

STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN FRATERNAL ORDER OF POLICE LABOR COUNCIL (FOPLC),  
Labor Organization-Respondent in Case No. 19-A-0090-CU and Case No. 19-A-0093-CU,

-and-

HARPER WOODS PATROL UNION,  
Labor Organization-Respondent in Case No. 19-A-0094-CU

-and-

SANDRA HERNDEN,  
An Individual-Charging Party in Case No. 19-A-0090-CU and Case No. 19-A-0094-CU,

-and-

ANTHONY ABDALLAH,  
An Individual-Charging Party in Case No. 19-A-0093-CU.

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APPEARANCES:

Cummings & Cummings Law Group, PLLC, by Heather Cummings, for Respondents Michigan Fraternal Order of Police and Harper Woods Patrol Union

Sandra Hernden and Anthony Abdallah, appearing for themselves

**DECISION AND ORDER**

On July 9, 2019, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order<sup>1</sup> in the above matter finding that Respondents 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.

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<sup>1</sup> MOAHR Hearing Docket Nos. 19-002679, 19-002682, & 19-002674

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 any 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



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Edward D. Callaghan, Commission Chair



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Robert S. LaBrant, Commission Member



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Natalie P. Yaw, Commission Member

**AUG 21 2019**

Issued: \_\_\_\_\_

TRUE COPY

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

In the Matter of:

MICHIGAN FRATERNAL ORDER OF POLICE LABOR COUNCIL (FOPLC),  
Respondent-Labor Organization in Case No. 19-A-0090-CU/19-002679-MERC  
and Case No. 19-A-0093-CU/19-002682-MERC,

-and-

HARPER WOODS PATROL UNION,  
Respondent-Labor Organization in Case No. 19-A-0094-CU/19-002674-MERC,

-and-

SANDRA HERNDEN,  
An Individual-Charging Party in Case No. 19-A-0090-CU/19-002679-MERC,  
and Case No. 19-A-0094-CU/19-002674-MERC,

-and-

ANTHONY ABDALLAH,  
An Individual-Charging Party in Case No. 19-A-0093-CU/19-002682-MERC.

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APPEARANCES:

Cummings & Cummings Law Group, PLLC, by Heather Cummings, for Respondents  
Michigan Fraternal Order of Police and Harper Woods Patrol Union

Sandra Hernden and Anthony Abdallah, appearing for themselves

**DECISION AND RECOMMENDED ORDER**  
**OF**  
**ADMINISTRATIVE LAW JUDGE**

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard on March 25, 2019, before Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Administrative Hearing System (now Michigan Office of Administrative Hearings and Rules) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including written closing statements filed by the parties on or before May 16, 2019, I make the following findings of fact, conclusions of law, and recommended order.

### The Unfair Labor Practice Charges:

On January 28, 2019, Sandra Hernden and Anthony Abdallah, both employed as police officers by the City of Harper Woods (the Employer), filed unfair labor practice charges against their collective bargaining representative, Michigan Fraternal Order of Police Labor Council (FOPLC). Hernden also filed a charge against the FOP's local affiliate, the Harper Woods Patrol Union (Local Union).<sup>1</sup> These charges were consolidated for hearing.<sup>2</sup>

In an election conducted on January 21, 2019, the Union's members, by a vote of nine to eight, ratified a tentative agreement reached by the Union and the Employer on January 15, 2019. The charges allege that the Union violated its duty of fair representation and Section 10(2)(a) of PERA by various acts of commission and omission committed by the Union in connection with the ratification of the contract. These include: (1) that the Union conducted the January 21, 2019, vote pursuant to new procedures set out in new bylaws that had not been distributed to members; (2) that the Union refused to allow Officer Thomas Silva, who was unable to be present in person at the January 21 meeting, to vote by other means after Silva expressed his intention to vote no on the contract; (3) that in response to questions at the January 21 meeting about compulsory interest arbitration, the Union falsely informed the membership that if the members did not ratify the tentative agreement they would "lose everything the City was offering," the Employer would be taken over by an emergency manager, and the Employer would go bankrupt and officers would be laid off; (4) that the Union was unable to answer members' questions about the tentative agreement at the January 21 meeting and misrepresented the amount of the pay increases contained in the agreement; (4) that the Union refused to provide Dispatcher Rosemarie Schroeder with an alternative means to vote after her supervisor refused to let her leave her post to vote in the January 21 election, and did not allow Schroeder's vote to be counted until after she complained; (5) that after Officer Stephen Johnson complained about his placement on the salary scale in the January 15 tentative agreement, Local Union President David Holfelder solicited the Employer to change his placement in order to influence his vote.

