STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE,
Respondent-Public Employer in Case No. C01 A-21,

-and-

AMERICAN FEDERATION OF TEACHERS, LOCAL 2000,
Respondent-Labor Organization in Case No. CU01 A-4

-and-

MALVERN L. CRAWFORD,
Individual Charging Party.
_____/

APPEARANCES:

Floyd E. Allen & Associates, by Jacqulyn G. Schulte, Esq. and Shaun P. Ayer, Esq., for the Respondent Employer

Mark H. Cousens, Esq. and Gillian H. Talwar, Esq., for the Respondent Labor Organization

Malvern L. Crawford, in pro per

DECISION AND ORDER

On April 3, 2002, Administrative Law Judge (hereafter "ALJ") Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent American Federation of Teachers, Local 2000 (hereafter "AFT") did not violate its duty of fair representation under Section 10(3)(a)(i) of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, MCL 423.210. The ALJ also found that because Charging Party, Malvern L. Crawford, failed to establish that Respondent AFT breached its duty of fair representation, Charging Party had no claim under PERA against Respondent Wayne County Community College (hereafter "WCCC"). On April 24, 2002, Charging Party filed timely exceptions to the Decision and Recommended Order of the ALJ. Respondent AFT filed a timely

brief in support of the ALJ's Decision and Recommended Order on May 6, 2002. Respondent WCCC filed a response to Charging Party's exceptions dated May 7, 2002.

In his exceptions to the ALJ's Decision and Recommended Order, Charging Party requested oral argument. After reviewing the exceptions and briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, the request for oral argument is denied.

The facts of this case were accurately set forth in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Briefly, Charging Party, a part-time instructor at WCCC who has a master's degree in geography, taught a Geography 101 course until 1987, when Respondent WCCC ceased offering the course. Since then, Charging Party has taught an astronomy class. In 1993, Respondent WCCC offered a Geography 202 course, and a full-time instructor with a degree in anthropology selected and was assigned to teach it. In January or February of 2000, Charging Party complained to Respondent AFT that the aforementioned full-time instructor had been permitted to teach Geography 202 even though the course was not in his department. Respondent AFT filed a grievance on Charging Party's behalf and ultimately settled, after consulting with its legal counsel. In September of 2000, Respondent AFT filed another grievance for Charging Party when he was informed that Geography 202 had been assigned to the full-time instructor despite the fact that Charging Party had already been assigned to teach it. This grievance was settled as well. Charging Party protested the settlement of both grievances on the basis that he should be compensated for all semesters that the full-time professor taught the course.

In January of 2001, Charging Party was again denied the opportunity to teach the Geography 202 course. Charging Party complained to the AFT's president, and went to the AFT office for the purpose of filing a grievance, but the office was closed. A subsequent phone call by Charging Party to the AFT office was not returned. Two other grievances were subsequently filed by Respondent AFT on Charging Party's behalf. Both involved problems that arose from the course Charging Party taught in the spring of 2000. Respondent AFT eventually withdrew both of these grievances after accepting WCCC's offer and argument. Again, Charging Party was not satisfied with the resolution of either grievance. On January 29, 2001, Charging Party filed unfair labor practice charges against both Respondent WCCC and Respondent AFT. Charging Party alleged that WCCC violated the collective bargaining agreement by refusing to assign him classes in his area of specialty, and that the AFT violated its duty of fair representation by its handling of the four previously discussed grievances. The ALJ found that Charging Party did not establish that the AFT breached its duty of fair representation. She also concluded that, in light of the rule that an employee cannot pursue a breach of contract claim against his employer under PERA unless he is successful in his duty of fair representation case, Charging Party had no claim under PERA against WCCC.

In its response to Charging Party's exceptions, Respondent WCCC argues that Charging Party's exceptions are time-barred. The exceptions were due in our office by April 26, 2002. We received Charging Party's exceptions on April 24, 2002. Therefore, the exceptions were timely filed, and we will consider them.

