STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN STATE UNIVERSITY ADMINISTRATIVE-PROFESSIONAL ASSOCIATION, MEA/NEA,
Labor Organization - Respondent,

Case No. CU05 J-044

- and -

JOHN MORALEZ,
An Individual - Charging Party.
_____/

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by William F. Young, Esq., for the Respondent

John Moralez, *In Propria Persona*

DECISION AND ORDER

On March 8, 2006, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Respondent's Motion for Summary Disposition in the above matter, dismissing Charging Party John Moralez's unfair labor practice charge. The ALJ found that the Respondent Michigan State University Administrative-Professional Association, MEA/NEA (the Union) did not commit an unfair labor practice in violation of Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by refusing to proceed to arbitration on Charging Party's grievance. The ALJ also found no PERA violation when the Union refused to request certain information from the Employer relative to Charging Party's case and refused to provide him with copies of certain documents.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On March 17, 2006, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. Respondent filed a brief in support of the ALJ's Decision and Recommended Order and a Response to Charging Party's Exceptions on March 27, 2006.

In his exceptions, Charging Party alleges that the ALJ erred in finding the charge untimely and argues that the ALJ applied the wrong date as the "date of occurrence" from which to calculate the six-month limitations period. He also excepts to the finding that there were no genuine issues of material fact.

We have reviewed Charging Party's exceptions and find that while the ALJ erred in calculating the statute of limitations, the charge was properly dismissed.

Procedural History:

In dismissing the charge, we note that Charging Party has sought to file numerous pleadings subsequent to the filing of his exceptions. Some of those filings are not permitted by the Commission's Administrative Rules and are not part of our record on review. As to those documents that we have considered, none of them alters our conclusion that Charging Party has failed to state a claim under PERA. For purposes of clarity in the record, we briefly summarize Charging Party's filings that occurred subsequent to the filing of his exceptions.

On March 29, 2006, Charging Party filed a Response to Respondent's Brief in Support of the ALJ's Decision. Because this filing is not permitted by the Commission Rules, we do not consider it.

Charging Party next filed a Motion for Reopening of the Record on May 25, 2006. Respondent responded to this Motion and filed a Brief in Opposition on June 13, 2006.[1] Charging Party filed a second Motion for Reopening of the Record on March 19, 2007. On March 29, 2007, Respondent filed a Response to this Motion.

Regarding both Motions, pursuant to Commission Rule 423.166, a motion for reopening the record will be granted only upon showing that there is newly discovered evidence that could not have been produced at the hearing and that receipt of the additional evidence, if adduced and credited, would require a different result.

In his first Motion, Charging Party seeks to reopen the record to admit some 16 documents from 2003 and 2004 that include correspondence between the University and the NAACP. The documents appear to be an effort to challenge the University's layoff decision, as well as the grievance proceedings. Several of those documents are not relevant to Charging Party's fair representation claim filed against his Union. Further, even assuming that any of those documents are admitted and credited, they would not change our decision in this case.

In the second Motion, Charging Party seeks to reopen the record to admit human resource documents from 2004 and early 2005, concerning a position at the University for which he had applied and was not selected, along with an undated Decision and Order

1 Subsequently, Charging Party filed a Brief in Response to Respondent's Brief in Opposition on June 22, 2006. A response to a brief in opposition is not permitted under the Commission Rules; therefore, this response was not considered.

of MERC. He alleges that the Respondent fraudulently withheld and intentionally concealed these documents that are pertinent to his case. We again find that the documents are irrelevant; hence, any failure to disclose them does not require reopening of the record.

Charging Party filed amendments to his Charges on August 16, 2006 and again on September 29, 2006, seeking to provide further details about how the Union allegedly "knowingly and purposefully" worked with the Employer to fraudulently deceive him during grievance proceedings. In his second amendment, Charging Party attempts to reiterate the basis for his Charge – asserting that the Union's conduct in representing him and in refusing to take his grievance to arbitration violated its duty of fair representation. He further states that the Union withheld information regarding his grievance and "knowingly and deliberately" presented false and incomplete information to the Union's executive board in an effort to manipulate and influence its decision. Even assuming that those amendments are permitted under Rule 423.153, neither allegation (if true) would cause us to change our decision.

