STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMERICAN FEDERATION OF TEACHERS, LOCAL 3550,
Public Employer – Respondent,

Case Nos. CU08 J-057 & CU09 K-036

-and-

MELINDA DAY,
An Individual – Charging Party.

_____/

APPEARANCES:

Mark H. Cousens, for the Respondent

Melinda Day, *In Propria Persona*

DECISION AND ORDER

On April 25, 2012, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GRADUATE EMPLOYEES ORGANIZATION, AFT LOCAL 3550,
Labor Organization-Respondent,

Case Nos. CU08 J-057
CU09 K-036

-and-

MELINDA DAY,
An Individual-Charging Party.
_____/

APPEARANCES:

Mark H. Cousens, for Respondent

Melinda Day, appearing for herself

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

Melinda Day, a graduate student at the University of Michigan, filed the above two charges against the Graduate Employees Organization, AFT Local 3550, her collective bargaining agent during periods in 2008 and 2009 in which she was employed by the University (the Employer) as a graduate student instructor (GSI). The charges allege that the Respondent violated the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by failing to accord her rights due her as an objecting nonmember and agency fee payer under PERA and the United States Constitution. Pursuant to Section 16 of PERA, the charges were consolidated and assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System.

Based on motions filed by Respondent to dismiss both charges, facts as alleged by Day in her charges and other pleadings and other facts not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Charge and Facts - Case No. CU08 J-057

Respondent represents a bargaining unit of graduate student employees of the Employer which includes graduate student instructors (GSIs). Respondent's collective bargaining agreement with the Employer contains a provision, as authorized by §10(2) and the proviso to

§10(1)(c) of PERA, compelling members of its bargaining unit to pay it either dues or, in the case of employees who decline to become union members, service fees.

As was held in *Abood v Detroit Board of Education*, 431 US 209 (1977), public employees have a right under the First Amendment of the U.S. Constitution not to be compelled to contribute to their bargaining representative's political and ideological activities or activities other than those related to collective bargaining, contract administration, and grievance adjustment. It is now well established that a union that represents public employees is constitutionally required to have in place procedures to safeguard the rights of nonmembers under *Abood* if it seeks to compel nonmembers to pay agency or service fees. *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson*, 475 US 292 (1986).

Day became a GSI for the first time during the fall semester of 2008. Around the first week of September 2008, Day sent Respondent's president and its treasurer copies of a letter notifying Respondent that she did not want any of her agency fees to be used to support political or ideological activities not related to collective bargaining. She also requested that Respondent provide her with "full disclosure of the budget and finances of the union."

On or about September 8, 2008, Day attended a training course for GSIs at which Respondent representative Dave Rowland came to discuss the obligations of GSIs to pay dues or representative service fees and to pass out "yellow cards" for them to authorize the deduction of union dues or agency fees from their paychecks. Pursuant to the terms of its collective bargaining agreement with Respondent, the Employer deducts the full amount of a unit member's dues or fees for a semester from a single paycheck. In the fall of 2008, this deduction was scheduled to take place in November. Day asked Rowland how she could go about making her objections to the use of her money for political and ideological activities known to Respondent. Rowland told her that the cost of those activities had already been deducted from the representation service fee.

Sometime thereafter, Day read Respondent's bylaws on its website. The section of the bylaws entitled "Dues and Representation-Service Fees" included this provision:

> Representation-service fees shall be calculated at the same rate as dues, provided, however, that the amount of the representation-service fees has not been challenged by the employee, as specified by the current agreement negotiated between the Regents of the University of Michigan and the Graduate Employees' Organization.

The bylaws also included a procedure for making "agency shop objections" that gave agency fee payers the right to challenge the expenditure of his or her portion of the fee for political or ideological activities unrelated to collective bargaining. The challenge was to be made in writing within fifteen days of the effective date of employment. Under the procedure, the union was to calculate the approximate proportion of dues and services fees spent for political or ideological purposes annually, and rebate to challengers a pro-rated portion of the amount of his or her agency fee. According to the bylaws, a challenger dissatisfied with the

union's calculation of the fee was to appeal this calculation by filing an unfair labor practice charge with the Commission.