On exception, Charging Party contends that the ALJ erred when she concluded that Respondent AFT did not act arbitrarily when it decided to accept the employer's settlement offers rather than proceeding to arbitration. In particular, Charging Party contends that the AFT failed to present any evidence showing that the AFT obtained the best settlement possible. As the ALJ noted, a union breaches its duty of fair representation if its conduct toward a member is arbitrary, discriminatory, or in bad faith. See *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Vaca v Sipes*, 386 US 171, 177 (1967). Arbitrary conduct has been defined as "impulsive, irrational, or unreasoned conduct" as well as "inept conduct undertaken with little care or with indifference to the interests of those affected." See *Goolsby* at 679.

After carefully considering the record, we find that Respondent AFT settled the grievances because it reasonably believed in good faith that it was in Charging Party's best interest to do so. In both cases, WCCC offered to pay Charging Party the full amount that he would have been paid had he taught Geography 202. Although WCCC refused to compensate Charging Party for all of the previous semesters that the full-time instructor had been assigned the course, the AFT, after consulting with its attorney, determined that it was highly unlikely that an arbitrator would find such a claim to be timely. A union has no duty to pursue a grievance which has no merit or which it would be futile to pursue. See *Park Management Ass'n City of Detroit*, 1988 MERC Lab Op 1023, 1026; *SEMTA*, 1988 MERC Lab Op 191, 195; *Detroit Bd of Ed*, 1986 MERC Lab Op 74, 77. Moreover, an individual member does not have the right to demand that his grievance be pressed to arbitration, and the union is "obviously" not required to carry every grievance to the highest level but must be permitted to assess each with a view to individual merit. See *Gunkel v Garvey*, 45 Misc. 2d 435 (1964); *Gross Ile Office & Clerical Ass'n*, 1996 MERC Lab Op 155. Furthermore, even if Respondent AFT did not proffer evidence showing that the grievance settlements were reasonable, the initial and ultimate burden was on the Charging Party to show that they were unreasonable. See *Lowe v Hotel Employees Union*, 389 Mich 123 (1973). We, therefore, find that the ALJ did not err in concluding that Respondent AFT did not act arbitrarily in settling his grievances.

Charging Party also argues on exception that the record does show that he requested that the AFT file a grievance for him in January 2001, contrary to the ALJ's findings. We have carefully reviewed the record, and are unable to locate any indication of Charging Party's alleged request. Thus, we find that the ALJ did not err in this regard.

Next, Charging Party contends on exception that the ALJ erred in concluding that the AFT was not required to notify him of a settlement offer or include him in settlement meetings. Charging Party looks to Section 11 of PERA as his authority for this argument. This section's proviso, however, does not provide a bargaining unit member with the right to be notified of or included in settlement meetings or offers when his bargaining representative has already filed a grievance and is in the process of its adjustment. See 1965 PA 379, as amended, MCL 423.211. The purpose of this proviso is to permit individual employees to present certain grievances to their employers without the delay or formality of grievance procedures, or where the bargaining agent is acting capriciously; and second, to *permit* the employer to negotiate directly with the individual teacher without being in violation of PERA. See *Mellon v Bd of Ed*, 22 Mich App 218 (1970). Therefore, we find that the ALJ was correct in concluding that Respondent AFT did not,

per se, have a duty to obtain Charging Party's consent before settling or withdrawing the grievances, or to include him in settlement discussions.

We have carefully considered all other arguments raised by Charging Party and find that they do not warrant a change in the outcome of this case.

