STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MT. CLEMENS COMMUNITY SCHOOLS,
Respondent-Public Employer in Case Nos. C98 B-17 & C98 B-19,

-and-

AFSCME LOCAL 873,
Respondent-Labor Organization in Case Nos. CU98 B-4 & CU98 B-5,

-and-

SARA L. NALLS,
An Individual Charging Party in Case Nos. C98 B-19 & CU98 B-5,

-and-

VIRGINIA PHILLIPS,
An Individual Charging Party in Case Nos. C98 B-17 & CU98 B-4.
_____/

APPEARANCES:

Pollard & Albertson, P.C., by Robert Nyovich, Esq., for the Public Employer

Miller Cohen, P.L.C., by Gail M. Wilson, Esq., for the Labor Organization

Sara L. Nalls and Virginia Phillips, *in pro per*

DECISION AND ORDER

On September 29, 1998, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaints.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

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

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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_____/

APPEARANCES:

For the Respondent Employer:	Robert Nyovich, Esq., Pollard & Albertson, P.C.
For the Respondent Labor Organization:	Gail M. Wilson, Esq., Miller Cohen, P.L.C.
For the Charging Parties:	Sara L. Nalls and Virginia Phillips, in pro per

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan on May 8,1998, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. This hearing was conducted pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 & 423.216, MSA 17.455(10) & 17.455(16). Based upon the entire record, including post-hearing briefs filed by the parties on or before July 8, 1998, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On February 3, 1998, Charging Party Virginia Phillips filed the charge in Case No. C98 B-17 against the Mt. Clemens Community Schools (the Employer), and the charge in Case No. CU98 B-4 against AFSCME Local 873 (the Union). On February 4, 1998, Charging Party Sara L. Nalls filed the charges in C98 B-19 and CU98 B-5 against these same parties. All four cases were consolidated on February 10, 1998. On April 15, 1998, the Union filed a motion for summary dismissal on the grounds that Charging Parties had failed to state a claim against it under the Act. Charging Parties filed a response to this motion on April 29.

Charging Parties allege that the Union breached its duty of fair representation by refusing to provide them with a copy of an arbitrator's award awarding longevity pay to certain employees, including the Charging Parties. The arbitrator's award resulted from a group grievance filed by the Union on December 12, 1996. Secondly, Charging Parties allege that the Union breached its duty of fair representation by refusing to file a second grievance regarding the Employer's interpretation of the arbitrator's award. Under this interpretation, the Employer was not required by the award to pay longevity accrued prior to the date the grievance was filed. Additionally, Charging Parties allege that the Union breached its duty of fair representation, and failed to follow the steps of the contractual grievance procedure, by failing to file a written grievance regarding the longevity pay dispute prior to December 12, 1996. Charging Party Nalls also initially alleged that the Union committed an unfair labor practice by refusing to permit her to speak at a Union meeting in January 1998. However, after it was explained to her that PERA does not cover internal union disputes she did not present evidence at the hearing regarding this allegation. Against the Employer, the Charging Parties allege that it breached its collective bargaining agreement by refusing to pay Charging Parties the amount of longevity pay they were owed under the contract.

Findings of Fact:

The Union represents a bargaining unit consisting of all non-instructional personnel employed by the Employer, excluding substitutes, noon aides, crossing guards, office clerical personnel and supervisors. The Union has represented this bargaining unit for more than 20 years. Charging Party Phillips is employed by the Employer as a hall monitor and Charging Party Nalls is employed as a paraprofessional. Both Charging Parties are included in the Union's bargaining unit. Neither Charging Party works 12 months per year, although some members of the bargaining unit do.

The Union and the Employer had a collective bargaining agreement covering this unit which expired on June 30, 1997. Contained in this contract was the following language regarding the payment of longevity pay:

> ARTICLE XXX - LONGEVITY
>
> A. Longevity payments based on the base rate of an employee's classification will be paid as follows:
>
> After 10 years - $400.00
> After 1-5 years - $550.00

B. Longevity payments will be made in a separate check following the employees' anniversary date.

The contract also contained a provision on seniority which read as follows:

2. a. 2080 hours - one (1) year credit

b. Less than 2080 hours- number of scheduled days times number of scheduled hours divided by 2080 = percent of credit to nearest month (paid holidays that fall within the employee's work year will be used in computing hours toward seniority)

Similar provisions have been in the Respondents' collective bargaining agreements for many years. The Employer had consistently interpreted these provisions as requiring it to pay longevity only after an employee had acquired ten years of seniority, as computed using the formula set out above, and not when the employee reached his or her ten-year anniversary date. That is, employees who normally worked less than 2080 hours a year did not begin receiving longevity payments after ten years of employment, and did not get an increase in the amount of their longevity after they had worked for the Employer for 15 years.

