STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C03 K-241,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 345,
Labor Organization-Respondent in Case No. CU03 K-049,

-and-

PAMELA A. LEWIS,
An Individual-Charging Party.
_____/

APPEARANCES:

Gordon A. Anderson, Esq., for Respondent Employer

Miller Cohen, PLC, by Eric I. Frankie, Esq., for Respondent Labor Organization

Pamela A. Lewis, *In Propria Persona* before the Commission

DECISION AND ORDER

On October 26, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above-captioned matter finding that Respondent American Federation of State, County and Municipal Employees, Local 345 (Union) did not breach its duty of fair representation when it failed to continue to pursue a grievance over the allocation of overtime opportunities. Inasmuch as the ALJ found no breach of the duty of fair representation with respect to Respondent Union, the ALJ found it unnecessary to consider the claim that Respondent Detroit Public Schools (Employer) violated the collective bargaining agreement regarding the assignment of overtime. The ALJ found that neither Respondent violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended MCL 423.210 and recommended that the charges be dismissed.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. Charging Party Pamela A. Lewis filed timely exceptions to the ALJ's Decision and Recommended Order on November 18, 2005. In her exceptions, Charging Party asserts that the record contains sufficient evidence to show that the Employer improperly assigned overtime in violation of the collective bargaining agreement. We have carefully and thoroughly reviewed the record in this matter and find no merit to the exceptions.

The Unfair Labor Practice Charges:

Pamela Lewis filed unfair labor practice charges on November 10, 2003, against the Detroit Public Schools and the American Federation of State, County and Municipal Employees (AFSCME), Local 345. The charge against the Employer alleged that it violated its collective bargaining agreement with the Union by failing to equalize overtime among assistant custodians at Cass Technical High School and by improperly assigning overtime to supervisors. The charge against the Union alleged that it violated its duty of fair representation when it failed to pursue a grievance over the alleged contract violations.

The charges were amended on February 11, 2004, by a letter claiming that on May 9, 2003, the Union and Employer took overtime away from bargaining unit members by providing bargaining unit work to nonmembers; and on April 16, 2004, the charge against the Union was amended by a letter claiming that the Union acted in bad faith by failing to timely file the grievance referenced in the original charge against the Union.

Facts:

Charging Party was an assistant custodian at Cass Technical High School and, as such, was a member of a bargaining unit represented by AFSCME Local 345. The head custodian and other supervisory custodians are represented by another union, the Organization of Classified Custodians.

Respondents' collective bargaining agreement provides that "overtime hours shall be divided as equally as possible among all employees in the bargaining unit by classification within a building." From payroll information sheets showing that the head custodian and the other foremen worked overtime almost daily during the latter part of 2002 and that some assistant custodians worked more overtime than others, Charging Party concluded that the head custodian was not properly assigning overtime and was "stealing" overtime opportunities from the assistant custodians.

In the spring of 2003, Charging Party received additional payroll information from which she again concluded that the head custodian was not properly assigning overtime and was taking overtime for himself and other supervisors. On March 24, 2003, the Union filed a class action grievance on behalf of the assistant custodians at the high school claiming that overtime opportunities had not been offered equally to all staff and

that the head custodian had improperly included himself in the overtime rotation. On April 15, 2003, the grievance was denied at the first step. Based upon an examination of overtime records, the Union concluded that overtime was being more or less equally distributed and that the head custodian was not improperly assigning unit work to supervisors. Consequently, the Union did not advance the grievance to the second step.

On May 9, 2003, a group of part-time bus attendants belonging to the Union's bargaining unit was sent to the high school for one day of training as substitute custodians. The assistant custodians had not been informed of this visit and were upset; when they complained to the Union, they were assured that the bus attendants were not going to take their overtime. During the course of the discussion of this and other overtime issues, the assistant custodians were told that a grievance had been filed over their complaints about the head custodian's overtime assignments. According to Charging Party, they were told that this grievance was at the second step of the grievance procedure but were not told that it had been denied. The Union claims that the assistant custodians were told that the grievance had been denied at the first step, but were not told that the Union would advance the grievance to the next step.

In September of 2003, Charging Party transferred to another school. Later that month, she and two other assistant custodians from Cass Technical High School were told that the Union had not pursued the grievance beyond the first step.

