STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WEST BRANCH-ROSE CITY EDUCATION ASSOCIATION AND MICHIGAN EDUCATION ASSOCIATION,
Labor Organizations - Respondents,

-and- Case No. CU98 J-50

FRANK DAME,
An Individual Charging Party.
_____/

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by James J. Chiodini, Esq., for Respondents

Mark L. Fischer, Esq., for Charging Party

DECISION AND ORDER ON REMAND

This matter is before the Commission on remand from the Michigan Court of Appeals. On October 27, 2000, the Commission issued its Decision and Order in this case, finding that Respondents, the West Branch-Rose City Education Association and the Michigan Education Association (the Union or the MEA)[1], violated their duty of fair representation, in violation of Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, by failing to give notice to Charging Party regarding restrictions on his ability to resign from the Union. In an unpublished decision, the Court of Appeals found that the Commission erred by basing its decision on the notice issue, which was not specifically addressed in the exceptions. The Court vacated MERC's decision and remanded the case, directing that the Commission should first consider whether it had jurisdiction over the dispute, and then proceed accordingly.[2]

[1] Because there is no significant distinction between the West Branch-Rose City Education Association (WB-RCEA) and the Michigan Education Association (MEA) for purposes of the legal issues relevant to this case, we will refer to both associations collectively as the Union, Association or Respondent.

[2] *Michigan Education Association and West Branch-Rose City Education Association v Frank Dame*, unpublished opinion per curiam of the Court of Appeals, decided January 24, 2003 (Docket No. 230803).

Background:

On October 5, 1998, Frank Dame, a teacher in the West Branch-Rose City School District, filed an unfair labor practice charge alleging that Respondent violated its duty of fair representation by refusing to immediately honor his attempt to resign from the Union, and by maintaining rules which restricted his right to become a service fee payer and assert his rights to a reduced service fee, commonly referred to as *Beck* rights.[3] Pursuant to the Union's Constitution, membership could be terminated during a one-month period from August 1 to August 31. Under MEA procedures, a nonmember who has properly resigned from the Union (or never joined) has a 30-day window period during which time he or she must object to paying their pro rata share of political or ideological activities of the Association. Dame joined the Union and had maintained Union membership since 1988. Dame's attempt to resign his membership in April 1998 was refused by the Union.

In recommending dismissal of the charges, the Administrative Law Judge (ALJ) concluded that nothing in PERA precludes a labor organization from placing reasonable restrictions on the timing and manner of the withdrawal of an employee from membership and that the Union had amply demonstrated the reasonableness and necessity of the window period in this case. Thus, the ALJ found that the Union did not violate its duty of fair representation by making Charging Party wait four months, from April to August, to resign from the Union.

Charging Party filed timely exceptions pertaining solely to the Union's maintenance and enforcement of the annual one-month window period for filing resignations and *Beck* objections.[4] Charging Party alleged that the ALJ erred in finding that the procedures and actions of the Union relative to resignations of Union membership did not violate the Union's duty of fair representation. In a decision issued October 27, 2000, *West Branch-Rose City Education Association*, 2000 MERC Lab Op 333, the Commission found that the Union failed to notify Charging Party of his right to refrain from joining the Union, and failed to provide him with information concerning its own internal rules regarding continuing membership obligations. Under such circumstances, it was improper for Respondent to place impediments on Charging Party's ability to immediately resign his membership in the Union and become a service fee payer. Thus, the Union was found to have breached its duty of fair representation. Because the decision was based on Respondent's failure to provide Dame with notice of his rights and obligations, the Commission did not address the broader issue of the legitimacy of the Union's policy restricting the ability of its members to resign.

On appeal by the Union, the Court of Appeals found that the Commission erred by basing the decision on an issue not specifically raised in Charging Party's exceptions. Although the issue of notice was raised at the hearing before the ALJ, the Court agreed with the MEA that the notice issue was beyond the scope of the issues specifically urged in Dame's exceptions and that

[3] In *Communications Workers v Beck*, 487 US 735 (1988), the Supreme Court held that the expenditure of dues and fees on activities outside the union's role as collective bargaining representative violated the union's duty of fair representation to *nonmember* employees who objected to such expenditures.