On October 28, 2008, Day filed the charge in Case No. CU08 J-057. Day complained that Respondent had led her to believe that it was unnecessary for her to object to the use of her agency/service fee for political or ideological activities by telling her, erroneously, that the cost of these activities had been omitted from the calculation of its service fees. She also noted that she had not received any response to her letter registering her objection to the use of her fee for noncollective bargaining purposes and asking for financial information. Day alleged that Respondent had an obligation under PERA to implement *Hudson* safeguards against compelled contributions by fee payers to Respondent's noncollective bargaining activities. That is, she asserted that Respondent was obligated to provide her with: (1) audited financial information about how the amount of the agency fee was calculated; (2) an opportunity to challenge the amount of the agency fee before an impartial decision maker; and (3) the right to place the contested amount of the agency fee in escrow so that Respondent could not use her money while a decision on the proper amount of the agency fee was pending.

On November 3, 2008, Respondent sent Day a letter acknowledging her September challenge to the amount Respondent charged for the agency fee, and also noting that she had authorized the union to deduct the appropriate fee, although no deductions had yet been made. In the letter Respondent stated that it set its agency fee rate at a lower level than the dues rate and took pains to ensure that monies collected from nonmembers were not used for political or ideological activities. Along with this letter, Respondent sent Day an independently audited financial statement for the fiscal year ending June 30, 2007 and an independently audited statement of expenses allocated between chargeable and non-chargeable expenses for that same fiscal year. The latter, entitled "Schedule of Expenses and Allocation between Chargeable and Non-Chargeable Expenses," included definitions of chargeable and nonchargeable expenses and, for each expense category, an explanation of the specific expenses within the category deemed chargeable and nonchargeable. Respondent also sent Day a copy of the agency fee objector section of its bylaws.

Although Day initially signed a "yellow card" authorizing automatic deduction of her agency fee from her paycheck, she later revoked it. On November 24, 2008, she received an email from the Employer notifying her of her obligation to pay the agency fee. On November 25, 2008, she sent a check to Respondent with a letter indicating that the payment was made under protest and did not constitute a waiver of the claims made in her charge. Respondent, however, did not cash her check.

I held a pre-hearing conference with the parties on December 18, 2008. At this conference, we discussed Respondent's agency fee objection procedures, including Respondent's constitutional and statutory obligations as a union representing public employees to provide objecting nonmember fee payers with a reasonably prompt opportunity to challenge its calculation of an agency fee before an impartial decision maker. At this conference, Respondent produced a copy of a document entitled "Expedited Procedure for Agency Fee Cases," adopted by the Commission by resolution in 1988. This procedure stated that it would apply whenever an unfair labor practice charge was filed under §10(1)(c) or §10(3)(b) of PERA alleging that an

employer and/or union had collected or attempted to collect a service fee in excess of that authorized by law, and set forth guidelines for expedited handling of the charge to comply with the *Hudson* requirement that the union provide objecting nonmembers with a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker. The parties also discussed during the conference the information provided to employees about dues and service fees on Respondent's website, and the information Respondent had provided to Day about the calculation of the chargeable portion of the fee. Day asserted that the information was inadequate because the information was too old and covered a period for which she was not even a member of the bargaining unit. She also asserted that Respondent was required to provide more detailed information about how it calculated its chargeable expenditures, e.g., timesheets that showed how much time employees spent on chargeable tasks.

After this conference, I brought the fact that Respondent was relying on its 1988 expedited agency fee case procedure to the Commission's attention. At its January 12, 2009 meeting, the Commission voted to repeal this procedure because it had never been utilized and because the procedure had not been properly promulgated under the Administrative Procedures Act.

