STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GOVERNMENT EMPLOYEES LABOR COUNCIL,
Labor Organization-Respondent,

Case No. CU10 G-036

-and-

RICHARD J. SMITH,
An Individual-Charging Party.
_____/

APPEARANCES:

Michael J. Akins, for Respondent

Richard J. Smith, appearing on his own behalf

DECISION AND ORDER

On April 25, 2012, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Government Employees Labor Council (the Union), violated its duty of fair representation under § 10(3)(a)(i) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(3)(a)(i) when it amended its agency fee policy in July 2010. The ALJ determined that the amended policy breached Respondent's duty of fair representation by: requiring nonmembers to formally request information regarding the calculation of the service fee; and failing to provide a method by which nonmember fee payers would participate in the selection of an impartial arbitrator to decide challenges to the amount of their agency fees. The ALJ found that the Respondent afforded Charging Party, Richard J. Smith, adequate procedural safeguards for the protection of his *Abood*[1] rights prior to requiring him to pay his 2010 agency fee, and recommended that the Commission dismiss that portion of his charge. The Decision and Recommended Order of the ALJ was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on June 18, 2012. Therefore, Respondent's response to the exceptions was due July 2, 2012. On July 5, 2012, we received Respondent's request for an extension of time to file its response to the exceptions in an envelope postmarked on June 27, 2012. Bureau of Employment Relations staff informed Respondent of the untimely

[1] *Abood v Detroit Bd of Ed*, 431 US 209 (1977).

delivery of its extension request. Subsequently, on July 17, 2012, Respondent submitted its Motion to Retroactively Grant an Extension to File a Response to Exceptions to the Administrative Law Judge's Decision and Recommended Order, as well as its proposed response to the exceptions. We might have considered the unusually long time it took for Respondent's extension request to be delivered to be good cause for a late filing under Commission Rule 176(8). However, we have not found it necessary to consider the response to the exceptions in reaching our decision, because Respondent merely urges us to adopt the ALJ's Decision and Recommended Order.

In his exceptions, Charging Party contends the ALJ erred in finding Charging Party was provided with adequate procedural safeguards for the protection of his *Abood* rights prior to his being required to pay his 2010 agency fee. He asserts, therefore, that he was deprived of property (agency fees) without due process of law.

On reviewing the record carefully and thoroughly, we find Charging Party's exceptions to be without merit.

Factual Summary:

The facts in this case were set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here. In early 2006, Charging Party, an employee of Calhoun County, resigned his membership in the Union and subsequently filed a charge (Case No. CU06 F-021) alleging that Respondent violated PERA by failing to honor his rights as an agency fee payer with respect to the agency fee charged to him for the 2006 calendar year. Smith and Respondent settled this charge and agreed to extend the time limit for Smith to file objections to his agency fee for the 2007 calendar year.

On April 10, 2007, within the time period set out in the settlement agreement, Smith objected to the expenditures used to determine his 2007 agency fee and, on August 24, 2007, filed a second unfair labor practice charge (Case No. CU07 H-045) alleging that Respondent failed to provide him with an opportunity to challenge the amount of his fee before an impartial decision maker. After the charge was filed, the parties reached a settlement of that case and agreed to use Arbitrator David Tanzman to arbitrate the dispute.

On April 8, 2008, Tanzman issued an award in which he found that Respondent had provided Smith with adequate notice of how his agency fee was calculated.

In 2008, Smith became a member of the Union again but, on July 1, 2009, resigned his membership and registered his objection to having his agency fee used for purposes other than collective bargaining, contract administration, and grievance adjustment. After an exchange of correspondence between Smith and Respondent, Smith did not ask for a hearing on the challenge to the amount of the 2009 fee, nor did he file an unfair labor practice charge.

On February 8, 2010, Smith sent Respondent a check representing his agency fees from July 2009 through January 2010. In an attached letter, Smith asked Respondent a number of questions about the computation of the agency fee and also complained about his local union

officers' handling of certain collective bargaining issues. Smith pointed out that, under Respondent's agency fee policy, audited expense statements should be sent to him each year in January without him having to request them.

On March 22, 2010, Respondent sent Smith a copy of an audited statement of the major categories of its expenditures for the fiscal year ending June 30, 2009. According to the letter from the auditor that accompanied the statement, the audit was completed on September 2, 2009. The statement listed thirty-two categories of expenditures. The statement also included a general definition of chargeable expenses; a list of examples of expenditures classified as chargeable; a general definition of nonchargeable expenses; and a list of the types of expenses in the statement classified as nonchargeable. Respondent notified Smith that, based on this statement for the calendar year 2010, his agency fee would be the equivalent of ninety-four percent of the dues assessed to members.

On March 29, 2010, Smith sent Respondent a letter asking fourteen questions about the audited statement. Smith also attached a check for his February and March 2010 fees, and asked Respondent to put the "proper amount" in an escrow account until a hearing could be held to address the issues raised in his letter.

On April 22, Respondent sent Smith a letter stating that the entire amount of Smith's 2010 agency fee would be escrowed pending a ruling on Smith's challenges by an arbitrator. It also told Smith that it intended to forward his challenges regarding the agency fees to Arbitrator Tanzman, along with copies of the statements of expenses for the years ending on June 30, 2008 and 2009. Respondent informed Smith that Tanzman would then make a determination of the appropriate agency fees for 2010. Respondent copied Tanzman on this letter and sent him a copy of its agency fee procedure, with proposed amendments to the procedure.

On or about April 26, Smith wrote Respondent and objected to Tanzman's appointment. Smith pointed out that Respondent's agency fee policy required it to file for a hearing of the dispute with the American Arbitration Association (AAA).

On June 15, 2010, Respondent sent Tanzman a letter asking him, over Smith's objections, to issue a decision on the appropriate amount of the fee and to do so without a new hearing.

Within a few days after receiving Respondent's letter, Tanzman issued a decision in the form of a letter concluding that Respondent had correctly calculated the amount of the chargeable fee. Recapping the history of the dispute, Tanzman noted that Smith had filed an unfair labor practice charge with the Commission challenging Respondent's service fee for the year ending June 30, 2006. Tanzman noted that, in an effort to curb costs, Respondent had requested that he resolve this matter without a hearing even though this was contrary to Respondent's agency fee policy, which indicated that Respondent would file with the AAA in response to a challenge. Tanzman stated that Respondent had informed him that it was in the process of amending its agency fee policy to allow for subsequent challenges by the same objecting agency fee payer to remain under the jurisdiction of an arbitrator who previously decided the challenge. Tanzman ordered Respondent to amend its policy "in accordance with

these proceedings." Addressing Smith's objection to the manner of his selection, Tanzman stated:

> [A]s GELC rightfully pointed [out] in its letter of June 15, 2010, this Arbitrator was originally selected by MERC ALJ Stern; thus satisfying the requirement that the decision-maker be impartial. . . .

Tanzman also noted that, in his 2008 award, he had concluded that Respondent had met its full obligation to prove its chargeable expenditures by providing all "reasonable, rational, responsible data and records" in the form of the audited statement, the testimony of Respondent's witnesses, and the testimony of the auditor. He said that for the fiscal year ending June 30, 2009, Respondent had provided its nonmember agency fee payer with nearly identical accounting of its major categories of expenditures, prepared in the same method. Since the 2009 accounting mirrored the 2006 accounting, he reasoned, the expenditures established as chargeable in the 2006 accounting could be again counted as chargeable in the 2009 accounting.

He further concluded that the increase in the agency fee from eighty-four percent of dues in 2006 to ninety-four percent in 2009 was justified because the increase was attributable to the decision to add the expense of the annual conference to the list of chargeable expenditures and to include attorneys' fees and arbitration costs as chargeable expenditures. Tanzman concluded that Respondent had met its burden of establishing the amount of its chargeable expenditures and of justifying the amount of the fee Smith was required to pay.

In July 2010, Respondent amended its agency fee policy to require nonmembers to make a formal request to receive information about the amount of their service fee and how it was calculated and to provide for the unilateral selection of an arbitrator by Respondent from a list maintained by the Commission.

