

**STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
LABOR RELATIONS DIVISION**

In the Matter of:

BENTON HARBOR AREA SCHOOLS,  
Public Employer-Respondent in Case No. C01 A-1

-and-

MICHIGAN EDUCATION ASSOCIATION,  
Labor Organization-Respondent in Case No. CU00 G-26

-and -

BETTY WHITFIELD-MITCHELL,  
Individual Charging Party

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**APPEARANCES:**

Miller, Johnson, Snell & Cumiskey, PLC, by Gary A. Chamberlain, Esq., for the Respondent Employer

White, Schneider & Baird, P.C., by Thomas A. Baird, Esq., for the Respondent Labor Organization

Jeffrey P. Ray, Esq., for the Charging Party

**DECISION AND ORDER**

On July 26, 2002, 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, 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

DATED:

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

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Lansing, Michigan on December 17, 2001, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 27, 2002, I make the following findings of fact, conclusions of law, and recommended order.

**The Unfair Labor Practice Charges:**

On July 21, 2000, Betty Whitfield-Mitchell, a bus driver employed by the Benton Harbor Area Schools (the Employer), filed the charge in Case No CU00 G-26 against her

bargaining representative, the Michigan Education Association (the Union). The charge was amended on January 18, 2001. The charge, as amended, alleges that sometime during the spring of 2000 the Union violated its duty of fair representation by persuading the Employer to alter Whitfield-Mitchell's seniority date. Whitfield-Mitchell asserts that as a result of the change in her seniority date, she was bumped from her position, school mailperson, on June 30, 2000. Whitfield-Mitchell also alleges that the Union violated its duty of fair representation in November 2000 when it refused to take two grievances to arbitration. One of these grievances asserted that the Employer violated Respondents' contract by its delay in filling the mailperson vacancy in 1999. The other grievance protested Whitfield-Mitchell's bump.

Whitfield-Mitchell filed the charge in Case No. C01 A-1 against her Employer on January 2, 2001. Whitfield-Mitchell alleges that by changing her seniority date, the Employer violated the collective bargaining agreement and interfered with her exercise of her rights under Section 9 of PERA.

Facts:

On February 8, 1993, the Union was certified as the bargaining representative for a unit of full-time and regularly scheduled part-time custodial/maintenance, bus drivers, and food service employees of the Employer. The record indicates that at one time another labor organization represented these employees in separate units of custodial and maintenance, transportation, and food service employees. Sometime prior to the Union's certification, the Employer and the then-bargaining representative began negotiating a single contract covering all three units. The recognition clause of the contract, however, continued to refer to the three groups as separate "units," defined the scope of each unit, and provided for separate seniority lists for each "unit." The custodial and maintenance "unit" included the school mailperson. After the Union became the bargaining representative, Respondents' contracts retained this language. After hall monitors and security personnel were added to the unit in about 1994, Respondents' contracts referred to them as the "security unit," and a separate seniority list was created for this group. At the time of the events covered by this charge, Respondents were party to a contract with the term 1998-2001.

Whitfield-Mitchell was hired by the Employer as a bus driver on September 2, 1975. In the spring of 1999, the position of school mailperson became vacant. The Employer assigned the job to a building custodian on a temporary basis around the beginning of April. On April 28, 1999, the Employer posted the vacancy for bid. The posting stated that the position was open to "interested candidates who are currently members of the BHSEA/MEA/NEA." More than 20 employees bid on the position, including Whitfield-Mitchell, several other bus drivers, some food service employees, and five or six custodial employees.

The Employer had no assistant superintendent for human resources between about May 1999 and August 1999, when it hired Nora Jefferson for the position. Jefferson had not previously worked in labor relations for the Employer. On September 20, 1999, the Employer, relying on Article V, Sections 1(a) and 12(2) of the contract, awarded the mailperson position to

the bidder with the most date-of-hire seniority.<sup>1</sup> After two days, this individual decided to return to her former position of bus driver. Whitfield-Mitchell, the bidder with the next highest date-of-hire seniority, was awarded the position on September 22.