ORDER

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

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:_____

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Mark H. Cousens, Esq., for the Respondent Labor Organization

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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 Detroit, Michigan on June 1, 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 November 27, 2001, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On January 29, 2001, Malvern Crawford filed the charge in Case No. C01 A-21 against his employer, Wayne County Community College, and the charge in Case No. CU01 A-4 against his bargaining representative, the American Federation of Teachers, Local 2000. Crawford is employed by the Respondent Employer as a part-time instructor. In Case No. C01 A-21,

Crawford alleges that the Employer violated the collective bargaining agreement by refusing to assign him classes in his field of specialty. In Case No.CU01 A-4, Crawford alleges that the Respondent Union violated its duty of fair representation under Section 10(3)(a)(i) of PERA by its handling of four grievances. He asserts that the Union: (1) failed to process the grievances in a timely manner; (2) accepted unreasonable settlements and unreasonably refused to pursue the grievances to arbitration; (3) failed to keep Crawford informed about the status of the grievances; (4) settled the grievances without discussing the settlements with him. Crawford also alleges that the Union violated its duty of fair representation by failing to "take steps" to prevent the Employer from repeatedly committing the same contract violation. The Respondent Employer filed a motion to dismiss the charge for failure to state a claim under PERA. This motion was held in abeyance pending decision on the charge against the Union.

Facts:

Crawford has a master's degree in geography. Crawford, at one time, taught a course entitled Geography 101. The Employer stopped offering this course in about 1987. Although Crawford repeatedly signed up to teach other geography courses, the Employer told him that full-time instructors had selected the courses. Under the collective bargaining agreement, full-time faculty members have priority in course selection over part-time faculty. For some time Crawford has taught only one course, an astronomy class. Crawford has not taught geography since he stopped teaching Geography 101. Two of the four grievances that are the subject of Crawford's charge against the Union had to do with the Employer's failure to assign Crawford to teach a geography course, Geography 202.

Geography 202 was first offered by the Employer in the summer of 1993. In the fall of 1993, a full-time instructor, James Saad, selected and was assigned to teach this course. Saad has a degree in anthropology. The record indicates that under the collective bargaining agreement a full-time instructor is entitled to an assignment outside his or her principal field only if (1) he is also qualified to teach in this field; or (2) she has selected courses in her principal field but has not been assigned any.

Saad continued to teach Geography 202 semester after semester. However, there is no evidence in this record that Crawford complained to the Union about Saad's assignment before January or February 2000. Around that time Crawford came to the Union office to complain that Saad had been allowed to teach Geography 202 despite the fact that the course was not in his department. Crawford and the Union's office manager went through course selection records, and discovered that Saad had not selected an anthropology course for at least several terms. On February 22, 2000, the Union filed a grievance on Crawford's behalf claiming that Saad should not have been allowed to "cross over" into another field without exhausting all the possibilities in anthropology. The grievance demanded that Crawford be compensated for "all illegally selected geography courses and application of appropriate seniority." The Employer's investigation confirmed that although Saad had course work in geography, he had not completed a degree in this field. However, the Employer refused the Union's demand that it compensate Crawford for every semester Saad had taught Geography 202. On September 5, 2000, the Union made a demand to arbitrate. On October 16, 2000, the Employer offered to pay Crawford approximately $1800, representing the amount he would have earned teaching Geography 202

for one semester. After discussing the issue with its counsel, the Union concluded that an arbitrator would likely deem its claim for compensation for past semesters to be untimely. The Union accepted the Employer's offer, and withdrew the grievance. It was not clear from the record whether the Union notified Crawford of the offer before it accepted it. In any case, Crawford was dissatisfied with the settlement; he believed he was entitled to compensation for the seven years Saad had taught the course. Crawford appealed the Union's decision to drop the grievance to the Union's Board of Appeals. His appeal was heard on November 14, 2000. As of the date of the hearing in June 2001 he had not received an answer from the Board of Appeals.

In the fall of 2000, Crawford was assigned to teach Geography 202. Before classes began, however, Saad filed a grievance asserting that if Crawford taught this class he would have more hours than a part-time instructor was permitted under the contract. Nothing in the record indicates that this would have been true. However, the Employer granted Saad's grievance. When Crawford showed up on the first day of class, he was informed that the course had been assigned to Saad. On September 5, 2000, the Union filed another grievance on Crawford's behalf. This grievance also asserted that Crawford should have been assigned to teach Geography 202. The September 5 grievance, however, only demanded "compensation for the illegally selected Geography 202 course and appropriate seniority." (Emphasis added). On October 16, 2000, the Employer offered to pay Crawford for the course, as well as three credit hours of "in lieu" time to allow him to develop and bring to the curriculum committee a proposal for a new geography course to be offered in the Spring 2001 semester. [1] The Union agreed this was a fair settlement, and withdrew the grievance. Crawford protested, arguing again that he should be compensated for past semesters that Saad had taught the course.