Discussion and Conclusions of Law:

In *Abood v Detroit Bd of Ed*, 431 US 209 (1977), the Supreme Court upheld agency fee systems in which employees who are not members of the exclusive bargaining representative are required to pay a fair share of the union's cost of negotiating and administering a collective bargaining agreement. The court noted that an agency fee system is designed to prevent the problems associated with "free riders," employees who "refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222.

The *Abood* court also recognized that nonmember employees have a constitutional right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234. While the nonmember employee has the burden of raising an objection to an agency fee, the union bears the burden of proving the validity of the assessment. *Id.* at 239–241. Agency fee procedures must be designed to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237.

In *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson*, 475 US 292 (1986), the court outlined the procedural safeguards required to achieve this objective and promulgated a three-part test to be met in collecting agency fees from nonmembers. In *Hudson*, the Court noted that there must be (1) adequate explanation of the basis for the fee, (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and (3) an escrow for the amounts reasonably in dispute while a challenge is pending. *Id.* at 310.

The duty of fair representation is a judicially created doctrine founded on the principle that a union's status as exclusive bargaining representative carries with it the obligation and duty to fairly represent all employees in the bargaining unit, members and nonmembers. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). The elements of a union's duty of fair representation include: 1) serving the interests of all members without hostility or discrimination; 2) exercising its discretion with complete good faith and honesty; and (3) avoiding arbitrary conduct. When a union's conduct toward a bargaining unit member is "arbitrary, discriminatory, or in bad faith" the duty of fair representation is breached. A union satisfies the duty of fair representation so long as its decision is within the range of reasonableness. *Air Line Pilots Ass'n v O'Neill*, 499 US 65 (1991); *Int'l Union of Operating Eng'rs, Local 547*, 2001 MERC Lab Op 309, 311; *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

A union's duty of fair representation extends to union conduct in representing employees in their relationship with their employer, such as negotiating a collective bargaining agreement or resolving a grievance, and in related decision-making procedures. *Wayne Co Cmty Coll Fed'n of Teachers, Local 2000, AFT*, 1976 MERC Lab Op 347. See also *Org of Classified Custodians*, 1996 MERC Lab Op 181, 183 (no exceptions); *Lansing Sch Dist*, 1989 MERC Lab Op 210. The duty, however, does not apply to matters that are strictly internal union affairs, which do not impact the relationship of bargaining unit members to their employer.

In *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004), the Commission held that the collection of agency fees from nonmembers cannot be characterized as purely an internal union matter because it can only be accomplished pursuant to a negotiated contract provision, and there is a potential impact on employment should the nonmember refuse to pay. Further, courts have found that a union's collection and use of agency fees implicates the duty of fair representation. The Commission noted that, in *Communications Workers v Beck*, 487 US 735 (1988), the U.S. Supreme Court found that exactions of agency fees from objecting nonmembers beyond those necessary to finance collective bargaining activities violated a union's duty of fair representation as well as the nonmembers' First Amendment rights. See also *Lansing Sch Dist*, 1989 MERC Lab Op 210; *Bridgeport-Spaulding Cmty Sch*, 1986 MERC Lab Op 1024; and *California Saw and Knife Works*, 320 NLRB 224 (1995). A union's duty of fair representation under §10(3)(a)(i) therefore requires a union to acknowledge the *Abood* rights of agency fee payers and a union's failure to implement procedures adequate to safeguard an employee's *Abood* rights violates the union's duty of fair representation. Additionally, a union violates §10(3)(b) of PERA if it causes or attempts to cause a public employer to take action against an agency fee payer for failure to pay his or her fee in the absence of these procedural safeguards.

Although Charging Party contends that his *Abood* rights were violated because Respondent failed to provide him with information about the amount of his 2010 agency fee and the method by which it was calculated within a reasonable period of time and without his having to request it, the Commission agrees with the findings and conclusions of the ALJ. As noted by the ALJ, the requirement that a union provide information about the calculation of its fee within a reasonable period of time after the commencement of the fee period must assume that the nonmember is being compelled to pay the fee at least until he or she makes an objection. In this case, unlike *Hudson*, no agency fees were being deducted from Smith's paycheck. Although Smith did pay agency fees, he did so sporadically. Despite his irregular payments, Respondent did not attempt to enforce the agency shop provision in the contract or to otherwise force Smith to pay any portion of his fee. Consequently, Smith was not required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." See *Abood* at 234-235. To the contrary, there was no potential impact on Smith's employment. We agree, therefore, that Respondent did not violate its duty of fair representation toward Smith.

Additionally, Respondent did not violate its duty of fair representation by asking Arbitrator Tanzman to decide Smith's challenges to the amount of his fee in 2010. Although the *Hudson* court concluded that a procedure which involved the union selecting an arbitrator from a list of arbitrators provided by the state was constitutionally defective[2], Respondent did not unilaterally select Arbitrator Tanzman to hear Smith's dispute in 2010. To the contrary, Respondent and Smith had mutually agreed to Tanzman's selection in 2007. Furthermore, there is no basis for concluding that requiring objectors to have their challenges in successive years heard by the same arbitrator violates *Hudson* standards, provided that the initial selection of that arbitrator complies with the *Hudson* requirement that it not represent the union's unrestricted choice. Contrary to Smith's contention, requiring objectors to have their challenges in successive years heard by the same arbitrator represents a reasonable way of preventing compulsory subsidization of ideological activity without unduly burdening a union's ability to require every employee to contribute to the cost of collective bargaining activities. See *Hudson*, at 302.

Although Smith also alleges that Respondent breached its duty of fair representation because he was not given a hearing or even asked if the record was complete before Tanzman rendered his decision regarding the 2010 agency fee, the Supreme Court, in *Hudson*, at 308, n 21, stated that a fee challenge did not require "a full dress administrative hearing, with evidentiary safeguards." Contrary to Smith's contention, nothing in *Hudson* or any other cited decision requires an oral hearing. Additionally, at the time Tanzman rendered his decision, he had before him Smith's March 29, 2010 challenges, other letters from Smith questioning Respondent's allocation of chargeable expenditures dating back to the previous July, and other correspondence between the parties. Smith was thus not deprived of a fair decision on his challenges. Respondent, therefore, met its obligation, under its duty of fair representation, to provide Smith with the opportunity to have his objections addressed in a fair and objective manner by an impartial decision maker. This is precisely what the law requires.

[2] *Hudson*, at 308.

We have also considered all other arguments submitted by Charging Party and conclude that they would not change the result in this case. Accordingly, we affirm the ALJ's Decision and Recommended Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Robert S. LaBrant, Commission Member

_____
Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GOVERNMENT EMPLOYEES LABOR COUNCIL,
Labor Organization-Respondent,

Case No. CU10 G-036

-and-

RICHARD J. SMITH,
An Individual-Charging Party.
_____/

APPEARANCES:

Michael J. Akins, for the Respondent Labor Organization

Richard J. Smith, appearing for himself

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Lansing, Michigan on January 25, 2011, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 28, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Introduction:

Richard J. Smith, an employee of Calhoun County (the Employer) and a member of a bargaining unit represented by the Government Employees Labor Council (GELC), filed this charge against his collective bargaining representative on July 20, 2010. On July 1, 2009, Smith sent Respondent a letter resigning his union membership. By such action, Smith became subject to the clause in the collective bargaining agreement between Respondent and the Employer requiring unit members who are not members of Respondent to pay Respondent an agency fee in lieu of dues or be subject to discharge. In addition to resigning his union membership, Smith also informed Respondent that he objected to the use of his agency fee for any purpose other than collective bargaining, contract administration, and grievance adjustment. In so doing, Smith was asserting his constitutional right, as declared in *Abood v Detroit Board of Education*, 431 US 209

(1977), not to be forced to contribute to union expenditures for purposes other than those listed above.