Discussion and Conclusions of Law:

We find no support in the record before us for the complaint that the head custodian worked overtime hours belonging to Charging Party or others. Excerpts from the applicable collective bargaining agreement that were offered and admitted at the hearing before the ALJ provide that overtime assigned to nonsupervisory custodians must be divided as equally as possible within the classification and within a building. These excerpts do not indicate that supervisory custodians are prohibited from working overtime or that overtime assignments are shared by supervisory and nonsupervisory custodians.

As for the claim that overtime was not properly distributed among nonsupervisory custodians, the contractual language "equally as possible" does not require perfection. The Union examined records from which it concluded that overtime was being more or less equally distributed. Although the Union might have been more thorough and aggressive in its investigation, there is no evidence that its investigation was irrational or unreasoned, indifferent to the interests of those affected, reckless, or conducted in a manner that was arbitrary, discriminatory, or in bad faith. *Goolsby v Detroit*, 419 Mich 651, 661-665 (1984); *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21, 25 (1991). See also *Vaca v Sipes*, 386 US 171, 177 (1967).

Because we find that neither Respondent violated PERA in this case, we adopt the recommended order of the ALJ.

ORDER

The charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Gordon A. Anderson, Esq., for the Respondent Employer

Miller Cohen, PLC, by Eric I. Frankie, Esq., for the Respondent Labor Organization

Motley and Associates, by Jennifer Tolmer, Esq., for the Charging Party

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, this case was heard at Detroit, Michigan on April 18, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the Charging Party and the Respondent Union on July 5, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

Pamela Lewis, an individual, filed these charges on November 10, 2003 against her Employer, the Detroit Public Schools (the Employer), and her collective bargaining representative, the American Federation of State, County and Municipal Employees, Local 345 (the Union). The charges were amended on February 11 and April 16, 2004. From September

2002 until September 2003, Lewis was an assistant custodian at the Employer's Cass Technical High School (the school or the high school). Lewis' charge against the Employer alleges that it violated Respondents' collective bargaining agreement by failing to equalize overtime among assistant custodians at the high school and improperly assigning overtime to supervisors. Lewis' charge against the Union alleges that it violated its duty of fair representation under PERA when it decided not to pursue a grievance over these alleged contract violations. Lewis asserts that she did not learn until September 2003 that the Union was not going forward with the grievance.

Facts:

During the 2002-2003 school year, Lewis was one of approximately nineteen assistant custodians at the high school. Assistant custodians are part of a bargaining unit represented by AFSCME Local 345. The head custodian, Benjamin Morgan, and a foreman supervised the assistant custodians on the afternoon shift, and another foreman supervised the day shift. Morgan and the foremen are represented by another union.

Respondents' collective bargaining agreement provides that overtime is to be distributed "as equally as possible among all employees in the bargaining unit by classification within a building." The contract explains in detail how overtime opportunities are to be rotated among employees. It also states that the head custodian, who is responsible for assigning overtime, must keep up-to-date records of the amount of overtime offered to and worked by each custodian, and must keep such records available for review at all times.

In the fall of 2002, Lewis and other assistant custodians began to suspect that Morgan was not rotating overtime opportunities among the custodians as required by the contract, and that some employees were getting more than their fair share of overtime. They also believed that Morgan was "stealing" their overtime. They based this conclusion in part on the fact that both Morgan and the afternoon foreman often worked overtime on the same day. Although a supervisor had to be present whenever an assistant custodian worked overtime, they believed that only one supervisor should work overtime and that if there was more work it should be offered to an assistant custodian. They also observed Morgan and the foremen doing the work of absent custodians, work that they believed should have been offered to them as overtime.

In October or November 2002, Lewis asked to see Morgan's overtime records. Morgan refused. Shortly thereafter, another individual gave Lewis copies of some weekly payroll information sheets for custodians at the school from September and October. Payroll information sheets show how many hours of overtime each assistant custodian and supervisor works each week. They do not indicate to whom the overtime was initially offered. The payroll information sheets Lewis obtained showed that Morgan and the foremen worked some overtime nearly every day, and also that some assistant custodians worked more overtime than others. Lewis concluded that these documents substantiated the custodians' suspicions that Morgan was not properly rotating overtime and taking overtime opportunities from the assistant custodians.

Around the time that Lewis obtained the payroll sheets, she told Union executive vice-president Keith January of the assistant custodians' suspicions. January spoke personally to Morgan, who denied that he was distributing overtime improperly. January also called Jared

Davis, a vice principal at the school. January told him that the Union was getting complaints about Morgan's assignment of overtime, and asked Davis to watch him. Lewis also spoke to Davis about her suspicions. Davis told Lewis that he would look into the matter.