On February 21, 2019, the Employer, because of complaints from employees about the agreement and how the election was conducted, asked the Union to rerun the election. The Employer presented the Union with a second document with some minor "enhancements," and the Union scheduled an election for members to vote on the revised agreement. On March 1, 2019, the Union's membership voted thirteen to five to accept the substitute agreement.

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<sup>1</sup> The two labor organizations are collectively referred to in this decision as the Union.

<sup>2</sup> Hernden and Abdallah also both filed charges against the City of Harper Woods. See Case No. 19-A-0089-CE/19-0002678-MERC and Case No. 19-A-0088-CE/19-002680-MERC. The charges, also assigned to me, were consolidated. On February 20, 2019, I issued an order to Hernden and Abdallah to show cause why these charges should not be dismissed on the grounds that they did not allege a claim against the Employer upon which relief could be granted under PERA. Hernden and Abdallah did not respond to my order. On July 9, 2019, I issued a Decision and Recommended Order recommending dismissal of both charges.

Findings of Fact:

Prior to February 2018, the Union's bargaining unit was represented by the Harper Woods Public Safety Officers/Detective/Dispatcher Association, a local affiliate of the Police Officers Association of Michigan (POAM). The last collective bargaining agreement between the Employer and the POAM covering this unit covered the term January 1, 2009, through December 31, 2016. In February 2018, the FOPLC filed a petition for representation election and was certified as the bargaining agent for full-time nonsupervisory patrol officers, detectives, and dispatchers on March 20, 2018. The local affiliate then changed its name to the Harper Woods Patrol Union. Holfelder, who became president of the local affiliate in June 2017, continued as president of the Harper Woods Patrol Union.

2017 Local Union Bylaws

At a membership meeting held on December 6, 2017, while the POAM was still the bargaining representative, the Local Union adopted a set of bylaws. Holfelder testified that as far as he knew there were no bylaws before these bylaws were adopted. Article VIII, entitled "Grievances and Contract Ratification," included the following paragraphs:

Ratification of new collective bargaining agreement: A collective bargaining agreement negotiated between the union and the employer through the collective bargaining committee must be voted on at a meeting called for the purpose of a ratification vote. Ratification of a new collective bargaining agreement will be by a simple majority of those members present at such ratification meeting. Notice of the result of the ratification should be immediately given to the POAM or its representatives.

Absentee ballot for union voting. An absentee ballot may be cast via text message, telephone, or US Mail. Absentee ballots must be cast with the "election monitor" (Article V Section II) and placed in the ballot box. Written absentee ballots shall be returned to an Executive Board member and it shall not be opened until the day of voting. No other member shall be permitted to cast a vote in another's absence. An absentee ballot will be accepted in the following cases ... (Funeral, Bereavement, Vacations, Training Days, Sick Days, Hardship Cases, and on a case by case basis as determined by the Executive Board.)

Both Hernden and Silva testified, without contradiction, that prior ratification elections had been held over a period of several days and that members voted by placing their ballots in the ballot box at any time during the election period. Although copies of the new bylaws were passed out to Union members who attended the December 6, 2017,

Union meeting, the bylaws were not otherwise distributed to the membership until sometime after the January 21, 2019, election.