Smith alleges that Respondent violated its duty of fair representation toward him under PERA by failing in the spring of 2010 to accord him certain rights due him as an objecting agency fee payer under PERA and the United States Constitution, as set out in *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson,* 475 US 292 (1986).[3] These are, as summarized by the *Hudson* Court at 310:

> An adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Smith's principal allegation is that Respondent failed to provide him with an opportunity to challenge the calculation of his 2010 agency fee before an impartial decision maker because Respondent unilaterally selected the arbitrator who decided his challenge and because the arbitrator made his decision without giving him a fair hearing. As a remedy for that violation, Smith seeks an independent determination by the Commission that the fee he was required to pay was improper.

Smith also alleges that Respondent violated its obligation to provide him with an adequate explanation of the basis of his fee, including the amount of the agency fee and an explanation for how it had been calculated, within a reasonable period of time after the beginning of the 2010 calendar year. On March 22, 2010, Respondent sent Smith a notice informing him of the amount of his agency fee for the 2010 calendar year and audited financial statements to support how it had been calculated. Smith asserts that this information was provided too late and that Respondent failed to provide the information without Smith first asking for it.

In July 2010, after the arbitrator had ruled that Smith's 2010 agency fee had been calculated appropriately and around the time Smith filed his charge, Respondent amended its internal agency fee policy to change the method by which an arbitrator is selected to hear an objecting nonmember's challenge to the amount of his agency fee and to require that nonmembers make a specific request before receiving an explanation of the calculation of their agency fee. A copy of the amended policy was introduced at the hearing on the unfair labor practice. Smith alleges that the amended policy violates Respondent's duty of fair representation because it fails to adequately protect the rights of agency fee payers guaranteed by *Hudson.*

[3] In his post-hearing brief, Smith alleges other violations of Respondent's duty of fair representation dating back to 2008. However, under §16(a) of PERA, allegations of unfair labor practice occurring more than six month before the date the charge was filed and served on Respondent are untimely. Therefore, although the record included evidence of events occurring prior to January 2010, these events are discussed in this decision for background purposes only.

Findings of Fact:

Smith's 2006 and 2007 Unfair Labor Practice Charges

Respondent is an affiliate of the Police Officers Labor Council (POLC), a labor organization representing public safety employees. Respondent shares office space and staff with that labor organization. The two labor organizations also share office space and staff with the Law Enforcement Education Program (LEEP), a non-profit corporation.

For some period prior to 2006, Smith was a member of Respondent. In early 2006, he resigned his membership. On June 8, 2006, Smith filed a charge against Respondent (Case No. CU06 F-021) alleging that Respondent violated PERA by failing to honor his rights as an agency fee payer with respect to the agency fee charged him for the calendar year 2006. This charge, like Smith's subsequent charges, was assigned to me. Smith was Respondent's first, and remains its only, agency fee payer to object to the use of his fees for purposes other than collective bargaining, contract administration, and grievance adjustment.

In January 2007, Respondent provided Smith with an audited statement of the major categories of its expenditures for the fiscal year ending June 30, 2006. For each major category, the statement listed the amounts chargeable to objecting nonmembers and the amounts not chargeable. Along with this statement, Respondent sent Smith a letter telling him that, in accord with this allocation, the amount of his monthly agency fee for the calendar year 2007 was eighty-four percent (84%) of the dues paid by members. Smith was instructed that, if he wished to challenge the amount of the fee, he was to comply with the procedures in the attached agency fee policy.

In February 2007, Smith sent Respondent a letter asserting that the audited statement did not provide him with enough information to frame his objections to the allocation of expenditures between chargeable and nonchargeable expenses. Smith asked to see the records examined by the auditors. Respondent replied in a letter dated February 26, 2007. In denying Smith's request to examine its records, it told him that it was his obligation to provide an arguably reasonable basis for objecting to a particular expenditure, at which point the burden shifted to Respondent to justify the chargeability of the expenditure. The letter also stated that since Smith had not made a timely objection with any arguably reasonable basis to any of the delineated expenditures, Respondent considered the amount of Smith's fee for the 2007 calendar year to be a settled issue.

In March 2007, Smith and Respondent entered into a written settlement agreement of Smith's charge in Case No. CU06 F-021 which included a provision extending the time limit for Smith to file objections to the expenditures used to determine the amount of his agency fee for the 2007 calendar year. On April 10, 2007, within the time period set out in the settlement agreement, Smith submitted a letter containing objections to expenditures listed as chargeable in Respondent's audited statement for the fiscal year ending June 30, 2006.

On June 28, 2007, Respondent sent Smith a letter explaining why it believed his objections lacked merit. Referring Smith to its agency fee policy, the letter stated that Smith's objections were untimely since they were not filed within the time period provided for in the policy.

Respondent's agency fee policy at this time included a provision stating that "as soon as practicable after a timely objection is received," Respondent was to file for a hearing of the dispute with the American Arbitration Association (AAA) pursuant to its Rules for Impartial Determination of Union Fees. Respondent's policy stated that if there were multiple individuals filing objections, the cases could be consolidated. Respondent was to notify the individuals who had objected of the identity of the impartial decision maker, the time and place of the hearing, and whether their objection had been consolidated with others. Under the AAA's Rules for Impartial Determination of Union Fees, the AAA, upon receiving an initiating letter from a union, appoints an arbitrator from a special panel of arbitrators. Thereafter, the parties communicate only through the AAA until a decision is rendered. The AAA charges a substantial administrative fee for its services in handling a determination of union fees dispute.

On August 24, 2007, Smith filed a second unfair labor practice charge, Case No. CU07 H-045 alleging that Respondent had failed to provide him with an opportunity to challenge the amount of his fee before an impartial decision maker. After the charge was filed, Respondent admitted that Smith's April 10, 2007 objections should have been considered timely under the agreement settling Case No. CU06 F-021.

On October 17, 2007, the day of the scheduled hearing on the unfair labor practice charge in Case No. CU07 H-045, the parties reached a settlement of that case. The settlement agreement, which was read by me into the record, stated that Respondent would contact Arbitrator David Tanzman and seek to engage him to arbitrate the dispute within the next three months. If Tanzman was not available within that period, the parties agreed that the Union would contact Arbitrator George Roumell and ask him to arbitrate the dispute under these same terms, and that if Roumell was not available, the Union would contact Arbitrator Donald Sugarman. Smith agreed that the decision of the arbitrator selected would be binding and that he would withdraw the charge after the arbitration took place. I was present during the parties' settlement discussions, but did not suggest names of arbitrators that the parties might contact to resolve the dispute. During the settlement discussions, Smith asked me about Arbitrator Tanzman, and I told Smith that I knew Tanzman as a well-regarded and experienced arbitrator.

Tanzman accepted the assignment. Tanzman held a hearing on Smith's challenges on November 19, 2007. On November 30, 2007, I issued an order stating that Smith had asked to withdraw the charge in Case No. CU07 H-045 and that the withdrawal had been approved.

On April 8, 2008, Tanzman issued a lengthy award finding that Respondent had provided Smith with adequate notice of how his agency fee was calculated. Tanzman noted that the reported amounts for each category of expenditure had been verified by an independent auditor. He found that Respondent had provided evidence at the hearing that the amounts deemed chargeable excluded expenses not directly associated with collective bargaining such as political and organizing costs; that Respondent had explained how it had estimated the amount of its staff

members' time spent on nonchargeable activities related to the Law Enforcement Education Program (LEEP), a non profit organization, and the National Association of Police Organizations (NAPO) and the Michigan Association of Police Organizations (MAPO); that Respondent had used the constitutionally adequate method of using managerial estimates of the amount of staff time, professional and legal services, etc, attributable to Respondent as opposed to the POLC; and that no expenditures for political activities or time spent on political activities had been included in chargeable expenditures. Tanzman addressed several arguments raised by Smith at the hearing and found them to be without merit. For example, he found no merit to Smith's argument that fringe benefits paid to staff members should not be considered chargeable expenditures because they were unnecessary expenses. He also rejected Smith's argument that Respondent should not be allowed to factor in the employee's pay rate when calculating the agency fee, as it does in setting the amount of dues. Tanzman concluded that Respondent's calculations were reasonable, that Respondent had met its burden of proving its chargeable expenditures, and that Smith was required to pay the assessed agency fee equivalent to eighty-four percent (84%) of dues for the calendar year 2007. Tanzman did not indicate whether he was retaining jurisdiction over the dispute after the award was issued. The fee Respondent paid Tanzman for his services was approximately six times the total amount of the agency fee paid by Smith in 2007.

