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. CU10 I-040

-and-

DANNY LAYNE,

An Individual-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Michael M. Shoudy, for Respondent

Danny Layne, *In Propria Persona*

DECISION AND ORDER

On February 25, 2011, Administrative Law Judge (ALJ) Julia Stern issued her Decision and Recommended Order on Motions for Summary Disposition in the above matter finding that Respondent, Michigan State University Administrative Professional Association (Union or APA), did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ concluded that Charging Party, Danny Layne, failed to state a claim upon which relief can be granted under the Act. The ALJ held that Respondent did not breach its duty of fair representation since Charging Party's allegations did not support his claim that Union had acted arbitrarily or in bad faith by refusing to advance his grievance to arbitration. The ALJ also rejected Charging Party's contention that improper ex-parte communications occurred between the ALJ and Respondent when the agency's secretary provided the case number and assigned judge's name to a representative of the Union. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA.

On March 10, 2011, Charging Party filed a motion entitled "Request for Legally Mandated Evidentiary Hearing Regarding Charging Party's March 10, 2011 Filed and Pending Motion to Set Aside, Completely Vacate and Dismiss ALJ Julia Stern's Feb. 25, 2011 Order"

that we will consider as his exceptions to the ALJ's Decision and Recommended Order. Subsequently, on March 21, 2011 and March 23, 2011, Charging Party untimely filed two similar motions that are not permitted under the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R423.101 – R423. 194. On March 21, 2011, Respondent filed cross-exceptions and brief in partial support of the ALJ's conclusions.

In his exceptions, Charging Party argues that the ALJ erred in recommending dismissal of the charge. He asserts since Respondent and the ALJ engaged in secret, ex-parte communication, the ALJ is legally mandated to conduct an evidentiary hearing on this matter and that summary disposition should be granted in his favor.

In its supporting brief, Respondent concurs with the ALJ's findings that Charging Party failed to state a valid PERA claim and that his allegations of improper "ex-parte" communications are meritless. However, Respondent's cross-exception focuses on the ALJ's failure to include summary dismissal on the basis that Charging Party failed to exhaust his internal remedies within the Union's established protocol. Respondent relies, in part, on an internal union by-law provision that sets forth this requirement before a member may seek outside relief on any union dispute.

After carefully considering the arguments made in the parties' exceptions and cross-exceptions, we find both to be without merit.

Factual Summary:

We adopt the ALJ's factual findings as outlined in her Decision and Recommended Order and will only repeat them here as necessary. We also review the record before the ALJ in a light most favorable to Charging Party to determine the appropriateness of summary dismissal.

Layne was employed as a network administrator at Michigan State University (Employer) and a member of Respondent's bargaining unit. On February 26, 2010, he was laid off when his position was eliminated and duties out-sourced to a third party vendor. Respondent filed a grievance on Layne's behalf asserting that the layoff constituted a constructive discharge; however, the Employer denied the grievance through step 3 of the grievance procedure under the parties' collective bargaining agreement. On July 12, 2010, Respondent informed Layne that it would not advance his grievance to arbitration (step 4) advising, however, that he could appeal this decision to the Union's executive board on or before August 13, 2010. On August 13, 2010, Layne e-mailed the Union indicating his desire to appeal the denial. Layne asserts he never received a response to his email, and therefore did not attend the executive board meeting on August 17, 2010. Shortly thereafter, Layne received a letter from Respondent stating in pertinent part-- "[p]lease be advised, that since you did not appear at the August 17th Executive Board meeting, this matter is now closed".