Although it did not revise its bylaws, in January 2009, Respondent revised the portion of its website providing information about dues and service fees, including adding a link to a page entitled "Information about the Representation-Service Fee." Respondent also began providing this as a handout to new hires into the bargaining unit. The new page read:

> Information about the Representation-Service Fee
>
> 1. You have the right to become a member of the organization or refrain from becoming a member of the Union without fear of reprisal by either the Union or the University of Michigan.
>
> 2. An employee represented by the Union who chooses not become a member of the union or who after joining the union decides to resign is required to pay a representation-service fee.
>
> 3. The service fee is limited to that portion of union dues the Union expends on matters germane to collective bargaining with the employer.
>
> 4. A non-member who does not arrange for payroll deduction of the representation-service fee must pay by check.
>
> 5. A nonmember may object to the amount of the service fee. To object, the nonmember must present a written objection to the Union's treasurer. The objection must be presented no later than 30 days after notice of a payroll deduction.
>
> 6. An objector will be given a full explanation of the basis for the service fee. The explanation will include a detailed list of chargeable and nonchargeable

expenditures and a report of an independent auditor showing the Union's expenditures from the most recent prior calendar year.

7. The following are examples of expenditures that are chargeable to a non-member;

a. All expenses concerning the negotiation of agreements, practices and working conditions;

b. All expenses concerning the administration of agreements, practices and working conditions, including grievance handling, all activities related to arbitration, and discussion with employees in the bargaining unit or employer representatives regarding working conditions, benefits, and contractual rights;

c. Normal union internal governance and management expenses;

d. Social activities and union business meeting expenses;

e. Publication expenses to the extent coverage is related to chargeable expenditures;

f. Expenses of litigation before the courts and administrative agencies related to contract administration, collective bargaining rights and internal governance;

g. Expenses for legislative, executive branch and administrative agency representation on implementation of contracts;

h. All expenses for the education of and training of members, officers and staff intended to prepare the participants to better perform chargeable activities.

i. A proportional share of all overhead and administrative expenses.

8. The following are examples of expenditures which are not chargeable to nonmembers;

a. Expenses related to community service activities of the Union;

b. Expenses incurred in legislative activity not related to contract ratification or the implementation of contracts;

c. The costs of affiliating with other organizations;

d. Expenses related to the support of political candidates.

9. A fee payer who disagrees with the Union's characterization of chargeable and non-chargeable expenditures or calculation of the expenditures in any category may challenge the Union's determination by submitting a written challenge to the Treasurer of the Union within 30 days of the receipt of the auditor's report on the allocation of chargeable and non-chargeable expenses.

10. A timely filed challenge to the union's determination of chargeable and non-chargeable expenses will be resolved by resort to the American Arbitration Association's Rules for Impartial Determination of Union Fees. All challenges will be consolidated to the extent practicable and will be heard as soon as possible. The presentation to the arbitrator will be either in writing or at a hearing if requested by any objector(s). If a hearing is held, any objector who does not wish to attend may submit his or her views in writing by the date of the hearing. If a hearing is not held, the arbitrator will set a date by which all written submissions will be received and will decide the case based on the records submitted. The Union will bear the burden of justifying its calculations.

11. The cost of the arbitrator's services and the cost of any proceedings before the arbitrator will be borne by the Union. Individually incurred costs will be borne by the party incurring them.

12. While the objection is pending, the Union's Treasurer will hold, in an interest bearing escrow account, that portion of the fees that are reasonably in dispute. In the event that the arbitrator determines that the objector is entitled to a greater reduction in fees than that calculated by the Union an additional check will be issued at the close of the objection procedure for the balance of the reduction in fees, as determined by the arbitrator.

Respondent also revised a page on its website entitled "Question and Answers about Union Dues and the Representation-Service Fee." As revised, the page stated that for the 2008-2009 academic year, dues were set at 1.45% of gross pay and representation-service fees were 1.35%.

On January 26, 2009, Day submitted a letter to me and to Respondent in which she reiterated the objections she had made at the December 2008 conference to the financial information she had been provided by Respondent. In her letter, Day asserted that the information she had received was not sufficient for her to be able to outline her objections. She asserted that the audited statement of expenses was too old, and that Respondent was required to provide her with financial information for the fall of 2008. She also asserted that Respondent was required to provide her with more detailed information regarding how it determined what expenses were chargeable, including time sheets and publication line sheets. Day supplemented her letter with a second letter filed on February 2, 2009.