Smith's 2009 Objections

In 2008, Smith became a member of Respondent again. On July 1, 2009, Smith resigned his membership and again registered his objection to having his agency fee used for purposes other than collective bargaining, contract administration, and grievance adjustment. Smith asked Respondent to provide him with an accounting of its expenditures as soon as possible, and to escrow any dues/fees that were not subject to an immediate rebate until he received this accounting. In fact, Smith did not pay any dues or fees from July 2009 until February 2010.

In July 2009, Respondent's agency fee policy provided as follows:

> 1. The agency fee period shall run from January 1 to December 31 of the following year.
>
> 2. By January of each year, all known non-member agency fee payers shall be provided with notice of how the agency fee was determined.
>
> 3. Any non-member agency fee payers who become known after January 1 of that year shall receive notice of how the agency fee was determined within thirty (30) days of their becoming known. If a hearing before an impartial decision maker has been held for the dues period in question, such non-member agency fee payers shall be informed that they are bound by that decision until the next agency fee period.
>
> 4. Notice will include an independently audited statement of the Union's expenses for the period relied upon in calculating the agency fee, a statement of what expenditures or portions of expenditures have been included in the calculation of

the agency fee, a copy of this policy, a verification from the independent CPA who conducted the audit that the amounts contained in the notice are accurate and have been audited in accordance with appropriate auditing standards, and any decision by an impartial decision maker that has been issued for the dues period in question.

5. If, due to unforeseen circumstances, the audit has not been completed by January 1, the date notices are provided may be extended until the audit has been completed.

6. Within thirty days of receipt of notice pursuant to this policy, non-member agency fee payers may object to the agency fee amount by providing, in writing, their name, employer, job classification, address, phone number, the expenditures included in the agency fee to which they are objecting, and the reason(s) for the objections. This information must be post-marked no later than thirty (30) days after the receipt of notice provided under this policy and sent by certified or registered mail to: [address omitted]

7. If a hearing before an impartial decision maker has not previously been held for the applicable agency fee period and upon receipt of a timely written objection which states the expenditure(s) being objected to along with the reason(s) for the objection(s), the Union shall place the proportional amount of the agency fee that is being objected to in an interest bearing escrow account from January 1 until the objection is resolved as described below.

The policy also provided that upon receipt of an objection Respondent would file for a hearing of the dispute with the AAA. It stated that the Voluntary Labor Arbitration Rules of the AAA would apply to the hearing, with the following exceptions;

A. An individual objecting to the agency fee who plans to attend the hearing shall, at least twenty (20) business days prior to the hearing, supply to the Union copies of exhibits he/she intends to introduce at the hearing, along with a list of witnesses that he/she intends to call at the hearing.

B. Ten (10) business days prior to the hearing, the Union will make available for review the records upon which it relies to justify the amount of the agency fee, along with copies of exhibits it intends to introduce in its case in chief at the hearing. The Union shall also make available a list of witnesses it intends to call at the hearing.

C. The Union shall have the burden of justifying contested expenditures.

D. A verbatim transcript of the hearing will be made by a court reporter and this transcript will be the official record of the hearing. A copy of the transcript shall be supplied to the impartial decision maker at the Union's expense. Any other

parties participating in the hearing shall be entitled to a copy of the transcript at their own expense.

E. The Union and other participants in the hearing will be given the opportunity to file post-hearing briefs. Such briefs shall be filed within the time period specified by the impartial decision maker.

On July 14, 2009, Respondent sent Smith a copy of its most recent audited statement of chargeable and nonchargeable expenditures, the statement for the fiscal year ending June 30, 2008. It also told him what it calculated the monthly amount of his agency fee to be based on this statement. On August 3, 2009 Smith sent Respondent a letter with twelve questions about/objections to the statement, and asked Respondent to "respond or schedule a hearing on his objections before an impartial decision maker."

Respondent responded in a letter dated August 11, 2009 in which it attempted to answer each of the questions Smith raised in its letter. In a lengthy letter dated August 24, 2009, Smith continued to raise questions about the amounts deemed chargeable in the audited statements. For example, Smith argued that arbitration and attorneys fees should not be chargeable to him because, as he understood it, these sums consisted mainly of costs attributable to Act 312 interest arbitration hearings for POLC members. Smith also asked for an explanation of the expenses listed as "miscellaneous," and pointed out some alleged inconsistencies between the audited financial statements and Respondent's filings with the Internal Revenue Service. In his August 24 letter, Smith stated that he intended to pay his agency fee when he got the answers to his questions, unless Respondent preferred that he pay into an escrow account.

The next communication between the parties was a letter from Respondent to Smith dated October 27, 2009. In this letter, Respondent noted that Arbitrator Tanzman had concluded in his previous decision that Respondent had provided Smith with all the information regarding its calculation of the agency fee to which Smith was entitled, that Respondent had made a reasonable and rationale calculation of chargeable expenditures, and that Respondent's calculation of the amount of the agency fee was appropriate. It also noted that Smith "was entitled to request annually a written accounting of the GELC's expenditures as they relate to the determination of non-member agency fees," and Respondent had provided Smith with an accounting of Respondent's expenditures as they related to the determination of his current agency fee on July 14. The last paragraph of the letter stated that Smith was entitled to challenge the amounts listed in the accounting and, if he did so, the disputed amounts would be placed in an escrow account. Smith did not ask for a hearing on the challenge to the amount of the 2009 fee or file an unfair labor practice charge.

Smith's 2010 Objections

On February 8, 2010, Smith sent Respondent a check representing his agency fees from July 2009 through January 2010. In an attached letter, Smith asked Respondent a number of questions, including who had paid for printing the collective bargaining agreement, and also complained about his local union officers' handling of certain collective bargaining issues. Smith also pointed out that, contrary to Respondent's statement in its October letter, under

Respondent's agency fee policy audited expense statements should be sent to him each year in January without him having to request them.

On March 22, 2010, Respondent sent Smith a copy of the audited statement of the major categories of Respondent's expenditures for the fiscal year ending June 30, 2009. According to the letter from the auditor accompanying the statement, the audit was completed on September 2, 2009. The statement listed 32 categories: payroll, attorney fee-contract, arbitration and attorney fees, annual conference, automobile expense-administrative, automobile expense-membership, business promotion, conventions and seminars, depreciation, disability and life insurance, donations, dues and subscriptions, equipment rental, executive committee meetings, hospitalization, insurance, management/info systems, meals and travel, membership retention, office expenses, pension contributions, postage, professional services, publications, representative meetings, office rent and cleaning, taxes-payroll, taxes-property, telephone, utilities, workers' compensation, miscellaneous, and reimbursements. The latter was shown as a negative charge. All expenditures for business promotion, donations, and membership retention were shown as nonchargeable, and all expenditures for attorney fees –contract, arbitration and attorney fees, professional services, and publications were shown as chargeable. Expenditures in all other categories were divided between chargeable and nonchargeable expenses. As in previous years, the statement included a general definition of chargeable expenses; a list of examples of expenditures classified as chargeable; a general definition of nonchargeable expenses; and a list of the types of expenses in the statement classified as nonchargeable. It also explained that the salary, fringe benefits and payroll taxes of executives had been determined to be three percent nonchargeable, and the salary, fringe benefits and payroll taxes of office and clerical personnel had been determined to be one percent nonchargeable based on time spent on direct activities. Respondent notified Smith that based on this statement, for the calendar year 2010 his agency fee would be the equivalent of ninety-four percent (94%) of the dues assessed to members.

On March 29, 2010, Smith sent Respondent a letter asking fourteen questions about the audited statement.

1. Why has the annual conference been considered chargeable when it was not in the past? Does LEEP share the cost of the annual conference or have their own?

2. Why have the arbitration and attorney fees been considered chargeable when it was not in the past? (2006 No, 2008 Yes).

