STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

MACOMB COUNTY COMMUNITY COLLEGE
FACULTY ORGANIZATION,
Respondent - Labor Organization,

Case No. CU03 L-054

-and-

JOHN C. BONNELL,
An Individual - Charging Party.
_____/

APPEARANCES:

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

John C. Bonnell, *In Proria Persona*

DECISION AND ORDER

On December 8, 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

_____
Nino E. Green, 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 in Detroit, Michigan, on June 18, 2004, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC). Based on the record, I make the following findings of facts and conclusions of law.

The Unfair Labor Practice Charge:

On December 3, 2003, Charging Party John C. Bonnell filed an unfair labor practice charge against Respondent Macomb County Community College Faculty Organization. He alleged that Respondent conducted arbitrarily, discriminatorily and with bad faith fashion by refusing to fairly represent him in the face of Macomb County Community College's attack on his employment and contractual rights.[1]

Respondent filed a Motion for Summary Disposition on March 17, 2004. Charging Party filed a response on April 5, and challenged many of Respondent's characterizations of the facts. Therefore, on June 18, an evidentiary hearing was held. In lieu of filing post-hearing briefs, the parties made oral arguments and relied on their pleadings.

Facts:

Charging Party has been employed as a professor of language and literature at the Macomb County Community College (Employer) for over thirty-five years. He is a member of Respondent Macomb County Community College Faculty Organization, which represents faculty employed by

[1] An eighteen-page letter and twenty-one exhibits are attached to the charge. The facts set forth above are derived from the charge and the attached exhibits, Charging Party's response to Respondent's Motion for Summary Disposition and his testimony during the hearing.

the College. Article V.A.1 of the collective bargaining agreement between the College and Respondent provides that teachers are entitled to freedom of discussion within the classroom on all matters considered relevant to the subject matter under discussion. The College also has a sexual harassment policy that prohibits the use of vulgar, obscene or profane speech in the classroom, unless it is germane to course content as judged by professional standards.[2] Article VII of the collective bargaining agreement provides that students may file a complaint against a faculty member for misconduct or non-performance of faculty contractual obligations.

Since 1998, Charging Party has been warned, counseled and suspended for his use of certain language in the classroom. In February 1998, after a complaint was filed and investigated, the College warned Charging Party that, unless germane to discussion of appropriate course materials, and thus a constitutionally protected act of academic freedom, his use of words such as "fuck," "pussy" and "cunt" may serve as a reasonable basis for concluding that he was fostering a learning environment hostile to women, a form of sexual harassment. Charging Party defended his use of the words by arguing they were not directed to a particular student and were only used to demonstrate an academic point. In November 1998, a female student in Charging Party's English 122 class filed a sexual harassment complaint against him complaining about the language that he was using about stories students were reading. During the investigation of the complaint, Charging Party ignored the College's warning to keep the complaint confidential and distributed it, and his response to the faculty. In January 1999, Charging Party was notified that he would be suspended for three days, February 1-3, without pay for using vulgar and obscene language without reference on assigned readings in his English 122 class.[3] After learning that he had distributed the student's complaint and his response, the College directed Charging Party not to post, distribute or discuss, verbally or in writing (inside and outside the classroom), complaints filed against him regarding sexual harassment, his use of obscene or vulgar language or any disciplinary action taken against him, without written permission. Charging Party ignored the directive and provided a redacted copy of the student's complaint to television stations and the local newspaper. On February 2, the College suspended him without pay and benefits pending an investigation into his dissemination of the student's complaint..

Shortly thereafter, on February 12, 1999, Respondent's president James Yizze wrote Charging Party regarding Respondent's view of his conduct. The letter reads, in part, as follows:

> The [Faculty] Senate [Respondent's governing body] does not agree that words are just words. MCCFO concludes that academic professionals may be expected to fit within a certain standard of conduct and deportment. Your regular use of what most people believe to be profane words is below the standard that the Union believes applicable to MCC faculty.

