STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TECHNICAL PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN (TPOAM)
Labor Organization-Respondent,

MERC Case No. CU18 J-034

-and-

DANIEL LEE RENNER
An Individual Charging Party.
_____/

APPEARANCES:

Frank Guido, Police Officers Association of Michigan, for Respondent

Daniel Lee Renner, appearing on his own behalf

DECISION AND ORDER

On April 25, 2019, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] on Motion for Summary Disposition in the above matter, finding that Respondent Technical Professional and Officeworkers Association of Michigan (TPOAM or Union) violated § 10(2)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(a). The ALJ found that Respondent's "Nonmember Payment for Labor Representation Services" Operating Procedure unlawfully discriminated against nonunion members and restrained employees from exercising their § 9 right to refrain from joining or assisting a labor organization. The ALJ also found that Respondent breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party in the exercise of his § 9 rights by refusing to file or process his grievance unless he paid Respondent a fee for its services. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on May 7, 2019. Charging Party did not file exceptions to the ALJ's Decision and Recommended Order or a brief in support of the Decision.

In its exceptions, Respondent contends that the ALJ erred when she failed to recognize that the U. S. Supreme Court's decision in *Janus v American Federation of State, County and Municipal Employees,* 138 S. Ct. 2448 (2018), allowed it to implement its "Nonmember Payment for Labor Representation Services" Operating Procedure and to demand that Charging Party

[1] MOAHR Hearing Docket No. 18-019077

Renner pay for its services in processing his grievance. In its exceptions, Respondent further contends that the ALJ erred when she failed to recognize that, subsequent to the *Janus* decision, unions have the right under the First Amendment of the U. S. Constitution to refuse to associate with and represent nonmembers. Additionally, Respondent contends that the ALJ erred when she relied upon certain decisions of the National Labor Relations Board to find that it violated PERA. Finally, Respondent argues that the ALJ erred when she failed to recognize that its actions in the present case merely involved an internal union matter that did not impact conditions of employment.

We have reviewed the exceptions filed by Respondent and find them to be without merit.

Factual Summary:

Following a review of the record in this matter, we adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order. We will not repeat the facts, except as necessary.

Charging Party Daniel Lee Renner is employed by Saginaw County (the Employer) as a grounds employee and is covered by a collective bargaining agreement between the Employer and the TPOAM. This collective bargaining agreement contains a grievance procedure that ends in binding arbitration; however, only the Union has the right under the agreement to file a grievance and to process that grievance.

On March 1, 2017, Renner resigned his membership in the Union and exercised his right under §§ 9 and 10(3) of PERA to cease paying union dues, fees or assessments. The Union sent Renner a letter acknowledging his resignation and informing him that, as a non-member, he would not be entitled to the rights enjoyed by members. Specifically, as a non-member, Renner would not be allowed to attend union meetings, would not have the right to vote in either contract ratification elections or elections for union officers, and would not be eligible for coverage under the TPOAM extended legal representation plan. The letter also listed the conditions that Renner would have to meet in order to reestablish membership.

On August 10, 2018, the Union adopted a resolution entitled "Union Operating Procedure: Non-member Payment for Labor Representation Services" that required bargaining unit members who have opted out of union membership to pay for labor representation services when they request the union to perform such services. These services include, but are not limited to, internal investigatory proceedings, unfair labor practice proceedings, grievance handling, and arbitration proceedings.

On September 18, 2018, Renner received a written warning from the Employer for allegedly making a false claim about a co-employee.

On September 20, 2018, Renner submitted a written grievance over the reprimand to his supervisor on the Employer's form for its internal grievance procedure. He also sent a copy of his grievance to the Local Union President, Blanca Echevarria-Fulgencio, and told her it was a grievance at step one of the grievance procedure. Renner asked her to send him the forms necessary to file the grievance at step two. The following day, Renner and Union Business Agent

Jim Cross exchanged a series of emails in which Cross explained that any assistance by the Union would require a service fee, and Renner responded by accusing the Union of violating PERA and right to work laws by trying to charge him a fee. Cross, nonetheless, emailed Renner a copy of the Union grievance form.

On September 26, 2018, Renner received a written response from his supervisor to his September 20 grievance. In the response, the supervisor noted that the Employer's internal grievance procedure could only be used by "employees not covered by a collective bargaining agreement." The supervisor further informed Renner he did not believe that Renner had the right to use the internal procedure since his position was covered by a collective bargaining agreement. The supervisor, however, also noted that he reviewed the information Renner had provided and believed that the disciplinary action taken against Renner was warranted.

Later that day, Renner sent an email to Echevarria-Fulgencio and Cross informing them that he had received a response from his supervisor and asking them to whom he should send the information necessary to file a grievance under the collective bargaining agreement.

On September 27, 2018, Union Counsel Frank Guido sent Renner an email in response to Renner's request for assistance in processing his grievance. Guido's email noted that Renner had exercised his right to opt-out of union membership and told Renner that while he remained part of the bargaining unit, "the Union does not owe any duty to you to provide direct representation services unless you comply with the Union Operating Procedure which mandates that an opt-out employee may request union representation services upon prepayment for services." A summary of the Union Operating Procedure was attached to the email.

In the email, Guido also provided Renner with an estimate of $420 for the services of Union representatives in processing his grievance through the third step of the grievance procedure, and an additional estimate of $870 for "consultation, review and determination by legal counsel to proceed to step 4." Renner was directed to prepay $1,290 by credit or debit card if he was requesting Union assistance in the further processing of his grievance and was informed that the Union "reserves the right, in its exclusive discretion, to determine if the grievance should be processed to step 4 arbitration."

Renner filled out the Union grievance form, signed it, and submitted it to Echevarria-Fulgencio and Cross by email on October 1, 2018, along with supporting documents. He did not, however, pay the Union any money and the Union did not submit the grievance on his behalf.

As a result, on October 2, 2018, Renner filed the instant charge. On October 18, 2018, the Union filed a motion for summary dismissal asserting that there were no genuine issues of fact and that it was entitled to summary judgment as a matter of law. Renner filed a response objecting to the motion on October 23, 2018 and, on November 13, 2018, the ALJ heard oral argument on the motion. On April 25, 2019, the ALJ issued her Decision and Recommended Order on Motion for Summary Disposition and recommended that the Union's motion be dismissed.

Discussion and Conclusions of Law:

Charging Party alleges that the Union violated its duty of fair representation toward him and § 10(2)(a) of PERA, as well as his rights under PERA's right to work amendments, by refusing to represent him in a disciplinary dispute with the Employer unless and until he paid the Union a fee for its services.

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 (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. When a union's conduct toward a bargaining unit member is "arbitrary, discriminatory, or in bad faith," the duty of fair representation is breached. A union satisfies the duty of fair representation so long as its decision is within the range of reasonableness. *Air Line Pilots Ass'n v O'Neill*, 499 US 65 (1991); *Int'l Union of Operating Eng'rs, Local 547*, 2001 MERC Lab Op 309, 311; *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

A union' s duty of fair representation extends to union conduct in representing employees in their relationship with their employer, such as negotiating a collective bargaining agreement or resolving a grievance, and in related decision-making procedures. *Wayne Co Cmty Coll Fed ' n of Teachers, Local 2000, AFT*, 1976 MERC Lab Op 347.