### Contract Negotiations and the January 15, 2019 Tentative Agreement

After the FOPLC's election, a Union bargaining committee was formed consisting of FOPLC Director of Labor Services David Willis, Holfelder, and Local Union Vice President Adam Lewis. In October 2018, the Union's bargaining committee held a meeting with the membership to discuss the terms of an Employer proposal. As Willis testified, the proposal sought to close the pay gap between so-called "Tier One" officers in the unit, who were generally more senior, and "Tier Two" officers. The terms of the proposal, therefore, were overall more favorable for the less senior officers. During the meeting, Willis discussed the financial documents he had received from the Employer. Hernden testified that the information Willis had obtained seemed to be out of date, although Willis testified that documents that he discussed covered the Employer's previous fiscal year. Willis testified that at this meeting he emphasized the fact that the unit's pension was only 45% funded and that retiree health care was pay-as-you-go, meaning that the Employer had no money set aside to cover this benefit. According to Willis he also explained the new legal requirements imposed on municipalities by the State of Michigan that meant that the Employer would have to begin setting aside more money to go into the pension fund and to pre-fund retiree health benefits.

During the October meeting, Hernden said that the offer was not very good and asked the bargaining committee about filing for compulsory arbitration. Holfelder and Willis explained that while this was the Employer's current offer, its "table position" was no raises for 2017 or 2018, a 1% increase for 2019 and a 1% increase for 2020. They said that if the Union were to file for compulsory arbitration, the Employer would withdraw its current offer and retreat to its table position, or, as Hernden recalled their statement, "the crappiest offer the Employer could come up with."

On January 15, 2019, the Employer and Union reached a tentative contract agreement covering the period January 1, 2018, through December 31, 2020. The tentative agreement was not substantially different than the Employer's October 2018 offer. Tier One officers had their annual pension contribution reduced by 1%, while the Tier Two Officers had theirs reduced by 2%. The pension multiplier for officers hired before January 1, 2014 was reduced from 2.5 to 2.0, but there was no reduction in the multiplier for less senior officers which was already less than 2.5. There was also a change in retiree health care benefits for Tier One officers hired before January 1, 2015, a category which included all the current Tier One officers. The agreement replaced these officers' Employer-paid retiree health benefits with Employer contributions to a retiree health care savings account (RHSA).<sup>3</sup> The Employer, however, agreed to pay this group of officers monthly stipends to help cover the cost of health insurance after they retired until they became Medicare-eligible.

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<sup>3</sup> Tier Two officers had no retiree health care benefits at the time that the tentative agreement was reached, and the tentative agreement did not provide them with any.

There were also benefits and take-aways which applied to all unit members. For example, all officers and the dispatcher were to receive a signing bonus after the contract was ratified, and everyone's life insurance benefits were to be increased. However, two health plans previously available to members were eliminated, leaving active employees with only a high-deductible health plan. The Employer's payments into employees' health care savings plans (HSAs) were reduced.

Under the tentative agreement, Tier Two officers were to begin receiving the "merit increases" based on years of service that Tier One officers had been receiving. The tentative agreement also had a new wage schedule for Tier Two Officers. Like the wage schedule in the POAM agreement, the new wage schedule included step increases based on months of service. However, according to testimony, the number of steps, pay at each step, and the length of time it took to reach the top step differed in the two agreements. Under the tentative agreement, newly hired officers would receive automatic wage increases at twelve, twenty-four, thirty, thirty-six, forty-two, sixty and seventy-two months of service. The tentative agreement included a chart listing the salary at each step effective January 1, 2019 and stated that all steps on the scale would increase by 1% effective January 1, 2020.

On January 15, 2019, the eleven Tier Two officers, who included Abdallah, Holfelder, and Lewis, were divided into three salary groups. The first group, consisting of three officers, were paid a salary that was about the same as the salary at the 24-month step under the new wage schedule. The second group of seven officers received a salary that was slightly below the salary at the 36-month step. One Tier Two officer, Stephen Johnson, was a lateral transfer and the Employer had recognized his service in another department of the City. Johnson was paid a salary that fell between the salary for the 36-month step and the 42-month step. The current salaries of all four Tier One officers, including Hernden and Silva, were above the salary at the 72-month step.