On March 10, 1999, Charging Party filed an action in the U. S. district court against the College president, individually and as president of the College, two administrators and Mark Cousens, Respondent's legal counsel. Among other things, he alleged a violation of his right to free speech and sought a restraining order enjoining the College for enforcing the suspensions. The court denied the motion for an injunction and remanded the matter to the College for an administrative

[2]Title IX of the Education Amendments of 1972 requires that educational institutions that receive federal funds to provide a learning environment free of sex discrimination, including sexual harassment. See 20 U.S.C. § 1861(a)(1),(8).
[3]The College alleged that Charging Party made a practice of using such words as "shit," "damn," "fuck" and "ass;" in describing a newspaper account of necrophilia, said that one doesn't expect to receive a serious "butt-fucking" after being dead; said President Clinton received a "blow job" from Monica Lewinsky; and remarked that "tits on a nun are as useful as balls on a priest."

hearing. After a hearing in July 1999, the College found that Charging Party violated Federal and Michigan law, the College's polices and directives, the collective bargaining agreement. Charging Party was suspended, effective August 18, 1999, for fourteen days without pay for insubordination, concurrent with a four-month suspension without pay and benefits for breaching the complaining student's confidentiality, and retaliation. The court granted Charging Party's emergency motion for an injunction and he returned to the classroom on August 30, 1999.[4]

After an appeal by the College, on March 1, 2001, the U.S. Court of Appeals for the Sixth Circuit found that Charging Party's circulation of the student's complaint and other material was protected speech, but that his in-class use of various vulgarities was not protected. In commenting to Charging Party's classroom language, the court noted:

> Turing to the matter at hand, just as a university coach may have the constitutional right to use the word "nigger," but does not have the constitutional right to use the word in the context of motivating his basketball players; so too, Plaintiff may have a constitutional right to use words such as "pussy," "cunt," and "fuck," but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy. This is particularly so when one considers the unique context in which the speech is conveyed – a classroom where a college professor is speaking to a captive audience of students who cannot "effectively avoid further bombardment of their sensibilities simply by averting their [ears]." Although we do not wish to chill speech in the classroom setting, especially in the unique milieu of a college or university where debate and the clash of viewpoints are encouraged – if not necessary – to spur intellectual growth, it has long been held that despite the sanctity of the First Amendment, speech that is vulgar or profane is not entitled to absolute constitutional protection. [Citations omitted.]

Bonnell v Lorenzo, 241 F3d 800 (CA 6, 2001).

On December 11, 2001, prior to end of this four-month suspension, the Charging Party was issued a lengthy counseling memorandum that identified conduct the College found unacceptable.

The incident that gave rise to the unfair labor practice charge in this case began on March 4, 2003, when the College received a written complaint from a student regarding her experience in Charging Party's English 122 class. The student, who withdrew from the class after four meetings, complained that during every class they only talked about the graphic sexual content of handouts, and even if they contained no sexual content, Charging Party would create some. She also complained that Charging Party explained to the class that he did not intend to follow department goals for what students should learn.

Charging Party was ordered to meet with the College on March 28 to informally discuss the student's complaint. Prior to attending the meeting, Charging Party and several of Respondent's representatives, including grievance coordinator Marie Baeckeroot and Respondent's legal counsel, Mark Cousens, discussed the complaint and how it might implicate the College's sexual harassment policy and the collective bargaining agreement. A second meeting was held with the College's representatives on April 29, 2003. After a preliminary discussion about possible charges that might

[4]Shortly after returning to work, another student filed a complaint alleging that Charging Party's alleged use of profanity and offensive language denigrated the Jewish faith and women.

be brought against Charging Party, Respondent's representatives proposed to him that he retire, and that any shortfall in his pension from prior suspensions would be adjusted.

The following week, Charging Party presented two counter-proposals to the retirement offer. He proposed to the College that rather than continuing its censorship, complaining students be reminded of the importance of free speech. In the second, he proposed that on the first day of class, students be informed that courses may contain ideas and words of an adult nature and be allowed to select assignments of a less controversial character. The next day, May 7, the College notified Charging Party that there was reasonable cause to believe that he violated: (1) the policy against the use of profane, vulgar or obscene speech in the classroom that is not germane to course content as measured by professional standards; (2) the College's sexual harassment policy; and (3) federal and Michigan law prohibiting sexual harassment.