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 *Steele*, which arose under the Railway Labor Act, a union representing railroad firemen excluded black firemen from membership. It also negotiated collective bargaining agreements with provisions that explicitly discriminated against them. While not holding that the union' s exclusion of the black firemen from membership was unlawful, the Supreme Court held that since the union was the statutory representative of the class of firemen, it owed a duty toward all employees in that class, including those who were not union members.

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 § 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. The Court noted, at 337:

> A union may not neglect the interests of a membership minority solely to advantage a membership majority; members are to be accorded equal rights, not arbitrarily subjected to the desires of a stronger, more politically favored group. *Teamsters Local Union No. 42, supra,* at p. 611. "These tenets strike home when a union

> attempts to prefer workers based solely on how long they have been loyal to the guild." *Id.,* at p. 612. The only factor distinguishing Hunter from other former Cherry Hill employees who received retroactive seniority was her lack of union membership while at Cherry Hill. The WWEA owed her a duty of fair representation and breached that duty.

More recently, in *Government Employees Labor Council*, 27 MPER 18 (2013), we again held that a 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 that a union's failure to properly represent a nonmember violates § 10 of PERA. See also *SEIU, Local 517M*, 27 MPER 47 (2014). Additionally, as noted in the ALJ's decision, in 2012 PA 349, the Michigan Legislature enacted the "freedom to work" amendments to PERA. These amendments removed § 10(2) and, in a new § 10(3), explicitly made it unlawful for a public employer and union to require employees, as a condition of obtaining or continuing their employment, to "pay any dues, fees, assessment or other charges or expenses of any kind or amount or provide anything of value to a labor organization or bargaining representative." 2012 PA 349 also amended § 9 of PERA to state explicitly that public employees have a right to refrain from any the activities protected by § 9, including the right to form, join, or assist in labor organizations, and added a new § 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.

Prior to 2012, § 10(3)(a)(i) of PERA made it unlawful for a labor organization or its agents to "restrain or coerce public employees in the exercise of the rights guaranteed in Section 9." The freedom to work amendments left the language of § 10(3)(a)(i) in place, but this language became § 10(2)(a) of the amended statute.

In the present case, the ALJ found that the Respondent's "Nonmember Payment for Labor Representation Services" Operating Procedure violated § 10(2)(a) of PERA because it unlawfully discriminated against nonunion members and restrained employees from exercising their § 9 right to refrain from joining or assisting a labor organization. The ALJ also found that the Union breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party in the exercise of his § 9 rights by refusing to file or process his grievance unless he paid the Union a fee for its services.

In its exceptions, Respondent argues that the ALJ erred when she failed to recognize that the Supreme Court's decision in *Janus v American Federation of State, County and Municipal Employees,* 138 S. Ct. 2448 (2018), allowed it to lawfully implement its "Nonmember Payment for Labor Representation Services" Operating Procedure and to demand that Charging Party Renner pay for its services in processing his grievance. In *Janus*, the Supreme Court held that an Illinois statute authorizing the collection of mandatory agency fees from employees in the public sector who chose not to be union members was unconstitutional because it violated the free speech rights of public employees by compelling them to subsidize private speech on matters of substantial public concern. The *Janus* decision did not involve an allegation of either a breach of a union's duty of fair representation or restraint on an employee's pursuit of a statutory right. Respondent, nonetheless, points out that, in *Janus*, the Court noted, at 2468-2469:

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris,* 573 U.S., at ——, 134 S Ct, at 2639 (internal quotation marks omitted). *Individual nonmembers could be required to pay for that service or could be denied union representation altogether.*[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers. [Emphasis added]
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> Respondent further notes that, in footnote 6 of the *Janus* decision, the Court stated:
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> There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.,* Cal. Govt. Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

Contrary to Respondent's position, however, we agree with the ALJ that, in the language relied upon by Respondent, the Supreme Court was only expressing its belief that a state statute could be enacted or modified to address a perceived "free rider" concern that would allow a public sector union to charge a non-member for processing his or her grievance without violating the non-member's First Amendment rights.[2] Nothing in the *Janus* decision, as we read it, prohibits a public sector bargaining unit from having an exclusive representative. Additionally, the *Janus* decision makes it clear that, if a union is an exclusive representative of a bargaining unit, it must not discriminate against non-members with respect to collective bargaining activities, even though nonmembers will no longer be required to pay "fair share" fees. Significantly, in the paragraph immediately following that relied upon by Respondent, the *Janus* Court goes on to state, at 2469:

> Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 2460-2461. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union

[2] We note that, on July 8, 2019, Rhode Island Governor Gina Raimondo signed companion bills H5259 and S0712 into law and thereby authorized public sector unions, in Rhode Island, to impose fees on nonmembers who request union representation in grievance and/or arbitration proceedings. Unlike Rhode Island, however, Michigan has not modified PERA to allow nonmember representation fees.

> were *not* subject to the duty to represent all employees fairly. *Steele, supra*, at 198, 65 S.Ct 226.

Similarly, the *Janus* Court asserted, at 2485, n. 27:

> States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.

We further note that, on remand from the Supreme Court, Mark Janus sought damages in the amount of the agency fees he paid to his union prior to the Supreme Court's *Janus* decision. In affirming the district court and rejecting this request, the Seventh Circuit analyzed the Supreme Court's *Janus* holding and concluded that "the only right the *Janus* decision recognized is that of an objector not to pay *any* union fees." *Janus v. AFSCME, Council 31*, --- F.3d ---, 2019 WL 5704367, at 4 (7th Cir., 2019) (emphasis in original). In coming to this conclusion, the Seventh Circuit noted that, after *Janus*, "even with payments of zero from objectors, the union still enjoys the power and attendant privileges of being the exclusive representative of an employee unit." Id. at 4. Additionally, when discussing the principles behind exclusive union representation, the Seventh Circuit noted that "Unions designated as exclusive representatives were (and still are) obligated to represent all employees, union members or not, 'fairly, equitably, and in good faith.'" Id. at 1.

In the present case, Respondent TPOAM is the exclusive representative of all employees in Charging Party's bargaining unit and, under PERA, has a concomitant duty to represent all members of that bargaining unit, regardless of union membership. In seeking to change this, we believe Respondent is seeking to change the State's labor relations statute and system, an end at odds with the Supreme Court's decision in *Janus*. See *Janus*, at 2485, n. 27. Consequently, the ALJ did not err when she found that the *Janus* decision did not allow Respondent to implement its "Nonmember Payment for Labor Representation Services" Operating Procedure or to demand that Charging Party Renner pay for its services in processing his grievance.