Layne filed this unfair labor practice charge alleging that Respondent intentionally refused to arbitrate his grievance in "blatant statutory violation" of PERA. He also alleged that the Union's decision was "arbitrary, capricious and in dishonest bad faith". The Union responded by filing a motion for summary dismissal asserting that the charge failed to state a

valid PERA claim and that Layne had failed to exhaust his internal remedies within the Union prior to filing his unfair labor practice charge. In preparing to file its summary dismissal motion, Respondent's office contacted the Michigan Administrative Hearings System (MAHS) office and obtained from a MAHS secretary the MERC case number and name of the assigned ALJ. Surprised that the APA's motion contained a MERC assigned case number and judge's name, Layne filed a motion for summary disposition, seeking relief in his favor, asserting that Respondent's possession of the MERC case number was the result of improper ex-parte communications between the Respondent and the ALJ. In his motion, Charging Party provided no additional factually based allegations of misconduct by the ALJ or the Union. On December 21, 2010, oral argument was held before the ALJ on the respective motions for summary disposition filed by the parties.

Discussions and Conclusions of Law:

Charging Party excepts to the ALJ's recommendation of summary dismissal of his charge based on his failure to state a valid claim under PERA. He asserts summary disposition in his favor is appropriate in light of the alleged ex-parte communications between the ALJ and the Union. He further asserts that since the Employer outsourced his bargaining unit duties without negotiating with the Union, the ALJ is required by law to provide remedial relief. We reject each contention.

A responsibility under Section 9 of PERA, on every exclusive bargaining representative, is the duty of fair representation of the members of its collective bargaining unit. As the ALJ correctly indicates this duty consists of several key components outlined by the Michigan Supreme Court in *Goolsby v Detroit*, 419 Mich 651, 679 (1984), and requires that a union: (1) serve the interests of all members without hostility or discrimination toward any; (2) exercise any discretion in complete good faith and honesty and (3) avoid arbitrary conduct. Significantly, a union is authorized to exercise wide latitude in determining whether to pursue, or not pursue grievances based on what it perceives, in good faith, is in the best interest of the entire membership, even though that decision may conflict with the wishes of an individual member. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131, 134. Therefore, a union may decide whether to file or process a member's grievance and is not required to follow the dictates of an individual member in conjunction with the grievance. *AFSCME Council 25*, 1992 MERC Lab Op 166. Further, a union is not expected to always make the right or best decisions, so long as it has acted in good faith and avoided being arbitrary. *City of Detroit*, 1997 MERC Lab Op 31.

We agree with the ALJ that the record in this matter does not support the charge based on Layne's allegation that Respondent violated its duty of fair representation by refusing to arbitrate his grievance. Charging Party proffers several conclusory assertions without actually setting forth factual details to substantiate his claim of arbitrary, capricious, and bad faith conduct by the Union. It is well settled that a complaint for a breach of a union's duty of fair representation must contain more than conclusory allegations of improper representation. *Martin v Shiawassee*, 109 Mich App 32 (1981).

Charging Party also suggests that his effort at appealing the Union's arbitration denial failed because APA representatives did not timely respond to his email request. While the

Union might have been more attentive in replying to such requests from its members, there is no indication that Charging Party's appearance at the APA's executive committee meeting would have resulted in the Union agreeing to arbitrate the grievance. Further, we do not find the delayed reply to Layne's email requesting an appeal, alone, to be sufficient to sustain a charge against the Union. Rather, we view the APA's appeal protocol as an internal union process for which we lack jurisdiction. This Commission lacks authority to regulate or monitor said union internal protocol, absent a showing of some direct impact upon the employment relationship or denial of section 9 rights. *Detroit Ass'n of Educational Office Employees,* 1984 MERC Lab Op 947. Since we can find no showing in the record to adequately support Charging Party's contention that the Union failed to carry out its statutory duties, summary dismissal of the charge in this matter is appropriate under Rule 165.

We now address the issue raised in Charging Party's exceptions alleging improper ex-parte communications between Respondent and the ALJ. "Ex-parte communications" are typically defined as communications between one party and the court or jurist in the absence of the opposing party, and are ordinarily prohibited. However, where courts have found such improper communications to exist, they are not necessarily deemed problematic unless one party is disadvantaged or prejudiced by the contact. *People v. France*, 436 Mich. 138, 162-163; 461 NW2d 621 (1990).[1] Based upon the record before us, we find no reasonable indication of an improper ex-parte communication between the ALJ and the APA. The information exchanged is neither confidential nor privileged, and is readily available to any interested party or the public at large. Further, the APA secretary had no direct contact with the ALJ, but simply obtained information from the agency clerk.

