STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Respondent-Public Employer in Case No. C98 J-217,

-and-

PONTIAC EDUCATION ASSOCIATION,
Respondent-Labor Organization in Case No. CU98 J-53,

-and-

MARILYN HATCHETT,
An Individual Charging Party.
____/

APPEARANCES:

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

Amberg, McNenly, Firestone and Lee, P.C., by Michael K. Lee, Esq., for the Labor Organization

Wiggins and Associates, by Chris Hunter, Esq., for the Charging Party

DECISION AND ORDER

On May 28, 1999, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent 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 complaint.

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

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

____
Harry W. Bishop, Commission Member

____
C. Barry Ott, Commission Member

Date: ______

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent in Case No. C98 J-217

-and-

PONTIAC EDUCATION ASSOCIATION,
Labor Organization-Respondent in Case No. CU98 J-53

-and-

MARILYN HATCHETT,
Individual Charging Party.
____/

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

Amberg, McNenly, Firestone and Lee, P.C., by Michael K. Lee, Esq. for the Respondent Union

Wiggins and Associates, by Chris Hunter, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan on February 10, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. The 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 exhibits and a transcript of the hearing filed on April 21, 1999, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

The charge in Case No. CU98 J-53 was filed on October 29, 1998, by Marilyn Hatchett against her bargaining representative, the Pontiac Education Association. This charge was amended on November 17, 1998. The charge, as amended, alleges that the Union breached its duty of fair representation by promising on June 10, 1998 to file a grievance regarding the docking of Hatchett's pay, and then failing to do so within the time limits allowed by the collective bargaining agreement.

This charge also alleges that on June 21, 1998, the Union breached its duty of fair representation by refusing to file a grievance or otherwise assist Hatchett with respect to alleged unspecified harassment by her supervisors. Finally, the charge alleges that in September 1998 the Union unlawfully refused to file a grievance over Hatchett's failure to receive a transfer to an assignment as a preschool teacher.

The charge in Case No. C98 J-217 was filed by Hatchett on October 29, 1998, against her Employer, the Pontiac School District. This charge alleges, first, that the Employer discriminated against Hatchett with regards to hiring practices. The charge does not specify the reason for this discrimination. It also alleges that various administrators employed by the Employer "harassed, blackballed and discriminated" against Charging Party for "their own independent and collective reasons."

Facts:

Hatchett has been employed as a teacher with the Pontiac School District since 1987. She is a member of a bargaining unit of certified teachers represented by the Pontiac Education Association.

Hatchett's Transfer Request:

During the 1996-97 school year Hatchett taught second grade. In May 1997 she applied for a preschool teacher position for the following school year, indicating that she wanted to teach younger children and to utilize her early childhood endorsement. In early June, she also applied for a kindergarten position, indicating that this was her second choice. The Employer expected a preschool position to become vacant because one of the preschool teachers had said she would not be returning. On June 25, Hatchett received a letter from the Employer stating that she was assigned to teach preschool for the 1997-98 school year. However, on July 10, she was informed that the preschool position was no longer available, and that she would be assigned to teach kindergarten. The record indicates that the preschool teacher had changed her mind and decided to stay in her position. Hatchett felt that she should have been given the preschool assignment anyway, and she called the Union president and asked him to file a grievance. The Union president told her he didn't think this was a grievable issue.

In the fall of 1997 another preschool teacher position unexpectedly became vacant. Instead of immediately filling the position, the Employer assigned a substitute to the classroom for the duration of the 1997-98 school year. Hatchett believed, however, that she would eventually get the assignment based on her previous application.