The collective bargaining agreement contains a procedure for two meetings to be conducted to evaluate a complaint before discipline is imposed. Prior to a May 21 meeting to respond to the charge, Respondent's representatives advised Charging Party to keep his responses to the College's interrogation brief since the matter would be arbitrated if their belief proved true that he would be terminated. A June 10 meeting was scheduled for Charging Party to confront the complaining student and to call witnesses in his defense. On June 7, in preparation for that meeting, Charging Party met with Respondent's representatives. Cousens and Baeckeroot told him that they believed the College would fire him. They advised Charging Party to abandon the next step as a clue to the College that they were thinking ahead to arbitration, and because of their misgivings about opening the process to more students who were capable of "saying just about anything." Charging Party agreed and signed a statement waiving the June 10 meeting.[5] The next day, the College issued a nine page "written determination." Charging Party was suspended for two months without pay and benefits and informed that upon his return to work, he would be counseled via a comprehensive memorandum detailing the College's expectations.

On June 16, Charging Party asked Respondent to file a grievance challenging his suspension. The Faculty Senate held a special meeting to consider the request on June 25.[6] Charging Party submitted various documents for the Senate's review and was given an opportunity to present and discuss his case. He emphasized that the College was unable to find other student support for the charge. He told them that the collective bargaining agreement guaranteed teachers' right to free speech in the classroom and that only teachers had a contractual right to judge what is relevant or germane to classroom discussion. Some Senate members asked whether there might be some corroboration of some of the Employer's claims. Some suggested that he should abide by the College's sexual harassment policy. One took offense to Charging Party's inability to recall how many students dropped his class. Another voted against filing a grievance after learning that the College's enforcement of its policy regarding the use of language in the classroom was only directed at Charging Party. Baeckeroot, Respondent's grievance coordinator, spoke and voted against his request to file a grievance. After an hour-long discussion, the Senate, by an 8-4 vote, decided not to file a grievance.

Later that day, Charging Party issued a press release decrying his suspension and Respondent's failure to file a grievance. Regarding his appearance before the Senate, he wrote:

[5]Charging Party's June 10 statement reads: "This will confirm that I agree that the intermediate level proceeding for June 10, 2003 should be waived."

[6]Charging Party served as a member of the Faculty Senate in 2000.

> After some discussion larded with insinuations and even accusations, the Senate voted against my appeal. They argued that the College's speech code was a useful and necessary guide for professionals of the 21st century. They said offensive speech was any speech the College did not like, that any student might not like, or that they themselves did not like. By clear implication, the only person not qualified to judge the appropriateness of in-class discourse is the targeted professor. They remonstrated with me, and called my intelligence into question, because I persist in believing outmoded notions of free speech. They said that the Contract's first enumerated Right of Teachers, obviously patterned on the First Amendment ("The teacher shall be entitled to freedom of discussion within the classroom on all matters which he considers relevant to the subject matter under discussion."), does not mean what it seems to say, or what I think it means. Before a discussion on this head [sic] could be fully developed, the chair closed debate and called for a motion.

Thereafter, in August, Charging Party requested that Respondent file a grievance on his behalf challenging an August 8 memoranda notifying him that the College intended to monitor his classroom performance. Respondent told Charging Party that his request was premature since his classes had not been monitored. However, Respondent sent the College a letter indicating that although it did not protest monitoring of Charging Party's classes in the Spring 2002 term, it reserved the right to object to monitoring classes in the future.

Conclusions of Law:

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 (1984), citing *Vaca v Sipes*, 286 US 171 (1967). The *Goolsby* Court, at page 679, defined "bad faith" as an intentional act or omission undertaken dishonestly or fraudulently, and "arbitrary" conduct as actions that are "impulsive, irrational, or unreasoned," "undertaken with little care or with indifference to the interests of those affected" or "extreme recklessness or gross negligence."