Charging Party filed a Motion for Summary Disposition on October 27, 2006, and Respondent filed a Cross Motion for Summary Disposition on January 3, 2007. Charging Party then filed a Cross Motion for Summary Disposition on January 5, 2007. Charging Party subsequently filed two additional Motions for Summary Disposition on April 10, 2007, and April 23, 2007. On April 27, 2007, Charging Party filed a Motion to Strike all of Respondent's previous pleadings. For the reasons explained in this Decision, we deny Charging Party's Motions for Summary Disposition and his Cross Motion for Summary Disposition, his Motion to Strike, and other requested relief. Instead, we adopt the ALJ's Recommended Order dismissing his Charges.

Factual Summary:

The facts in this case are set forth fully in the ALJ's Decision and Recommended Order on Summary Disposition and need not be repeated in detail here. Briefly, Charging Party John Moralez filed an unfair labor practice charge against the Union on October 26, 2005 claiming that it failed to represent him in his case against Michigan State University regarding his lay-off.

Moralez was laid off on July 1, 2003, along with another employee, Corey Vowels, who was represented by another union. At the time of his lay-off, Moralez notified his Union that he would not be filing a grievance. Over a year and a half later, in February 2005, Moralez heard that Vowels had been reinstated. He contacted the Union to determine if Vowels' case had any issues that pertained to him. The Union filed a grievance on Moralez's behalf on February 28, 2005. The grievance was denied by the University at the third step meeting on April 7, 2005. At its May 10, 2005 grievance committee meeting, the Union considered whether the matter should be taken to arbitration. Moralez was not permitted to attend the meeting, but was notified the next day, May 11, 2005, that his grievance would not be pursued. Subsequently, Moralez was permitted to appear before the Union's executive board, as well as before the executive

committee of the Michigan Education Association. On both occasions, his appeal was denied. Ultimately, Charging Party was told by the Union executive board that he had no further appeals, following which, he filed this unfair labor practice charge.

Discussion and Conclusions of Law:

Moralez argues that the Union failed to represent him by not taking his grievance to arbitration, as well as by failing to request important information from the University and refusing to provide him with certain documents in its possession. He claims that there are similarities between his case and that of Vowels, who was reinstated after a grievance was filed. The Union alleges that the charge is untimely and, therefore, should be dismissed. Furthermore, it argues that it was justified in its decision not to pursue the case to arbitration and did not violate its duty of fair representation to the Charging Party.

In addressing whether the charge was filed in a timely manner, we disagree with the ALJ that the charge was untimely. The ALJ found that Moralez knew the Union would not take his grievance to arbitration as of June 2003. At this time, the only notice Moralez had received was the opinion of the Union president that the grievance, which Moralez could have filed on his own, would not be successful. It was not until May 11, 2005 that Moralez was notified of the decision not to proceed to arbitration, less than six months prior to his filing of his charge on October 26, 2005. We, therefore, conclude that the charge was filed within the six-month limitations period and should not have been dismissed as untimely.

However, we agree with the ALJ that the Union did not breach its duty of fair representation in deciding not to pursue Charging Party's grievance to arbitration. To prevail against a union on a claim of unfair representation involving a grievance, a charging party must establish both that that union breached its duty of fair representation and that a breach of the collective bargaining agreement occurred. *Goolsby v Detroit*, 211 Mich App 214 (1995). First, in this case, there is no claim that the employer violated the collective bargaining agreement. In addition, it is well settled that a union's decision not to proceed to arbitration on a grievance is not arbitrary as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35.

We believe that the record indicates that the Union acted reasonably in determining that it could not prevail on Charging Party's grievance. First, there was a preliminary timeliness issue – whether or not the grievance was in fact filed within the contractual time frame. Also, the contracting out which occurred in the Moralez case was not close to being "on all fours" with the Vowels' case. Not only were the circumstances different, but the cases involved different unions and different collective bargaining agreements. In this case, the grievant was allowed numerous opportunities to appeal his grievance through internal union procedures. It is well settled that an individual union member does not have the right to demand that the union pursue his grievance to arbitration. Instead, because a union's ultimate duty is to the membership as a whole, a union has considerable discretion to decide whether to pursue a grievance to arbitration.

As stated by the Michigan Supreme Court in *Lowe v Hotel & Restaurant Emp Union, Local 705*, 389 Mich 123, 146 (1973), "the union is vested with discretion which permits it to weigh the burden upon contractual grievance machinery, the amount at stake, the likelihood of success, the cost, even the desirability of winning the award against those considerations which affect the membership as a whole."[2] In this case, we agree with the ALJ that the Union did not violate its duty of fair representation in deciding not to pursue Charging Party's grievance to arbitration; nor did the Union violate its duty to Charging Party by failing to request documents from the University and to provide him with copies of all documents the Union had in its possession, as such documents were irrelevant.