In February 1998, the Employer posted the preschool teacher position that was being taught by a substitute. The fact that this position was posted indicated that the Employer did not believe that

it had a transfer request for this position on file.[1] Hatchett, however, was not aware of this and assumed she would get the position without taking any further action. In late May or early April 1998, Hatchett saw a notice that another teacher would be teaching preschool in the fall, and went to the Union president. The Union president spoke to the temporary personnel director about the matter. The personnel director told him that the teacher whose name had been posted was an involuntary transfer, who had the first right to the job, but that in fact this teacher had decided to take another position, and the preschool job was going to a teacher who had applied in response to the posting. The personnel director told the Union president that Hatchett did not have a valid transfer request on file. According to the president, he did not have any reason to disbelieve the personnel director, and did not take any further action at that time. In late June or early July, Hatchett spoke to the personnel director herself. After that conversation, Hatchett called the Union president again. The Union president told Hatchett that the Employer didn't have a current transfer request on file from her. Hatchett told him that this was wrong, and that he needed to look into it. According to Hatchett, at some point Charging Party tried to show the president her copies of her transfer requests, but he refused to look at them. On September 3, the Union filed a FOIA request asking that the Employer supply it with the transfer requests made by teachers during the 1996-97 and 1997-98 school year. On September 4,the Employer replied that it only had transfer requests made after May 15, 1998, and that previous requests had been destroyed. The president then looked at the current seniority list, and noted that the teacher awarded the preschool position had more seniority than Hatchett. He concluded that there was no basis for filing a grievance. There is no indication on the record that Hatchett specifically asked the Union president to file a grievance at any time.

The Alleged Harassment of Hatchett by Her Supervisors

---

[1]Article 6 of the Respondents' collective bargaining agreement covers transfers. The pertinent language is as follows:

> 2.1 On or before May 15, teachers shall be notified that they may apply for any classroom position currently existing in the District. Teachers may file for these positions through October 15. On October 16 the requests will be frozen until May when anyone requesting a change must refile.
>
> 2.2 As vacancies occur they shall be filled from the list of teachers on file. . .
> . . .
> 3. Any non-classroom position or classroom position which is not a duplication of an existing position shall be posted. . . . A classroom position shall be posted during the period from October 16 to March 1 when there are no active transfer requests on file, subject to the provisions of Item 2 of this Section. A position which is known to be available for the following school year shall be posted and
> may be tentatively filled prior to May 15.

At the beginning of the 1997-98 school year, Hatchett began having problems with her assistant principal. Hatchett felt that the assistant principal was unfairly singling her work out for special attention. During the 1997-98 school year, Hatchett asked the Union president to intercede on her behalf with various administrators approximately 50 times. On each occasion the Union president spoke to the administrator, usually the assistant principal, informally. Some of these intercessions did not involve criticisms of Hatchett's work performance. For example, the Union president succeeded in getting Hatchett reimbursement for some paper cups she had bought that were not used in a classroom project because Hatchett was absent on the day the project was done. The record indicates that Hatchett was generally satisfied with the Union president's efforts, and that she did not ask him to file grievances.

Sometime in the late winter or mid-spring of that school year, a consultant who had come into Hatchett's classroom to evaluate a problem student began criticizing Hatchett, and the two had a verbal altercation. The consultant later went to the assistant principal and made unfavorable comments about Hatchett. Hatchett complained to the Union president, and the president arranged a meeting with the assistant principal. According to the Union president, the consultant, who was a teacher, did not have the right to evaluate Hatchett. However, since there was no written document from the consultant in Hatchett's personnel file which could constitute "an evaluation" under the contract, there was nothing for him to grieve in this instance. Later in that year Hatchett complained to the Union president that the assistant principal had started writing comments regularly in Hatchett's lesson plan book, even though he did not even bother looking at other teachers' lesson plans. The president had a meeting with the administration, and he also talked to some other lower elementary teachers in Hatchett's building. These teachers all told him that they turned in their lesson plan books or an administrator always came and looked at their books. The Union president concluded that there was no basis for filing a grievance alleging unfair treatment.