Charging Party further contends that an evidentiary hearing is required in light of his allegations. We disagree and rely on the holding in *Smith v. Lansing School District*, 428 Mich. 248 (1987) that authorizes summary disposal of any charge that fails to state a valid PERA claim without an evidentiary hearing, as long as the parties have an opportunity to present oral arguments. Layne also asserts the Employer violated its duty to bargain by failing to negotiate the outsourcing of the duties of his prior position. Again, we reject this contention in light of our longstanding premise that the duty to bargain runs between the employer and the recognized bargaining agent, and not individual unit member. *Coldwater Community Sch*, 1993 MERC Lab Op 94 (no exceptions).

As to Respondent's contention that summary dismissal is appropriate because Layne failed to exhaust his internal remedies under the APA by-laws, we disagree. A union's duty of fair representation is limited to actions having an effect on employment, as such, most internal union affairs fall outside of the scope of PERA. *Service Employees Int'l Union, Local 586,* 1986 MERC Lab Op 149, 151. The ALJ properly notes in her decision that we have yet to require employees to exhaust all internal remedies before filing a charge of a breach against a union. *Brighton Support Personnel Assn,* 20 MPER 85 (2007). However, even if Respondent's contention were true, the record supports that Layne requested an internal appeal of the

[1] In People v France, the Michigan Supreme Court categorized a trial court's ex-parte communication to the jury as an administrative communication because it concerned the availability of evidence, and such administrative communications carried no presumption of prejudice. Since no showing of actual prejudice was made, reversal was not warranted.

arbitration denial. The APA denied that request closing out the matter after Layne failed to appear at the August 17, 2010 executive board meeting. The subsequent communication from the Union appears to serve as indication to Layne that any remaining internal remedies had been exhausted.

Finally, we carefully examined all other claims and issues raised in the parties' exceptions and cross-exceptions, and find that they would not impact the outcome of this decision. For all of the aforementioned reasons, this Commission dismisses the exceptions and cross exceptions of the parties and adopts the Decision and Recommended Order of the Administrative Law Judge.

ORDER

The unfair labor practice charge against Respondent is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN STATE UNIVERSITY
ADMINISTRATIVE PROFESSIONAL ASSOCIATION,
Labor Organization -Respondent,

Case No. CU10 I-040

-and-

DANNY LAYNE,
An Individual-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young and Chiodini, by Michael M. Shoudy, for Respondent

Danny Layne, appearing for himself

DECISION AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY DISPOSITION

On September 16, 2010, Danny Layne filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his collective bargaining representative, the Michigan State University Administrative-Professional Union (Respondent), under Section 10 of the Public Employment Relations Act (PERA) 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the State Office of Administrative Hearings and Rules (SOAHR). On October 8, 2010, I issued an order to Layne to show cause why his charge should not be dismissed for failure to state a claim, and both Respondent and Layne filed motions for summary disposition. Based on facts not in dispute as alleged by both parties in their motions, and on the arguments made in the pleadings and at oral argument held on December 21, 2010, I make the following conclusions of law and recommend that the Commission issue the following order:

The Unfair Labor Practice Charge:

Layne is an employee of Michigan State University (the Employer). His charge, as filed, read as follows:

> On Wednesday, August 18, 2010 the (Respondent) MSU APA Union intentionally refused to process Charging Party's (Danny Layne) grievance to

> arbitration in blatant statutory violation of the Public Employment Relations Act (PERA), MCL 423.209 and MCL 423.210. The MSU APA Union's willful August 18, 2010 based [sic] refusal to process my grievance to arbitration was arbitrary, capricious and in dishonest bad faith.

Layne requested that an evidentiary hearing be held immediately on his charge, citing as authority *Smith v Lansing Sch Dist,* 428 Mich 248 (1987).

