not call off earlier was because he was needed as head carpenter. Endres asked Aguirre if he needed to stay at the Breslin Center until his replacement arrived, and Aguirre said that he could go home. Aguirre told Endres to tell Dillon he was leaving.

After speaking to Aguirre, Endres returned to Dillon's office and told him that Respondent was replacing him. Dillon cut him off and ordered him to return to work. Endres said again that Aguirre was replacing him and turned to leave. As Endres was walking out the door, Dillon yelled, "If you walk out that door you will never work again." Endres did not mention his sinus headache to Dillon.

At Respondent's monthly membership meeting held a few days later, Endres brought up the events of October 20, including Dillon's refusal to let him work as head carpenter. Endres asked whether the University's contract allowed it to change a person's department or role after Respondent had assigned the call. Respondent President Jim Peters said that this was a grievable offense and told Endres and Aguirre to provide written statements about the incident to Respondent's executive board. There was other discussion of the October 20 incident during the meeting, but Endres did not provide details in his pleadings. Woolman stated in his affidavit that Respondent did not learn about Endres' sinus headache until after Endres filed his unfair labor practice charge. However, according to Endres, he explained during the membership meeting that he had left the Breslin Center because he had a sinus headache.

After the membership meeting, Endres emailed his account of the events on October 20, to Peters. On October 24, 2017, Peters emailed Endres that Respondent was "working to see that this kind of situation did not happen again, and [if] it does, stage management will handle the situation correctly." Endres did not receive any further communication from Respondent about the matter. According to Endres, he believed that the situation had been resolved informally.

Endres continued to receive referrals from Respondent to venues other than the Breslin Center. Endres' next referral to the Breslin Center was for an event on January 26, 2018, and Endres worked that event without challenge. On March 7, 2018, Aguirre gave him a referral to work an event at the Breslin Center on March 9 and March 12, 2018. Endres worked on March 9. However, when he

appeared at the Breslin Center on March 12, his name was not on the sign-in sheet. Endres called Aguirre, who told Endres that he had misunderstood Aguirre's text and that he was not supposed to work that day. Endres then emailed Woolman but did not receive a response. The following day, March 13, Endres was working at another venue when he encountered Woolman. Woolman told him that Dillon had banned him from working at the Breslin Center because he walked off the job on October 20, 2017. Endres told Woolman that he had been replaced on that date. He also complained that he had not received written notice that he had been banned from either the University or Respondent. Endres also told Woolman that he had worked at the Breslin Center a couple of times since October 20, 2017.

Endres was apparently not told when Respondent was informed by the University that he was banned. Endres later asked Respondent for records of the referrals it made between November 2017 and March 2018 to determine whether the ban had caused him to lose work opportunities during this period, but Respondent did not give him the records. In his affidavit, Woolman admits that Endres was banned for "several months," but asserts that Endres did not lose work because he was referred to other venues during the ban.

At Respondent's next general membership meeting, on March 26, 2018, Endres asked about the status of his ban. Peters and Woolman told Endres that if he wanted to work at the Breslin Center again he would have to apologize to Dillon. Woolman also told Endres that it was in Endres' best interest not to file a grievance. Endres responded that he did not feel the need to apologize because he had not done anything wrong. Woolman said again that if Endres wanted to return to the Breslin Center he would have to apologize. Peters then asked Endres if he was willing to meet with Dillon. Endres said that he would. According to Endres, Woolman told him that he, Woolman, would set up the meeting.

On March 31, when Endres had not heard anything about the proposed meeting with Dillon, Endres emailed Peters and Woolman and complained that they were dragging their feet. Endres told them that "this should have been taken care [of] back in October when I brought it up at the October General Membership meeting but wasn't." Endres also said in the email that he had changed his mind about apologizing and that he wanted to file a grievance.