In its exceptions, Respondent also argues that unions and union members now have the right under the First Amendment of the U. S. Constitution to refuse to associate with and represent free-riding nonmembers. In *Sweeney v. Raoul*, No. 18-CV-1362, 2019 WL 5892981 (N.D. Ill. Nov. 12, 2019), however, the United States District Court for the Northern District of Illinois recently rejected an identical argument made by Local 150 of the International Union of Operating Engineers. In *Sweeney*, Local 150 argued that, after the Supreme Court's decision in *Janus*, the designation of a public employee union as the exclusive representative for a bargaining unit and the concomitant duty of the union to represent nonmembers fairly, were unconstitutional under the First Amendment. Local 150 specifically argued that the reasoning in *Janus* allows a union to refuse to represent non-union members because "unions and union members have the right under the First Amendment to refuse to associate with free-riding nonmembers." In rejecting this argument, the Court held that Local 150 was reading *Janus* too broadly and found:

> Because *Janus* did not change a union's exclusive representation obligations under the [Illinois Public Labor Relations Act], the Court is left with controlling Supreme Court precedent enunciated in *Minnesota State Bd. for Cmty. Coll. v. Knight*, 465

> U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984), which *Janus* did not overrule. *See Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (The *Janus* "decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue."). In *Knight*, the Supreme Court held that Minnesota's system of exclusive union representation did not violate First Amendment speech or associational rights of non-union members. *Id.* at 288, 104 S.Ct. 1058. Based on *Knight*, the Seventh Circuit has concluded "the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny." *Hill v. Service Employees Int'l Union*, 850 F.3d 861, 864 (7th Cir. 2017). *Knight* directly controls Local 150's arguments and is still binding upon the lower courts until the Supreme Court overrules it. *See, e.g., Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019) (citing *Agostini v. Felton*, 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).
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> Therefore, Local 150's argument that Illinois' exclusive-bargaining-representative scheme is unconstitutional under *Janus* fails.

The U. S. District Court's decision in *Sweeney* is consistent with the Ninth Circuit Court of Appeals' decision in *Mentele v. Inslee*, 916 F.3d 783 (9th Cir., 2019), (State's authorization of exclusive bargaining representative did not infringe upon First Amendment rights) and the United States District Court for the Eastern District of California's decision in *Sweet v. California Ass'n of Psychiatric Technicians*, 2019 WL 4054105 (E.D. Cal., 2019). See also the decision of the Supreme Judicial Court of Massachusetts in *Branch v. Commonwealth Employment Relations Bd.*, 481 Mass. 810, 120 N.E.3d 1163 (2019).

In view of the foregoing, we also believe that Respondent reads *Janus* too broadly and ignores much of the language of the decision as well as recent precedent interpreting the decision. Consequently, we do not believe the First Amendment allowed Respondent to refuse to represent nonmembers such as Charging Party.

In its exceptions, Respondent also contends that the ALJ erred when she relied upon certain "archaic" decisions of the National Labor Relations Board (NLRB). The Michigan Supreme Court, however, has long held that since PERA, in its original form, was patterned on the NLRA, it was the Legislature's intent that the Commission would rely on legal precedents developed under the NLRA insofar as they applied to the public sector and that the Legislature intended the courts to view the federal labor case law as persuasive precedent. See *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 53, 64 (1974). See also *Michigan Employment Relations Comm. v Reeths-Puffer School Dist,* 391 Mich 253, 259–260 (1974) and *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-563 (1998). Significantly, in *Goolsby v City of Detroit*, 419 Mich 651, 660, (1984), the Michigan Supreme Court concluded that since the rights and responsibilities imposed by PERA on labor organizations representing public sector employees were similar to those imposed on labor organizations representing private sector employees by the NLRA, PERA impliedly imposes on labor organizations representing public

sector employees a duty of fair representation, which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees.

In the present case, the NLRB has long held that a union violates the NLRA when it makes union membership a condition precedent to processing a grievance and that telling represented employees that a union will only represent them if they are members has the effect of unlawfully coercing employees into union membership. See, e.g., *Auto Workers Local 1303 (Jervis Corp Bolivar),* 192 NLRB 966 (1971); *Lea Industries*, 261 NLRB 1136 (1982); *Plumbers Local 195 (Bethlehem Steel),* 291 NLRB 571 (1988); *Mail Handlers Local 305 (Postal Service)*, 292 NLRB 1216 (1989); *Oil Workers Local 3–495 (Hercules, Inc.)*, 314 NLRB 385 (1994); *Joint Council of Teamsters Numbers 3, 28, 37, 42, (Lanier Brugh Corporation)*, 339 NLRB 131 (2003); and *United Food & Commercial Workers Union, Local 540 (Tyson Foods)*, 366 NLRB No. 105 (2018).

Similarly, in *Machinists Local 697 (HO Canfield Rubber Co),* 223 NLRB 832 (1976), the Board extended some of these holdings to a case in which the union had made the payment of fees by nonmembers a condition of grievance processing. In *Machinists Local 697*, an employee in Virginia, a right to work state, was informed that the union would not pursue his grievance unless he paid a fee toward the cost of union representation. The employee was not a union member, and the local told him his non membership was the reason for the union's demand for a fee. The Board noted that "a grievance procedure is vital to collective bargaining and . . . grievance representation is due employees as a matter of right" and held that "[t]o discriminate against nonmembers by charging them for what is due them by right restrains them in the exercise of their statutory rights" in violation of the NLRA. See also *Hughes Tool Co.*, 104 NLRB 318, 329 (1953); *Electrical Workers Local 396 (Central Telephone Co.)*, 229 NLRB 469 (1977); *Plumbers Local 141*, 252 NLRB 1299 (1980); *Exxon Co. U.S.A.*, 253 NLRB 213 (1980); *American Postal Workers (Postal Service),* 277 NLRB 541 (1985); *Furniture Workers Local 282 (Davis Co.)*, 291 NLRB 182, 183 (1988); *Allied Industrial and Service Workers International Union, Local 1192 (Buckeye Florida Corporation),* 362 NLRB 1649 (2015); and *IATSE, Local 720 (Tropicana Las Vegas)*, 363 NLRB No. 148 (2016).

Although we recently noted, in *Hurley Medical Ctr*, 31 MPER 41 (2018), that the Commission is not bound to follow "every turn and twist" of NLRB case law especially where NLRB precedent conflicts with that of the Commission or other NLRB precedent, the NLRB precedent relied upon by the ALJ in this case is consistent with our own precedent, see *Lansing School District*, supra, and does not conflict with other NLRB precedent. Consequently, we do not believe that the ALJ erred when she relied upon certain decisions of the NLRB in concluding that Respondent breached its duty of fair representation and violated § 10(2)(a) of PERA.

In its exceptions, Respondent also argues that the ALJ erred when she failed to recognize that its implementation of its operating procedure requiring nonmember payment for representation services was an internal union matter that did not impact conditions of employment. Contrary to Respondent's argument, however, we believe that grievance handling is fundamental to a union's duty as the exclusive bargaining agent to represent all members of the bargaining unit without discrimination. Because a union's decision not to represent a unit member in a grievance or disciplinary matter has a clear impact on that unit member's terms or conditions of employment and the terms and conditions of other members of the bargaining unit, it is not merely an internal

union matter. Moreover, by requiring non-member payment for representation services, a union interferes with an employee's § 9 right to refrain from union activities. As we noted in *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016), the language of § 10(2)(a) does not permit a union to deny an employee the rights provided by § 9, regardless of whether the union's actions have an impact on conditions of employment. See also *Saginaw Ed Ass'n,* 29 MPER 21 (2015) and *Teamsters Local 214,* 29 MPER 46 (2015).