[4] The charge also asserted that the Union interfered with, restrained and coerced Dame in the exercise of his PERA rights by making unlawful threats and interrogating him with respect to his protected activities; no exceptions were filed with respect to the ALJ's decision on these allegations.

the Commission had erred by basing its ruling on that issue. Finding that Dame did not raise the issue of notice in his exceptions, or in his brief, the Court ruled that Dame had therefore waived any notice issue. On appeal, the MEA also argued that MERC lacked jurisdiction over the dispute because it involved internal union matters. The Court noted that MERC had not addressed this issue, and instructed MERC to consider the issue on remand.

For reasons discussed below, we conclude that our assertion of jurisdiction over this dispute was proper. Further, having carefully considered the record and arguments of both sides, we have decided to affirm the decision of the ALJ and adopt his recommended order.

Discussion:

The Union asserts that all members of the Association are voluntary members. Dame entered into a membership agreement with the Association, thereby making himself eligible for the rights and benefits of membership as well as the reciprocal obligations of membership. Respondent contends that under these circumstances, where the Union was simply applying an internal rule, there can be no unfair labor practice. If this were the only issue raised in this case there would be no need for further analysis. However, since only nonmembers can request a reduction in their service fee, we must examine whether the Union's restriction on resignation improperly impacts *Beck* rights. Thus, the essential PERA issue raised in this dispute is whether the Union's use of window periods with respect to the resignation of membership and the concomitant assertion of *Beck* rights violates its duty of fair representation.

The duty of fair representation is a judicially created doctrine, founded on the principle that a union's status as exclusive bargaining representative carries with it the obligation and duty to fairly represent all employees in the bargaining unit, members and nonmembers. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). The elements of a union's duty of fair representation include: 1) serving the interests of all members without hostility or discrimination; 2) exercising its discretion with complete good faith and honesty; and (3) avoiding arbitrary conduct. When a union's conduct toward a bargaining unit member is "arbitrary, discriminatory, or in bad faith" the duty of fair representation is breached. A union satisfies the duty of fair representation so long as its decision is within the range of reasonableness. *Airline Pilots v O'Neill*, 499 US 65 (1991); *Int'l Union of Operating Eng'rs, Local 547*, 2001 MERC Lab Op 309, 311; *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

A union's duty of fair representation extends to union conduct in representing employees in their relationship with their employer, such as negotiating a collective bargaining agreement or resolving a grievance, and in related decision-making procedures. *Wayne County Community College Federation of Teachers, Local 2000, AFT*, 1976 MERC Lab Op 347. See also *Organization of Classified Custodians*, 1996 MERC Lab Op 181, 183 (no exceptions); *Lansing School District*, 1989 MERC Lab Op 210. The duty does not apply to matters that are strictly internal union affairs, which do not impact the relationship of bargaining unit members to their employer. Although Respondent asserts that the collection of dues is an internal union matter, the collection of agency fees from nonmembers cannot be characterized as purely an internal union matter, since it can only be accomplished pursuant to a negotiated contract provision, and

there is a potential impact on employment should the nonmember refuse to pay. Further, courts have found that a union's collection and use of agency fees implicates the duty of fair representation. In *Beck*, the U.S. Supreme Court found that exactions of agency fees from objecting nonmembers beyond those necessary to finance collective bargaining activities violated a union's duty of fair representation as well as the nonmembers' First Amendment rights. See also *Lansing Sch Dist*, 1989 MERC Lab Op 210; *Bridgeport-Spaulding Community Schs* 1986 MERC Lab Op 1024.

The ALJ in his decision found that the annual window period for withdrawal of membership was reasonable and necessary and that the Union had provided adequate and valid administrative justifications for its policy including budgeting, auditing, and programming requirements. In his analysis, he relied on the court's decision in *Nielsen v Int'l Ass'n Machinists & Aerospace Workers, Local Lodge 2569*, 94 F3d 1107, 1116 (CA 7 1996) *cert den* 520 US 1165 (1997). In *Nielsen*, the Seventh Circuit upheld a union's window period for asserting *Beck* rights, stating:

> It is not unreasonable for a union to require existing members or full fee nonmembers to voice their objections in a timely fashion, and to be aware that the price of not doing so will be to wait at most ten or eleven months before implementing their new status. Life is full of deadlines, and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of the law. *Nielsen v Int'l Ass'n of Machinists*, 94 F3d 1107, 1116.