3. What portion of the total POLC/GELC expenses are attributable to the GELC and how do you determine that portion?

4. What are the total dues revenue for the GELC and POLC respectively?

5. What was the cost of the Web Site and where was it allocated this year?

6. What portion of the Telephone was paid by others? Please explain who and how much.[4]

7. What part [of]the Office rent and cleaning was paid by others and how much did they pay?

8. What portion of the Office expenses are paid by others? Please explain

9. What portion of the Utilities are paid by others? Please explain.

10. Does LEEP share the cost of Executive committee meetings?

11. Please explain the expenses in the miscellaneous category and the amount of each. Would you also explain how they relate to collective bargaining?

12. Reimbursements have declined by 9% while Utilities increased 37%, office rent is up 5.3%, office expenses up 48%, executive meetings up 42%, this seems unfair to the union members who are sharing the cost. Would you PLEASE explain how the reimbursements are calculated and justify the total and what affiliate's [sic] reimbursed them and to what amount?

13. Could you please explain what contributions (dollar amount) were made to the POLC PAC and where did they come from (what accounts)? Also, what is the interest rate on that account?

14. Would it be possible to obtain copies of IRS Form 990 for Fiscal Year July 1, 2008 thru June 30, 2009 for both POLC and LEEP from you and if so would there be a cost to me?

Smith also attached a check for his February and March 2010 fees, and asked Respondent to put the "proper amount" in an escrow account until a hearing could be held to address the above challenges.

On April 22, Respondent sent Smith a letter stating that the entire amount of Smith's 2010 agency fee would be escrowed pending a ruling by an arbitrator on Smith's challenges. It also told Smith that it was planning to forward his challenges of the agency fees to Arbitrator Tanzman, along with copies of the statements of expenses for the years ending on June 30, 2008 and 2009 and any other applicable responses provided to him by Respondent, and that Tanzman would then make a determination of the appropriate agency fees for 2010. Respondent copied Tanzman on this letter, and sent both Tanzman and Smith copies of all the correspondence between Respondent and Smith between July 1, 2009 and March 29, 2010, except for Smith's February 8, 2010, letter which it sent him on June 15. It also sent Tanzman a copy of its agency fee procedure, with proposed amendments as discussed below.

On or about April 26, Smith sent Respondent a letter objecting to Tanzman's appointment and pointing out that Respondent's agency fee policy required it to file for a hearing

[4] Very small amounts were listed on the statement as nonchargeable expenditures under the headings of meals and travel, office expenses, postage, office rent and cleaning, telephone, and utilities.

of the dispute with the AAA. It is not clear whether Smith sent a copy of the letter to Tanzman. Smith did not receive a response to his letter from Respondent or from Tanzman.

On June 15, 2010, Respondent sent Tanzman a letter asking him, over Smith's objections, to issue a decision on the appropriate amount of the fee and to do so without a new hearing. The letter to Tanzman, reads, in pertinent part, as follows:

> Enclosed please find a copy of Mr. Smith's most recent correspondence, dated April 26, 2010, in which he challenges Arbitrator Tanzman's authority to rule on the appropriate agency fees for GELC. Mr. Smith contends that GELC has "unilaterally" chosen the Arbitrator in this instance. To the contrary, MERC ALJ Julia Stern originally made the selection. Because Mr. Tanzman has already issued an award on the subject as it applies to the same parties, coupled with the fact that all subsequent accountings have been prepared in the exact method employed as that of the accounting that was the subject of the original proceedings, GELC is merely asking this impartial decision-maker to once again decide the matter.
>
> . . .
>
> As Mr. Smith has correctly pointed out, GELC's Policy Re: Agency Fees states that in response to a timely objection to the amount of dues, if a determination has not already been made for the same year, the "Union shall file for a hearing of the dispute with the American Arbitration Association [AAA] pursuant to its rules for impartial determination of union fees." Mr. Smith is of the opinion that this policy necessarily affords him the opportunity of a hearing. In reality, the AAA's rule for determining agency fees expressly indicate that "such issues can be determined on the basis of documents." Continuing further, the rules provide that "*if* a hearing is necessary, it should be held promptly . . . (emphasis added). Clearly, AAA does not guarantee an agency fee objector the benefit of a hearing.[5]
>
> It should be noted that Mr. Smith is GELC's sole agency fee objector. In fact, he is the only agency fee objector in the history of the GELC. As such, it should come as no surprise that the GELC has been caught off guard by Mr. Smith's perpetual challenges to the amount of agency fees charged to nonmembers who reap the benefits of membership. Furthermore, at the time the policy was drafted, the Union did not contemplate continued challenges made in bad faith following the decision of an impartial decision-maker, such as those levied by Mr. Smith. GELC contends that it is not constitutionally obligated to annually bear the cost of an arbitration hearing, which would total in the thousands of dollars for each challenge, in order to collect a few hundred dollars in agency fees from a single objector. Reading the law as requiring that result would be patently unreasonable.

[5] The statements quoted by Respondent appear in the introduction to the AAA's rules for impartial determination of union fees, not in the rules themselves. Rule 19 of the AAA rules, entitled "Waiver of Oral Hearings" states: "The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the arbitrator shall specify a fair and equitable procedure."

> As such, in spite of the seemingly contrary language included in the GELC's policy, GELC contends that it should be allowed to return to the previous impartial decision-maker when the same nonmember subsequently challenges agency fees that were previously held to be appropriate. GELC is not asking that the previous award be given preclusive effect, just that it be allowed to reduce the potential cost of arbitration. In any event, GELC's policies will be amended to reflect the union's better understanding of its obligations in these matters with regard to both nonmembers as well as its members.
>
> Accordingly, GELC requests that Mr. Tanzman once again determine the appropriate amount of agency fees for its nonmember agency fee payers and issue a final and binding award on the matter. In addition, GELC asks that Mr. Tanzman retain jurisdiction for any subsequent challenges to said fees by Mr. Smith.

In this letter, Respondent explained to Tanzman that the annual conference was listed as a chargeable expenditure in this year's statement because Respondent representatives now attend, whereas they did not in the past. It also told Tanzman that the "arbitration and attorney fees" category represented the costs of in-house counsel handling arbitration and collective bargaining, as well as other costs involved in arbitration proceedings, and that when it had hired outside counsel it had deemed these costs nonchargeable because of the difficulty of calculating the pro-rata share for agency fee payers.

Within a few days after receiving Respondent's letter, Tanzman issued a decision in the form of a letter concluding that Respondent had correctly calculated the amount of the chargeable fee.[6] Recapping the history of the dispute, Tanzman noted that Smith had filed an unfair labor practice charge with the Commission challenging Respondent's service fee for the year ending June 30, 2006, and stated that I had ordered the parties to utilize Tanzman's services to resolve that matter. Tanzman noted that, in an effort to curb costs, Respondent had requested that he resolve this matter without a hearing even though this was contrary to Respondent's agency fee policy that indicated that Respondent would file with the AAA in response to a challenge. Tanzman stated that Respondent had informed him that it was in the process of amending its agency fee policy to allow for subsequent challenges by the same objecting agency fee payer to remain under the jurisdiction of an arbitrator who previously decided the challenge. Tanzman ordered Respondent to amend its policy "in accordance with these proceedings." Addressing Smith's objection to the manner of his selection, Tanzman stated:

> Agency fee payers have the right to annually challenge the amount of the agency fees pursuant to a union's internal procedures, which must culminate in a determination by an impartial decision maker. The law does not define the method in which the impartial decision maker shall be chosen. Jurisprudence suggests that an employee need not exhaust internal remedies if they culminate in a decision by a board of employees selected by the Union. That said, there is no case law barring the selection of the impartial decision maker by a judge, such as

[6] Tanzman's decision is dated June 16, 2010, the day after Respondent's letter, but Respondent argued at the hearing that this date was incorrect. In any case, both parties received Tanzman's decision in the mail on or before June 21.

ALJ Stern, a neutral third party, such as the AAA, or from a list supplied by a neutral third party, such as the MERC.