On January 13, 2001, Crawford tried again to select Geography 202 for the winter semester. His department chair told him that he would not be allowed to pick the class. Crawford told Respondent's president, James Jackson, what had occurred, and Jackson said that he would talk to the department chair and get back to him. Crawford did not hear from Jackson. On the day classes began, Crawford went down to the Union offices to file a grievance, but the offices were closed. Three or four days later he called the Union office to file a grievance, but his call was not returned.

The other two grievances that are the subject of this charge arose from problems Crawford had with his class during the spring of 2000. First, Crawford accused a number of students in his class of cheating on the midterm. Some students were suspended, although they were later reinstated. Second, some students in the class submitted a petition to the administration complaining about Crawford's conduct. Finally, on March 28, Crawford's department chair entered the classroom before Crawford arrived and found the class acting in so disorderly a manner that she had to call security and cancel the class. On April 4, 2000, the Employer removed Crawford and replaced him with another instructor. The Union filed a grievance over this action on May 11. After learning that Crawford would be paid for the entire semester and not disciplined, however, the Union withdrew the grievance. This occurred on or about June 13, 2000. Crawford was not satisfied with this action since he felt that he had been insufficiently compensated for the humiliation he had suffered.

[1] Crawford submitted his proposal, but the new course was never established.

Sometime after being replaced as instructor, Crawford submitted his grades for the portion of the class he had taught. He gave failing grades to the students who he believed had cheated on the midterm. He later discovered that an administrator had signed the final grade roster, and that these students had not been failed. On October 11, 2000, the Union filed a grievance asserting that the Employer had violated the contract by changing student grades without the instructor's approval. The Employer replied that the final grades for the course had been issued by the instructor who took over the class, and that the final grade roster had been signed by the administrator simply to expedite the issuance of transcripts. The Union accepted the Employer's argument that Crawford was not the instructor of record in this situation, and it withdrew the grievance.

Discussion and Conclusions of Law:

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. *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; (1967) *Goolsby v Detroit*, 419 Mich 651,679(1984).

A Union owes a duty to its individual members, but its overriding duty is to the membership as a whole. Therefore, it has the discretion to determine whether an individual grievance should be pressed or settled. *Lowe* v *Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973). It deciding whether to proceed with a grievance it may weigh the burden on the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the desirability of winning the award. *Knoke v East Jackson PS*, 201 Mich App 480,486 (1993). In all cases, however, the Union must act avoid arbitrary conduct and must act in complete good faith and honesty.

The Court in *Goolsby* held that a Union acted arbitrarily and violated its duty of fair representation under PERA when it negligently missed a contractual grievance deadline, causing the Charging Parties' grievance to be rejected by the Employer as untimely. The *Goolsby* Court defined "arbitrary" conduct by the following examples:

> . . . (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. *Goolsby*, at 682.

Crawford complains that the Union acted arbitrarily in accepting the Employer's settlement offers and refusing to proceed to arbitration on the two grievances protesting the Employer's failure to assign him to teach Geography 202. In both cases, the Employer admitted that by assigning the course to Saad it had violated the contract. In both cases, it agreed to pay Crawford the amount he would have earned teaching the course for the semester in which the grievance was filed. Crawford argues that the Employer's offers were unreasonable because they failed to compensate him for the many times the Employer's had previously violated the contract by assigning the class to Saad rather than to him. The issue, however, is not whether the

Employer's offers were fair, but whether the Union acted arbitrarily in accepting these offers. The record indicates that in both cases, the Union ultimately decided that it was likely that an arbitrator would find its claims for compensation for previous semesters to be untimely.[2] As the Union puts it in its brief, the Union concluded that the settlements granted everything that it could have reasonably expected to achieve in arbitration. Crawford makes reference in his brief to cases involving statutes of limitations of up to three years. However, the Union's decision that the claim was untimely was based on the time limits set out in the contract for filing a grievance.