The Motions:

On October 8, 2010, pursuant to Rule 165(1) and (2)(d) of the Commission's General Rules, 2002 AACS, R 423. 165, I issued an order to Layne to show cause why his charge should not be dismissed for failure to state a claim under PERA. I noted that a union does not violate its duty of fair representation merely by refusing an individual's demand that it arbitrate his or her grievance, and that a union satisfies its duty of fair representation when it makes a good faith, nondiscriminatory decision not to proceed with a grievance as long as its decision is within the range of reasonableness. Although Layne asserted, in a conclusory fashion, that Respondent's refusal to arbitrate his grievance was arbitrary, capricious, dishonest, and made in bad faith, I found that his charge, as filed, did not state a claim under PERA because he did not set forth any facts to support these claims.

In my order to show cause, I explained that under *Smith v Lansing Sch Dist* an evidentiary hearing is unnecessary if, when all the facts as alleged by the charging party are taken as true, the charge fails to state a claim for which relief can be granted under PERA. However, as held in *Smith*, a charging party is entitled, upon request, to an opportunity to present oral argument regarding the legal and factual sufficiency of his or her claims before the charge is dismissed.

On September 29, 2010, before I issued the order to show cause, Respondent filed a motion for summary dismissal of the charge pursuant to Rule 165. The motion, which was accompanied by documents and an affidavit from Respondent Uniserv Director Melissa Sortman, argues that Layne's charge should be dismissed because Layne did not exhaust his internal union remedy before filing the charge. Respondent attached to its motion a copy of the bylaws and constitution of the Michigan Education Association (MEA), of which it is an affiliate. Article X of the MEA Constitution states that the MEA executive committee "shall have original and only jurisdiction over all disputes arising over alleged violations of the duty of fair representation." Article XII (E) of the MEA bylaws states that "all disputes described in Article X of the Constitution shall be submitted to the executive committee of the board of the directors for disposition … in duty of fair representation cases, the decision of the executive committee shall be final." Finally, Article IV (D) of the MEA bylaws requires members to "exhaust all procedures and remedies provided for in the MEA Constitution and bylaws before filing a claim in any court, tribunal or agency."

On October 12, 2010, Layne filed his own motion for summary disposition pursuant to Rule 165. This included a claim that Respondent's counsel and I had engaged in improper ex parte communications. On October 25, Layne filed a second motion for summary disposition

and, on October 26, he filed a response to my October 8 order to show cause. The October 25 motion included a "request for a legally mandated evidentiary hearing regarding summary disposition." Interpreting this as a request for oral argument under *Smith v Lansing*, I scheduled oral argument and explained to Layne, in a letter dated December 10, 2010, that the purpose of the oral argument was to give him an opportunity to explain in person why, taking all the facts as he alleged them to be true, his charge alleged a violation of PERA.

In motions filed on December 7 and December 16, Layne argued that summary judgment should be immediately granted in his favor since Respondent had made no attempt to refute the facts set out in his motions and response to the show cause. On December 21, I held oral argument. On January 19 and February 11, 2011, Layne filed new motions in which he again argued that he was entitled to summary disposition in his favor because there were no material issues of fact.

Facts:

Prior to February 26, 2010, Layne was employed as a network and publications administrator, a position in Respondent's bargaining unit. The Employer contracted with a third party to perform Layne's job duties, Layne's position was eliminated, and he was laid off. Layne was later recalled to another unit position. On March 2, 2010, Layne filed a grievance asserting that his layoff constituted a constructive discharge. Respondent representative Kevin Karpinski was assigned to handle the grievance.

Layne's grievance was denied by the Employer. While the grievance was being processed, Karpinski requested information from the Employer pertaining to Layne's grievance that he did not receive. What this information was is not described in the pleadings. Sometime in early July 2010, Layne emailed Karpinski to ask about the status of the grievance. Karpinski replied to this email on July 12. Karpinski apologized for not responding more promptly to Layne's inquiry and wrote, "We have some time to go through the appeal process since I was able to secure a 90 day extension for the purpose of appealing the grievance to arbitration. I will advise you regarding your next step in this process."