Sometime in late 1995 the Union elected a new president. She replaced Charging Party Nalls, who had been Union president for the previous seven years. The new president, like both Charging Parties, normally worked less than 12 months per year. The new president's ten year anniversary date occurred on September 12, 1996. During the fall of 1996, the president began talking to employees she knew worked less than 12 months per year about whether they had been receiving longevity pay. Because she had only a seniority list, the Union president did not initially know how many employees in the unit had been employed for more than 10 years. On October 3, the new president sent an e-mail to Nalls. The new president asked Nalls if longevity pay was supposed to be based on years with the Employer or on "union seniority." In her reply, Nalls stated it should be based on anniversary dates, and indicated that she had planned to submit a request for longevity pay after she reached her ten-year anniversary date. Since Nalls was hired as a regular employee on November 24, 1986, she was about to reach this date. Nalls suggested to the new president that the president send the Employer a memo about the issue.

Shortly thereafter, the Union president approached the Employer and asserted that under Article XXX of the contract longevity payments should be based solely on an employee's anniversary date. No written grievance was filed at this time, but the Respondents discussed the matter informally. At one point, the Employer presented the Union with a proposed memorandum of understanding, but Respondents were unable to resolve the matter.

During this period the Union president looked through the Employer's records and came up with a list of employees she believed were entitled to longevity pay based on their anniversary dates. During this same period a Union steward also prepared a list, although the record does not indicate what sources the steward used.

On November 26, Nalls made a request to the Employer to be paid longevity pay based on the fact that she had reached her 10-year anniversary date. She was referred by the Employer to the Union president. On November 27, the president e-mailed Nalls that a group grievance would be filed as soon as the Employer refused in writing to pay "those of us" who had reached their 10-year anniversary. She wrote Nalls that other Union representatives had advised her that the issue would probably have to be arbitrated. The president added, "There is no time limit on issues involving money."

On December 3, 1996, the president wrote the Employer demanding that seven named individuals, including herself and the Charging Parties,[1] receive longevity pay "in accordance with Article XXX of the existing contract." The Union filed a grievance on December 12, 1996. In this grievance the Union demanded that the Employer adhere to the language of Article XXX and make "payment in full to all eligible AFSCME members." No specific individuals were mentioned in the grievance. Respondents agreed to bypass the interim steps of the grievance procedure and proceed directly to arbitration.[2] An arbitration hearing was held on June 26, 1997. On October 12, 1997, the arbitrator issued his award granting the grievance. The award concluded:

> To remedy this violation, (the Employer) is directed forthwith to make those payments effective with the date the grievance arose and continue them until such time as the terms of the CBA are changed. (Emphasis added)

Although the arbitrator did not specifically refer to this section of the contract, the Employer asserts that the arbitrator was limited in his authority to grant retroactive relief by the following language in Article VIII of the contract, the grievance procedure:

> ... the parties agree that the arbitrator has the right to grant a monetary award, provided that such award is not retroactive more than ten (10) days prior to the date of the alleged grievance.

The Union's newsletter of October 29, 1997, included an article about the arbitration award by the Union president:

> On Wednesday, October 15, 1997, AFSCME Council #25 Staff Specialist Bill Harper informed me that we had won our Longevity Arbitration.
>
> A Grievance was filed in 1996 on behalf of AFSCME Members who had reached their 10th Anniversary with the Mount Clemens School District. These employees were ten

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[1] Charging Party Phillips was hired in 1981. (Phillips recalls her hiring date as November 18, 1981, but the Employer has an earlier date, in September).

[2] Step one of the grievance procedure is a meeting between an employee and his supervisor. The Union submits a written grievance at the conclusion of this meeting. Steps two and three involve a department head and the superintendent or his representative, respectively. Step four is arbitration.

> and eleven month workers. The Grievance was denied and therefore sent to Binding Arbitration. The Arbitrator rendered his decision in favor of AFSCME Local 873. I spoke with Staff Specialist Bill Harper who advised us to be patient, the monies will be paid in a timely manner. The longevity payments will be paid in accordance with Article XXX, sections A and B of the existing contract.
>
> If you have questions regarding this matter you may call me before 9:30 a.m. or after 3:30 p.m. at ext 1917 or (phone number) after working hours.
> . . .
>
> P.S. If you would like to read the Longevity Arbitration Ruling, it will be available at the November 8, 1997 meeting.

Nalls attempted to obtain a copy of the award by both e-mailing and phoning the president, but could not reach her. On November 7, Nalls sent a certified letter to a Union staff representative requesting "information" about the award. Nalls did not attend the November 8, 1997, Union meeting. Phillips did attend, but testified that she was unable to read the whole arbitration award because there was only one copy available and so many members wanted to see it. Phillips did ask the Union president at this meeting how many payments she would receive, since (according to her calculations) her anniversary date was coming up soon. The Union president told Phillips that she would be getting two checks, one for 1996 and one after her 1997 anniversary date.