The Union clearly decided to settle these grievances short of arbitration. In order to find these decisions to be "arbitrary," I must find that these decisions were not simply wrong, or unfair, but irrational or "unreasoned." The record does not support either finding. I am unable to conclude on this record that the Union acted arbitrarily when it decided to accept the Employer's settlement offers rather than incurring the expense of arbitrating.

Crawford also questions why the Union did not "take steps" to prevent the Employer from repeatedly violating the contract. The Union did not demand in either of these two grievances that the Employer stop assigning Geography 202 to Saad. The Union did not explain on the record why it did not seek this relief. I note, however, that there is no indication in the record that Crawford asked the Union to include this demand in either grievance, or that he complained to the Union that the grievances should not have been settled without the Employer's agreement to take this action. The burden of proof to establish a breach of the duty of fair representation falls on the Charging Party. I conclude that there is not enough evidence on the record for me to conclude that the Union acted arbitrarily by failing to demand that the Employer stop assigning Geography 202 to Saad rather than Crawford.

I also note that Crawford's charge did not allege that the Union failed or refused to file a grievance for him in January 2001. Although Crawford testified at the hearing that he attempted to contact the Union to file a grievance without success, the Union was not put on notice of this allegation and the matter was not litigated.

Crawford also alleges that the Union acted arbitrarily in refusing to proceed to arbitration on the grievances filed on May 11, 2000 and October 11,2000. The record indicates that the Union withdrew the May 11, 2000 grievance after it learned that Crawford would not suffer a loss of pay and would not be disciplined. With respect to the October 11, 2000 grievance, Crawford asserts that the Union ignored Respondent's "blatant" violation of the contract provision prohibiting it from changing an instructor's grades. The record indicates, however, that the Union withdrew the grievance because it was persuaded by Respondent that Crawford was not the "instructor" of the class since he had been replaced prior to the conclusion of the semester. The evidence does not support a finding that these decisions were arbitrary. I conclude

[2] Crawford does not assert that the Union was responsible for the fact that a grievance over Saad's assignment was not filed until February 2000. On the other hand, he also does not maintain that the Employer prevented either the Union or Crawford himself from obtaining the information necessary to establish that Saad was not entitled by contract to the Geography 202 assignment before February 2000.

that Charging Party has not established that the Union violated its duty to fair representation by withdrawing these two grievances.

Crawford also alleges here that the Union failed to communicate with him concerning the status of his grievances, did not adhere to the time limits set out in the grievance procedure, and, in general, was slow in processing his grievances. There is no evidence in the record to support these allegations. In any case, a union's failure to adhere strictly to the time limits contained in a contractual grievance procedure does not constitute a breach of its duty of fair representation unless the union's negligence results in the dismissal of a grievance as untimely. See, e.g., *City of Westland*, 1988 MERC Lab Op 73,76.

Finally, Crawford complains that the Union settled his grievances without consulting with him and without his agreement. As noted above, a union has the discretion to settle or withdraw grievances as long as it exercises its discretion in good faith and without discrimination, and avoids arbitrary conduct. The Union was not required to obtain Crawford's consent before settling or withdrawing the grievances, and it had no duty, per se, to include him in settlement discussions.

In accord with the findings of fact, discussion and conclusions of law set out above, I conclude that Crawford did not establish that the Union breached its duty of fair representation. Crawford's charge against the Employer is that it violated the contract. An employee cannot pursue a breach of contract claim against his employer under PERA unless he is successful in his claim of a breach of the duty of fair representation by his union. *Knoke v East Jackson School District*, *supra*, at 485. Since I have concluded that Crawford has not established his claim against the Union, I also find that Crawford has no claim under PERA against his Employer. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

Julia C. Stern
Administrative Law Judge

Dated: ______________