On February 24, 2009, Respondent filed a motion to dismiss Day's charge. Respondent attached to this motion its revised agency fee objections procedures. Respondent argued that it

had provided Day with sufficient information for her to determine, as an agency fee payer who objected to the use of fees for purposes unrelated to collective bargaining, whether or not she wished to challenge the amount of her fee, but that she had not yet filed a challenge under Respondent's new procedures. Day filed a response on February 26, 2009. Day asserted that since Respondent had the burden of proving its chargeable expenditures, a hearing was necessary so that Respondent could provide her with enough information to verify that what they were charging her was an accurate computation based on actual expenses for the current year. Day did not say anything in her response about the new procedures.

On March 23, 2009, Respondent sent Day an audited financial statement and an audited schedule of expenses and allocation between chargeable and non-chargeable expenses for the fiscal year ending June 30, 2008. The schedule of expenses and allocation followed the same format as that for the previous year and, according to the cover letter, had been completed on February 23, 2009. Since it appeared that Day had now received the relief she had sought in her original charge, including financial information from the last fiscal year and the opportunity to challenge the calculation of her fee before an arbitrator, I held Respondent's motion to dismiss in abeyance to give Day the opportunity to exercise her rights under Respondent's revised agency fee procedure. [1]

The Charge and Facts - Case No. CU09 K-036

During the fall semester of 2009, Day was again assigned to be a GSI. On September 8, 2009, Day sent letters to Respondent's president and treasurer notifying them of her objection to the use of any of her agency fees to support any political or ideological activities not related to collective bargaining. The letter read:

> I am notifying you today of my agency shop objections. I must insist that none of my agency shop fees be used to support any political or ideological activities not related to collective bargaining. According to the *Bridgeport-Spaulding* decision, the burden is on you and the union to show what expenses are chargeable, and how the chargeable portion is calculated.[2] The information I have received in the past from the union does not meet that criteria. As I am now once again a member of the bargaining unit, I must insist that the union meet the burden of proof by providing me with the relevant financial information including detailed information regarding how expenses are determined to be chargeable, such as time sheets and publication line counts.
>
> On your part, I expect to be reimbursed for all expenditures by the union not related to collective bargaining at the end of the fiscal year. In addition, I insist on receiving a budget and all related information in a timely manner. I am requesting that the union meet the requirements outlined in the *Bridgeport-Spaulding* decision, and that my service fee remain in escrow until that time.

[1] A union is entitled to base its calculation of its agency fee on its previous year's expenditures. *Hudson*, at 307, fn 18.

[2] See *Bridgeport-Spaulding Cmty Schs*, 1986 MERC Lab Op 1024, discussed below.

On October 14, 2009, Day received an email from Respondent's treasurer. The email referred Day to the "fee information for service fee payers" on the website, to the "objector bylaw in the GEO constitution," and to Article 5 of Respondent's collective bargaining contract. The Treasurer also asked Day if she intended to "formally object to the spending of the agency fee provision," and stated that, if this was the case, he would provide an explanation for the service fee and list of chargeable and non-chargeable expenditures along with the independent auditor's report for the last fiscal year. Day replied by letter dated October 15. In this letter, Day quoted the agency shop provisions in the bylaws. She stated that by sending the letters on September 8 she had made a formal objection and was entitled to a rebated pro-rated portion of her fees at the end of the year as set out in the bylaws. Day also reiterated that she believed that the financial information she received in the past did not satisfy Respondent's burden of proof to show what expenses were chargeable and how the chargeable portion was calculated, and demanded that the union provide her with more detailed financial information, including time sheets and publication line counts, and that her service fee remain in escrow until Respondent provided the information necessary to satisfy its burden of proof.

On October 27, Respondent wrote Day again. Its letter reminded Day that Respondent did not owe her any rebate of her agency fee for the previous year, since it never cashed her check for that year. It told her that it would provide her with an audited financial statement and audited schedule of chargeable and nonchargeable expenditures for the fiscal year ending June 30, 2009 as soon as it became available, which it expected would be available within the next two weeks. It told her that it was not obligated to provide her with time sheets and publication line counts, and declined to provide her with the information. It stated that if the documents it provided her did not satisfy her concerns regarding the computation of the agency fee she was to be charged for this year, it would invoke the process for resolution of agency fee disputes by providing notice to the AAA. However, it offered to try to resolve the dispute by reaching a compromise with her on the amount of the fee she should pay and invited her to meet for that purpose.

