STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 547,
Respondent-Labor Organization,

Case No. CU00 A-5

-and-

RONALD DIEBEL,
An Individual Charging Party.
_____/

APPEARANCES:

J. Douglas Korney, Esq. for Respondent

Ronald Diebel, In propria persona

DECISION AND ORDER

On January 24, 2001, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Charging Party Ronald Diebel failed to demonstrate that Respondent International Union of Operating Engineers, Local 547, violated its duty of fair representation. The ALJ recommended that we dismiss the charges and complaint which were filed pursuant to the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, MCL 423.210 & 423.216. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On March 15, 2001, Charging Party filed timely exceptions to the Decision and Recommended Order of the ALJ. Respondent did not file a brief in support of the ALJ's decision.

The facts of this case were set forth in detail in the ALJ's Decision and Recommended Order and only Charging Party's basic allegations need be repeated here. Charging Party is employed with the Board of Education of the City of Detroit. He alleges in an unfair labor practice charge filed on January 31, 2000, and later amended, that his bargaining agent, the Internal Union of Operating Engineers, Local 547, breached its duty of fair representation by failing to process and/or file grievances on his behalf. His grievances were based on the school district's alleged failure to pay him for time worked, including overtime, from 1997-1999. He also asserts that the Union deliberately led him to believe that it was processing his grievances, when in fact it was not. Finally, Charging Party seeks, as an element of damages, reimbursement from the Union for attorney fees which he incurred when he filed and later settled a lawsuit in federal court based upon the Fair Labor Standards Act (FLSA), 29 USC Section 201 *et seq.*

Charging Party groups his exceptions into two different categories. First, he alleges that the ALJ abused her discretion in reaching various factual findings "that go against the great proponderance [sic] of the evidence." Second, he alleges that the ALJ failed to follow "stare decisis" when she applied the standards set forth in *Lowe v. Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973) and *Goolsby v City of Detroit*, 419 Mich 651 (1984), and determined that no breach of the duty of fair representation occurred. He also asserts that the Judge's decision is contrary to the Commission's "established precedent" set forth in *International Union of Operating Engineers, Local 547 and Gerald U Dajnowicz*, 1991 MERC Lab Op 561.

We find no merit to Charging Party's challenges to the ALJ's factual findings. These challenges appear to be based upon perceived conflicts between his testimony and that of a witness for the Union. For example, Respondent testified that in all but one instance, the District acknowledged that it owed Charging Party money for time worked from 1997-1999, and that he eventually would be paid. Mr. Diebel asserts that management deliberately refused to pay him for this time. In *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124 (1974), our Supreme Court held that the factual findings of an experienced trial examiner who has observed witnesses and lived with the case should be given due weight and should not be overturned if they are supported by competent, material and substantial evidence. Substantial evidence means such evidence as a reasonable mind will accept as adequate to justify a conclusion. *Id.* at 122. See also *Rochester School District,* 2000 MERC Lab Op 38; *County of Ionia*, 1999 MERC Lab Op 523. We see no reason to set aside the ALJ's credibility findings as to this or any other issue in the case.

We also agree with the Judge's reliance upon the standards set forth in *Lowe* and in *Goolsby* to determine if a breach of the duty of fair representation occurred, and we find that the ALJ properly applied those standards in this case. Under PERA, a union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby, supra* at 659, citing *Vaca v Sipes*, 386 US 171; 64 LRRM 2369 (1967). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe, supra* at 146; *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op ___ (Case No. CU99 F-27, issued January 31, 2001). Because the union's ultimate duty is toward the membership as a whole, when determining which grievances should be pressed and which should be settled or dropped, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe*, *supra*. A union satisfies the duty of fair representation so long as its decision was within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67; 136 LRRM 2721 (1991); *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35. An individual employee does not have the absolute right to have his or her grievance taken to arbitration. *Goolsby*, *supra* at 661.

In this case, the ALJ concluded that the Union "was faced with a deluge of complaints of unpaid wages from its members." Charging Party, in fact, admitted that the District had

problems with its "antiquated and inefficient" payroll system and that every single member of the bargaining unit was affected by those problems.[1] We agree with the ALJ's determination that the Board of Education acknowledged that it owed money to numerous employees, including Charging Party, and that any delay and/or failure to pay was based on an antiquated payroll system and not on any refusal on the part of the employer to pay that amount. Rather than proceed with the expense of filing a multitude of grievances and ultimately proceeding to arbitration on Charging Party's claims and numerous others, the ALJ correctly determined that the Union made a "reasoned decision" to seek to work with the Board to assure that as many claims as possible were paid. We agree with the ALJ that the Union's decision was made in good faith and was not arbitrary. While Charging Party may not have been satisfied with the results, Respondent had the right to consider such factors as the contractual burden, the cost, the chance at success, and ultimately whether payment by the Board would be forthcoming if it prevailed during the grievance proceedings. We further agree with the Judge's conclusion that Respondent never told Charging Party that it had filed a formal grievance on his behalf. There is no evidence in the record suggesting that the Union deliberately misled Charging Party through delays, silence, and/or false assurances. The record simply does not support a finding that the failure to file grievances over these pay claims was an impulsive, irrational or unreasoned decision, or that the Union acted with little care or indifference to Charging Party's interests. We also note that the *Dajnowicz* case cited by Charging Party was an ALJ's recommended order to which no exceptions were filed and, therefore, the Commission did not address the issues raised therein. *City of Kalamazoo*, 1975 MERC Lab Op 558.