In conclusion, we find that Respondent's "Nonmember Payment for Labor Representation Services" Operating Procedure violates § 10(2)(a) of PERA because it unlawfully discriminates against nonunion members and restrains employees from exercising their § 9 right to refrain from joining or assisting a labor organization. Additionally, we find that the Respondent Union breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party Renner in the exercise of his § 9 rights by refusing to file or process his grievance unless he paid the Union a fee for its services. Although Respondent argues that requiring a union to bear the cost of grievance representation for nonmembers in a right to work state is unfair, we believe Respondent's argument should properly be made to the Michigan legislature and not in this forum.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. We, therefore, affirm the ALJ's decision and adopt the Order recommended by the ALJ.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Issued: December 10, 2019

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

In the Matter of:

TECHNICAL PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN (TPOAM),
Labor Organization-Respondent,

Case No. CU18-J-034
-and- Docket No. 18-019077-MERC

DANIEL LEE RENNER,
An Individual-Charging Party.
_____/

APPEARANCES:

Frank Guido, Police Officers Association of Michigan, for Respondent

Daniel Lee Renner, appearing for himself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On October 2, 2018, Daniel Lee Renner, an employee of Saginaw County (the Employer) filed an unfair labor practice charge against his collective bargaining representative, the Technical Professional and Officeworkers Association of Michigan (Respondent or the Union) 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 Office of Administrative Hearings and Rules (MOAHR).

As discussed below, on September 18, 2018, Renner received a written warning from the Employer which included this statement, "Any further incidents will lead to progressive disciplinary action, up to and including discharge." Renner alleges that the Union violated PERA by refusing to represent him concerning that written warning, or file a grievance under the collective bargaining agreement, unless Renner agreed to pay the Union in advance for its services.

On October 18, 2018, the Union filed a motion for summary dismissal asserting that there were no genuine issues of fact and that the Union was entitled to summary judgment as a matter of law. Renner filed a response objecting to the motion on October 23, 2018. On November 13, 2018, I held oral argument on the motion.

On April 1, 2018, Renner requested that I consider, as part of the record, recent actions taken against him by the Employer of a disciplinary nature. The Union opposed the request on the grounds that Renner had not shown that the new facts would require a different result. I agreed with the Union and rejected Renner's request on April 5, 2019.

Based on facts as set forth below, alleged in the parties' pleadings, and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Renner alleges that the Union violated its duty of fair representation toward him and Section 10(2)(a) of PERA, and his rights under PERA's right-to-work amendments, by refusing to represent him in a disciplinary dispute with the Employer unless and until Renner paid the Union a fee for its services.

Facts:

Renner is employed by the Employer as a grounds employee and is a member of a bargaining unit represented by the Union. On or about March 1, 2017, Renner resigned his membership in the Union and exercised his right under Section 10(3) of PERA to cease paying union dues, fees or assessments. The Union sent Renner a letter acknowledging his resignation and informing him that as a non-member, he would not be allowed to attend union meetings, would not have the right to vote in either contract ratification elections or elections for union officers, and would not be eligible for coverage under the TPOAM extended legal representation plan. The letter also listed the conditions Renner would have to meet in order to reestablish membership.

In February 2018, the Union filed a class action grievance on behalf of Renner and his co-workers in the grounds department over changes in their weekend work schedules. The grievance was resolved with a settlement agreement on or about March 14, 2018.

On August 10, 2018, the Union, and its affiliated labor organizations the Police Officers Association of Michigan (POAM), Command Officers Association of Michigan (COAM), and Firefighters Association of Michigan (FAOM) adopted a union operating procedure entitled "Nonmember Payment for Labor Representation Services." The operating procedure, made retroactive to July 23, 2018, included the following:

> 1.A nonmember that is part of bargaining unit represented by the Union (POAM, COAM, TPOAM & FAOM), that requests representation services, shall be required to pay, in advance, for the services rendered. The employment related issues that a nonmember may request paid-for services include, but are not limited to:
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> > a. Internal investigatory proceedings, including critical incident submission of information (reports, statements, or verbal questioning- including *Weingarten* and *Garrity* related matters);

b. Employer administrative proceedings, including department hearings, trial boards, civil service commission meetings/hearings, pension board meetings/hearings, or any other commission, council board or tribunal proceeding;

c. State administrative proceedings, including, but not limited to, representation/unfair labor practice proceedings (direct not collective) before the Michigan Employment Relations Commission;

d. Consultation with a union representative or union legal counsel; and

e. Grievance step meetings, arbitration and post-arbitration matters.

2. POAM shall determine the costs, expenses and fees for the providing of labor representation services on a case-by-case basis.

3. The costs, expenses and fees shall include: (a) grievance arbitrator bills; (b) alternative dispute resolution agency charges for filing, processing and administration of arbitration cases (AAA, FMCS and MERC); (c) witness fees, including expert witness fees; (d) subpoena fees; (e) transcript fees; (f) court costs and related filing fees and expenses; (g) appeal fees and related costs and expenses; and (h) the hourly equivalent of the wages and benefits of the direct provider of services, whether business agent or attorney.

4. The nonmember will be advised by a representative of the Union of the amount of the service cost, expense and fee to be paid by the nonmember prior to the delivery of service.

5. The nonmember shall pay for the services to be rendered, in advance of the receipt of services, by credit or debit card, or other financial transaction service, as designated by the Union.

6. In the event the amount of the costs, expenses and fees cannot be calculated prior to services being provided, the Union shall estimate the anticipated costs, expenses and fees, which shall be paid by the nonmember in advance of services being provided.

7. In the event the actual amount of the costs, expenses and fees for services exceed the anticipated amount, the nonmember shall be responsible for payment of the additional amount within seven (7) days after transmittal of the notice of payment. In the event of nonpayment within the time period specified, further labor representation services shall be suspended, with any pending proceedings being adjourned. Failure to pay the costs, expenses and fees by the end of business on the tenth (10^{th}) day after transmittal of the notice for payment, shall result in withdrawal and/or dismissal of the matter. Calculation of time period shall be on the day of the transmittal of the notice, whatever method of delivery is preferred, in the sole and

exclusive discretion of the Union. The calculation of the time period shall be inclusive of weekdays and weekends.

8. The Union shall determine, in its sole and exclusive discretion, the Business Agent, Labor Attorney or Local Association Representative that will be assigned to represent the nonmember that has requested labor representation services.

9. A nonmember shall not be allowed to opt-in to union membership during the pendency of an employment related issue, as determined by the Union. At the conclusion of such matter, the nonmember shall be allowed to opt-in to dues paying union membership. The terms and conditions for opt-in shall also be in accordance with the governing POAM Executive Board Resolution, as adopted on May 8, 2015, which include, but are not limited to, the following requirements:

a. Payment to the Union of a $500.00 administrative/user reinstatement fee.

b. Execution of a deduction of union dues/fees authorization form with the public employer.