The Docking of Hatchett's Pay

On June 10, 1998, Hatchett was late for work on a day when a school program was taking place. When Hatchett tried to call in, the phone lines were busy. She had no banked sick leave at that time. When Hatchett received her paycheck on June 19, 1998, she had been docked for two and one-half hours for an "absence without pay." According to Hatchett, very soon after receiving her check she called the president, who told her to find out from the Employer why her pay had been docked. According to Hatchett, she later reported to the president that she had spoken to her principal, but that he had been "evasive." According to Hatchett, the president then told Hatchett that he would talk to the assistant principal himself. Hatchett testified that they also "talked about" the president's filing a grievance. According to Hatchett, she was under the impression that the president would do whatever needed to be done to get her money back over the summer break. Hatchett testified that after school started again in September 1998 she again approached the president about her money. According to Hatchett, she asked him to file a grievance at that time, but the president said that he was still working on it informally. By this time, according to Hatchett, it was too late to file a grievance under the contract. She never received any money.

The Union president's version of events differs from Hatchett's. According to the Union president, he did not learn about Hatchett's complaint until about the last week of July or the first week of August 1998, when Hatchett approached him at a teacher's meeting. According to the Union president, Hatchett told him that she had been late and had "missed graduation," and that her pay had been docked. The Union president testified that he told Hatchett that he would look into it and asked her for a copy of her pay stub. According to the president, he also asked her to document what happened so that he would have her version. On September 15, the president wrote to Hatchett reminding her to give him a copy of her pay stub. According to the president, shortly thereafter he received the pay stub, but he never received a written version from her of what had happened. The president testified that immediately after he received the pay stub he went to the personnel department, who informed him that Hatchett had no sick days at that time. According to the president, he then went to Hatchett's principal. Although the principal had the authority to rescind his action, he would not agree to do so. According to the president, the principal did not give him a flat "no," and he spoke to the principal informally about the incident about five or six times. However, according to the president, he did not believe at any time that Hatchett had a meritorious grievance, since she had admitted to him that she had been late and since she had no sick leave at that time. The president testified that he did not tell either Hatchett or her principal that he planned to file a grievance. After the instant unfair labor practice charges were filed, the Union president asked the principal for a letter clarifying the Employer's position on this issue. On December 1, the principal wrote a letter stating that Hatchett had been several hours late on the day of the kindergarten promotion ceremony for students and their parents, that Hatchett did not report her absence in a timely manner, that both the principal and the assistant principal had been required to supervise the ceremony and draft parents to help, and that the principal believed that it was appropriate to dock Hatchett for the time she was not present under these circumstances.

Discussion and Conclusions of Law:

A union representing public employees owes a duty of fair representation toward these employees under Section 10(3)(i) of PERA. The union's duty consists of three distinct responsibilities: (1) to serve the interest 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 (1967); *Goolsby v Detroit*, 419 Mich 651(1984). Bad faith consists of an intentional act or omission undertaken dishonestly or fraudulently. *Goolsby*, at 679. Hatchett does not allege that the Union was guilty of bad faith under this definition, or that it acted or failed to act out of personal hostility toward her.

The duty to avoid "arbitrary" conduct does not require that the union succeed in getting its members what they want, and it also does not require a union file a grievance whenever there is a dispute between a member and his or her employer. The meaning of "arbitrary conduct' under PERA was defined by the Michigan Supreme Court in *Goolsby,* at 682:

> . . . 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 those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence . . .

Hatchett alleges, in effect, that the Union acted negligently in failing to file a grievance over her failure to receive a transfer to a vacant preschool teaching position for the school year 1998-99. The record indicates that Hatchett requested a transfer to this position in May 1997. The Employer apparently had her transfer request on file in June 1997, when it awarded her a transfer to a position that it expected to become vacant in September 1997. From the contract language, it appears that Hatchett's transfer request should have been valid at least until May 1998. It appears, therefore, that under the contract the preschool vacancy which opened up in September 1997 should not have been posted as a vacancy in February 1998,because there was at least one valid transfer request on file at that time.