On November 4, 2009, Day filed the unfair labor practice charge in Case No. CU09 K-036, asserting that Respondent had again failed to accord her the rights due her as an objecting nonmember and agency fee payer. Day's second charge made reference to the "still pending" charge she had filed the previous year. On November 13, 2009, I directed Day to provide more specific information about the allegations in her new charge and the status of the dispute in Case No. CU08 J-047.

On November 19, 2009, Respondent sent a request to the American Arbitration Association (AAA) initiating arbitration of Day's dispute under its Rules for Impartial Determination of Union Fees. On November 27, 2009, Day sent Respondent a letter, with a check representing her agency fee, stating that the payment was made under protest and did not constitute a waiver of her pending claims.

Day filed a response to my November 13 order on November 30. Day stated that because Respondent had not revised the agency fee policy in its bylaws, she assumed that the bylaws still controlled. Day stated that for this reason she had not attempted to utilize the revised agency fee

objection procedure and was instead awaiting a Commission order to Respondent to provide her with the additional information she had requested. She also asserted that she assumed that, because Respondent had not changed its bylaws, she would need to file another unfair labor practice charge to challenge the amount of her agency fee in the fall of 2009. In her response, Day indicated her willingness to proceed to arbitration if all costs and fees attributable to the arbitration were paid by Respondent, the two pending charges remained open, and her service fee payments remained in escrow pending resolution of any arbitration proceeding and the resolution of her pending charges. Day also asserted, however, that Respondent had violated her rights in the fall of 2009 by failing to give her adequate notice that arbitration was now the procedure for determining the issue of chargeable versus non-chargeable and by refusing to provide her with current, detailed information about its chargeable expenditures and how they were calculated, as she had requested.

On December 4, 2009, Respondent filed a motion to dismiss the charge in Case No. CU09 K-036 and a renewed motion to dismiss the charge in case No. CU08 J-057, as discussed below.

On February 9, 2010, an arbitrator selected by the AAA conducted a hearing on Day's challenges to the amount of her agency fee for 2008 and 2009. On April 19, 2010, the arbitrator issued an award in which he determined that Respondent had established that the reduced fees that it had established for agency fee payers were appropriate.

Discussion and Conclusions of Law:

Respondent's December 4, 2009 motion seeks dismissal of both Day's charges on the grounds that the charges are moot and/or fail to state a claim upon which relief can be granted under PERA. Respondent characterizes Day's original charge in Case No. CU08 J-057 as a claim that she did not receive proper notice of her rights under *Abood.* It argues that this claim has become moot, since (1) Day has now received more than adequate notice of her rights to object under *Abood* and *Hudson;* (2) Day was not prejudiced by any delay in her receipt of notice, since Respondent did not cash Day's check for her agency fee in 2008; and (3) Respondent has now modified its agency fee policy.

Respondent asserts that to the extent that Day's charges seek to have the Commission determine whether the amount of her fee was appropriate, her charges fail to state a claim upon which relief can be granted because, by rescinding its 1988 expedited agency fee procedure, the Commission has indicated that it will not make this type of determination. It also asserts that Day's claim that Respondent has not provided her with sufficient information about its expenditures and how her fee was calculated is simply erroneous. According to Respondent, Day appears to claim, in both her 2008 and 2009 charges, that Respondent must provide her with enough information to explain its fee to her satisfaction. According to Respondent, it has no such duty. Rather, it is required to provide her with enough information to allow her to decide whether to challenge the fee and the opportunity to have her challenge heard in an arbitration proceeding where Respondent has the burden of proof to justify its chargeable expenditures. Respondent asserts that since it is clear that Respondent has met its obligations, the charges should be dismissed.

In her response to the motion, Day asserts that the Commission does have jurisdiction to determine the amount of the fee, i.e., to determine whether Respondent's proportional allocation of its costs to agency fees actually reflects expenditures properly chargeable to representational activities. She also notes that if the agency fee procedure in the bylaws is no longer in effect, Respondent should amend its bylaws to reflect that fact.