In his analysis, the ALJ indicated his disagreement with the National Labor Relations Board's (NLRB) holding in *Polymark Co*, 329 NLRB 9, (1999) and noted the different opinions of Board members reflected in that decision. In *Polymark*, the NLRB found an unfair labor practice when the union declined to honor *Beck* objections that were not filed during a designated window period. Members Fox and Liebman dissented in part and disagreed with the conclusion of the majority, finding that any assessment of the validity of a window period requirement must take into account a union's legitimate interests in administrative efficiency and simplicity. *Polymark*, 329 NLRB at 13. The dissenting members, relying on *Nielsen*, also indicated that there was no legal requirement of "instantaneous action" with respect to objector claims, regardless of the administrative burden placed on the union.

Given the similarity between the language of PERA and that of the National Labor Relations Act (NLRA), the Commission is often guided by federal cases interpreting the NLRA. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 260, (1974), *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44 (1974) and *U of M Regents v MERC*, 95 Mich App 482, 489 (1980). However, while Board precedent is often given great weight in interpreting PERA in those cases where PERA's language is analogous to that of the NLRA, this Commission is not bound to follow NLRB precedent. *Rockwell v Bd of Ed*, 393 Mich 616 (1975); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co Health Dep't*, 1993 MERC Lab Op 901, 906. Particularly in this area, where Board members disagree, and where the

statutory language of PERA differs from that of the NLRA,[5] we choose to follow the better reasoned approach of *Nielsen*.[6] In addition to the court in *Nielsen*, other federal courts have found that it is reasonable for a union to require that objections be filed within an administratively convenient period and that window periods facilitate the interests of the union and the employees in the prompt resolution of obligations and disputes. See, for example, *Abrams v Communications Workers*, 313 US App DC 385; 59 F3d 1373, 1381 (1995); *Andrews v Educ Ass'n of Cheshire*, 653 F Supp 1373, 1378 (D Conn, 1987) *aff'd*, 829 F2d 335 (CA 2, 1987); *Kidwell v Transportation Communications Int'l Union*, 731 F Supp 192, 205 (D Md, 1990) *aff'd in part and rev'd in part on other grounds*, 946 F2d 283 (CA 4, 1991).

We agree with the ALJ that the Association's one-month window period is a reasonable rule that is justified by the Union's administrative and budgetary needs. In order to successfully perform its role of exclusive representative of bargaining unit employees, and to fulfill its statutory mission to bargain collectively on behalf of public employees, a union must be able to effectively budget and allocate its resources. See *Edwards v Indiana State Teachers Ass'n*, 749 NE2d 1220 (2001). We find that utilization of a reasonable window period to achieve these ends is not arbitrary and does not violate the Union's duty of fair representation.[7] Accordingly, we adopt the order of the ALJ dismissing the charge.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

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Harry Bishop, Commission Member

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Maris Stella Swift, Commission Member

Dated: _____

[5] In its decisions, the Board relies on the "right to refrain" from union activity found in Section 7 of the NLRA. The analogous section of PERA, Section 9, does not contain this language and we will not infer it in the absence of clear legislative intent. While, clearly, union membership cannot be required under PERA, in this case Dame joined the Union voluntarily.

[6] Although in *Int'l Assn of Machinists & Aerospace Workers v NLRB*, 133 F3d 1012 (CA 7, 1998), the Seventh Circuit upheld a decision of the NLRB finding the ultilization of window periods to be arbitrary conduct, the court specified that it was applying the principle of deferential review of agency action; it was not finding that *Nielsen* was incorrect and indicated that, in fact, its rule may be the better one.

[7] Moreover, while this is not the proper forum to challenge constitutional rights, in recognition of both parties' constitutional arguments, we note that we also believe that the window period is carefully tailored to minimize infringement on First Amendment rights. See *Chicago Teachers Union v Hudson*, 475 US 292, (1986).