10. The Operating Procedure requirements, as specified in paragraphs one (1) to nine (9), hereinabove, may be waived in the sole discretion of the Union, if the bargaining unit employee, upon transmittal of notice from the Union, reconsiders and changes the decision to be a nonmember; provided further that the bargaining unit employee submits written notification of such decision to the Union office and executes the authorization form for dues/fees deduction with the public employer, within fourteen (14) days from the transmittal of the notice from the Union. In the event nonmember status is designated due to an arrearage in payment of union dues/fees, the bargaining unit employee will be allowed to restore union membership upon payment of all dues/fees in arrears, no later than (14) days from the transmittal of the notice from the Union.

. . . the Union retains the exclusive right to amend, modify, change or terminate any policy, rule, practice or procedure, with or without notice.

In the fall of 2018, a collective bargaining agreement between the Employer and the Union was in effect covering Renner's bargaining unit. This collective bargaining agreement contained a grievance procedure ending in binding arbitration. Only the Union had the right under the agreement to file a written grievance and process that grievance through the contractual procedure.

On September 6, 2018, Renner sent an email to one of his fellow grounds' employees asking him not to smoke around him because of Renner's medical condition. Renner copied his Union representative and supervisor on the email. Renner and the other employee then exchanged a series of emails in which the other employee denied smoking anywhere near Renner and Renner insisted that he had. On September 18, 2018, Renner received a written warning from the Employer for making what the Employer concluded was a false claim about a co-employee and failing to comply with his supervisor's request for "mutual cooperation with fellow employees."

According to the written warning, the supervisor interviewed both the alleged smoker and another employee and determined that Renner's accusation was false.

On September 20, 2018, Renner submitted a written grievance over the reprimand to his supervisor on the Employer's form for its internal grievance procedure. In this grievance he referred to City rules, the collective bargaining agreement, and the Bullard-Plawecki Employee Right to Know Act, MCL 423. 501 et seq. He sent a copy to the Local Union President, Blanca Echevarria-Fulgencio and told her that this was a grievance at step one of the grievance procedure. Renner asked her to send him the forms necessary to file the grievance at step 2. The following day, Renner and Union Business Agent Jim Cross exchanged a series of emails in which Cross explained that any assistance by the Union would involve a service fee and Renner accused the Union of violating PERA and right-to-work laws by trying to charge him a fee. Cross emailed Renner a copy of the Union grievance form.

On September 26, 2018, Renner received a written response from his supervisor to his September 20 grievance. The supervisor noted that the internal grievance procedure stated that "regular full-time and regular part-time employees not covered by a collective bargaining agreement" had the right to use that procedure. The supervisor told Renner he did not believe that Renner had the right to use the internal procedure since his position was covered by a collective bargaining agreement. However, he said that he was nevertheless responding to the grievance. He wrote that he had reviewed the information Renner had provided and believed that the disciplinary action taken was still warranted.

Later that day, Renner sent an email to Echevarria-Fulgencio and Cross informing them that he had received a response from his supervisor and asking them to whom he should send the information in order to file a grievance under the collective bargaining agreement.

On September 27, 2018, Union counsel Frank Guido sent Renner an email which, first, noted that Renner had exercised his right to opt-out of union membership. Guido told Renner that while by law he remained part of the bargaining unit, "the Union does not owe any duty to you to provide direct representation services unless you comply with the Union Operating Procedure which mandates that an opt-out employee may request union representation services upon prepayment for services." A summary of the procedures was attached to the email.

In the email, Guido provided Renner with an estimate of $420 for the services of Union representatives in processing his grievance through the third step of the grievance procedure, and an additional $870 for "consultation, review and legal counsel to proceed to step 4," i.e. arbitration. Renner was directed to prepay $1,290 by credit or debit card if he was requesting Union assistance in the further processing of his grievance. Renner was warned that this was only an estimate, and that if the actual amount exceeded the estimate, he would have to pay the balance prior to any continuation of services. He was also advised that the estimate did not include any additional services in the event the grievance proceeded to arbitration. The email also included these paragraphs:

> Please be aware that the only process allowed to pursue a grievance, through the CBA steps, is via the Union. The Employer is prohibited from direct dealing with

an individual employee in regard to the CBA grievance process. Though we are not obligated to advise you of individual rights under the Public Employment Relations Act (PERA), pursuit of an individual grievance is allowed under Section 1 of PERA, which states:

> …any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect, provided the bargaining representative has been given an opportunity to be present at such adjustment.

Renner filled out the Union grievance form, signed it, and submitted it to Echevarria-Fulgencio and Cross by email on October 1, 2018, along with supporting documents. He did not pay the Union any money, and the Union did not submit the grievance on his behalf. On October 2, 2018, Renner filed the instant charge, but continued to send Echevarria-Fulgencio and Cross emails asking about the status of his grievance, including an email on October 16, 2018, asking if the Union had "purposely missed the timeline" for filing the grievance.

Discussion and Conclusions of Law:

PERA's "Freedom to Work" Amendments
and the Duty of Fair Representation

Prior to 2012, PERA contained a provision, then Section 10(2), that explicitly affirmed the right of public employers and the unions representing their employees to agree that all members of a bargaining unit be required to share in the financial support of the bargaining representative by paying either dues or a service fee. In addition, Section 10(1)(c), which prohibits a public employer from discriminating in order to encourage or discourage union membership, at that time included a proviso stating that this section did not prohibit a public employer from making an agreement with an exclusive bargaining representative to require employees to pay a service fee as a condition of their employment. These provisions became the subject of a Supreme Court case, *Abood v Det Bd of Ed,* 431 US 209 (1977), in which the Supreme Court upheld the constitutionality of the provisions in the face of arguments that they violated the nonmember plaintiffs' right of freedom of association under the First and Fourteenth Amendments of the United States Constitution. The *Abood* Court, however, drew a distinction between a union's expenses related to collective bargaining, for which a union could charge nonmembers, and the money it spent on political and ideological activities. The Court held that that a union could not compel nonmembers to contribute to the latter.

In 2012 PA 349, the Michigan Legislature passed what came to be known as the freedom to work amendments to PERA. The amendments removed Section 10(2) and the proviso to Section 10(1)(c) and, in a new Section 10(3), explicitly made it unlawful for a public employer and union to require employees, as a condition of obtaining or continuing their employment, to "pay any dues, fees, assessment or other charges or expenses of any kind or amount or provide anything of value to a labor organization or bargaining representative." Public police and fire departments

were exempted from this prohibition. 2012 PA 349 also amended Section 9 of PERA to state explicitly that public employees have a right to refrain from any the activities protected by Section 9, 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.

Prior to 2012, Section 10(3)(a)(i) of PERA had made it unlawful for a labor organization or its agents to "restrain or coerce public employees in the exercise of the rights guaranteed in Section 9." A proviso affirmed that Section 10(3)(a)(i) did not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition of membership therein." The freedom to work amendments left the language of Section 10(3)(a)(i) and its proviso in place but they became Section 10(2)(a) of the amended statute.

