STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT FEDERATION OF TEACHERS,
Labor Organization – Respondent,

Case No. CU03 F-028

-and-

DAVID L. MARTIN,
An Individual – Charging Party.

_____/

APPEARANCES:

Sachs Waldman, P.C., by Marshall J. Widick, Esq., for Respondent

David L. Martin, In Pro Per

DECISION AND ORDER

On April 30, 2004, Administrative Law Judge Roy L. Roulhac issued his 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

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Maris Stella Swift, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT FEDERATION OF TEACHERS,
Labor Organization – Respondent,

Case No. CU03 F-028

-and-

DAVID L. MARTIN,
An Individual -Charging Party
_____/

APPEARANCES:

Sachs Waldman, P.C., by Marshall J. Widick, Esq., for Respondent

David L. Martin, In Pro Per

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan by Roy L. Roulhac, Administrative Law Judge for the Michigan Employment Relations Commission (MERC) on December 18, 2003, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based upon the record and post-hearing briefs filed by February 17, 2004, I make the following findings of fact, conclusions of law and recommended order pursuant to Section 16(b) of PERA.

The Unfair Labor Practice Charge:

David L. Martin, Charging Party, filed an unfair labor practice charge against the Detroit Federation of Teachers ("Respondent" or "DFT") on June 5, 2003. The charge reads: "Failure to represent. On February 19, 2003 paid for a medical appeal not received same in accordance with the contract." As clarified by his response to a Motion For a More Definite Statement, Charging Party alleges that he paid for a medical appeal on February 18, 2003, and despite being told by DFT staff that the appeal process would take approximately ten days, by June 5, 2003, he still did not have an appointment with, or the name of a neutral physician. He also claims that on August 21, 2003, when he went to the DFT office to pick up check, Keith Johnson refused to remove the phrase "in settlement of grievance" from a form that Johnson required Charging Party to sign as a condition to receiving the check. Finally, he claims that the check he received was $19, 243.99 less than the amount that he was owed.

Findings of Fact:

The essential facts are undisputed. Charging Party David L. Martin is employed by the Detroit Public Schools (Employer) and was a member of Respondent's bargaining unit. The Employer and Respondent are parties to a collective bargaining agreement that became effective on July 1, 1999, and expired on June 20, 2002. In November 2002, while working as a teacher at Nolan Middle School, a student assaulted Charging Party. He suffered damage to the vertebrae in his neck, torn muscles and ligaments in his right shoulder and extensive dental damage. Article XV, Section B, 5 of the contract provides that the gross earnings of employees who are unable to work because of school-related injuries shall be maintained by the payment of assault pay and that absences from work shall not be charged against sick leave.1

Charging Party received assault pay from November 2002, until January 24, 2003, when the Employer ordered him to return to work. On February 18, 2003, in accordance with Article XV, Section D of the contract, Respondent initiated a medical appeal on Charging Party's behalf. The section provides that within ten days after an appeal is filed, the Employer and the Union shall select an appropriate specialist to evaluate the teacher's ability to return to work.2 The determination of the specialist is final and binding. The contract also provides that: the teacher's physician and the Employer Medical Examiner shall select a specialist if the Employer and the Union fail to agree on one; the parties may mutually extend the time limit to select a specialist; and if the Employer refuses to pay or continue assault pay that the Union believes is required under the agreement and the report, the Union may file a grievance at step two of the CONTRACT's three-step grievance procedure.

Marvin Green, the Union Labor Relations Administrator, has been responsible for processing medical appeals for twenty years. He processes approximately six appeals per year. According to Green, the medical appeal process may take anywhere from a few weeks to several months. On February 17, 2003, Charging Party provided Green with medical evaluations from his physician indicating that he was unable to work. The next day, Green initiated the medical appeal process on Charging Party's behalf by sending a letter to the Employer's office of labor affairs. In response to a question regarding whether benefits are usually paid while the appeal process is ongoing, Green answered:

> No, benefits are not kept intact. Because the nature of the appeal, the appeal comes about because there is a dispute as to whether the employee can work, and that's what this [medical appeal] provision is for in terms of whether a person is entitled to continue assault pay benefits.

In an April 2, 2003, letter, Charging Party informed Green that he was scheduled for an MRI on April 15, 2003, indicated that they had not spoken since March 5, 2003, and inquired about the status of his appeal. The next day, Green wrote to Charging Party advising him that Green understood that Charging Party wanted to wait until he had an MRI before being evaluated by a neutral specialist, and since the MRI was scheduled, he would contact the Employer to select an appropriate specialist. On May 7, 2003, Green sent the Employer a letter memorializing their agreement to extend the ten-day time limit to process Charging Party's appeal. Two weeks later, the Employer sent the Union a list of proposed specialists that the Union found to be unacceptable. A month later, on June 2, 2003, Green advised Charging Party that a recent doctor's statement containing a diagnosis and prognosis was needed to process his appeal.

1Worker's compensation and social security benefits are deducted from assault pay.

2The contract requires teachers to pay one-half of the medical evaluation's cost. Charging Party paid a total $320.