Per a chart that was made part of the tentative agreement, the Tier Two Officers in the first group were all to be placed at the 30-month step effective January 1, 2019 and move to the 36-month step on July 1, 2019. Six of seven officers in the second group of Tier Two officers, including Abdallah, would begin at the 42-month step effective January 1, 2019, and move to the 48-month step on July 1, 2019. Johnson, and one of the officers in the second group was to begin at the 48-month step on January 1, 2019, and move to the next step, 60 months, on January 1, 2020. All these officers were to continue to receive further step increases after these dates in accord with the schedule in the tentative agreement.<sup>4</sup>

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<sup>4</sup> The Union claims that the Tier Two officers received 20% wage increases over the term of the contract. Charging Parties argue that after taking account of the step increases that Tier Two officers would have received under the salary schedule in the expired POAM contract, the percentage increases in the tentative agreement were 0% for 2019 and 1% for 2020. However, the salary schedule in the expired agreement is not part of the record. By my calculations, the three Tier Two officers in the first group were to receive a pay increase of about 5% effective January 1, 2019, another 5% on July 1, 2019, a third 5% increase on January 1, 2020, and fourth increase of about 2% on July 1, 2020. The Tier Two officers in the second group were to receive a salary increase of about 4% effective January 1, 2019, another increase of about 2% effective July 1, 2019, and a third increase of about 4% on July 1, 2020.

The agreement stated that any officer not receiving an increase under the new salary schedule, which included all four current Tier One officers, would receive a 1% increase effective January 1, 2019, and another 1% increase effective January 1, 2020. Dispatchers were also to receive a 1% increase on both those dates.

#### January 21, 2019 Ratification Election

After the tentative agreement was reached, the Union scheduled a ratification meeting for January 18, 2019, at 7:00 am. Hernden is assigned to a multi-county task force and can be assigned by the task force supervisor to work anywhere within the multi-county area. After the election was scheduled, Hernden, whose shift normally begins at 10 am, contacted Holfelder and told him that due to family obligations, she could not be at work at 7 am. According to Hernden, Holfelder told her that if she did not attend the meeting she could not vote, and that no other person could vote for her in her absence. Although Holfelder did not recall their conversation this way, he agreed that the Union's position was that under the bylaws a member had to be present at the ratification meeting to vote on the contract.

Because of the need to make corrections on the tentative agreement, on January 17, 2019, the Union rescheduled the election to January 21, 2019 at 6:00 pm. The Union mailed copies of the tentative agreement to the membership on January 17.

At some point before the January 21 meeting, Silva called or texted Holfelder and told him that he would not be able to make the meeting. According to Silva, he told Holfelder that he had "something going on with his family." According to Holfelder, Silva did not provide an explanation. Silva asked Holfelder to let him know whether he had to be at the meeting to vote, and told Holfelder that he wanted to vote no. Silva also asked if he could vote remotely by using the Facetime app. Holfelder told Silva that he, Holfelder, would get back with him on these questions. According to Holfelder, shortly after this conversation he sent a text to the entire membership telling them that they had to be present at the meeting in order to vote. Silva testified, however, that he did not receive any response from Holfelder after Holfelder said he would get back with him. Silva, therefore, assumed that his "no" vote would be counted.

The ratification election on January 21 was held in an auxiliary police office building some distance away from the police station. Hernden had difficulty persuading her supervisor that she had to leave a surveillance and return to Harper Woods to vote but managed to do so. The Local Union's executive board, consisting of Holfelder, Lewis, and Local Union Secretary Robert Hill, chaired the meeting, along with FOPLC Business Representative David Willis. Before the voting, there was discussion of the tentative agreement. Johnson brought up the issue of his placement on the salary scale. As noted above, Johnson's current salary on January 21, 2019, fell between the 36-month and 42-month level on the new wage scale. His placement under the tentative agreement at the 48-month level would provide him with a salary increase. However, in January 2019, Johnson had 69 months of service with the Employer and felt that he should have been placed at the 60-month step. In addition to questions about the salary scale, there was



also discussion of the health care provisions in the tentative agreement. Abdallah, among others voiced his displeasure at the fact that the high deductible plan was now the only health care plan available and at the reduction in the amount of the Employer's contribution to employees' health savings accounts.