After receiving the award, the Employer identified employees with anniversary dates falling between December 12, 1996, the date the grievance was filed, and the end of 1997. The Employer selected this date because it interpreted the "date the grievance arose" in the arbitrator's award to be the date the written grievance was filed. The Employer then issued checks to these employees based on their years of service. Eleven or twelve employees received checks. According to the Employer, these checks represented longevity payments due these individuals for 1997. On November 14, 1997, Charging Party Nalls received a check for $400. The Employer intended this to be the payment due her following her 11th anniversary date on November 24,1997. At about this time, Charging Party Phillips received a check for $550. The Employer intended this to be the payment due her following her 16th anniversary date in (according to the Employer) September 1997. According to the Employer's interpretation of the award, the grievance would have had to have been filed before their anniversary dates in 1996 for them to receive payments for 1996 under the award.

On about November 19, Nalls learned from a conversation with the Employer's director of personnel that, as far as the Employer was concerned, the check she had received represented her 1997 payment and she was not entitled to another one. Nalls had not seen the arbitrator's decision at that point. However, she told the director of personnel that she believed she was entitled to another payment, since "the grievance had been for her 10-year anniversary." On November 20, Nalls sent the Employer a written request for another payment, and sent a copy to the Union president. In an e-mail on that same day, Nalls told the Union president that she suspected that she would have to file a grievance when she did not receive a check the pay period following her anniversary date. Nalls also sent a memo to the Union staff representative requesting a copy of the December 12, 1996 grievance. In her reply to Nalls' November 20 e-mail, the Union president stated that she had turned

the matter over to the staff representative. She also told Nalls that since the check that they had gotten did not specify any date, they could assume that the check was for 1996, and that if necessary they would grieve again. However, the Union president subsequently was told by a Union staff representative that under the arbitrator's award the employees were entitled only to one check, for 1997. The Union president also called the American Arbitration Association, who confirmed that interpretation of the award.

On December 1, 1997, Nalls sent the Union president an e-mail asking her to write a grievance on her behalf regarding the longevity payment. On this same date, Phillips wrote a letter to the Union president stating that she had not received a longevity payment following her anniversary date on November 18, 1997, and asking the Union president to write a grievance for her. Neither Charging Party received responses to these communications. No grievances were filed.

At a Union meeting held in early December, the Union president explained to the bargaining unit that she had initially made an error in interpreting the arbitrator's award. The Union president also telephoned some, but not all, of the employees who had received checks to explain the matter. She also explained the situation to other employees when she encountered them. The Union president did not attempt to speak personally with all of the employees who had received checks, and did not speak personally with either Charging Party. It is not clear whether either Charging Party was at the December 1997 union meeting.

Discussion and Conclusions of Law:

Under Section10(3)(i) of PERA, a union representing public employees owes a duty of fair representation toward these employees. The duty of a public sector union toward its members is essentially the same that of a union representing members in the private sector. In both, the Union's duty of fair representation consists of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty; and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903 (1967).

In *Goolsby v Detroit*, 419 Mich 651, 682 (1984), the Michigan Supreme Court defined the meaning of "arbitrary conduct" as it applies to unions covered by PERA:

> . . . the conduct prohibited by the duty of fair representation includes (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 their charges filed on February 3 and 4, 1998,Charging Parties originally argued that the Union had a duty to file grievances for them regarding the Employer's failure to issue them longevity checks after their anniversary dates in November, 1997. The record disclosed that the reason the Employer did not do this is that it had already, in its view, paid them their longevity pay for that year. In October 1997, an arbitrator ordered the Employer to make longevity payments to eligible employees "effective with the date the grievance arose." The Employer interpreted "the date the

grievance" arose as the date the written grievance was filed, or December 12, 1996. That is, the Employer's position was that it did not owe longevity payments for 1996 to anyone whose annniversary date was before December 12. In mid-November, 1997, the Employer issued longevity checks to certain employees, including the Charging Parties. Charging Parties mistakenly believed that these were their checks for 1996. The Union president initially assumed, as Charging Parties did, that the award provided for payments for 1996. The Union, however, eventually took a different view, agreeing with the Employer's interpretation of the award. Thus, the Union did not take issue with the Employer's compliance with the terms of the award.[3]

The Union's decision that the Employer had correctly interpreted the award was not irrational or "unreasoned." There was never any dispute that the Employer had not been paying longevity pay in accord with employees' anniversary dates, throughout the term of the contract and before. Under these circumstances, there was no clear date for the grievance to "arise" other than the date it was filed in written form.