Soon after Whitfield-Mitchell's appointment, Local Union President James Lowry approached Jefferson and told her that the mailperson position should have been awarded to the bidder with the most seniority as a custodian. Jefferson was not convinced. At about the same time, Whitfield-Mitchell asked the custodians' steward to file a grievance seeking compensation for her for the Employer's delay in filling the mailperson position. The steward refused, telling Whitfield-Mitchell that she should not have been given the job in the first place.

Pursuant to contract and practice, a new custodial and maintenance seniority list was posted on October 7, 1999. Whitfield-Mitchell's seniority on this list was her date of hire in 1975. This put her eighth out of 49 employees on the list.

After being rebuffed by the steward for the custodial employees, Whitfield-Mitchell approached the steward for the transportation department about filing a grievance seeking compensation for Employer's delay in filling the mailperson position. On May 1, 2000, this steward filed a grievance asking that Whitfield-Mitchell be compensated from the date the custodian was appointed temporary mailperson to the date of Whitfield-Mitchell's appointment. Jefferson denied this grievance at Step 3 on June 7. She stated that the grievance was untimely, and also that Whitfield-Mitchell was not entitled to compensation because she was only awarded the position after the first person to accept the permanent job resigned. The Union did not appeal this grievance to the next step.

Jefferson testified that sometime between March and June 1, 2000, the Union convinced her that Whitfield-Mitchell should be listed on the custodian's seniority list according to her "unit" or job classification seniority date, i.e., September 22, 1999.

At the end of the 1999-2000 school year the Employer decided to close two buildings, resulting in the elimination of two custodial positions. On June 30, 2000, the two custodians whose positions were eliminated were notified that they would be allowed to exercise their bumping rights.<sup>2</sup> On this same date, the Employer posted a new custodial and maintenance seniority list. Whitfield-Mitchell was listed by her "unit seniority" date, which moved her from

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<sup>1</sup> Section 1(a) defined "seniority" as an employee's length of continuous service with the Employer. Section 12(2) stated that, "The filling of vacancies and newly created jobs within the bargaining unit shall be made on the basis of qualifications and seniority."

<sup>2</sup> Article V, Section 5(a) of the contract stated:

(b) Within two (2) working days after receipt of notice of layoff, an employee may exercise his/her unit seniority to replace a less senior employee within a different job classification or in the same job classification if the laid-off employee has greater job classification seniority . . . Employees thus displaced from a job classification shall be entitled to exercise the same right.

eighth position to second from the bottom of the list. One of the two laid off custodians chose to bump Whitfield-Mitchell. Jefferson gave Whitfield-Mitchell the choice of taking a vacant building custodian position or returning to her bus driver job. Whitfield-Mitchell chose the latter.

On July 13, 2000, Whitfield-Mitchell filed two grievances. One protested her bump. The other was essentially a duplicate of her previous grievance asking for back pay for the delay in awarding her the mailperson position. The chief steward initially told Whitfield-Mitchell that he would not process these grievances, but agreed to do so after Whitfield-Mitchell told him she had filed an unfair labor practice charge against the Union. The Employer denied both grievances at Step 3. With respect to the grievance protesting the bump, Jefferson stated, “grievant does not have seniority within the custodial maintenance unit, therefore not eligible to retain the position.” On November 27, 2000, the local executive board voted not to pursue either grievance to arbitration. On November 28, MEA Uniserv Representative Cheryl Melvin and Lowry wrote Whitfield-Mitchell a letter explaining the executive board’s decision. The letter stated that Whitfield-Mitchell’s “seniority in (the mailperson) position had been adjusted, resulting in her return to the transportation unit when school closings forced cutbacks in the custodial maintenance unit.” Whitfield-Mitchell did not appeal the local executive board’s decision to the MEA Executive Committee.