The U.S. Supreme Court has stated that the "constitutional requirements for the union's collection of agency fees include an adequate explanation of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Based on the record, the entire amount of fees submitted by Mr. Smith has been placed in escrow. In his letter of April 26, 2010, Mr. Smith challenged this Arbitrator's authority to rule on the issue. He indicated that the GELC may not unilaterally select the impartial decision maker. However, as GELC rightfully pointed [out] in its letter of June 15, 2010, this Arbitrator was originally selected by MERC ALJ Stern; thus satisfying the requirement that the decision-maker be impartial…

As for reducing potential costs, this Arbitrator is aware that the AAA charges a greater fee for the administration of an Impartial Determination of Union Fees than it does for administering other labor arbitrations. Beyond that, to hold a full hearing annually would greatly increase the costs for the Union; perhaps to an unreasonable amount. It is true that the AAA's rules indicate that a hearing may not be necessary in these matters. That said, the rules do not reveal how that determination is to be made. Thus, while the Union is free to request that the decision be made solely on the basis of documentation, the final determination rests with the Arbitrator. In this case, the Union has provided Mr. Smith with accountings which are nearly identical to that of 2006, and which have been prepared in an identical manner as that of 2006. This Arbitrator has also been supplied with all relevant correspondence regarding the challenged calculation. It is the opinion of this Arbitrator that a decision can be rendered based on documents, without the added expense of a hearing.

With regard to this, or any, Arbitrator retaining jurisdiction for subsequent challenges by the same nonmember agency fee payer, that decision should also rest with the Arbitra[tor]. It is widely recognized that "arbitrators may decide, at their discretion, to retain . . . jurisdiction." *Elkouri & Elkouri,* How Arbitration Works, 6th Ed., at 33. In fact, "it is common for arbitrators to retain jurisdiction so that their awards are properly carried out and disagreements . . . be resolved." *Id,* Significantly, "the retention of power would be *sua sponte* and not dependent on the express agreement of the parties. " Again, while either party may request that the arbitrator retain jurisdiction, the parties cannot compel the arbitrator to do so, nor prevent him from doing so. In this case, although not expecting to have such need, the request of the Union to have this Arbitrator return to resolve the matter expeditiously is granted.

Tanzman went on to note that in his 2008 award, he had concluded that Respondent had met its full obligation to prove its chargeable expenditures by providing all reasonable, rational, responsible data and records in the form of the audited statement, the testimony of Respondent's

witnesses, and the testimony of the auditor. He said that for the fiscal year ending June 30, 2009, Respondent had provided its nonmember agency fee payer with nearly identical accounting of its major categories of expenditures, prepared in the same method. Since the 2009 accounting mirrored the 2006 accounting, he reasoned, the expenditures established as chargeable in the 2006 accounting could be again counted as chargeable in the 2009 accounting. However, he concluded that he was obligated to determine if the increase in the agency from 84% of dues in 2006 to 94% in 2009 was justified. He concluded that the increase was attributable to the decision to add the expense of the annual conference to the list of chargeable expenditures and to include attorneys' fees and arbitration costs as chargeable expenditures. In his decision, Tanzman noted that in its letters of August 11, 2009 and June 15, 2010, Respondent had provided explanations for why it considered attorneys fees and the expenses of the annual conference chargeable expenses, although it did not charge them in earlier years. He found that as long as it charged the correct amount, Respondent was justified in considering attorneys fees and arbitration costs to be chargeable expenses. He also concluded that the cost of the annual conference was chargeable. Tanzman concluded that Respondent had met its burden of establishing the amount of its chargeable expenditures and of justifying the amount of the fee Smith was required to pay.

July 2010 Amended Agency Fee Policy

In July 2010, Respondent amended its agency fee policy.[7] Section 1 of the policy now reads:

> By January 1 of each year, or as soon as practicable thereafter, a copy of the accounting used to determine the amount of agency fees shall be made available to all members and known non-member fee payers upon request.

Section 8 of the policy, which had required Respondent to file for hearing of the dispute with the AAA as soon as practicable after a timely objection is received, now reads:

> As soon as practicable after a timely objection is received, if applicable, the Union shall request from the Michigan Employment Relations Commission a copy of its most current list of impartial arbitrators. The Union shall then select an impartial decision maker from the list. The parties will present their respective documentary evidence to the impartial decision maker. The final determination will be made solely on the basis of the documentary record. No hearing will be held without the mutual consent of the parties. If there are multiple individuals filing objections, the cases may be consolidated into a single case. As soon as possible, the individuals who have objected to agency fees will be notified of the identity of the impartial decision maker, whether their objection has been consolidated with other objections, and if applicable, the date, time and location of the hearing. Unless the parties mutually agree otherwise, the selected impartial

[7] In its post-hearing brief, Respondent asserts that on January 28, 2011, after the close of the hearing in this case, it amended its agency fee policy again. Although Respondent attached a copy of this policy to its brief, it did not seek to reopen the record to have it included. Accordingly, whether this policy satisfies the requirements of PERA is not before me.

> decision maker shall retain jurisdiction for all subsequent challenges made by the same objector(s) and any such subsequent challenge will be determined solely on the basis of the documentary record; no hearing will be held in those instances.

Section 11 was also modified to include the phrase, "if a hearing is necessary," to a statement that the Voluntary Labor Arbitration Rules of the American Arbitration Association would apply to the hearing.

Discussion and Conclusions of Law:

In *Garden City Sch Dist,* 1978 MERC Lab Op 1145, 1151, the Commission held that agency or service fees assessed by a union against nonmembers under §10(2) of PERA and the proviso to §10(1)(c) were subject to the "political expenditures" limitation imposed by *Abood.* Subsequently, in *Dearborn Local 20779 and Kempner,* 1982 MERC Lab Op 287, *aff'd* 126 Mich App 452 (1983), the Commission concluded that a union's right to enforce a contract clause requiring nonmembers to pay agency 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. The Commission also held in *Dearborn* that if appropriate procedural safeguards 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. Thereafter, in *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson,* 475 US 292 (1986), the U.S. Supreme Court held that a public sector union is constitutionally required to have procedures in place to prevent the compulsory subsidization of a union's ideological activities by employees who object, and explained what these procedures must minimally do to achieve this objective. Very shortly after *Hudson,* the Commission, in *Bridgeport-Spaulding Cmty Schs,* 1986 MERC Lab Op 1024, 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. Since *Bridgeport-Spaulding* did not involve procedural safeguards, the Commission stated in that case that *Hudson* had no bearing on the issues before it.

In the more than twenty-five years since *Bridgeport-Spaulding,* a substantial body of constitutional case law has developed surrounding the procedural safeguards required per *Hudson,* what types of expenditures can be lawfully charged to objecting fee payers (chargeable v non-chargeable expenditures), and the responsibility of a union to provide evidence to support its chargeable expenditures. In addition, in *Communications Workers of America v Beck,* 487 US 735 (1988), the Supreme Court held that a union violates its duty of fair representation under the NLRA by requiring objecting nonmembers to contribute to funds expended by the union on activities unrelated to collective bargaining, contract administration, or grievance adjustment. §8(a)(3) of the National Labor Relations Act (NLRA), 150 USC et seq., like §10(1)(c) of PERA, includes a proviso authorizing employers and labor organizations to enter into agreements requiring employees to pay union dues or fees as a condition of their employment. Since *Beck,* the National Labor Relations Board (NLRB) has issued a series of rulings deciding issues relating to the chargeability of union expenditures and considering whether unions' dues and fee collection procedures adequately protected *Beck* rights. It has held that unions' attempts to

enforce union security clauses without adequate procedural safeguards in place violate their duty of fair representation under the NLRA. For example, *California Saw and Knife Works*, 320 NLRB 224, 233 (1995), the NLRB held that when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union must inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right: (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections.