In conclusion, we find that although Charging Party's charge was timely filed, the Union did not violate its duty of fair representation. We, therefore, issue the following order.

ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

2 There also was evidence that the Union had lost a grievance in 1991 involving this same contract language and these same parties.

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-and-

JOHN MORALEZ,
An Individual-Charging Party.
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APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by William F. Young, Esq., for the Respondent

John Moralez, *in propria persona*

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On October 26, 2005, John Moralez filed an unfair labor practice charge alleging that his collective bargaining agent, the Michigan State University Administrative-Professional Association, violated its duty of fair representation toward him under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. On February 6, 2006, Respondent filed a motion for summary disposition pursuant to Commission Rule 161, 2002 MR 1, R 423.161. Respondent asserts that Moralez's charge is untimely under Section 16(a) of PERA. It also maintains that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. On February 21, 2006, Moralez filed a response to the motion. Attached to Moralez's response are copies of numerous e-mails and other correspondence between the parties as well as other documents. Based on the facts as set forth in Moralez's charge and in his February 21 response, as well as the arguments contained in Respondent's motion and Moralez's response, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Moralez was employed by WKAR-TV, a television station operated by Michigan State University (the Employer), and Respondent was Moralez's collective bargaining representative. On June 30, 2003, Moralez was laid off, allegedly for budgetary reasons. Moralez did not ask

Respondent to file a grievance over his layoff. In January 2005, a co-worker laid off at the same time as Moralez, but a member of a different bargaining unit, was reinstated pursuant to an arbitration award. On or about February 28, 2005, Respondent filed a grievance on Moralez's behalf alleging that his layoff had been improper and that the Employer had violated the contract by failing to recall him. On May 11, 2005, after the Employer had denied the grievance at the third step, Respondent notified Moralez that it had decided not to take his grievance to arbitration. Moralez alleges in this charge that Respondent acted arbitrarily and in bad faith by: (1) failing to request certain information pertinent to his case from the Employer; (2) refusing to give Moralez copies of certain documents it had in its possession, and (3) refusing to take his grievance to arbitration.

Facts:

The facts below are set forth in Moralez's response to the motion for summary disposition.

Moralez began working for WKAR-TV as a public affair television producer and on-air host on July 12, 1999. In March 2003, the Employer created a plan for reducing its broadcasting services budget which included laying off two WKAR staff members. An internal Employer memo dated March 24, 2003 stated:

> Layoff two staff. Details are:
>
> Corey Vowels, Production Assistant, C09, position 452, date of hire 6/5/00. Vowels is the least senior technical person on the staff in the lowest classification for technical staff in our unit. He is a television master control operator and his duties would be covered by re-assigning other staff and hiring some students. The impact would be to compromise quality control in the television broadcasts because less experienced people would be doing the work.
>
> John Moralez, TV Producer-Director, P13, position 256, date of hire 7/12/99. Moralez is the least senior of the TV Producers-Directors. He is not currently assigned to any ongoing television productions. The impact would be to increase the TV producing load on the remaining producers who would cover the occasional production projects that would have been assigned to Moralez. There are other staff members at the P13 level. They are radio Producer-Host positions. The positions are not interchangeable due to significant differences in skills to produce radio versus TV programs.

On March 31, 2003, Moralez and Vowels were notified that they would be laid off effective July 1, 2003. Moralez did not ask Respondent to file a grievance. On August 12, 2003 Moralez sent Respondent president Leo Sells an e-mail stating that he had not asked Respondent to file a grievance because he had hoped to be able to work out the situation himself with management and did not want to appear adversarial. In an e-mail response that same day, Sells explained to Moralez why he did not believe that Moralez had a valid grievance over his layoff. Referring to the March 24 memo, Sells told Moralez that if the Employer determined that it

could do with one less producer/director, Moralez was the appropriate person to lay off because he was the least senior TV producer.

In April 2004, Vowels' collective bargaining representative, the Clerical-Technical Union of Michigan State University (CTU), filed a grievance asserting that his layoff was improper because non-unit students had been hired to do his work. In January 2005, arbitrator Kenneth Frankland issued an award granting the grievance and ordering Vowels reinstated with backpay. Frankland concluded that the Employer had violated the recognition clause of the CTU contract by replacing Vowels with "non-union persons." He explicitly distinguished an earlier arbitration decision cited to him by the Employer involving a grievance filed by Respondent (the 1991 grievance). Frankland stated that in the 1991 grievance, the primary duties of the laid off person had been eliminated and other unit employees could handle the remaining overlapping duties. According to Frankland, the Employer had not eliminated Vowels' duties but had hired non-union students to perform them.