The next day, Charging Party sent the requested information to Janna Garrison, the Union's president, with whom he had been meeting or corresponding with since April 2003. In his letters to her, Charging Party inquired about the status of his appeal; demanded that the Union take action to maintain his gross earnings during the appeal process or provide him with a statement that he was not entitled to pay; requested that the sick leave that he used be restored to his sick bank; and requested that he be provided with copies of reports written by two security guards who witnessed the assault and the letter written by Green to initiate the appeal process.

On June 13, 2003, a week after the instant charge was filed, Green informed Charging Party that a neutral physician had been selected. Charging Party was evaluated on July 1, 2003, and his appeal was found to be meritorious. The Union received a copy of the report on July 22, 2003, and a week later wrote a letter to the Employer requesting that all benefits and pay be restored to Charging Party retroactive to the date that they were terminated.

A month later, on August 19, 2002, Keith Johnson, Respondent's director of operations, interceded on Charging Party's behalf and arranged for him to receive a partial payment of the assault pay that was owed to him. Two days later, Charging Party picked up a $15,000 check from the Union's office and signed a statement acknowledging receipt of the check. Shortly after leaving the office, Charging Party returned and objected to a statement on the receipt that read: "in settlement of a grievance." Johnson advised Charging Party that the receipt was a standard form and was not meant to close the matter.

Conclusions of Law:

Charging Party claims that Respondent breached its duty to fairly represent him because it failed to operate in good faith and failed to enforce certain provision of the contract. Specifically, Charging Party contends that Respondent: (1) failed to process his medical appeal within ten to twenty days as required by the contract; (2) agreed to extend the time limits without his consent or prior knowledge; (3) failed to permit his physician and the Employer's medical examiner to select an appropriate specialist after Respondent and the Employer failed to select one; (4) failed to insist that his gross wages be maintained and that his absences not be charged against his sick bank while his appeal was pending; and (5) and failed to file a grievance when the Employer discontinued his pay and benefits.

The duty of fair representation requires a union to (1) serve the interest of all members without hostility or discrimination, (2) exercise discretion with complete good faith and honesty, and (3) avoid arbitrary conduct. *Goolsby v Detroit,* 419 Mich 651, 664. For a union's conduct to be "arbitrary," it must be so far outside the wide range of reasonableness afforded unions that it is "wholly irrational," evaluated in "light of both the facts and the legal climate" at the time of the union's actions. *Air Line Pilots Ass'n v O'Neill,* 499 U.S. 65, 78 (1991). Applying this test, the evidence presented by Charging Party does not demonstrate that Respondent violated its duty to fairly represent him.

It is well-settled that delays, without a showing of bad faith or hostile motive, do not constitute a breach of the duty of fair representation. See *City of Detroit (Dept. of Transportation),* 1983 MERC Lab Op 188, 194, where the Commission found that a grievance that was pending for over a year did not breach the duty of fair representation. Similarly, in *Knoke v East Jackson School District, supra,* the Commission concluded that a delay created by an agreement between the union and the employer to extend the time limit set forth in the parties' contract did not violate the union's duty of fair representation.

Green, who has processed medical appeals for Respondent for twenty years, testified credibly the that appeals routinely take from several weeks to six months to process. Moreover, as contemplated by the contract, Respondent and the Employer mutually agreed to extend the ten-day time limit. Contrary to Charging Party's assertion, there is nothing in the contract that requires Respondent to obtain his consent or to notify him prior to extending the time limit.

I also find that Respondent did not violate its duty to fairly represent Charging Party by failing to permit his physician and the Employer's medical examiner to select an appropriate specialist. No evidence was presented to demonstrate that Respondent and the Employer were unable to agree upon an appropriate specialist. Although in mid-May 2003, Respondent found specialists proposed by the Employer to be unacceptable, by June 2, 3003, they mutually selected a physician who evaluated Charging Party and upheld his appeal. The delay by the Union and the Employer in selecting a specialist does not establish that they were unable to agree. Therefore, there was no need for Charging Party's physician and the Employer's medical examiner to intercede.

Finally, I find no merit to Charging Party's assertion that Respondent breached its duty to fairly represent him by not filing a grievance protesting the Employer's decision to discontinue his assault pay and sick leave benefits. Charging Party fails to comprehend that by initiating the medical appeal process set forth in the contract, Respondent was challenging the Employer's decision to terminate his assault pay. It was, therefore, unnecessary for Respondent to also file a grievance. Moreover, the contract provides that the Union may only file a grievance if the Employer refuses to pay or continue assault payment that the Union believes is required under the agreement and the medical specialist's *report*. The record reflects that shortly after receiving the specialist's report finding that Charging Party was unable to work, Respondent immediately requested that the Employer restore, retroactively, Charging Party's pay and benefits. Thereafter, Respondent took steps to expedite a partial payment of retroactive assault pay that was owed to Charging Party.

I find that Respondent's conduct in processing Charging Party medical appeal was not outside the wide range of reasonableness or wholly irrational and, therefore, did not violate its duty to fairly represent Charging Party. I have carefully considered all other arguments advanced by Charging Party and conclude that they do not warrant a change in the result.3 Based on the above findings of fact and conclusions of law, I recommended that the Commission issue the order set forth below:

Recommended Order

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac

3It is noted that Charging Party attached documentary evidence to his post-hearing brief that was not introduced during the hearing. This new evidence and accompanying arguments have not been considered in reaching this Decision and Recommended Order.

Administrative Law Judge

Dated: April 30, 2004