Woolman called Endres on April 3, 2018. Either in that conversation or at the March 31, 2018, meeting, Woolman told Endres that he had not wanted to file a grievance back in October because Dillon would have given Endres a hard time. During the April 3, 2018, conversation, Woolman told Endres that Respondent would not file a grievance over Endres' ban from the Breslin Center. Endres then asked Woolman about meeting with Dillon. Endres said that he could not meet the following week because he was working elsewhere every day that week. Woolman told Endres that Aguirre would arrange to give him a call-out in Lansing so that he would not have to make a special trip for the meeting.

On April 16, Endres emailed Woolman asking about the meeting and complaining that there was work at the Breslin Center for which he was not receiving calls. Endres again reiterated that he had not received a written notice of the ban and asked to see anything Respondent had in writing. Endres also asked Woolman "if the Local was going to represent me." Woolman replied in an email that Endres was supposed to ask Aguirre to schedule the meeting but that Endres had "neglected to do that simple action." After Endres called Aguirre, Aguirre arranged a meeting with Dillon for noon on April 18.

Endres' situation was discussed at a general membership meeting on the evening of April 16 at which Endres was not present.

Endres and Woolman exchanged additional emails on April 17 and on the morning of April 18. In these emails, Endres maintained again that he had nothing to apologize for. Woolman told Endres that he did not have the right to walk off the job and that Respondent could not defend him. At noon on April 18, Endres, Aguirre and Dillon met and Endres apologized to Dillon for leaving the Breslin Center on October 20. Dillon gave Endres a lecture but afterward told him that he could return to work and would not be written up for the incident.

Pertinent Provisions of the Collective Bargaining Agreement

Article 6 of the collective bargaining agreement between Respondent and the University requires the University to designate department heads for carpentry, flyrail, properties, wardrobe, electrics, sound and hair "to the extent required by the event." Per contract, department heads are paid an hourly on-call rate higher than the "basic hand rate."

Article 6, paragraph 26(C)(d) states:

> On-call employees will be assigned stage work related to the needs of the function by the Director or other designated University official(s).

In addition, Article 7, paragraph 47 of the contract reads as follows:

> The business agent or designated representative will supply the director or designee with a list of personnel and work assignments for each call no less than (1) hour prior to the start of call. A minimum of twelve (12) hours shall be given if the business agent or designated representative is unable to meet the personnel requirement of the call.

Under the collective bargaining agreement between Respondent and the University, the University must have just cause to refuse a referral of a stagehand. Article 7, paragraph 45, states:

> It is understood that the Employer may, with reasonable and just cause, direct in writing that specific individuals not be referred to calls on the campus of MSU.

According to Woolman's affidavit, "walking off from a job without good reason has been determined in the past to be good cause."

Discussion and Conclusions of Law:

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.*

Although a union owes a duty to all its members, its ultimate duty is to its membership as a whole. Therefore, a union, as long as it acts in good faith, has considerable discretion to decide how or whether to proceed with any particular grievance. That is, a union is not required to file a grievance under all circumstances, and an employee does not have the right to demand that it do so. Rather, a union is permitted to assess each grievance on its individual merit and to weigh the likelihood of the grievance's success against the cost to the union of pursuing it. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. The Commission does not substitute its judgment as to the merits of the grievance for that of the union. A union's deliberate, reasoned decision not to file or pursue a grievance, if made in good faith, is held to be lawful as long as it is not outside the range of reasonableness . *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.

In his response to Respondent's motion, Endres asserts that the fact that Woolman is employed by the University as house staff at the Breslin Center is why Respondent refused to file a grievance over his ban. Endres asserts that Woolman's failure to notify him that he had been banned from Breslin until March 13, 2018, almost four months after the incident occurring on October 20, 2017, demonstrates Woolman's bad faith. As indicated in the fact section, Endres did not learn of the ban until after he appeared for work and was turned away; Woolman admits that he was banned for "several months." While Respondent does not explain why it did not tell Endres sooner, Woolman's affidavit suggests that he may have deliberately delayed informing Endres about the ban in hopes that Dillon's temper would cool. I conclude that, whatever Woolman's reason for not informing Endres immediately, the fact of the delay, standing alone, does not support a finding that Woolman acted in bad faith by refusing to file a grievance over the ban. I also find that Endres did not allege any other facts that might suggest that Woolman's decision was motivated by his employment by the University or that his motives were otherwise improper. I conclude, therefore, that Endres failed to provide a factual basis for his claim that that Respondent acted in bad faith by refusing to file a grievance.