As the meeting went on, the discussion became heated. Hernden testified that the Union representatives told members that if they did not ratify the agreement an emergency manager would be appointed for the Employer. According to Hernden, they also said something about the Employer going bankrupt. According to Abdallah, Willis said that the Employer was not financially stable, and Lewis told the members that if they did not ratify the tentative agreement an emergency manager would be appointed. According to Willis, both the City of Detroit's bankruptcy and the triggers for the appointment of an emergency manager were discussed at the meeting, but the Union did not tell the members that the Employer's financial condition was such that it might have to file for bankruptcy. Willis testified that, as in October, he talked in detail about how the Employer was going to be required by the State of Michigan to increase its pension payments and to pre-fund retiree health care benefits.

Several members, including both Abdallah and Hernden, suggested that the Union file for compulsory arbitration. According to Abdallah, Willis said that arbitration was "not going to happen." Willis then said that the unit would not get a better result from arbitration, and talked about an arbitration that had taken place involving the City of Petoskey; Abdallah then asked him how the City of Petoskey was comparable to the City of Harper Woods and how he knew what an arbitrator would do. Hernden testified that Willis also said that if the members did not ratify this agreement they would "lose everything." According to Holfelder, he and Willis explained to the members again that if this tentative agreement didn't pass the Employer would likely take its current proposals off the table and, if the Union filed for arbitration, would present an offer to the arbitrator that was less favorable to employees.

After about an hour of discussion, ballots were marked and passed up to the Union officers at the front of the room. Someone mentioned that Schroeder, the dispatcher who was on duty back at the station at the time, had not come to vote. Lewis, the Union vice-president, asked the lieutenant in charge to allow Schroeder to leave to vote and offered to take her place. The lieutenant refused to let Schroeder leave her post because of the volume of calls and suggested instead that someone bring Schroeder a ballot. Lewis reported this to Holfelder and Willis by phone. As an even number of members had already voted, Willis said that Schroeder's vote would only matter if there was a tie. Willis and Holfelder decided to finish counting the ballots. The tally showed nine votes to ratify the contract and seven against.

After the election, both Schroeder and Silva filed complaints with the Local Union's Executive Board about their inability to vote. Silva said that he had been out of town for a family court hearing on a personal matter. However, he said that he would have found a way to be at the meeting if he had known that the vote that he texted to Holfelder wouldn't be counted. The Executive Board voted unanimously to allow

Schroeder to vote, citing the language in the bylaws allowing it to decide to allow absentee voting on a case-by-case basis, but rejected Silva's request by a vote of two to one. On January 23, 2019, Schroeder notified the executive board that she was voting no, and the final vote tally became nine to eight.

Meanwhile, on January 22, Holfelder called Johnson and told him that he would raise his pay concern with the Union and the Employer. Later that day, Holfelder called Johnson back and told him that Employer City Manager Joe Rheker had agreed to place Johnson at the 60-month step retroactive to January 1, 2019. Holfelder asked Johnson if the agreement to change his step placement would change his opinion on the contract.

At some point between January 22 and the middle of February 2019, the Employer implemented the salary increases and paid the bonuses contained in the new contract. However, some Union members continued to complain about the contract and about how the election had been conducted. They asked the Union to rerun the ratification election, but the Union told them that the contract had already been ratified. In late January, these unfair labor practice charges were filed. In addition, four members of the unit, including Hernden and Abdullah, appeared before the Employer's City Council to complain about the election and the agreement.

On February 21, 2019, the Employer's labor council called Willis and asked if the Union would consider holding another ratification vote. He explained that the City Council was receiving many complaints from employees. Willis noted that the contract had already been ratified and that employees had received pay raises; he said that the Union was not going to vote on the exact same contract again. The Employer's attorney told Willis that the Employer was prepared to offer some "enhancements" and then sent Willis a new proposal.

