STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 25 AND LOCAL 92,
Labor Organization- Respondent,

Case No. CU02 F-038

-and-

KEVIN J. PATTERSON,
Individual Charging Party.
_____/

APPEARANCES:

Robert Donald, Esq., for Respondent

Michael McMillan, for the Charging Party

DECISION AND ORDER

On February 5, 2003, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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 Detroit, Michigan on October 7, 2002, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including testimony and exhibits produced at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Kevin J. Patterson is an employee of the Oakland County Road Commission (the Employer). Patterson filed this charge against his bargaining representative, the American Federation of State, County and Municipal Employees, Council 25 and Local 92, on June 12, 2002. Patterson alleges that Respondent violated its duty of fair representation by mishandling a grievance it filed for Patterson in April 2001. The grievance asserted that Patterson's assignment to an out-of-classification job violated the contract provision requiring job assignments to be made in order of seniority. Patterson asserts that Respondent temporarily

misplaced his grievance and, as a result, failed to make a timely request to move his grievance to the next step of the grievance procedure. Because of this failure, Patterson asserts, his grievance was "nullified." According to Patterson, he first learned of these events from his steward, Mark Smith, sometime in the spring of 2002.

Motion to Admit Additional Evidence:

On November 14, 2002, Patterson filed a motion to re-open the record to admit evidence of events occurring at a grievance meeting on October 14, 2002, after the date of the hearing. This evidence consisted of an affidavit from AFSCME Local 92 President Mark Sasseen. According to Sasseen, the Employer began the October 14 meeting by stating it was denying all the grievances before it on the grounds that Respondent had failed to meet contractual time limits. These grievances included Patterson's April 2001 grievance. According to Sasseen's affidavit, the Employer then asked Respondent representatives at the meeting to come up with a list of grievances they really wanted to discuss. According to Sasseen's affidavit, Respondent Vice President Al Stutzman and Chief Steward Jeff Breckinridge told the Employer that that only a few members considered the assignment of out-of-class work to be a problem, and that this issue was not a big deal.

Respondent objects to the admission of Sasseen's affidavit. According to Respondent, the Employer and Respondent agreed at the October 14 meeting to schedule a special conference to discuss Patterson's grievance and another grievance with the same issue. Respondent asserts that the hearing should be reopened to allow it the opportunity to cross-examine Sasseen and to present rebuttal evidence.

Since Respondent challenges the truth of Sasseen's statements, Sasseen's evidence cannot be admitted into the record without giving Respondent an opportunity to cross-examine him and to present rebuttal evidence. MCL 24.272(4). For reasons discussed below, however, I conclude that Sasseen's evidence, if credited, would not require a different result in this case. [1] Patterson's motion to re-open the

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1 Rule 166(1) of the Commission's General Rules, R 423.166(1), states:

> A party to a proceeding may move for reopening of the record of the record following the close of a hearing conducted under Part 7 of these rules. A motion for reopening of the record will be granted only upon a showing of all of the following:
>
> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
> (c) The additional evidence, if adduced and credited, would require a different result

record is, therefore, denied.

Facts:

Respondent represents a bargaining unit of all hourly rated employees of the Oakland County Road Commission. Patterson, a truck driver, is a member of this unit. Article 61 of the Respondent's contract reads:

> (a) In making job assignments, the Employer will attempt in good faith where abilities are approximately equal, to give the advantage to their higher seniority employees of jobs [sic] where there is a known and accepted difference in the desirability of the job. If an employee feels that his assignment is improper because of his seniority, an attempt will be made the next working day to resolve the differences. Obvious errors known to the Superintendent will be corrected immediately whenever possible.
> (b) Employees required to work in a higher classification for four (4) hours or more shall be paid the rate for the higher classification for the entire day.
> (c) Employees required to work in a lower classified job will be paid their current rate.

In 1987, Respondent and the Employer entered into a letter of agreement stating that Respondent would prepare a list of job assignments ranked by desirability for each of the Employer's work districts. This list, called the job preference list, is used by the Employer to assign employees to jobs within their classification by seniority. Prior to 2001, the Employer generally did not use this list when assigning employees out of classification. Instead, the most senior employees were permitted to select the jobs they personally preferred. Thus, a more senior employee could, if he desired, choose a less desirable job in a higher classification and be paid at the higher rate. Respondent filed several grievances prior to 2001 alleging that the Employer had failed to allow a senior employee to select the job he preferred. All these grievances were settled short of arbitration.

On April 11, 2001, Patterson was assigned a job outside his classification that he did not want. His steward, Mark Smith, filed a grievance on his behalf asserting that the Employer had violated Article 61 and past practice. On July 25, 2001, the Employer denied this grievance at the third step of the grievance procedure. The Employer maintained that Patterson's job assignment had been made in accord with the terms of Article 61 and the job preference list.