In addition to amending PERA, the Legislature, in 2012 PA 348, amended the Labor Relations and Mediation Act (LMA), MCL 423.1 et seq, to extend the prohibition on requiring nonmembers to pay agency fees to private sector employers and unions in Michigan. Thus, Michigan joined the list of 20-odd states with so-called "right-to-work" laws applicable to private employees, many of which dated back to the late 1940s and 1950s.[3]

The *Janus* Decision

In *Janus v American Federation of State, County and Municipal Employees,* 138 S. Ct. 2448 (2018), a Supreme Court majority overruled *Abood* and held that an Illinois statute authorizing the collection of mandatory agency/service fees from employees in the public sector who chose not to be union members was unconstitutional as it violated the free speech rights of public employees by compelling them to subsidize private speech on matters of substantial public concern. Although it suggested that the "strict scrutiny" test for examining the constitutionality of statutes might be more appropriate, the Court noted that in previous cases involving the constitutionality of agency fees it had applied the less demanding "exacting scrutiny" test. However, the Court held that the Illinois statute could not survive even under the less demanding standard.

Citing *Knox v Service Employees International Union,* 567 US 298, 310 (2012). the Court held that under the "exacting scrutiny" test, a compelled subsidy of private speech must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." It held that that neither state's interest in preserving labor peace or its interest in avoiding "free riders," *Abood's* justifications for allowing agency fees, passed muster under that standard. The Court concluded that avoiding free riders was not a compelling state interest. In its discussion of this point, the Court also said, at 2468-69,

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly

[3] The National Labor Relations Act (NLRA), 29 USC 150 et seq., covers most private sector employers and employees and preempts most state regulation of labor relations in the private sector. Section 14(b) of the NLRA, however, explicitly permits states and territories to prohibit agreements requiring membership in a labor organization as a condition of employment.

> less restrictive of associational freedoms" than the imposition of agency fees. *Harris,* 573 U.S., at ——, 134 S Ct, at 2639 (internal quotation marks omitted). *Individual nonmembers could be required to pay for that service or could be denied union representation altogether.*[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers. [Emphasis added]
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> In fn 6, the Court commented:
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> There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.,* Cal. Govt. Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

Respondent relies on the statements quoted above to support the lawfulness of its "Nonmember Payment for Labor Representation Services" operating procedures and its demand that Renner pay for its services in processing his grievance pursuant to that policy. However, the issue in *Janus* was whether the Illinois statute permitting agency fees as a condition of employment was constitutional under the First Amendment. Although this was not an issue before it, it appears, from the comments quoted above, that the *Janus* Court would not have found a state statute allowing public sector unions to charge nonmembers for processing their grievances unconstitutional as a violation of the nonmembers First Amendment rights. The issues before me here, however, are not constitutional but statutory. That is, I must decide whether Respondent's nonmember policy and its refusal to process Renner's grievance unless he paid a fee violate PERA as that statute is currently written. These are issues of first impression for the Commission.

Cone v Nevada Service Employees Union

Respondent cites *Cone v Nevada Service Employees Union, SEIU Local 1107,* 116 Nev 473 (2000) in support of its claim that its nonmember operating procedures do not violate PERA. In *Cone,* the Supreme Court of Nevada, a state with a right to work statute covering both public and private sector employees, held that it was not an unfair labor practice under Nevada's Local Government Employee-Management Relations Act (hereinafter the Nevada Act) for a union representing nonunion members of its bargaining unit to charge these nonmembers fees to represent them in grievance meetings, hearings, and arbitrations. It also found that this practice did not violate Nevada's separate right to work law.

The union in *Cone* represented a bargaining unit of employees of a Nevada public hospital. The collective bargaining agreement between the union and the hospital contained a provision stating that while the union agreed to fairly represent all employees in the bargaining unit, the hospital recognized the right of the union to charge nonmembers "a reasonable service fee for representation in appeals, grievances, and hearings." The union's practice, however, was not to charge a fee to nonmembers. However, soon after 100 members of the union's bargaining unit

resigned their membership and revoked their dues authorization forms, the union adopted a new policy. This policy, first, established a fee schedule for nonmembers for representation in grievance matters and, second, notified nonmembers that they could select outside counsel to represent them in "collective bargaining matters."[4] Although the union never enforced this policy, a group of nonmembers filed a complaint with the Local Government Employees Management Relations Board alleging that the policy "interfered with, restrained, coerced and discriminated against [them and all nonmembers] in the exercise of their right, if they chose, to be nonmembers of the union."

Section 140 of the Nevada Act, NRS 288.140, includes these provisions:

> 1.It is the right of every local government employee, subject to the limitations provided in subsections 3 and 4 [disqualifying certain types of government employees from being a member of an employee organization], to join any employee organization of the employee's choice or to refrain from joining any employee organization. A local government employer shall not discriminate in any way among its employees on account of membership or nonmembership in an employee organization.
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> 2. The recognition of an employee organization for negotiation, pursuant to this chapter, does not preclude any local government employee who is not a member of that employee organization from acting for himself or herself with respect to any condition of his or her employment, but any action taken on a request or in adjustment of a grievance shall be consistent with the terms of an applicable negotiated agreement, if any.

Section 270 of the Nevada Act, like Section 10 of PERA, includes provisions prohibiting both employers and unions from interfering with, restraining or coercing any employee in the exercise of rights guaranteed by the Act, and a provision prohibiting an employer from discriminating with regard to hiring, tenure, or terms and conditions of employment in order to encourage or discourage membership in a labor organization. Section 270(2), in addition to prohibiting unions from interfering with or restraining or coercing employees in the exercise of their rights, also explicitly prohibits them from discriminating because of political or personal reasons or affiliations.

The Nevada right to work statute, NRS 613. 250, reads as follows:

> No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall the State, or any subdivision thereof or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization.

[4] Section 195 of the Nevada Act guarantees employee organizations the right to be represented by an attorney when entering into negotiations with a local government employer.

At the time the *Cone* decision was issued, this provision had been interpreted by the Nevada Courts as prohibiting agreements to pay fees to a labor organization in lieu of membership dues as a condition of employment. *Independent Guard Ass'n v Wackenhut Services,* 90 Nev 202 (1974).

The *Cone* Court first rejected the argument that the union's designation as the exclusive bargaining agent meant that it could not "pick and choose" what services it would provide for free and concluded that this designation did not prohibit a union from charging nonmembers a fee for individual grievance representation. It found that it was implicit in Section 140(2) of the Nevada Act, providing an individual with the right to forego union representation in dealing with his or her employer, that a nonunion member could be required to pay for pursuing his or her own grievance even if the payment was made to the union.

The *Cone* Court then concluded that the union's policy did not violate NRS 613.250. It stated that Nevada's right to work law was enacted for the express purpose of guaranteeing every individual the right to work for a given employer regardless of whether the individual belonged to a union. It held that, unlike an agency shop agreement, the payment of a service fee for grievance representation was not a condition of employment. The Court noted, "Indeed an individual may opt to hire his or her own counsel, and thereby forego giving the union any money at all, without fear of losing his or her job."