In February 2005, Moralez heard that Vowels had been reinstated and contacted Sells. Sells told Moralez about Frankland's decision. On February 22, Moralez asked Sells and Respondent UniServ director John VanDyken to see if there were any employment or contractual issues in Vowels' case that might pertain to him. On or about February 28, VanDyken filed a grievance alleging that Moralez's layoff had been improper and also that the Employer had violated the contract by failing to recall him. VanDyken also sent Moralez an e-mail explaining that he believed that Moralez's case more closely resembled the 1991 grievance than Vowels' case because the major functions of Moralez's position had been eliminated when he was laid off.

The third step grievance meeting on Moralez's grievance was scheduled for April 7. On April 5, Moralez sent VanDyken an e-mail giving three examples of outside contracts entered into by the Employer after February 2004 to produce shows Moralez had or could have produced. Moralez attended the April 7 grievance meeting with VanDyken. Attached to Moralez's pleadings in this case are detailed notes of this meeting taken by VanDyken's secretary. According to these notes, VanDyken asked the Employer why, if Moralez's position had been eliminated, his shows were still being produced and aired. VanDyken brought up the Frankland decision, and argued that Frankland's reasoning should also apply to Moralez if Moralez's work had not been eliminated but instead assigned to a "non-union person." VanDyken also asked the Employer why Moralez had not been recalled to open positions filled in March and October 2004.3 The Employer took the position that Moralez's grievance was untimely because it had not been filed within fourteen calendar days of the alleged occurrence as the contract required. It stated that the grievance was also untimely with respect to its failure to hire Moralez for the open positions. The Employer acknowledged that it had hired outside contractors to produce two programs previously assigned to Moralez and that a third project, also being done by a contractor, would have been assigned to Moralez if he had still been working at the station. It maintained, however, that the rationale of the Frankland decision did not apply since it had not hired non-unit employees to replace Moralez. It also said that it believed that the Frankland decision was a bad one. On April 15, 2005, the Employer denied the grievance at the

3 Moralez was interviewed for both of these positions – radio producer and communications manager with the College of Agriculture – but told later that he did not meet the minimum requirements for the positions.

third step without giving reasons.

After the Employer denies a grievance at step three, Respondent's grievance committee determines whether it should go to arbitration. Moralez's grievance was put on the committee's agenda for its May 10, 2005 meeting. On April 22, Moralez and VanDyken met and discussed obtaining copies of the outside contracts mentioned at the April 7 meeting and also determining how these contractors had been hired. Moralez later provided VanDyken with names and phone numbers to obtain this information. On May 3, Moralez sent VanDyken and Sells a lengthy letter laying out arguments for why his case was comparable to Vowels' and distinguishable from the 1991 grievance. Moralez also noted that the e-mails notifying him of the March and October 2004 vacancies stated that he met the minimum requirements for the two positions. He argued that it was absurd for the Employer to later deny him the positions for this reason. On May 6, VanDyken and Moralez met again. VanDyken gave Moralez a summary of the costs of the contracts but told him that he was not going to give Moralez "the actual financial information documentation as well as some other (unspecified) information related to grievance 03-05."

Moralez was not permitted to attend the May 10 meeting of Respondent's grievance committee. On May 11, VanDyken notified Moralez in writing that the grievance committee had decided not to take his grievance to arbitration. Moralez was told that he had the right to appeal the decision to Respondent's executive board. VanDyken's letter did not give reasons for the committee's decision. On May 13, Moralez told VanDyken that he wanted to appeal. He asked VanDykens to send the documents he had obtained from the Employer to his attorney and for minutes of the May 10 meeting so he could determine how the decision was reached. VanDyken told Moralez that the grievance committee did not keep minutes of its meetings except to record official actions and that the committee had voted unanimously not to proceed to arbitration. He also told Moralez that he had given him all the information that would be of use to him. On June 14,VanDyken gave Moralez some further documents pertaining to the costs of the contracts. Moralez demanded that VanDykens give him copies of any documents Respondent had in its possession, but VanDykens refused on the grounds that it was irrelevant to his case. Moralez appeared before Respondent's executive board on August 9 and was informed that his appeal had been denied on August 10. Moralez then appealed to the executive committee of the Michigan Education Association. On October 24, 2005 he was notified that his appeal had been denied and that he had no further internal union appeals.