The contract states that if the Local Union is not satisfied with the Employer's third step answer, the Local Union may refer the grievance to Council 25. Per the contract, a representative of the Council and the International Union then review the matter. They must, within 30 days after the third step answer, appeal the grievance to a pre-arbitration panel composed of representatives of the Employer and the Union. A pre-arbitration panel meeting was scheduled on Patterson's grievance. However, the meeting was cancelled after a Local 92 representative (the record does not indicate who) informed the Council 25 staff representative that the Local wanted to refer the matter to its steward's committee. Patterson's grievance

was held in abeyance pending the committee's action.

Patterson was not told of this development. Local 92 Vice President Al Stutzman told Patterson that his grievance had been processed through the pre-arbitration step. Smith initially told Patterson the same thing. However, sometime in the late spring of 2002, Smith told Patterson that a bunch of grievances that had been filed about the same time as Patterson's grievance came back as "void" because Respondent failed to process them on time.

On May 28, 2002, Patterson asked Jeff Breckinridge, Local 92's chief steward, about the status of his grievance. Breckenridge told him that he had no case because the 1987 letter of agreement allowed the Employer to do what it did. This was the first indication Patterson had that Respondent believed his grievance lacked merit. After his conversation with Breckinridge, Patterson filed the instant charge.

Shortly thereafter, Patterson and another employee with a similar grievance met with a Council 25 staff representative and Local 92 President Sasseen. After this meeting, the pre-arbitration panel meeting on Patterson's grievance was rescheduled for October 14, 2002.

On October 2, 2002, Smith filed a grievance on behalf of employee Richard Hall alleging that the Employer had violated the contract by refusing to allow him to "bump" a lower seniority employee when they were both working out of classification. The following day, Local 92 Vice-President Al Stutzman approached Hall and told him that the Employer had the right to do what it had done because it had followed the job preference list and Hall had the better job.

Discussion and Conclusions of Law:

A union breaches its duty of fair representation when its conduct toward a member of its bargaining unit is arbitrary, discriminatory, or in bad faith. *Goolsby v Detroit*, 419 Mich 651,679(1984). See also, *Marquez v Screen Actors Guild,* 525 U.S. 33 (1998); *Vaca v Sipes*, 386 US 171, 177 (1967). In *Goolsby*, the Michigan Supreme Court held that a union acted arbitrarily when it failed, without explanation, to move a grievance to the next step of the grievance procedure and the employer denied the grievance as a result.

However, as long as the union's decision is not arbitrary, discriminatory, or in bad faith, a union has considerable discretion to determine how far a grievance should be pressed. A union may lawfully conclude that a grievance has no merit. In deciding whether to go forward with a grievance it may weigh such factors as the amount at stake, the likelihood of success, or the cost of arbitration. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973).

Patterson alleged that Respondent caused his grievance to be denied by failing to make a timely request to move the grievance to the next step. That is, Patterson alleged that Respondent was guilty of the type of gross negligence which the *Goolsby* Court held to be a violation of the duty of fair representation. However, Sasseen's affidavit, submitted after the hearing, contains the only indication that Respondent might

have failed to appeal Patterson's grievance in a timely manner. No evidence was presented at the hearing to support Patterson's assertion that his grievance died because Respondent failed to appeal it. Smith, the steward who gave Patterson his information, was not called to testify. According to the evidence presented at the hearing, Respondent made a timely request to have Patterson's grievance heard by the prearbitration panel, but then asked that the grievance be held in abeyance while the Local Union considered whether it wished to proceed.

I conclude, however, that even if Respondent did fail to comply with contractual time limits in handling Patterson's grievance, the evidence, including Sasseen's affidavit, indicates that Respondent chose not to pursue Patterson's grievance because Breckinridge and Stutzman concluded that the grievance lacked sufficient merit to justify pursing it. I base my conclusion on the position Breckenridge took in May 2002, and the comments made by Stutzman to Richard Hall in early October 2002. The statements made by Stutzman and Breckinridge at the October 14, 2002 grievance meeting, according to Sasseen's affididavit, are consistent with their earlier statements. Thus, Sasseen's evidence, if credited, supports a conclusion that Respondent chose not to pursue Patterson's grievance because of its judgment of its merit and importance.

As noted above, a union has the discretion to determine whether a grievance has merit. It also may weigh such factors as the cost of pursuing a grievance against the likelihood of success. Despite evidence of a past practice, neither the language of Article 61 nor the 1987 letter of agreement unambiguously state that the Employer is required to allow senior employees to select out-of-class assignments in accord with their personal preference. I conclude that Patterson has failed to demonstrate that his grievance "died" through Respondent's arbitrary conduct. I also conclude that Patterson has not shown that Respondent's decision not to pursue his grievance was arbitrary, discriminatory, or in bad faith. For the above reasons, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____