The Court next rejected the argument that the union's policy discriminated against nonunion members and thereby breached its duty of fair representation as set forth in Section 140(1) and Section 270(2) of the Nevada Act. The Court stated that it found no discrimination, coercion, or restraint in requiring nonunion members to pay costs for union representation, citing *Schaffer v Bd of Ed,* 869 SW2d 163 (Mo. Ct. App. 1993), and *Opinion of the Justices,* 401 A2d 135 (Me. 1979).[5] The *Cone* Court also cited the Maine Supreme Court's statement that an exclusive bargaining relationship establishes a mutuality of obligation, in that the union has the obligation to represent all employees in the bargaining unit without regard to union membership and the employee has a corresponding obligation, if permissible under the collective bargaining agreement and union policy, to share in defraying the costs of collective bargaining services from which he or she directly benefits.

The *Cone* Court concluded its decision with the following paragraph:

> Although appellants cite much precedent, including NLRB opinions, in support of their position, we reject this authority. Preliminarily, we noted that this court is not bound by an NLRB decision when it determines that the statutes involved do not fall within the purview of the National Labor Relations Act. See *Associated Gen. Contractors v Otter Tail Power Co,*457 F Supp 1207 (DND 1978), (activities not listed in sections seven and eight of the National Labor Relations Act are within the jurisdiction of the state courts). Further, we disagree with this authority because it leads to an inequitable result that we cannot condone, by essentially requiring union

[5] The provision in a state employee contract in Maine and the school board policy in Missouri that were the subject of these decisions both required nonunion employees to pay the union a "fair share fee" as a condition of employment.

members to shoulder the burden of costs associated with nonunion members' individual grievance representation.

NLRB Decisions and Reasoning

As noted above, there are in excess of 20 states with right to work laws, some of them dating back to the 1940s and 1950s, and the jurisdiction of the NLRA extends to private sector employers and employees in those states. As the *Cone* Court noted, its conclusion that under Nevada statutes unions could lawfully charge individual nonmembers a fee for representing them in the grievance procedure was contrary to the National Labor Relations Board's (NLRB or the Board) interpretation of similar provisions in the NLRA. In a recent decision, *Allied Industrial and Service Workers International Union, Local 1192 (Buckeye Florida Corporation),* 362 NLRB 1649 (2015), the Board's ALJ, in a decision adopted by the Board when no exceptions were filed, summarized current Board law on this issue as follows:

> Applicable Board law is well settled and unambiguous. This matter arose in the State of Florida, a "right to work" state, and the collective bargaining agreement between the union and the employer contains no union security clause. The Union, via its Fair Share Policy, charges nonmember employees covered by the collective bargaining agreement a fee for processing a grievance. Under these circumstances, and current Board precedent, this Fair Share Policy violates Section 8(b)(1)(A) of the Act.
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> ** *
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> Section 8(b)(1)(A) of the Act prohibits an exclusive bargaining representative from restraining or coercing employees in the exercise of their Section 7 rights, which includes the right to refrain from joining a union. The Board has long held that a union violates Section 8(b)(1)(A) when it makes union membership a condition to processing a grievance. See, e.g., *Auto Workers Local 1303 (Jervis Corp Bolivar),* 192 NLRB 966 (1971). In *Machinists Local 697 (HO Canfield Rubber Co),*223 NLRB 832 (1976), the Board extended that holding to a case in which the union had made payment of fees by nonmembers a condition of grievance processing. The Board held [that] doing so discriminated against nonmembers and that to "discriminate against nonmembers by charging them for what is due them by right restrains them in the exercise of their statutory rights" Id, at 835, relying on *Hughes Tool Co,* 104 NLRB 31 (1953), (in which the Board held that demanding that nonmembers pay a fee for grievance and arbitration processing violated the union's obligations under Section 9(a) of the Act warranting revocation of the union's certification.). Thereafter, the Board has consistently held that absent a valid union security clause, or in a "right to work" state, a union may not charge nonmembers for processing of grievances or other related services because doing so coerces employees in the exercise of their Section 7 right to refrain from joining a union. *Furniture Workers Local 282 (Davis Co),* 291 NLRB 182 (1988) and *American Postal Workers (Postal Services),* 277 NLRB 541 (1985).

The Board explained its rationale for prohibiting unions from charging fees for grievance processing first in *Hughes Tool Co, supra* and then in *Machinists Local 697 (H.O. Canfield Rubber Co), supra. Hughes Tool* did not involve an unfair labor practice charge, but a motion by a rival union to revoke the certification of a unit's bargaining agent. Two different locals represented unit employees, one of which, Local 1, had announced that it would henceforth require that employees who were not union members be charged a fee for each grievance and each arbitration proceeding for which the union served as their representative. The rival union asserted that the fee system violated Local 1's duty to represent all employees in the bargaining unit whether or not they were members. Local 1 defended its fee system as a nondiscriminatory method of equitably sharing the costs of representation and argued that prior to the system certain members were "weighing our grievance men down with spurious grievances." Local 1 asserted that it did not refuse to represent any employee in the bargaining unit but merely required payment to equalize the financial burden arising from the expenses of grievance processing and arbitration.

The Board began its discussion with Section 9(a) of the NLRA. Section 9(a) is identical to Section 11 of PERA, and both state that "representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in the unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." Like Section 11 of PERA, Section 9(a), in a proviso, states that any individual employee shall have the right at any time to present grievances to his employer and have the grievances adjusted without intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement and the bargaining representative has been given the opportunity to be present at such adjustment. In *Hughes,* the Board stated that it had previously recognized that a labor organization which is granted exclusive bargaining rights has, in return, assumed the basic responsibility to act as a genuine representative of all the employees in the bargaining unit. The Board noted that a certified representative's status as exclusive representative can be achieved by virtue of the support of a bare majority of unit employees, and it held that to allow a union to discriminate based on union membership would subvert the privileges and rights granted to the union by the NLRA. The Board then held that since grievance handling plays a prominent part in the representation of employees, the presentation and adjustment of grievances is subject to the same requirement of nondiscriminatory representation as the negotiation of a collective bargaining agreement.

The Board concluded that Congress's intent in the proviso to Section 9(a) was to address the problem of an employee's right to choose to process a grievance without interference by his or her representative versus the representative's interest in preserving existing conditions of employment and its right to bargain. The proviso, the Board held, did not lessen the union's responsibility with respect to those grievances on which its aid had been requested. Finally, the Board concluded that the grievance and arbitration fees charged in the case before it conflicted with the union's duty to represent employees in grievance proceedings without discrimination. It said, "The duty of the certified representative to render such impartial assistance is clearly evaded where some employees are forced to pay a price for such help *or to forego it entirely."* [Emphasis in original.]

In *Machinists Local 697,* the collective bargaining agreement between the union and employer contained a grievance procedure ending in binding arbitration. Because the employer was in Virginia, a right to work state, the collective bargaining agreement was prohibited by Virginia law from including an agency shop or other compulsory union membership provision. The charging party, a member of the union's bargaining unit but not a union member, filed six grievances within a period of less than a year. After being involuntarily transferred to another job, charging party filed a seventh grievance, and filed an eighth after he was notified by the employer later that month that he was to be laid off for five days for failure to meet production standards. After charging party filed his seventh grievance, the union told him that it would process grievances for nonmembers through the first step, but absent an agreement to pay for all costs incurred, it would not process them further.