However, on or about July 14, before Karpinski had contacted him again, Layne received the following letter from Respondent Uniserv Director John Van Dyken:

> At a meeting of the APA grievance committee, your grievance #01-10 (Constructive Discharge) was considered for arbitration. The committee decided not to take it to Step 4, arbitration.
>
> This will notify you that you have the right to appeal this decision to the APA Executive Board. The Board will meet again on August 17, 2010 at 3:00 pm at the APA office located at . . .
>
> If you want to make an appeal to the Board, please notify me by 4:00 pm on August 13, 2010.

Layne was surprised by this letter, which he thought contradicted what Karpinski had told him. It is also evident from his pleadings that Layne did not understand that Respondent's grievance committee, and not its executive board, had made the decision not to take his grievance to arbitration. For example, Layne attached to one of his motions in this case a copy of the executive board's agenda for its July 13, 2010 regular meeting and pointed out that, according to the agenda, no grievances were discussed at that meeting.

Between July 14 and August 13, Melissa Sortman replaced Van Dyken. On August 13, Layne emailed Sortman telling her that "he wanted to appeal the APA Board's hasty decision to not take my case to arbitration." Layne copied Karpinski on the email. Neither Sortman nor Karpinski replied to the email. There is no indication that any Respondent representative spoke personally to Layne to confirm that he would appear at the executive board's August 17 meeting.

Layne did not attend the August 17 executive board meeting. On about August 18, Layne received the following letter from Sortman:

> In John Van Dyken's letter to you dated July 14, 2010, you were given notice that you could appeal the decision of the APA Executive Board in the above referenced matter at the August 17 meeting.
>
> Please be advised that, since you did not appear at the August 17 Executive Board meeting, this matter is now closed.

Layne apparently took Sortman's statement that the "matter was closed" at face value, and there is no indication that he had any further communication with Respondent about his grievance. On September 8, 2010, Sortman sent Layne a second letter notifying him of his right to appeal to the MEA executive committee. However, Layne did not receive this letter.

Layne filed his unfair labor practice charge on September 16, 2010. Respondent filed its motion for summary disposition on September 29, 2010. The motion was directed to me as the assigned judge and included the case number assigned to the charge. However, I had not yet sent the parties any communication with the case number or indicating that I had been assigned to the case. After Layne filed a motion asserting that Respondent's possession of this information was evidence that Respondent's counsel and I had had improper ex parte communications, Respondent's counsel sent a letter explaining that his secretary had telephoned the SOAHR offices and obtained the case number and judge assigned from a clerk.[2]

Discussion and Conclusions of Law:

I first address Layne's argument that Respondent's counsel and I had improper ex parte communications regarding his charge. Although Layne argues that the ex parte communications entitle him to summary disposition in his favor, reassignment of his case to another administrative law judge for decision would eliminate the prejudicial effect of any improper communication.

[2] Neither Respondent's counsel nor anyone from his office contacted me directly regarding Layne's case.

Section 82 of the Michigan Administrative Procedures Act (APA) MCL 24.282, prohibits ex parte communications on issues of fact or law between a party to a contested case administrative proceeding and an employee assigned to make a decision or findings in that case. It states:

> Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate.

In this case, almost a month elapsed between the time Layne filed his charge and the date he received my order to show cause. Layne was understandably surprised to receive, during that period, a motion from Respondent's counsel with the case number and name of the judge assigned to his charge. However, the case number and the name of the judge assigned to a case are not issues of either fact or law and are not covered by the prohibition against ex parte communications set out Section 82. Furthermore, it is not obvious, and Layne did not explain, how the ex parte communication of the case number or judge's name caused him undue prejudice. I find that no improper ex parte communications occurred in this case and no basis exists for reassigning the charge to another administrative law judge.