However, the Commission has not, since *Bridgeport,* addressed the question of what rights nonmember agency fee payers have under PERA with respect to the use of their fees by their bargaining representatives. Because the Commission has never considered these issues in light of *Hudson,* I believe that some discussion is required regarding the role of PERA in protecting *Abood* rights. The first question, of course, is whether the Commission should continue to hold, as it did prior to *Hudson,* that a union's duty of fair representation under §10(3)(a)(i) requires a union to acknowledge the *Abood* rights of agency fee payers. Unlike employees covered by the NLRA, individuals meeting the definition of a public employee under PERA have constitutional rights not to be compelled to contribute to their unions' expenditures for non-collective bargaining purposes. As a result, these individuals can obtain a remedy for violations of these rights by bringing suit in the federal courts. In addition, it is now clear, as it was not when *Garden City, Dearborn Local 20779,* and *Bridgeport-Spaulding*, were decided, that public sector unions are constitutionally required under *Hudson* to provide objecting agency fee payers with a means of challenging the amount of their fee before an impartial decision maker. As a consequence, and many, if not most, public sector unions in Michigan have procedures in place which allow objecting agency fee payers to have their challenges heard by an impartial arbitrator at the unions' expense prior to the objectors' bringing suit in federal court. In addition, many of the questions regarding what expenses are chargeable to objecting nonmember fee payers that were at issue in *Bridgeport-Spaulding* have now been settled by decisions arising under the First Amendment.

I conclude, however, that the Commission should continue to hold that a union's duty of fair representation under PERA encompasses an obligation to protect *Abood* rights. The fact that nonmembers have the right to bring a lawsuit in federal court to enforce their rights not to be compelled to contribute to the noncollective bargaining activities of their bargaining representatives does not guarantee that their rights will be respected. Small unions, in particular, may not have the incentive to put procedures in place to safeguard these rights since they are less likely to be sued than larger labor organizations. More important, however, is the fact that *Abood* rights are graftings on the tree of rights guaranteed by PERA. It is PERA that obligates public sector unions in Michigan to represent nonmembers and members equally in matters of collective bargaining and grievance adjustment and PERA that gives nonmembers the right to demand this representation. It is also PERA that explicitly permits unions to avoid "free riders" by compelling nonmember employees, under threat of discharge, to pay their share of the expenses of collective bargaining and grievance adjustment.

I find, therefore, that the Commission should exercise its jurisdiction to find that a union's failure to implement procedures adequate to safeguard employees' *Abood* rights violates the union's duty of fair representation, and should hold that a union violates §10(3)(b) of PERA if it causes or attempts to cause a public employer to take action against an agency fee payer for failure to pay his or her fee in the absence of these procedural safeguards. However, I 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. *Hudson* clearly requires unions to bear the cost of providing an impartial decision maker to decide challenges lodged by objecting nonmembers compelled to pay an agency fee. If the decision does not comply with constitutional standards, employees can bring a constitutional challenge. See *Bromley v MEA,* 82 F3d 686 (CA 6, 1996). Unlike legislatures in some other states, our Legislature did not amend PERA after *Hudson* to specifically provide that challenges by nonmember public employees to the amount of their agency fees would be heard by a public agency. In the absence of a specific legislative directive, I do not believe that the Commission should take on tasks that can, and should, be handled by an arbitrator.

The second question is whether the Commission, if it finds the duty of fair representation under PERA to encompass a duty to implement procedural safeguards for the protection of *Abood* rights, should pattern these safeguards on those developed by the NLRB, known collectively as "*Beck* rights." Although the Commission is often guided by federal precedent under the NLRA in interpreting PERA, it has held that it is not bound to follow "its every turn and twist." *Northpointe Behavioral Healthcare Systems,* 1997 MERC Lab Op 530; *Marquette Co Health Dep't,* 1993 MERC Lab Op 901. In this case, unions subject to PERA are also subject to a constitutional duty to implement procedural safeguards that meet the standards set out in *Hudson* and its progeny. I conclude that under these circumstances the Commission should look to these standards, as interpreted in the Sixth Circuit Court of Appeals, rather than to standards developed under *Beck.*

The third and fourth questions are what these standards are and whether Respondent failed in its duty to maintain adequate procedural safeguards in this case. As the *Hudson* Court said, at 302, "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities." *Hudson* provides three basic procedural safeguards for the protection of *Abood* rights. First, a union must provide an adequate explanation of the basis for its agency fee. Second, a union must provide a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker. Third, a union must provide an escrow for amounts reasonably in dispute while such challenges are pending.

Under *Hudson,* a union's duty to provide an adequate explanation for the basis for its fee requires it to provide each non-union employee with adequate information, in a timely fashion, to permit the employee to enter an intelligent and informed objection to his service fees if he so desires. *Damiano v Matish,* 830 F 2d 1363, 1370 (CA 6, 1987); *Tierney v City of Toledo,* 824 F2d 1497, 1504 (CA 6, 1987). This includes the amount of the service fee, as well as the method by which that fee was calculated. The union must include information about the union's

expenditures for collective bargaining and contract administration, i.e. information about its chargeable expenditures, as well as information about funds expended for political or ideological purposes. *Hudson,* at 307 n. 18; *Tierney,* at 1504. The union's calculations and disbursements must be verified by an independent auditor. *Hudson,* at 307 n. 18; *Tierney*, at 1504. *Matish*, at 1370. The union must make this information available to each employee, without formal request and within a reasonable period of time, to permit the employee to evaluate the calculation of the fees in order to make a reasonable appraisal of the fee preliminary to exercising the option to enter an objection. *Matish*, at 1370. A union may require nonmembers to renew their objections every year, as long as the union "discloses what it must before objections are required to be made." *Tierney* at 1506.

Smith alleges that in 2010, Respondent failed to provide him with information about the amount of his agency fee and the method by which it was calculated within a reasonable period of time and without his having to request it. The agency fee policy in effect in January 2010 stated that Respondent would provide all known non-member agency fee payers with notice of the amount of the agency fee and how it was determined, including audited financial information, by January 1 of each year or, for non-member agency fee payers who become known to Respondent after January 1, thirty days after they become known. The policy also stated that if the audit had not been completed by January 1, the notice period would be extended until the audit had been completed. On January 1, 2010, Smith was certainly known by Respondent to be a non-member agency fee payer, based on his prior objections. According to the auditor's letter, the audit of Respondent's expenditures for the previous fiscal year ending June 30, 2009 was completed in September 2009. However, Respondent did not send Smith notice of the amount of his agency fee for 2010 and information about how it was calculated until March 22, 2010, after Smith reminded Respondent, by letter dated February 8, 2010, that its agency fee policy required it to provide him with this notice without him having to request it. Respondent, therefore, apparently failed to follow its agency fee policy in this case.

I conclude, however, that Respondent's conduct did not violate *Hudson* standards. The requirement that a union provide information about the calculation of its fee within a reasonable period of time after the commencement of the fee period assumes that the nonmember is being compelled to pay the fee at least until he or she makes an objection. In this case, no agency fees were deducted from Smith's paycheck between January 1 and March 22, 2010. Respondent also made no efforts during that period to enforce the agency shop provision in the contract or otherwise force Smith to pay any portion his fee. I find, therefore, that Respondent's delay in providing Smith with notice in this case did not result in his having to contribute, even temporarily, to its expenditures for non-collective bargaining purposes. I conclude, therefore, that the delay did not violate Respondent's duty of fair representation toward him.

Smith also alleges that Respondent failed to provide him with the opportunity to challenge the amount of his fee before an impartial decision maker. Smith's argument that Respondent failed to comply with *Hudson* standards has two parts. He alleges, first, that Respondent's selection of David Tanzman as the arbitrator to decide his challenges represented the Respondent's unilateral choice. Second, he alleges that he was effectively denied the opportunity to present his challenge because he was not given a hearing or even asked if the record was complete before Tanzman rendered his decision.

In March 2010, when Smith sent Respondent his list of questions/objections to the amount of his 2010 agency fee, Respondent had an agency fee policy which provided that, after receiving a timely objection, the union would file for a hearing of the dispute under the AAA's rules for impartial determination of union fees. Under those rules, AAA would select the arbitrator. The AAA fee alone would have been $500. Respondent argues that it is unreasonable to expect it to pay this fee, plus the costs of arbitration, for one objecting nonmember, especially one who lodges challenges year after year. To save the AAA fee, and because Tanzman had previously heard Smith's challenges and would be able to decide his current challenges expeditiously without a prolonged hearing, Respondent referred the matter again to Tanzman and requested that he assert jurisdiction. Thereafter, in July 2010, Respondent amended its agency fee policy to provide that "the impartial decision maker shall retain jurisdiction for all subsequent challenges made by the same objector(s)."