The Board first noted that it was undisputed that the union had drawn a distinction between members and nonmembers and, to that extent, had discriminated against the charging party. The Board framed the issue as whether the union's discrimination against nonmembers was such that it restrained or coerced them in the exercise of their Section 7 rights, or whether the discrimination was merely a lawful exercise of reasonable discretion as the union claimed.

The Board began its analysis of this issue by noting that it had long held that an exclusive bargaining agent takes on the responsibility to act as the genuine representative of all employees in its bargaining unit irrespective of union membership or a union security contract. As it had in *Hughes Tool,* the Board held that this responsibility was the quid pro quo under the NLRA for the union's receiving the right to compel an employer to bargain with it in good faith despite the fact that a substantial minority in the unit may not want to be represented by that particular union or any union at all. The Board also held, as it had in *Hughes Tool,* that a grievance and arbitration procedure is a "a primary tool in the implementation of the collective bargaining agreement and therefore a vital part of collective bargaining." It noted it had repeatedly held that a union's duty to avoid unfair discrimination extends to the grievance procedure and that a union could not lawfully refuse to process the grievance of an employee in the unit because he was a nonmember. The Board cited *Port Drum Company,* 170 NLRB 555, 556, fn. 4 (1968). *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, and its Local No. 1303 (Jervis Corp., Bolivar Division)*, 192 NLRB 966 (1971); *United Steelworkers of America, Local No. 937, AFL-CIO-CLC (Magma Copper Company)*, 200 NLRB 40 (1972); *Local Union Nos. 186, 381, 396, et al., affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (United Parcel Service)*, 203 NLRB 799 (1973); and *International Brotherhood of Electrical Workers, Local Union 1504 (Western Electric Company, Inc.)*, 211 NLRB 580 (1974).

Although admitting that the union in the case before it had not refused outright to process charging party's grievance, the Board held that by requiring a fee from nonmember employees for services "which are due the latter as a matter of right," the union had, in effect taken the position that it would only represent its members in the important area of contract administration. The Board stated that by charging only nonmembers for grievance representation, the union had discriminated against nonmembers. It concluded that discriminating against nonmembers by charging them for what was due them by right restrained them in the exercise of their statutory

rights under Section 7 of the NLRA, including the right to refrain from joining a union, and thus violated Section 8(b)(1)(A) of the NLRA. [6]

Conclusion

Despite essential similarities between the Nevada Local Government Employee-Management Relations Act and the NLRA, the Nevada Court in *Cone* and the NLRB in *Machinists Local 697* reached opposite conclusions as to whether charging nonmembers a fee for grievance processing constitutes unlawful discrimination against nonmembers or interference with employees' right to refrain from joining a labor organization under these statutes. I note that the *Cone* Court apparently interpreted the Nevada Act as giving individual employees not only the right to present grievances to their employer and have them adjusted without assistance from the union but the right to compel their employer to deal with them and their personal attorneys on grievance matters. Neither Section 11 of PERA, nor Section 9(a) of the NLRA insofar as I can determine, has been interpreted as giving employees either the latter right or the right as individuals to file and process a grievance through the contractual grievance procedure when the union will not. However, the Court's ultimate holding in *Cone* did not rest on this distinction.

The Courts have long held that since PERA, in its original form, was patterned on the NLRA, it was the Legislature's intent that the Commission would rely on legal precedents developed under the NLRA insofar as they applied to the public sector and that the Legislature intended the courts to view the federal labor case law as persuasive precedent. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 53, 64 (1974). See also *Michigan Employment Relations Comm. v Reeths-Puffer School Dist,* 391 Mich 253, 259–260, (1974) and *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-563 (1998). In *Goolsby v City of Detroit*, 419 Mich 651, 660, (1984), the Supreme Court concluded that since the rights and responsibilities imposed by PERA on labor organizations representing public sector employees were similar to those imposed on labor organizations representing private sector employees by the NLRA, PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees.

The Commission is not required to follow "every twist and turn of federal precedent," even where the pertinent language in PERA is identical to that in the NLRA. *Kent Co,* 21 MPER 61 (2008); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530; *Marquette Co Health Dep 't*, 1993 MERC Lab Op 901. Here, however, as the ALJ in *Buckeye Florida Corporation,* put it, the Board law is "well settled and unambiguous" and the issue is one of first impression for the Commission. As the *Cone* Court pointed out, Board law requires unions which are legally barred from compelling unit employees to pay an agency fee, and those unions' members, to shoulder the cost of grievance representation for nonmembers. I agree with that Court that this is, at least arguably, unfair to those employees who pay dues to support these services. Nevertheless, I recommend that the Commission follow Board precedent and, therefore, deny

[6] Like Section 10(2)(a) of PERA, Section 8(b)(1)(A) includes a proviso stating that the section does not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." The Board in *Machinists,* however, did not discuss the impact of this section on the lawfulness of charging nonmembers a fee for grievance processing.

Respondent's motion for summary dismissal of the charge.[7] As the parties agree that there are no genuine issues of material fact and that they have had the opportunity to argue the issues of law, I also recommend that the Commission find that the Union's "Nonmember Payment for Labor Representation Services" operating procedures violate Section 10(2)(a) of PERA because they unlawfully discriminate against nonunion members and restrain employees from exercising their Section 9 right to refrain from joining or assisting a labor organization. In addition, I recommend that the Commission find that the Union unlawfully discriminated against and restrained 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. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Technical Professional and Officeworkers Association of Michigan, its officers and agents, are hereby ordered to:

1.Cease and desist from discriminating against nonmembers, and from interfering with, restraining, and coercing them in the exercise of their right to refrain from joining or assisting a union.

2. Cease and desist from refusing to represent nonmembers in grievance or disciplinary matters for which the Respondent normally provides representation without additional charge unless the nonmembers pay Respondent a fee for its representation;

3. Rescind or cease and desist from enforcing its "Nonmember Payment for Labor Representation Services" operating procedures adopted on August 10, 2018, to the extent that these operating procedures require nonmembers to pay Respondent a fee for services Respondent normally provides to its members without additional charge;

4. Cease and desist from demanding that Daniel Renner pay Respondent a fee as a condition of Respondent's filing a grievance on his behalf or providing him representation with respect to a disciplinary matter;

5. If permitted by Renner's employer, Saginaw County, post the attached notice in all places on the employer's premises where Respondent normally posts notices to its unit members for a period of thirty consecutive days or provide copies of the notice to unit members by other means Respondent usually uses to communicate with them.

[7] Respondent argues in this case that its right to implement these procedures is protected by the proviso to Section 10(2)(a) because the charging of fees is an internal union matter. However, as the NLRB has held, grievance processing is fundamental to a union's duty, as the exclusive bargaining agent, to represent all members of its bargaining unit without discrimination. Because a union's decision not to represent a unit member in a grievance or disciplinary matter has a clear impact on the unit member's terms or conditions of employment, it is not merely an internal union matter.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: April 25, 2019