I do not, however, find the Union guilty of a breach of its duty of fair representation in its handling of this matter. When Hatchett discovered in the spring of 1998 that the position was to be assigned to someone else and went to the Union president, he immediately investigated. He was told by the Employer that the position was going to a teacher who had applied during the posting period, and that Hatchett did not have a valid transfer request on file. He testified that he had no reason to disbelieve the Employer at that time. The record indicates that Hatchett asked the Union president during the summer of 1997 to file a grievance when the Employer notified her that she could not have a preschool position for the 1997-98 year because there was no longer a vacancy. Presumably he was aware, at that time, that Hatchett had a recent transfer request on file. As indicated above, however, their conversation was brief because the Union president did not believe that he could grieve the Employer's decision. Hatchett also testified that at some point after her conversation with the Union president in the spring of 1998, she attempted to show the Union president her own copies of her transfer requests, but that he refused to look at them. In view of the fact that the Union president caused the Union to file a Freedom of Information Act (FOIA) request to get these documents, however, I find that either Hatchett did not attempt to show him these papers until much later, or that the Union president did not understand what Hatchett wanted to show him I conclude, moreover, that it was not gross negligence on the part of the Union president to have forgotten, by the spring of 1998, about his brief conversation with Hatchett about her transfer the previous summer. The record indicates that the Union president did not simply set the matter aside after he was told by the Employer that Hatchett had not made a valid transfer request. Rather, he did what he would be expected to do if he did not have access to a copy of the request; he caused the Union to file a FOIA request to get the document. As set out in the statement of facts, this FOIA request was unsuccessful, and without a copy of the transfer request a grievance was unlikely to be successful.

I also find no merit to Hatchett's claim that the Union acted arbitrarily in failing to file a grievance over Hatchett's alleged harassment by her supervisors. The record indicates that the Union president interceded informally on Hatchett's behalf with her supervisors many times during the 1997-98 school year. Hatchett admitted that she was satisfied that the Union president had done his best and that she did not ask him to file a grievance in most of these cases. With respect to the incident involving the consultant, the record indicates that the Union president called a meeting and

investigated Hatchett's complaint. After discovering that there was no written "evaluation" by the consultant in Hatchett's file, he made a reasoned, good faith judgment that there was no basis to file a grievance. Likewise, after Hatchett complained about unfair treatment by her supervisor with respect to her lesson plan book, the Union president investigated. Based on the results of his investigation, he again made a reasoned, good faith judgment that the facts would not support a grievance alleging unfair treatment.

Hatchett's third allegation is that the Union president negligently failed to file a grievance over the docking of her pay in June 1998 before the time period for filing the grievance had expired. I find no merit to this allegation. First, I credit the Union president's testimony that he did not hear about the incident until late July or early August. Hatchett knew that she had been late on June 10. Her testimony that she called the Union president promptly after June 19, that he told her to find out why she had been docked, and that she was unable to do so does not make sense under the circumstances. I also credit the Union president's testimony that he asked Hatchett to give him a copy of her pay stub so he could investigate, and that she did not do so until after he reminded her on September 15, 1998. This testimony was supported by a copy of the actual letter he sent her on that date. The record indicates that the Union president investigated Hatchett's complaint after he received a copy of her pay stub. He learned from the personnel office that Hatchett had no available sick time when her pay was docked. Since Hatchett had admitted in her initial conversation with him that she had been late to work, the Union president reasonably concluded that there was no valid basis for filing a grievance.

For reasons set forth above, I conclude that Hatchett has not established on this record that the Union breached its duty of fair representation.

Section 10(1)(c) of PERA prohibits an Employer from discriminating against employees to encourage or discourage union activity. Hatchett, however, has not alleged in this case that the alleged harassment of her by her supervisors was connected to union activity or other activity protected by this Act. Hatchett did not allege in her charge that the Employer violated PERA by violating the collective bargaining agreement. Moreover, a claim by an employee that his or her employer has breached the contract does not allege a violation of PERA. *City of Detroit (Wastewater Treatment Plant)*, 1993 MERC Lab Op 716. 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, as noted above, I have concluded that the Union did not breach its duty of fair representation in this case. I conclude that Hatchett has not alleged any conduct by the Employer which would constitute a violation of PERA.

I find that neither Respondent Pontiac School District nor Respondent Pontiac Education Association 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

Dated: ___________