Under *Hudson*, a union must allow a nonmember to "have his objections addressed in an expeditious, fair and objective manner." *Hudson,* at 307; *Tierney,* at 1503-04. However, in *Hudson*, at 308, n 21, the Supreme Court stated that a fee challenge did not require "a full dress administrative hearing, with evidentiary safeguards," and that "expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decision maker, so long as the arbitrator's selection did not represent the union's unrestricted choice." *Hudson,* at 308, fn 21. The *Hudson* Court concluded that the procedure in that case, which involved the union selecting the arbitrator from a list of arbitrators provided by the State of Illinois, was constitutionally defective. However, I have found no case law suggesting that requiring objectors to have their challenges in successive years heard by the same arbitrator violates *Hudson* standards, providing that the initial selection of that arbitrator comported with the *Hudson* requirement that it not represent the union's unrestricted choice.

I did not select Tanzman in November 2007 to hear Smith's challenges to his 2007 agency fee. However, Smith voluntarily agreed in 2007 to allow Tanzman to decide his challenge to the amount of his fee as part of an agreement to settle his unfair labor practice charge. Tanzman's selection, therefore, was not the result of Respondent's unrestricted choice. At the time Smith entered into this agreement, Respondent's agency fee policy did not state that the arbitrator would retain jurisdiction over subsequent challenges. Smith, therefore, did not know that he was agreeing to the arbitrator who would hear his challenges in subsequent years. As far as I can determine, however, *Hudson* does not require a new selection process for each new challenge. I conclude that Respondent did not violate its duty of fair representation by asking Tanzman to decide Smith's challenges to the amount of his fee in 2010 because Respondent and Smith had mutually agreed to Tanzman's selection in 2007.

Smith also asserts that he was not given an adequate opportunity to present his challenges to Arbitrator Tanzman in 2010. He asserts, first, that Respondent had an obligation to provide him with a hearing. Insofar as I can determine, however, the courts have not held that an oral hearing is necessary to satisfy the *Hudson* requirement that union give the nonmember the opportunity to have his objections addressed in a "fair and objective manner." The AAA's rules for impartial determination of union fees allow the arbitrator to make a decision on documents and without oral hearing if the parties agree, in writing, to waive the hearing or, if the parties

cannot agree, pursuant to a "fair and equitable procedure" as specified by the arbitrator. This suggests that, under the AAA's rules, an arbitrator has the discretion to determine whether under the circumstances a hearing is necessary for the procedure to be fair and equitable. I find that Respondent did not violate its duty of fair representation by failing to provide Smith with an oral hearing on his challenges to the amount of his 2010 agency fee.

Smith also complains that Tanzman did not contact him to ask if the record was complete before making his decision. In April 2010, Respondent sent Tanzman copies of its correspondence with Smith relative to the amount of his 2010 fee. This included correspondence dating back to the previous summer, and Smith's March 29, 2010 in which he set out his challenges to the amount of that fee. It also sent Tanzman the statements of expenditures Respondent was offering to support the amount of the fee. It copied Smith on its correspondence with Tanzman and sent Smith copies of all the documents it sent Tanzman. On June 15, 2010, Respondent sent Tanzman a letter asking him to make a determination on Smith's challenges without an oral hearing. Tanzman issued his decision less than a week later. As Smith points out, Tanzman did not contact him to ask him if the record was complete before issuing his decision or wait to see if Smith would respond to the June 15 letter. The question before me, however, is whether Respondent met its obligation under *Hudson* standards to provide Smith with the opportunity to have his objections addressed in a fair and objective manner. When Tanzman issued his decision, he had before him, in addition to Smith's March 29, 2010 challenges, other letters from Smith questioning Respondent's allocation of chargeable expenditures dating back to the previous July as well as other correspondence between the parties. I conclude that Tanzman's decision to issue his ruling on Smith's challenges within a week after receiving Respondent's June 15 letter did not deprive Smith of a fair decision on these challenges. I find, therefore, that Respondent met its obligation under its duty of fair representation to provide Smith with the opportunity to have his objections addressed in a fair and objective manner by an impartial decision maker.

Smith's third allegation concerns the amendments made to Respondent's written agency fee procedures in July 2010. The procedures were amended to provide: (1) that Respondent provide the accounting of how its agency fee was calculated annually to members and nonmembers "upon request" instead of automatically to all known nonmember fee payers as soon as it becomes available after January 1; (2) that the selection of the arbitrator to hear a challenge be made by Respondent from a list of arbitrators provided by the Commission; (3) that unless the parties agree otherwise, the arbitrator retains jurisdiction for all subsequent challenges made by the same objector; and (4) that no hearing be held on a challenge without the mutual consent of the parties.

As discussed above, under the *Hudson* standards, a union must provide nonmembers with information about the amount of the service fee, as well as the method by which that fee was calculated, without formal request. I find that Respondent's amended policy did not comply with this standard. I also find that Respondent's selection of the arbitrator from a list of arbitrators provided by the Commission did not comply with these standards; in fact, the procedure found defective in *Hudson* itself allowed the union in that case to make the selection from a list of arbitrators provided by a state agency. I conclude, therefore, that Respondent violated its duty of fair representation under PERA by amending its agency procedure to require nonmembers to

make a formal request to receive information about the amount of their service fee and how it was calculated and to provide for the unilateral selection of an arbitrator by Respondent from a list maintained by the Commission. I find, however, that mandating that the arbitrator retain jurisdiction for subsequent challenges by the same objector does not violate the *Hudson* standards, as long as the arbitrator is initially selected by a method which comports with *Hudson.* I also find that Respondent could lawfully provide that no oral hearing be held on a challenge, as long as the alternate procedure used by the arbitrator was not fundamentally unfair. I conclude, therefore, that Respondent did not violate its duty of fair representation by amending its agency fee procedure to provide that the arbitrator retain jurisdiction for subsequent challenges by the same objector or by mandating that no oral hearing be held on a challenge.

As set out above, I conclude that Respondent's duty of fair representation under PERA encompasses the obligation to implement procedural safeguards for the protection of the *Abood* rights of nonmember agency fee payers and that these procedural safeguards must meet the standards set forth in *Hudson*. I conclude that Smith was afforded adequate procedural safeguards for the protection of his *Abood* rights prior to his being required to pay his 2010 agency fee, and I recommend that the Commission dismiss this portion of his charge. However, I conclude that Respondent violated its duty of fair representation by amending its agency fee policy in July 2010 to require nonmembers to make a formal request to receive information about the amount of their service fee and how it was calculated and to provide for the unilateral selection of an arbitrator by Respondent from a list maintained by the Commission. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The Government Employees Labor Council (GELC), its officers and agents, are hereby ordered to:

1. Cease and desist from violating its duty of fair representation under §10(3)(a)(i) of PERA by failing to maintain an internal procedure whereby nonmember agency fee payers can challenge the amount of their agency fee and which:

   a. Provides all nonmembers, in a timely fashion and without their having to request it, information about the amount of their agency fees and the method by which those fees were calculated that was adequate to permit the nonmembers to make an intelligent and informed objection to that fee, and

   b. Provides a method for the selection of an impartial arbitrator to decide challenges made by nonmember fee payers to the amount of their agency fees which does not give the union the right to unilaterally select the arbitrator.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Amend its agency fee procedure to provide that a copy of the accounting used to determine the amount of the agency fee will be made available to all

known non-members within a reasonable time after January 1 of each year, and adhere to the procedure as amended; and

b. Amend its agency fee procedure to provide for some method of selecting an impartial arbitrator to decide challenges made by nonmember fee payers that does not give the union the right to unilaterally select the arbitrator, and adhere to the procedure as amended; and

c. Mail a copy of the attached notice to all members of bargaining units represented by Respondent who are known to be nonmember agency fee payers on the date of this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____