Charging Parties argue that the Union acted in bad faith by refusing Nalls' request for a copy of the award. They also argue that it discriminated against them by refusing to give Nalls a copy of the award when the Union president herself had a copy, and by failing to personally notify them that the Union agreed with the Employer's interpretation of the award. There is no merit to these arguments. The Union president explained that she did not have the resources to make copies of the award for the whole membership, and that she did not think it would be right to give a copy only to Nalls. The Union president didn't attempt to explain the Union's position personally to all the members of the bargaining unit affected by the award. The record shows that the Union disseminated information about the award through its newsletter and at several union meetings. Also, the Union president clearly needed to have a copy of the award to carry out her function of representing the membership. The fact that she kept a copy of the award but refused to make a copy for Nalls is not an indication of either bad faith or unlawful discrimination.

More importantly, there is no indication that the Union's decision not to give Nalls her own copy of the award had any affect on the terms and conditions of her employment. The duty of fair representation under PERA covers only matters which have an impact on an employee's employment status or terms. See, *Organization of Classified Custodians*, 1996 MERC Lab Op 181. Internal union matters are not covered by the statute. The Union's decision not to make copies of the arbitrator's award for all its members or for Nalls in particular was an internal union matter, as was the Union president's failure to personally explain to Charging Parties the Union's position on the meaning of the award. As I stated at the hearing, Nalls' original allegation that she was denied the right to speak at a Union meeting in January 1998 also falls into this category.

During the course of the hearing, and in their brief, Charging Parties shifted the focus of their

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[3] The Union notes, correctly, that it could not have filed a grievance for the Charging Parties in 1997, since Charging Parties' dispute was with the Employer's interpretation of an arbitration award, not the contract. If the Union had believed that the Employer had not adequately complied with the award, however, it could have sought enforcement or clarification of the award.

charges from the Union's conduct after the issuance of the arbitrator's award in October 1997 to its initial handling of the longevity pay dispute during the fall of 1996. Under Section 16(a) of PERA, the Commission has no jurisdiction to find an unfair labor practice based on events which occurred more than six months prior to date the charge was filed. This statute of limitations begins to run on the date a charging party knew or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). On November 27, 1996, in response to Nalls' request that a grievance be filed on her behalf, the Union president e-mailed Nalls that a group grievance would be filed as soon as the Employer refused in writing to pay "those of us" who had reached their 10 year anniversary. Thus Nalls knew in November 1996 that the Union not yet filed a written grievance on the longevity issue and that it was not planning to file an individual grievance for her. Charging Party Nalls' allegations that the Union breached its duty of fair representation toward her in 1996 are therefore untimely.

There is no indication that Charging Party Phillips knew in 1996 what the Union was doing with respect to the longevity pay issue. I find, however, that the Charging Parties' claim that the Union "failed to comply with the provisions of the grievance steps" in 1996 is untrue. Step one of the Respondents' grievance procedure describes the way in which an individual employee can initiate a grievance. Step one states that "any" employee may request a meeting with his or her supervisor within 10 days of the date of occurrence of the alleged grievance. Step one provides that the Union "shall submit" a written grievance within three days of the meeting, if the matter is not resolved. Step one, by its terms, does not apply to grievances like the longevity pay grievance,which affected many employees including some which the Union could not identify. I find that the Union made a good faith, rational decision to engage in informal settlement discussions with the Employer over the longevity pay issue before filing a formal written grievance. I also find that the Union made a good faith, rational decision to file a group grievance instead of a grievance asking for specific relief for specific employees. For the reasons set forth above, I conclude that the Union did not violate its duty of fair representation in this case.

Charging Parties' claim against the Employer is that it breached its collective bargaining agreement with the Union by refusing to pay them longevity pay for 1996. They also allege that the Employer breached the contract by failing to comply with the steps of the grievance procedure and the time limits for these steps as stated in the contract. This second allegation apparently refers to the Respondents' agreement, after the Union filed the written grievance on December 12, 1996, to bypass steps two and three of the grievance procedure and proceed directly to arbitration.

Section 10(1)(c) of PERA prohibits an Employer from discriminating against employees to encourage or discourage union activity. However, a claim by an employee that his employer has violated the collective bargaining agreement does not allege a violation of PERA. See *City of Detroit(Wastewater Treatment Plant)*, 1993 MERC Lab Op 716; *Ferris State College*, 1978 MERC Lab Op 757. When a union has been found to have breached its duty of fair representation by failing to process a grievance, the Commission has jurisdiction to interpret the contract to determine whether the grievance would have had merit. *City of Detroit (Dept. of Environmental Maintenance)*, 1993 MERC Lab Op 268, on remand from *Goolsby*, *supra*. However, this is not the situation here. I conclude that Charging Parties have not alleged any conduct by the Employer which would constitute

a violation of PERA.

I find that neither Respondent Mt. Clemens Community Schools nor Respondent AFSCME Local 873 has committed an unfair labor practice under PERA. I therefore recommend that the Commission issue the following order.

Recommended Order

The charges in this case are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Date: _____