Discussion and Conclusions of Law:

Respondent argues that Moralez's charge is untimely under Section 16(a) of PERA because Moralez knew in August 2003 that Respondent did not intend to file a grievance over his July 2003 layoff, but did not file his charge until October 26, 2005. Section 16(a) prohibits the Commission from remedying an unfair labor practice occurring more than six months prior to the filing of the charge. When a charging party's complaint against his or her union is based on the union's failure to take some action, the statute of limitations contained in Section 16(a) begins to run when the charging party knew or should have reasonably realized that the union would not act on his behalf. *Washtenaw Cmty Mental Health,* 17 MPER 45, at 134; *Detroit Bd of Ed,* 1990 MERC Lab Op 781 (no exceptions). In this case, Moralez asserts that Respondent violated its duty of fair representation by actions it took in 2005, including its May 10, 2005 decision not to

proceed to arbitration with the grievance it filed on his behalf on February 28, 2005. Moralez does not allege that Respondent committed an unfair labor practice by failing to file a grievance on his behalf in 2003. I conclude that Moralez's charge is untimely under Section 16(a) since all the alleged unfair labor practices occurred within the six months prior to the filing of the charge.

To prevail against a union on a claim of unfair representation, a charging party must establish a breach of the union's duty of fair representation and also a breach of the collective bargaining agreement. *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993). A union's duty of fair representation under PERA is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty; and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651,679 (1984); *Vaca v Sipes*, 386 US 171, 177 (1967). "Bad faith" in this context is an intentional act or omission undertaken dishonestly or fraudulently, and "arbitrary conduct" is conduct that is impulsive, irrational, or unreasoned, or inept conduct undertaken with little care or with indifference to the interests of those affected. *Goolsby*, at 679. 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. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success. *Lowe*, at 146. A union satisfies its duty of fair representation as long as its decision is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35.

I agree with Respondent that the charge should be dismissed based on the facts set out in Moralez's pleadings. Moralez has not alleged any facts indicating that Respondent's May 10, 2005 decision not to take his February 2005 grievance to arbitration was based on personal hostility, dishonesty or fraud. Moralez argues that Respondent's decision was arbitrary and points out that VanDyken's May 11, 2005 letter did not provide a reasoned explanation of Respondent's decision. However, the issues in his grievance were thoroughly discussed at a meeting Moralez attended, the third step meeting between VanDyken and the Employer on April 7, 2005. At that meeting, the Employer stated that the grievance was not timely filed under the contract. It also told Respondent that it did not consider the Frankland decision pertinent to Moralez's situation, arguing that there was a distinction between hiring non-union employees to do the work of a laid off employee and contracting the work out. When Respondent considered whether to take Moralez's grievance to arbitration on May 10, it knew that the Employer would likely make these same arguments to an arbitrator. Both before and after Respondent's May 10 decision, Moralez argued that the distinction the Employer drew between his situation and Vowels' was false. However, Respondent also knew on May 10, as it points out in its brief, that under established principles of labor arbitration an arbitrator deciding Moralez's grievance would not be required to accord the Frankland decision any more weight than any other arbitration decision involving a different contract and different parties. On the other hand, Respondent would likely have to persuade the arbitrator that Moralez's situation was distinguishable from the 1991 grievance since that grievance arose under a contract between the same parties. In sum, Respondent knew it would have to overcome the Employer's timeliness argument. It also knew that to succeed at arbitration, Respondent would also have to persuade an

arbitrator both to adopt Frankland's interpretation of the recognition clause in another contract and apply it to the facts of Moralez's case. I find that Respondent's decision not to proceed to arbitration under these circumstances was not so far outside the range of reasonableness as to be irrational. I conclude, based on the facts as alleged by Moralez, that Respondent's decision was neither arbitrary nor in made in bad faith.

Moralez also alleges that Respondent violated its duty of fair representation by refusing to request certain information pertinent to his case from the Employer and by refusing to provide him with copies of certain documents. Nothing in the facts as alleged indicates that Respondent refused or failed to request relevant information from the Employer. Respondent refused to give Moralez some of documents in its possession pertaining to the cost of work that the Employer had subcontracted. However, the Employer admitted that it had contracted out work Moralez had previously done. As Respondent explained to Moralez, the amount of money the Employer spent on these contracts was irrelevant. I conclude that Respondent did not have an obligation under its duty of fair representation to give Moralez all the documents it had received from the Employer.

For reasons set forth above, I find that the facts as alleged by Moralez do not establish that Respondent breached its duty of fair representation toward him. I recommend that the Commission grant Respondent's motion for summary dismissal and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____