Charge Party, in his thirty-page response to Respondent's motion for summary disposition, in addition to making a broad attack against Respondent for refusing to support his notion of academic freedom, advances several conclusory reasons for his claim that Respondent unfairly represented him. He first claims that Respondent engaged in bad faith conduct on April 29 by adopting and cooperating in the College's scheme for him to retire. He also contends that he was unfairly represented on June 7, when he was encouraged to waive the June 10 meeting with the College to confront the complaining student. I find no merit to these assertions. Charging Party provided no evidence that Respondent's advice to him was undertaken dishonestly or fraudulently. Although he now claims that it is a pathetic union that construes representation with "removal" or "disappearing the victim," he considered the retirement offer and responded by making two counter-proposals, which were rejected. Moreover, Charging Party agreed with Respondent's assessment that he should forego the June 10 meeting by sending the College a letter waiving his right to the next step in the process.

Charging Party also argues that the Faculty Senate, during its June 25 deliberations, did not seriously entertain the charges against him and acted in a perfunctory matter. He claims that it acted in bad faith by not focusing on the central issues and by asking him questions, such as how many students dropped his class or whether the alarm he was sounding was symptomatic of a broad policy of faculty censorship or an isolated event. It is well settled that a union is not obligated to file a

grievance whenever a member make a request, but has the right and the duty to determine whether, on balance, the grievance should go forward. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-146. Charging Party presented no evidence that the Faculty Senate did not follow its usual procedure in considering his claim. *Detroit Bd of Ed*, 2000 MERC Lab Op 26. He was given an opportunity to discuss the charges brought against him and to share his point of view. There is no evidence that the questions asked by Senate Faculty members were impulsive, irrational, or unreasoned. The Senate's disagreement with his arguments in favor of filing a grievance does not mean that it breached its duty of fair representation. *Pearl v Detroit*, 126 Mich App 228 (1983). It is not the Commission's role to second-guess Respondent's judgment or strategy. In *Airline Pilots Assn v O'Neil*, 499 US 65 (1991), the Supreme Court held that unions have broad discretion in administrating their collective bargaining agreements and that their decisions are not actionable unless their judgment is "wholly irrational" and outside the "wide range of reasonableness" accorded to unions. I find that Respondent's representation of Charging Party before and during its June 25 deliberation was no outside the range of reasonableness.

I also find no merit to Charging Party's assertion that Respondent violated its duty to fairly represent him because, contrary to its past practice, it failed to send him a letter detailing reasons for not filing a grievance. Of the numerous exhibits presented by Charging Party, there is none that shows that Respondent had a practice of sending him a letter. It does show that after Charging Party was suspended in February 1999, Respondent sent him a letter informing him that his use of profanity in the classroom was inappropriate for the College's faculty. The Commission has long held that where an employer and a union concur on the interpretation of the contract, their construction governs. *Michigan Council 25, AFSCME, Local 3308*, 1999 MERC Lab Op 132. Moreover, Charging Party's press release makes clear that he knew why a grievance was not filed.

Further, to prevail on a claim of unfair representation, the employee must establish not only a breach of the duty of fair representation but also a breach of the collective bargaining agreement. *Martin v East Lansing Sch Dist*. 193; Mich App 166, 181 (1992); *Pearl v Detroit, Supra*, 126 Mich App 228, 238 (1983), and *Hines v Anchor Motor Freight, Inc*, 424 US 554, 570-571 (1976). Thus, even if plaintiff established that Respondent breached its duty of fair representation, his claim fails because he failed to show that his suspension violated the collective bargaining agreement. *Bonnell v Lorenzo, Supra*.

I have carefully considered all other arguments raised by Charging Party, including his claim that Respondent violated PERA by refusing to file a grievance in response to the Employer's announcement that his classroom performance would be monitored, and conclude that they lack merit. Based on the above findings of fact and conclusions of law, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: December 8, 2004