The new proposal extended the period that monthly stipends would be paid to non-Medicare eligible retirees in lieu of retiree health insurance, added a salary schedule for "Tier Two" dispatchers, and slightly modified the language of the "me too" clause in the original tentative agreement. The new proposal also contained an expanded chart detailing how, when and by what amount the salaries of Tier Two officers would increase under the wage schedule during the term of the contract and beyond. The new proposal also included a wage schedule for 2020 that incorporated the 1% increase at each step. In addition, the proposal included wage charts for the Tier One officers and for Schroeder, and charts illustrating how the health care Medicare stipend for the Tier One officers would increase and how the balance in their retirement health care savings accounts would increase over time.

The Employer sent Willis an email stating that if the bargaining unit rejected the new proposal, it would rescind all the improvements contained in the two agreements, including wage increases, merit pay increases, reductions in employee pension contributions, and increases in life insurance. The email also added that if the new proposal was rejected, the Employer would be entitled to collect from members any of

the above already paid out. Willis included a copy of this email with the new proposal when he sent it to members.

After receiving the City's offer, the Union planned another ratification election. It decided that this time voting would take place over a period of four days and that votes would be accepted via email, text and phone in addition to a ballot box. Two new employees were hired between the first election and the second, and all eighteen members voted in the second election. The ballots were counted on March 1, 2019. The members ratified the agreement thirteen to five, and the City Council ratified the second agreement on March 4, 2019.

#### 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. See also *Vaca v Sipes*, 386 US 171 (1967). It is well established that this duty extends to contract negotiations as well as other actions by unions that affect employees' terms and conditions of employment. See *Air Line Pilots Ass'n Int'l v O'Neill*, 499 US 65, 67 (1991). Although the Commission does not have authority over internal union matters, such as elections for officers, it has held that the duty of fair representation does apply to elections to ratify collective bargaining agreements since such elections have an impact on terms and conditions of employment. See e.g., *Wayne Co Cmty College Federation of Teachers*, 1976 MERC Lab Op 347; *Service Employees International Union, Local 586*, 1986 MERC Lab Op 149; *Registered Nurses and Registered Pharmacists of Hurley Hospital*, 2002 MERC Lab Op 394.

As set forth in the Unfair Labor Practice Charges section above, Hernden and Abdallah allege that the Union violated its duty of fair representation by the manner in which it conducted the January 21, 2019 election, by misrepresenting the consequences for the unit of rejecting the tentative agreement, and by overstating the benefits in that agreement. However, between the date these charges were filed and the date of the hearing, the Union and the Employer agreed to hold a second contract ratification election. It is axiomatic that when subsequent events cause issues in a case to become moot, the issues should not be adjudicated since it is not a court's job to decide issues which have no practical legal effect. *City of Flint (Police Dept)*, 25 MPER 12 (2012). See e.g., *Woodbury v Res-Care Premier, Inc*, 495 Mich. 961, 961 (2014); *Federated Publications, Inc v Lansing*, 467 Mich 98, 112 (2002). A moot issue can properly be reviewed if it is publicly significant and likely to recur, but this is an exception to the general rule. *Wayne State Univ*, 1991 MERC Lab Op 496, 499-500; *City of Flint (Police Dept)*, 22 MPER 107 (2009).

All the Union's members voted in the second election, which was conducted over a period of several days. The members voted decisively to adopt the agreement and the Employer's City Council subsequently ratified it. Before the second election, opponents of the agreement had sufficient time to bring to the attention of voters, and counter with facts, any misleading statements that may have been made by the Union about the Employer's finances, the emergency manager law, the possibility of bankruptcy, or how much of a wage increase the employees were actually receiving in the tentative agreement. The members also now have the opportunity to amend their bylaws to change, or at least clarify, the contract ratification election procedures, an action that Willis has endorsed. I conclude that in light of these facts, the issues raised by Charging Parties about the conduct of the January 21, 2019, election, the Union's refusal to count Silva's vote, and the statements allegedly made by Willis and Local Union officers at the meeting prior to this election have all become moot and should be dismissed on this basis.