In about January 2003, Wayne White, supervisor of custodians for a constellation of schools that included the high school, heard that assistant custodians at the school were complaining that Morgan was not distributing overtime properly. White told Morgan to post logs so that the custodians could see how overtime was being assigned. Morgan did not comply with White's order.

In the spring of 2003, Lewis' source provided her with more payroll information sheets. On March 14, 2003, Lewis and three other assistant custodians wrote to Davis complaining that Morgan was not rotating overtime and was taking it for himself and the other supervisors. They included, as examples, specific dates on which Morgan worked overtime which they believed should have been offered to assistant custodians. The letter asked Davis to remove Morgan as head custodian. After he received this letter, Davis told Lewis that he believed that Morgan was not assigning overtime properly. However, he said that he was not going to remove Morgan from his position, and that the Union should handle the matter. After Lewis reported Davis' comment to January, he spoke again to Morgan, who again denied that he was doing anything wrong. January also talked to Davis. Davis told January only that he was keeping an eye on Morgan. However, January decided that it was time to file a grievance.

On March 24, 2003, the Union filed a class action grievance on behalf of the assistant custodians at the high school. The grievance stated that Morgan had failed to assign overtime opportunities to allow equal opportunities for all staff, and that Morgan had improperly included himself in the overtime rotation. The Union did not tell Lewis or the other assistant custodians that it had filed a grievance.

On April 15, Davis and George Cohen, principal of the high school, denied the grievance at the first step. Davis and Cohen told the Union that Morgan had to be in the building as long as it was in use in the evening because he had the codes for the school's security alarms. They also said that the funds for Morgan's overtime were coming out of the school's budget, and not from the district-wide housekeeping fund from which custodial wages are normally paid. Davis and Cohen insisted that Morgan was keeping records of both overtime offered and worked. They provided the Union with the name of a person to contact and a number to call to obtain copies of Morgan's overtime reports. When January called, the person he had been told to talk to was on vacation. January admitted that he did not call again. According to January, since Cohen and Davis had given him this phone number, he assumed that if he looked at these records they would substantiate Cohen and Davis' claim that Morgan was assigning overtime properly.

In April 2003, January was participating in a joint union-management committee whose purpose was to address excessive overtime costs and help save unit members from layoff. As a member of this committee, January had received a computer printout every two weeks since October listing every custodian in Local 345's bargaining unit who worked twenty hours or more hours of overtime during that period, how many overtime hours they worked, and the schools to which they were assigned. He also received printouts with the same information for supervisory

custodians. Unlike payroll information sheets, these printouts did not list by name employees who worked less than twenty hours of overtime during a pay period. However, they showed the total number of overtime hours worked by Local 345 custodians at each school. After the March 24 grievance was denied, January looked over these printouts. He observed that in many two-week periods, several assistant custodians at the high school worked more than twenty-four hours of overtime. He also noticed that the other assistant custodians at the school together often worked more than one hundred hours of overtime per pay period. From the fact that a great deal of overtime was being worked by custodians who worked less than twenty hours of overtime per pay period, January concluded that the overtime was being more or less equally distributed. From the amount of overtime being worked by members of his unit, and an examination of the printouts showing supervisory overtime worked, January also concluded that Morgan was not improperly assigning unit work to the supervisors. According to January, he concluded that the amount of overtime Morgan was working - about 35 hours per pay period - was consistent with Davis and Cohen's claim that Morgan had to stay in the building until it was unoccupied to set the alarms. January decided not to appeal the grievance to the second step.

On May 9, 2003, a group of part-time bus attendants, also members of the Union's bargaining unit, were sent to the high school for one day of training so that they might be used as substitute custodians. This training was part of a pilot program associated with the overtime committee of which January was a member, and January accompanied the bus attendants to the school. The assistant custodians at the high school had not been informed in advance of this visit and were upset when the bus attendants were assigned their duties. January met with a group of them to explain the presence of the bus attendants and assure them that the bus attendants were not going to take their overtime. January and the custodians also discussed other overtime issues. During the course of this discussion, January told the assistant custodians that a grievance had been filed over their complaints about Morgan. According to Lewis, January said that this grievance was at the second step of the grievance procedure. January, however, testified that he told the assistant custodians that the grievance had been denied at the first step, and that he also said that he had looked at the records and did not understand why the assistant custodians were complaining. I find it unnecessary to determine which version of the conversation was accurate. January admitted that he did not specifically tell Lewis that the Union was not going forward with the grievance. I conclude that his statement that he did not understand why the custodians were complaining was not sufficient to put Lewis on notice in May 2003 that the Union did not intend to pursue the grievance.