In *Garden City Sch Dist,* 1978 MERC Lab Op 1145, 1151, the Commission held that agency or service fees assessed against nonmembers under §10(2) of PERA and the proviso to § 10(1)(c) of PERA were subject to the "political expenditures" limitation imposed by *Abood.* In *Dearborn Local 20779 and Kempner,* 1982 MERC Lab Op 287, *aff'd* 126 Mich App 452 (1983), decided before *Hudson,* the Commission concluded that a union's right to enforce a contract clause requiring nonmembers to pay service fees under threat of discharge was contingent on the institution by the union of certain procedures to ensure that objecting nonmembers' rights under *Abood* were protected. It also held that if appropriate procedures were in place, as it found they were in that case, an objecting nonmember could be compelled to exhaust his or her internal union remedies for challenging the amount of the fee before seeking a determination from the Commission of the proper amount of the fee. In *Bridgeport-Spaulding Cmty Schs,* 1986 MERC Lab Op 1024, the Commission issued a decision addressing the question of what types of expenditures could lawfully be charged to objecting service fee payers, making reference to *Abood* and earlier cases involving compelled union fees decided under the federal Railway Labor Act. By the time the Commission issued its decision in *Bridgeport-Spaulding,* the Supreme Court had decided *Hudson.* However, the Commission held in *Bridgeport-Spaulding* that *Hudson* had no bearing on the issues before it in that case.

Over the decades since *Hudson* and *Abood,* there have been many cases in the courts filling in the outlines of the rights and obligations of public sector unions and nonmember service fee payers established by those two cases. In addition, in 1988, the Supreme Court held that unions violate their duty of fair representation under the NLRA by requiring objecting nonmembers to contribute the union's expenditures for activities unrelated to collective bargaining, contract administration, or grievance adjustment. *Communications Workers of America v Beck,* 487 US 735 (1988). Thereafter, the National Labor Relations Board (NLRB) issued a series of rulings considering whether unions' dues and fee collection procedures adequately protected *Beck* rights. It held that unions' attempts to enforce union security clauses without these protections in place violated their duty of fair representation See *California Saw and Knife Works,* 320 NLRB 224, 233 (1995); *In re Office and Professional Employees International Union,* 331 NLRB 48 (2000); *Teamsters Local 579,* 350 NLRB 1166 (2007) *International Association of Machinists,* 355 NLRB No. 174 (2010). The Commission, however, has not had occasion to consider, post-*Hudson,* what its role should be in protecting the *Abood* rights of nonmember service fee payers.

As discussed in another decision I have issued this same day, *Government Employees Labor Council and Richard Smith,* Case No. CU10 G-036, I conclude that the Commission should continue to exercise its jurisdiction to find that a union's failure to implement procedures adequate to safeguard the rights of nonmember fee payers under *Abood* violates the union's duty of fair representation under §10(3)(a)(i) of PERA, and that a union violates §10(3)(b) of PERA if

it causes or attempts to cause an employer to take action against an agency fee payer for failure to pay his or her fee in the absence of these procedural safeguards. I also conclude, for reasons discussed in *Government Employees Labor Council,* that in assessing whether the union's procedural safeguards are adequate the Commission should look to *Hudson,* as it has been interpreted within the Sixth Circuit, rather than to decisions of the NLRB. Finally, for reasons discussed in that decision, I also conclude that the Commission should not undertake to determine whether individual expenditures by a union are properly chargeable to objecting nonmember fee payers or whether a union has met its burden of establishing its chargeable expenses because the unions' duty of fair representation requires it to provide, and bear the cost of, a determination of these issues by an impartial decision maker. I note that this conclusion is not based on a finding that the Commission lacks jurisdiction to determine whether individual union expenditures are properly chargeable to objecting nonmember fee payers where the union seeks to enforce agency fee obligations. However, for reasons discussed in *Government Employees Labor Council,* I conclude that even if the Commission has jurisdiction it should not exercise it.