Even assuming *arguendo* that Charging Party could establish a breach of the duty of fair representation, we do not believe that PERA authorizes an award of attorney fees under these circumstances. The record indicates that Charging Party affirmatively took it upon himself file a complaint pursuant to the FLSA, a federal law unrelated to PERA, and to retain an attorney to represent him. This decision was made after he had been told by the Union that, except for on one occasion, the District acknowledged that it owed Charging Party money for time worked and that payment would eventually be forthcoming. The record reflects that the Union had previously approached a governmental agency seeking to file a wage complaint on behalf of numerous unit members, including Charging Party, but was advised that a class action complaint would not be accepted. We believe that the Union was taking appropriate action to protect the contractual rights of its members, and that it should not be responsible for any legal fees incurred by the Charging Party when he choose to pursue his rights under another law. In so holding, we note that even in cases under PERA, the Court of Appeals has held that this Commission is constrained from awarding attorney fees and costs. *Goolsby v City of Detroit*, 211 Mich App 214 (1995). But see *POLC,* 1999 MERC Lab Op 196, 202.

Finally, we have carefully considered Charging Parties' remaining exceptions and conclude that they do not warrant a change in the result of this case.

ORDER

[1] Charging Party noted that even the former CEO of the District was not immune from payroll problems.

For the above reasons, we hereby adopt the Administrative Law Judge's Decision and Recommended Order as our final order in this case and dismiss the charges in their entireties.

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

Dated: _____

STATE OF MICHIGAN
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RONALD DIEBEL,
Individual Charging Party
/

APPEARANCES:

J. Douglas Korney, Esq., for the Respondent

Ronald Diebel, in pro per

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Detroit, Michigan on Friday, September 1, 2000, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Charging Party on October 31, 2000, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed by Ronald Diebel against the International Union of Operating Engineers, Local 547, his bargaining agent, on January 31, 2000. The charge was amended on February 23 and May 8, 2000. Diebel alleges that Respondent breached its duty of fair representation by (1) failing to file and/or process grievances for him over his employer's failure to pay him for time worked in 1997, 1998 and 1999; (2) affirmatively misleading him by assuring him, on August 4, 1999, and again on September 2, 1999, that they were actively processing these grievances. Diebel admits that he reached a settlement with his employer of his claims for back wages on April 4, 2000. However, Diebel asks that Respondent be ordered to reimburse him for the legal expenses he incurred in procuring this settlement.

Facts:

Ronald Diebel is employed by the Detroit Board of Education as a building engineer and is a member of bargaining unit represented by the Respondent. Since 1997, Diebel has experienced difficulty getting the Employer to pay him for certain types of time worked. According to Diebel's records, as of the date this charge was filed the Board owed him money for 29 dates in 1997, 11 days in 1998, and seven days in 1999.

Diebel sent memos or faxes to his union steward or to Respondent's vice-president asking them to file grievances on the following dates: October 3, 1997; March 5, April 2, October 7, 1998; March 8, April 2 & 19, May 8, 18 & 22, and June 7, 14, & 21, 1999. In each of these memos or faxes, Diebel simply stated that he had failed to get paid for the dates listed in the memo and asked Respondent to file a grievance. On several occasions, the last being in

August 1999, Diebel's steward told him that Respondent agreed that Diebel was due the money and was "working on it." In addition, sometime between October 1997 and June 1999, Respondent's vice-president told Diebel that he had received Diebel's memos and was "working on the problem." Diebel assumed that Respondent had filed grievances on his behalf. On June 9, 1999,Diebel filed a lawsuit against the Board under the Fair Labor Standards Act. The complaint was filed in pro per, but on September 1, 1999 Diebel retained an attorney to represent him.

Throughout the period Diebel was sending his memos, Respondent was receiving numerous complaints from other members that the Board had failed to pay them accurately, to credit their sick leave, or even to pay them their regular paychecks. In most cases, when Respondent brought a problem to the Board's attention, the Board admitted that it owed the money. Since the Board was swamped with payroll problems, however, this did not mean that the employee received his or her money. According to Respondent, since the Board gave first priority to problems with regular paychecks, it was particularly difficult to get overtime paid. Both the Board and Respondent recognized that the source of these problems was the Board's terribly inadequate paper-only payroll system. Since the Board acknowledged that it owed the money, and since the problem was endemic throughout the District, Respondent did not file grievances when it received a complaint from a member about pay. Instead, Respondent routinely met with the Board's payroll director and labor relations representatives to hand over stacks of payroll problems, provided the Board with payroll correction forms, asked for audits of employees' time, and generally tried to track the progress of pay problems. At some point prior to 1999, Respondent also attempted to file a class action complaint on behalf of its members with the Wage and Hour Division of the State Department of Consumer and Industry Services. After it was told by that agency that employees had to file their own individual complaints, Respondent gave out the phone number of that agency at union meetings.