In his motions for summary disposition, Layne argues that as Respondent has not disputed any of the facts set forth in his pleadings, he is entitled to summary disposition and the immediate issuance of an order requiring Respondent to make him whole. However, Layne is not entitled to summary judgment if, when all his factual allegations are accepted as true, these allegations do not support the conclusion that Respondent violated its duty of fair representation.

A union representing public employees in Michigan owes its members a duty of fair representation under Section 10(3) (a) (i) of PERA. The union's duty 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); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. In other words, a breach of the union's duty of fair representation occurs when the union's conduct is arbitrary, discriminatory, or in bad faith. See *Vaca v Sipes*, 386 US 171, 177, 190 (1967). The *Goolsby* Court, at 679, defined bad faith conduct as "intentional acts or omissions undertaken dishonestly or fraudulently," and arbitrary conduct as "impulsive, irrational or unreasoned conduct, or inept conduct undertaken with little care or with indifference to the interests of those affected." 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 in arbitration. *Lowe*. A union is not required to follow the wishes of the individual grievant, but may investigate and proceed with the case in the manner it determines to be best. *Detroit Police*

Lts and Sgts, 1993 MERC Lab Op 729. A union satisfies the duty of fair representation as long as its decision is within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991). The fact that an individual member is dissatisfied with the union's efforts or its ultimate decision is insufficient to demonstrate a breach of the duty of fair representation. *Eaton Rapids EA.*

In his motions, although not in his original charge, Layne asserts that the Employer had a duty to provide Respondent with information relating to his grievance and that it failed to provide this information. Layne correctly cites Commission cases holding that an employer violates its duty to bargain under Section 10(1) (e) of PERA when it fails or refuses to provide a union with requested information necessary to administer the collective bargaining agreement, including information related to pending grievances. Layne's charge, however, is a charge against a union under Section 10(3) of PERA, not a charge against an employer.[3] Layne appears to argue that Respondent violated its duty of fair representation by failing to insist, prior to dismissing the grievance, that the Employer provide Respondent with the information it requested. As noted above, however, as long as a union acts in good faith and avoids discriminatory or arbitrary conduct, it has the discretion to investigate and proceed with a grievance in the manner it determines to be best. Layne's pleadings do not explain why Respondent's failure to insist on the release of the information in his case violated its duty of fair representation, or even what information the Employer withheld. I conclude that Layne has failed to set forth facts in his pleadings to support his claim that Respondent violated PERA by dismissing his grievance without insisting that the Employer turn over information relating to the grievance.

Layne also cites *Bedford Pub Schs*, 19 MPER 10 (2006), and other cases in which the Commission held that employers violated Section 10(1)(e) of PERA by subcontracting bargaining unit work without giving unions the opportunity to bargain. Layne's layoff resulted from the Employer's subcontracting of his work. However, Layne's charge is a charge against his union, not a charge alleging that his Employer violated its duty to bargain. Layne appears to assert that Respondent's duty of fair representation required it to file an unfair labor practice charge against the Employer over the subcontracting which led to the elimination of his position. However, his pleadings do not contain facts which support this allegation. I conclude that it should be dismissed.

Layne' original charge alleged only that Respondent's refusal to take his grievance to arbitration was arbitrary and capricious as well as dishonest and made in bad faith. Layne argues that the Commission should infer from the fact that Respondent's July 14, 2010 letter gave no reasons for its refusal to arbitrate his grievance that Respondent's had no reasons, and that its decision was, therefore, arbitrary. I conclude, however, that this is not a reasonable inference. The letter stated that Respondent's grievance committee had made a decision, and that Layne had the right to appeal it to Respondent's executive board. Unlike *Goolsby*, there is no

[3] As an individual employee, Layne cannot bring a charge alleging that the Employer violated its duty to bargain in good faith because the obligation to bargain runs between Respondent and the Union and an individual employee does not have standing to assert the claims of his labor organization. *Detroit Pub Schs*, 1985 MERC Lab Op 789; *Wayne Co*, 21 MPER 73 (2008) (no exceptions).