#### Discussion and Conclusions of Law:

A union’s duty of fair representation under PERA is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651,679(1984), citing *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; (1967); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. A union’s decision not to proceed with a grievance is arbitrary only if, in light of the factual and legal landscape at the time of the union’s action, the union’s decision is so far outside a “wide range of reasonableness” as to be irrational. *Marquez v Screen Actors Guild*, 525 US 33, 45 (1998); *Air Line Pilots Assoc. v O’Neill*, 499 U.S. 65, 78 (1991).

Whitfield-Mitchell alleges that the Union violated its duty of fair representation by taking the position that Whitfield-Mitchell should not have been awarded the mailperson job because it should have gone to the bidder with the highest custodial “unit” seniority. She argues that the Union’s position was arbitrary because its interpretation of the contract was contrary to the plain language of the agreement. Whitfield-Mitchell also argues that the Union’s position was not based on its good faith reading of the contract, but that it simply gave in to pressure from custodians who did not want to see the position awarded to a bus driver.

Whitfield-Mitchell was bumped from the mailperson position when the Employer eliminated two custodial positions at the end of the 1999-2000 school year. The record establishes that the Employer determined that under Article V, Section 5(b), Whitfield-Mitchell’s seniority date for bumping purposes was the date she had been awarded a position in the custodial and maintenance “unit” or group. The Union agreed with the Employer, and therefore refused to arbitrate Whitfield-Mitchell’s grievance protesting the bump. I note that in this case the contract frequently refers to the various groups within the bargaining unit as “units”, and that

Section 5(b) uses the term “unit seniority,” I conclude that the Union’s interpretation of Article V, Section 5 was not so far outside the range of reasonableness that it could be labeled arbitrary. I also conclude that the evidence is not sufficient to support a finding that the Union representatives, which in this case included Uniserv Representative Melvin, insisted on this interpretation because they wished to appease the custodians at the expense of the rest of the bargaining unit. I find that the Union did not act in bad faith or in an arbitrary fashion when it refused to take Whitfield-Mitchell’s bumping grievance to arbitration.

It is not clear from the record exactly why the Union refused to take to arbitration the grievance regarding the delay in filling in mailperson position. The record indicates, however, that the grievance Whitfield-Mitchell filed in July 2000 was essentially the same grievance as the one filed on her behalf on May 1 of that year. The Employer denied this grievance on the grounds that it was untimely, and because the Employer believed that Whitfield-Mitchell was not entitled to compensation for the delay because she was not the first person awarded the position after the delay. I conclude that given the issues raised by this grievance, the Union’s decision not to proceed to arbitration was neither irrational nor arbitrary.

Whitfield-Mitchell’s claim against the Employer is that it violated the Respondents’ collective bargaining agreement. Although employers are often joined with the union as a respondent when an employee brings a hybrid breach of contract and breach of the duty of fair representation claim, PERA does not provide employees with an independent cause of action against their employers for violation of the collective bargaining agreement. As Whitfield-Mitchell has failed to show that the Union violated its duty of fair representation, Whitfield-Mitchell has failed to state a claim against the Employer under the Act.

For the reasons set forth above, and in accord with my findings of fact and conclusions of law, I conclude that Whitfield-Mitchell has failed to demonstrate the Union violated its duty of fair representation toward her or that the Employer committed a violation of PERA.<sup>3</sup> I recommend that the Commission issue the following order.

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<sup>3</sup> The Union asserts that the charge against it should be dismissed on the grounds that Whitfield-Mitchell failed to exhaust her internal union remedies, i.e. failed to appeal the local union’s refusal to go to arbitration to the MEA Executive Committee. Although the Union points to a provision in the MEA Constitution requiring members to exhaust such remedies before commencing litigation, there is no affirmative evidence on the record that the Union’s internal remedies could have afforded Whitfield-Mitchell full relief. *Clayton v Auto Workers*, 451 US 679 (1981).

**RECOMMENDED ORDER**

The charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern  
Administrative Law Judge

Dated: \_\_\_\_\_