When Endres first complained to Respondent at a membership meeting about Dillon's October 20, 2017, conduct, Respondent President Peters told him that Dillon's refusal to allow him to work as head carpenter was grievable. However, Endres admits that he was aware that Respondent did not intend to file a grievance over Dillon's conduct on October 20, 2017. He did not press Respondent to file a grievance because he believed that Respondent had resolved the issues informally. Part of the current dispute between Endres and Respondent, however, is whether Dillon had a contractual right to assign Endres to work as a hand after Respondent had referred him to the job as head carpenter. In its motion, Respondent, citing Article 6, paragraph 26(C)(d), argues that Dillon had the right under the contract to determine which stage hand would be the head carpenter. Endres disagrees, citing Article 7, paragraph 47. As discussed above, when an employee alleges that his or her union is interpreting the collective bargaining agreement incorrectly, it is not the role of the Commission to determine which interpretation is correct. That is, the law is well established that a union's decision not to file a

grievance, if made in good faith, does not violate its duty of fair representation as long as that decision is not so far outside the range of reasonableness that it can be considered irrational. I find that Respondent's position that the contract allowed Dillon to reassign Endres to work as a hand on October 20, 2017, was based on the contract language and was not irrational or arbitrary. Based on the facts asserted in the charge, therefore, I conclude that Respondent did not violate its duty of fair representation under Section 10(2)(a) of PERA by taking that position.

Moreover, even if an arbitrator found that Dillon violated the collective bargaining agreement by changing Endres' assignment, he or she might nevertheless have concluded that the University had just cause for banning Endres from the Breslin Center. According to Woolman, walking off a job without good reason has been determined to constitute just cause for the University to ban an individual from working for it. On October 20, 2017, Dillon was short stage hands for the load out at Breslin and told Endres to get to work immediately. Endres twice told Dillon that he was being replaced, but did not ask Dillon, as he had asked Aguirre, whether he should wait until his replacement showed up. Nor did he tell Dillon, as he had told Aguirre, that he had a sinus headache or that this was the reason he was leaving. Since Dillon had threatened him with discipline if he left, Endres knew Dillon was ordering him to return to work. As the ALJ noted in *City of Detroit, Water and Sewerage Dept,* 1997 MERC Lab Op 117, 125, there is a well-established principle of labor relations that an employee is generally required to obey an order and grieve it later. Under the facts as described by Endres, if an arbitrator were to apply that rule to the October 20, 2017, incident, he or she might find Endres guilty of insubordination.

As discussed above, a union is permitted in each individual case to weigh the likelihood that the grievance will succeed against the cost of pursuing it. Here, in addition to the costs that Respondent might incur in pursuing the grievance, and the fact that Endres might remain banned from the Breslin Center while the grievance was being processed to arbitration, there was a substantial risk that an arbitrator might agree that there was just cause for the ban. I find that under these circumstances, Respondent's refusal to file a grievance and its insistence that Dillon instead apologize for his conduct on October 20, 2017, was neither irrational nor unreasonable. I conclude, therefore, that based on the facts as alleged by Endres, Respondent's decision not to file a grievance over Endres' ban from the Breslin Center was neither arbitrary nor made in bad faith.

Rule 165(1) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423. 165(1), states that the Commission or administrative law judge designated by the commission may, on its own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party on grounds set forth in Rule 165, including that there is no material dispute of fact and the respondent is entitled to judgment as a matter of law. Based on facts as alleged by Endres, I find that Respondent's motion to dismiss Endres' charge alleging that it breached its duty of fair representation should be granted, and that the Commission should 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: September 11, 2018