indication from Layne's pleadings that Respondent mislaid his grievance, inexplicably failed to make a decision about whether to go forward with it, or was otherwise guilty of "inept conduct taken with little care or with indifference" to his interests. Had Layne appeared before the executive board, or even asked Respondent for an explanation of the grievance committee's decision after he received the July 14 letter, he might have learned the reasons behind it. As he points out, Layne did not get to argue his case to Respondent. However, the duty of fair representation does not require that a member be allowed to participate in the union's grievance decisions, but only that the union make these decisions in good faith and honesty and without hostility or discrimination toward individual members. I conclude that the facts as alleged by Layne do not support his claim that Respondent acted arbitrarily in refusing to take his grievance to arbitration.

I also find that the facts as Layne asserts them do not support his claim that Respondent's refusal to take his grievance to arbitration was made dishonestly or in bad faith. Layne does not assert that Respondent or any of its agents bore him any personal animosity or had any reason not to proceed with his grievance other than an assessment of its merits. In his motions, Layne repeatedly uses the words "dishonest," "fraudulent" and "deceptive" to refer to actions taken by Respondent's agents. I conclude, however, that the facts as alleged by Layne simply offer no support for these characterizations or his claim that Respondent's decision not to take his grievance to arbitration was made in bad faith. For reasons set forth above, I conclude that Layne's motions for summary disposition should be denied. I also conclude that also that his charge should be dismissed for failure to state a claim upon which relief can be granted.

As discussed above, Respondent filed a motion for summary disposition asserting that Layne's unfair labor practice charge should be dismissed because Layne failed to exhaust his internal union remedy, i.e., he did not appeal Respondent's decision not to take his grievance to arbitration to the MEA's executive committee. Since I have concluded that Layne's charge should be dismissed for failure to state a claim, I need not address this motion. I note, however, that both the federal and Michigan courts require union members to exhaust their internal union remedies before bringing suit against their unions when the standards enumerated in *Clayton v International Union, UAW,* 451 US 679 (1981), are met. See, e.g., *Rogers v Buena Vista Schools* 2 F3d 163 (CA 6, 1993); *Murad v Professional and Administrative Union Local 1979,* 239 Mich App 538 (2000). However, the National Labor Relations Board, which administers the federal statute upon which PERA was patterned, does not require a charging party to exhaust his internal union remedies before bringing an unfair labor practice charge alleging a breach of the duty of fair representation. The NLRB reasons that this would violate public policy by discouraging free access to the NLRB's administrative processes. *Ironworkers Local 843, International Ass'n of Bridge, Structural & Ornamental Ironworkers,* 327 NLRB 29, (1998); *Auto Workers Local 148 (McDonnell-Douglas),* 296 NLRB 970, 996, fn 19 (1989); *Electrical Workers IBEW, Local 581,* 287 NLRB 940, 950 fn 25 (1987); *California Saw and Knife Works,* 320 NLRB 224, 276-277 (1995).

The Commission has also not required charging parties to exhaust their internal union remedies before filing unfair labor practice charges under PERA. One of the arguments against requiring an individual to exhaust his internal union remedies before seeking recourse from an administrative agency is that an individual may fail to understand what he needs to do under the

internal union appeal procedures to preserve his rights. Layne's pleadings suggest that this may have been what happened here. Respondent sent Layne a letter telling him that he could appeal the decision of Respondent's grievance committee not to take his grievance to arbitration to its executive board. Before the date set out in Respondent's letter, Layne notified Sortman, Respondent's new UniServ Director, that he wanted to appeal. Layne, however, may not have understood that he was also supposed to appear at the August 17, 2010 executive board meeting. After that meeting, Layne was told by Sortman that the matter was closed due to his failure to appear at the meeting. Three weeks later, Layne was sent another letter, which he did not receive, informing him of his right to appeal to the MEA's executive committee. He does not appear to have been told that if he failed to pursue this remedy he would waive his rights to file a duty of fair representation claim in another forum.

Based on my conclusion that Layne's charge does not state a claim under PERA, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____