In July 2003, Spencer Woolridge, manager of custodial services for Respondent's eastside region, took over the management of custodial services at the high school. White told Woolridge of the complaints about Morgan's assignment of overtime. In late August 2003, Woolridge held a meeting with the custodial staff at the high school, including the supervisors. Woolridge explained to the staff that there had been complaints about the condition of the school, and he told the custodians what he expected in terms of work performance and attendance. He also informed the custodians that unless the number of custodians at the school dropped, there would be no more overtime except when Woolridge preapproved it. Woolridge reviewed how overtime was to be assigned under the union contracts, and, in the presence of the assistant custodians, gave Morgan specific directions on how to keep his overtime log. During

the fall, Woolridge assigned someone to check on Morgan periodically to ensure that he was complying with Woolridge's directives.

In September 2003, Lewis transferred to another school. Later that month, however, Lewis and two other assistant custodians from the high school approached January after a union meeting to ask about their grievance. January told them that the Union had not pursued their grievance beyond the first step.

Discussion and Conclusions of Law:

A union does not breach its duty of fair representation under PERA unless its conduct toward members of its collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Goolsby v Detroit,* 419 Mich. 651, 661-665 (1984); *Silbert v Lakeview Ed Ass'n,* 187 Mich App 21, 25 (1991). See also *Vaca v Sipes,* 386 US 171, 177 (1967). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and is permitted to assess each grievance with a view to its individual merit and the interests of the unit as a whole. *Lowe v Hotel Employees,* 389 Mich 123, 146-147 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A union's decision not to proceed with a grievance is not arbitrary if it falls within the range of reasonableness. *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35, citing *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991). In *Goolsby,* the court stated that arbitrary conduct under PERA included (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." It affirmed, however, that mere negligence in the handling of a grievance does not violate a union's duty of fair representation. *Goolsby,* at 680. See also *Police Officers Labor Council,* 1999 MERC Lab Op 196, 201; *Diversified Contract Services*, 292 NLRB 603, 605-606, (1989).

Lewis argues that the Union did not properly investigate the grievance before deciding not to take it to the next step of the grievance procedure. According to Lewis, the documents January reviewed showed only who at the high school received more than twenty hours of overtime in a pay period. She asserts that January did not have enough information to determine that overtime was being assigned properly when he decided to drop the grievance. According to Lewis, January should have reviewed the weekly payroll information sheets showing the number of overtime hours worked by each assistant custodian and supervisor at the high school. She also maintains that January should have spoken to the person who, according to Davis and Cohen, had possession of Morgan's overtime records.

After the March 24, 2003 grievance was denied at the first step, January reviewed overtime records that told him that both supervisors and assistant custodians at the high school were working a lot of overtime. These records also showed that Morgan was not assigning all of the overtime to a handful of assistant custodians, as the assistant custodians appeared to have claimed. January did not examine the payroll information sheets or follow up on the Employer's offer to let him examine Morgan's records. While the payroll information sheets listed the overtime worked by every employee, they were not significantly more informative than January's printouts since they did not indicate whether custodians had turned down offered overtime. Moreover, it was not unreasonable for January to assume that because the Employer

offered to let him see Morgan's records, these records would support their claim that Morgan was assigning overtime properly. I find that January's investigation of the grievance, while perhaps not as thorough as it might have been, was not so deficient as to make his decision not to proceed with the grievance arbitrary under *Goolsby* standards. I conclude that the Union did not violate its duty of fair representation when it failed to take the March 24, 2003 grievance to the second step of the grievance procedure.

Lewis' charge against the Employer alleges only that it violated provisions of Respondents' collective bargaining agreement. Although a party seeking to show that a union has violated its duty of fair representation in processing a grievance must show both that the union breached its duty of representation and that the employer breached the contract, PERA does not provide an independent cause of action for an Employer's breach of a collective bargaining agreement. *Michigan State Univ*, 17 MPER 75 (2004); *Knoke v East Jackson Sch Dist*, 201 Mich App 480, 485 (1993). Since Lewis has failed to show that the Union violated its duty of fair representation in this case, I need not address the issue of whether the Employer violated Respondents' collective bargaining agreement by Morgan's assignment of overtime at the high school.

I find that the record does not establish that either Respondent violated PERA in this case. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____