In Case No. CU08 J-057, Day did not merely assert that she had not been properly notified of her rights under *Abood,* she alleged that Respondent had failed to provide the procedural safeguards mandated by *Hudson.* In the fall of 2008, Respondent's agency fee procedures, as set out in its bylaws, were deficient by *Hudson* standards. For example, they did not require Respondent to provide nonmember fee payers with information about the method by which their fee was calculated, including an audited statement of the union's expenditures for collective bargaining and contract administration. *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson,* at 307, n 18; *Tierney v City of Toledo,* 824 F2d 1497, 1504 (CA 6, 1987). They did not provide a method whereby an objecting fee payer could have his objections addressed by an impartial decision maker in an expeditious manner, and they did not provide for escrow of the disputed amount of the fee while a decision on that amount was pending. However, after Day filed her charge, Respondent moved promptly to correct these deficiencies. It provided her with the most recent audited financial information it possessed, financial statements and an allocation of its expenses between chargeable and non-chargeable expenditures for the fiscal year ending June 30, 2007. It also arranged for an audit to be done of its expenditures for the next fiscal year, and provided Day with these documents when they became available in March 2009. Although it did not amend the agency fee procedures in its bylaws, it created a new agency fee procedure that gave objectors the right to a decision on their objections by an impartial arbitrator selected by the AAA. The new procedure also provided for an escrow of the amount of the fee that was reasonably in dispute while the objection was pending. Respondent put the new procedure on its website and also began distributing it to new GSIs. Finally, and significantly, Respondent did not cash Day's check for her agency fee for the fall semester of 2008. Therefore, Day was not forced to subsidize Respondent's noncollective bargaining activities during the period that Respondent lacked an agency fee procedure that met *Hudson* standards.

In the fall of 2009, when Day once again became a member of Respondent's bargaining unit, Respondent had procedures in place that provided for expeditious arbitration of fee disputes and escrow of fees reasonably in dispute until that dispute was resolved. In the fall of 2009, Respondent provided Day, before she was required to pay her agency fee, with an audited financial statement and an audited allocation of its expenditures between chargeable and non-

chargeable expenses for the most recent fiscal year. [3] When Day declined Respondent's offer to negotiate a compromise fee, Respondent filed for arbitration of Day's dispute by an arbitrator selected by the AAA. A hearing was held and a decision rendered by the arbitrator in April 2010. I find that Respondent provided Day with the procedural safeguards required by *Hudson* to protect her from being compelled to contribute to Respondent's political and ideological activities before it attempted to collect her agency fees for 2008 and 2009. I conclude, therefore, that Respondent did not violate its duty of fair representation toward Day and did not unlawfully cause or attempt to cause her Employer to discriminate against her in violation of §10(3)(c) of PERA.

Day argues that Respondent violated PERA by refusing to provide her with sufficient information to establish its chargeable expenditures. This would include, according to Day, timesheets for its staff supporting the allocation of their time between chargeable and nonchargeable activities, and line counts for its publications to show how much space was devoted to chargeable activities. However, I agree with Respondent that Respondent was not required by *Hudson* to provide this type of information. The information to which Day was entitled was information to allow her to make an intelligent and informed decision as to whether to challenge the calculation of her fee, and the audited statements which Respondent provided were sufficient for that purpose. See, e.g., *Damiano v Matish,* 830 F 2d 1363, 1370 (CA 6, 1987). After Day made her objection, Respondent had the burden to establish that the allocation of expenses it used to calculate the agency fee was appropriate, which included establishing the amount of its chargeable expenditures for that year. However, Respondent clearly had no obligation to prove to Day that its allocation was appropriate. Rather, it was obligated to demonstrate this to the satisfaction of an impartial decision maker, in this case an arbitrator. Respondent met this obligation.

Finally, Day argues that if the agency fee procedures contained in Respondent's bylaws are no longer in effect, Respondent should amend its bylaws to reflect this fact. However, the new procedures are available on Respondent's website and are distributed to new unit members. I find that Respondent's failure to amend its bylaws to conform to the agency fee procedures now in effect did not constitute a violation of its duty of fair representation under PERA.

In accord with the conclusions of law set forth above, I recommend that the Commission issue the following order.

[3] Respondent did not violate *Hudson* standards by basing its calculation of its 2009 fee on its expenditures for the previous year. *Hudson,* at 307, fn 18.

RECOMMENDED ORDER

The charges in Case No. CU08 J-067 and CU09 K-036 are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____