I note, however, that even had these issues not become moot, I would not find the Union to have breached its duty of fair representation on these facts. 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. A finding that a union has breached its duty to avoid discriminatory conduct requires evidence of discrimination by the union that is "intentional, severe, and unrelated to legitimate union objectives." *Spellacy v Airline Pilots Ass'n*, 156 F3d 120, 126 (CA 2, 1998); *Merritt v Int'l Ass'n of Machinists & Aerospace Workers*, 613 F3d 609, 617 (CA 6, 2010). "Arbitrary" conduct by a union was described by the Court in *Goolsby, supra*, as (a) impulsive, irrational or unreasoned conduct; (b) inept conduct undertaken with little care or with indifference to the interests of those affected; (c) the failure to exercise discretion; and (d) extreme recklessness or gross negligence.

In this case, the Local Union adopted a set of bylaws in 2017. The January 21, 2019, election was the first contract ratification election held after these bylaws were adopted. The bylaws required the Local Union to call a meeting for the purpose of conducting a contract ratification vote and stated, "Ratification of a new collective bargaining agreement will be by a simple majority of those members present at such ratification meeting." Even though the bylaws had not been uniformly distributed to the membership, the Union's decision to follow the rules in its bylaws cannot be deemed irrational or "arbitrary" under the above definition. I also find insufficient evidence that the Union deliberately attempted to prevent any group of members, or any individual member, from voting on the contract. The reason Silva initially gave for his inability to attend the meeting, "family business," and the reasons he subsequently provided for not being there, did not clearly fall within any of the categories under the bylaws for voting absentee under the bylaws. Unlike Schroeder, he was not prevented by his supervisor from attending the meeting. The mere fact that the Union knew that Silva wanted to vote "no," is not, I conclude, enough to support a finding that the Union's decision not to count his ballot was made in bad faith.<sup>5</sup>

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<sup>5</sup> I also see nothing in the record to indicate that Holfelder attempted to bribe Johnson to change his vote by obtaining the Employer's agreement to change his placement on the salary scale. An election had already

As noted in the findings of fact, the contract about which Charging Parties continue to complain did not benefit all officers equally. Rather, as Willis admitted, the agreement deliberately reduces the gap in pay and benefits between the unit's more senior and highly paid officers and those with less seniority. However, the Commission has held that a union does not violate its duty of fair representation merely by negotiating a contract that is more favorable toward one group of employees than another. See, e.g., *West Ottawa Pub Schs*, 1979 MERC Lab Op 1091 (no exceptions); *City of Detroit*, 1978 MERC Lab Op 519 (no exceptions). Moreover, the "discrimination" which the duty of fair representation prohibits is discrimination which is both intentional and "unrelated to legitimate union objectives." Reducing pay disparity within a bargaining unit does not, I find, fall within the latter category.

Hernden and Abdallah also charge the Union with incompetence in failing to negotiate a contract with better terms, and point to what they perceive to be the Union's inability to provide adequate answers to their questions about such matters as the Employer's financial status. The Commission's authority under Section 10(2)(a), however, is limited to determining whether the Union complied with its duty of *fair* representation, as that duty has been defined in the law, and does not extend to assessing whether the Union obtained the best deal for its members that could have been obtained under the circumstances.

Based on the findings of fact and conclusions of law as set forth above, I conclude that Charging Parties did not establish that the Union violated its duty of fair representation toward them under Section 10(2)(a) of PERA. I recommend, therefore, that the Commission issue the following order.

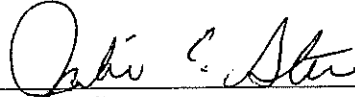
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been held and the contract ratified by the membership on January 23, 2019, when Holfelder told Johnson about the change. It was clearly not improper for Holfelder to ask the Employer to correct what might have been a mistake in the tentative agreement.

**RECOMMENDED ORDER**

The charges filed by Hernden and Abdallah are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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Julia C. Stern  
Administrative Law Judge  
Michigan Office of Administrative Hearings and Rules

Dated: July 9, 2019