During the period Diebel was trying to collect his money, the Board had one system for recording and paying regular overtime, another for unscheduled overtime, and a third for "community use" time. Unscheduled overtime is generally overtime to fill in for an employee who is sick. "Community use" is a term used to designate time worked by Board employees during a period when an outside organization is using a school building. Among the hours for which Diebel was not paid were "community use" hours worked on 19 dates during the summer of 1997. Most of the rest of the time for which Diebel did not get paid was unscheduled overtime. In the fall of 1997, Diebel submitted a form for the 19 days of community use time worked by him that summer. This form was returned to Diebel's supervisor asking for an explanation of why Diebel was asking to be paid for periods when a boiler operator was also on duty at the school. Diebel's supervisor asked Diebel to resubmit his claim, minus the hours when the boiler operator was there. Diebel refused, on the grounds that he had worked this schedule in the past and had never been told that it was improper. According to Respondent, Diebel was not entitled by the terms of the contract to be paid for this time. However, after Diebel sent his memo to Respondent requesting that a grievance be filed, Respondent presented Diebel's claims to the Board. The Board agreed to pay him for all but one day. Diebel was not aware of these discussions and he did not, in fact, get paid for the time. Since he didn't receive any money, Diebel assumed that the Board was refusing to pay him because of the double coverage issue. After the summer of 1997, Diebel's claims forms for unscheduled overtime were repeatedly returned to him to make corrections or supply missing information. When the forms were returned to Diebel, he supplied the missing information and resubmitted them. Since Diebel never received any money, he concluded that these claims were also being denied.

In the fall of 1998, the Board made the decision to buy a computerized payroll system. The new system began operating during the summer of 1999, but was still not functioning well by the beginning of the 1999-2000 school year. At around this time a coalition of unions, including Respondent, met with the Board to discuss what Respondent described as a "payroll nightmare." On August 4, 1999, Diebel attended a meeting of Respondent's Executive Board. Diebel gave the Executive Board a copy of the complaint in his lawsuit and asked it to pay his attorneys fees. The Board told him they would discuss it and let him know. On September 2, the Executive Board sent Diebel a certified letter stating that it "had decided to carry forward his grievances" and that it would not pay his legal expenses.

As of January 31, 2000, when he filed this unfair labor practice charge, Diebel had not heard anything more from Respondent, and had not received his money from the Board. On April 4, 2000, Diebel's lawsuit was settled with Diebel receiving full payment from the Board of all the money he claimed.

Discussion and Conclusions of Law:

Under PERA, a union owes its members the duty to: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651,679(1984). The duty a union owes to an individual member is different from that of a fiduciary, because the union's first duty is to the membership as a whole. Having regard for the good of the general membership, the union has the discretion to decide whether to proceed with an individual grievance. In making this decision it may consider many factors, including the burden upon the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the effect of winning an arbitration award on the membership as a whole. *Lowe* v *Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973). As long as the union acts in good faith to make a reasoned, nondiscriminatory decision, the union does not violate its legal duty of fair representation under Section 10(3) of PERA.

In this case Respondent was faced with a deluge of complaints of unpaid wages from its members and an admission from the Board that it in fact owed employees most of this money. The cause of most of the problems, Respondent knew, was a payroll system which was totally inadequate for the demands placed upon it. Had Respondent pursued these hundreds of claims through the grievance procedure to arbitration, it might very well have ended up with an award on which it could not collect. Instead of incurring the expense of arbitration or a lawsuit, Respondent made a reasoned decision to try to work informally with the Board to get as many claims paid as possible. The record does not support a finding that Respondent's failure to file grievances over these pay claims was an impulsive, irrational, or unreasoned decision or was inept conduct undertaken with little care or with indifference to the interests of those affected. See *Goolsby, supra*, at 679.

Diebel argues that he did not receive his community use pay because the Board deliberately denied his claim, not because of the faults of the Board's payroll system. Assuming that this was the case, however, nothing in the record indicates that Respondent knew or should have known that this claim was any different from the hundreds of other pay claims it received from its members. I conclude that Respondent did not act in bad faith or discriminate against Diebel in the handling of his pay claims.

Diebel also alleges that Respondent affirmatively mislead him by telling him that it was pursuing his claims as grievances. The record reflects that prior to September 1999, Respondent repeatedly told Diebel that it was "working" on his problem, but did not tell him that it had filed grievances on his behalf. On September 16, 1999, Respondent's Executive Board sent him a letter stating that it had "decided to carry forward your grievances." Even if this were construed as a a misstatement of fact, however, Diebel did not act in reliance upon it by giving up his lawsuit. I conclude that Respondent did not breach its duty of fair representation by its statements regarding Diebel's claims.

In accord with the findings of fact, discussion and conclusions of law set forth above, I conclude that Diebel did not demonstrate that Respondent violated its duty of fair representation to him in this case. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is this case is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: