STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB COUNTY,
Public Employer-Respondent,

MERC Case No. C13 D-074
-and- Hearing Docket No. 13-002118

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 893,
Labor Organization-Respondent,

MERC Case No. CU13 D-017
-and- Hearing Docket No.13-002119

JOHN P. GREINER,
An Individual Charging Party.
_____/

APPEARANCES:

McConaghy and Nyovich, PLC, by Timothy McConaghy, for the Public Employer

Shawntane Williams, Staff Counsel, AFSCME Council 25, for the Labor Organization

John P. Greiner, appearing on his own behalf

DECISION AND ORDER

On November 3, 2015, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents, Macomb County (Employer) and AFSCME Council 25 and its affiliated Local 893 (Union), did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that the Charging Party, John P. Greiner, failed to allege facts sufficient to establish a *prima facie* case of discrimination by the Employer. The ALJ also found that the Union did not violate its duty of fair representation under PERA when it refused to arbitrate Charging Party's discharge grievance. The ALJ recommended that the charges against the Employer and the Union be dismissed. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

After receiving an extension of time, Charging Party filed "exceptions" to the ALJ's Decision and Recommended Order on December 30, 2015. Neither Respondent filed a response to Charging Party's exceptions. Although we do not believe that Charging Party's "exceptions" comply with Rule 176(4) of the Commission General Rules, 2002 AACS R 423.176(4), we recognize that Charging Party is an individual not represented by counsel and, in this particular

case, to the extent we are able, we will address Charging Party's "exceptions." As we interpret them, the vast majority of Charging Party's "exceptions" express disagreement with the testimony of Union Staff Representative Paul Long. Charging Party further contends that the ALJ erred by failing to find that filing grievances was one reason for Charging Party's discharge.

We have reviewed the exceptions filed by Charging Party and find them to be without merit.

Factual Summary:

We adopt the facts set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except where necessary. Charging Party Greiner was first employed by Respondent Macomb County in November 2000 as a laborer and was, subsequently, promoted to a heavy truck driver's position. On December 8, 2009, he was operating one of the Employer's trucks and was involved in an accident. As a result of the accident, he was suspended pending an investigation. In lieu of discharge, he and the Union entered into a last chance agreement with the Employer. The last chance agreement included the following language:

> Understanding the severity of an at fault accident on December 8, 2009, and John Greiner's negligence, accident history, and insubordination, the parties to this Agreement agree as follows:
>
> ***
>
> > 3. Any further acts of negligence, insubordination or unsafe activity on John Greiner's part shall be cause for his immediate discharge from employment with the Road Commission of Macomb County. John Greiner and his union agree that no Grievance of any kind will be filed challenging his discharge from employment under the terms of this Last Chance Agreement. The parties agree that the Arbitrator shall be without authority to hear a discharge case if the terms of this Agreement are violated. Further, John Greiner knowingly and willingly waives his right to pursue any form of legal or equitable relief, including any grievance or civil action, if he is discharged from employment pursuant to the terms of this Last Chance Agreement.
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> ***
>
> > 5. The Memorandum of Understanding dated February 3, 2010, is hereby incorporated by reference.

The February 3, 2010 Memorandum of Understanding to which §5 of the last chance agreement refers provided that if Greiner was found not guilty of all charges relating to the accident, he could bring a grievance challenging the last chance agreement. Although Greiner filed a grievance challenging the validity of the last chance agreement and the Union appealed this grievance to arbitration, the arbitrator, in a decision issued on June 28, 2011, denied the

grievance, concluding that the Union did not present a viable challenge to the last chance agreement.

In May 2011, Greiner was assessed discipline on three occasions for allegedly violating the Employer's rules. The Union appealed grievances over these disciplinary actions and, on July 22, 2011, Respondent's personnel director met with Greiner and the Union's chief steward to discuss the grievances. During this meeting, the Union agreed to withdraw Greiner's grievances in return for removal of the discipline from his record.

On June 14, 2012, Greiner was given a disciplinary suspension for unsatisfactory work performance/inability to perform his work duties. Although Greiner filed a grievance over this suspension, the Employer denied the grievance, and the Union refused to arbitrate it.

On July 17, 2012, Greiner was issued a three-day suspension for failure to perform his job duties. Greiner also filed a grievance over this suspension but the Union refused to arbitrate it.

On August 20, Greiner was issued a 10-day suspension. The "Disciplinary Action Form" furnished to Greiner by the Employer in connection with this suspension stated:

> On July 30, 2012, John was deliberately inefficient and incompetent in performing the most basic tasks of his classification. Throughout the day he pretended to not know what his everyday duties were and acted as if it was his first day on the job. John was unable to place the post driver on post, assemble signs, lift posts or stubs and get in and out of bucket in a competent manner.

Greiner was further warned that any further violations of the Employer's rules would result in more severe discipline up to termination. Greiner filed a grievance challenging this 10-day suspension on August 20, 2012. Although the Union appealed this grievance, the Employer denied it on October 9, 2011, and the Union subsequently refused to arbitrate it. In explaining its refusal to arbitrate the grievance, the Union sent a letter to Greiner, in which it stated that he was given a 10-day suspension, and that the Employer alleged that the grievant was deliberately inefficient and incompetent in the performance of his duties. The letter also stated that the grievance file provided no evidence to refute the Employer's allegation and that the grievant had been issued discipline for similar behavior in the past.

On October 11, 2012, Greiner was charged with insubordination and poor work performance in connection with incidents that occurred on September 26 and September 27. According to the Employer, on the morning of September 26, 2012, Greiner was argumentative and disruptive after being directed by his project leader on where to stand while flagging on a guardrail crew and was repeatedly unresponsive on the two-way radio while flagging later that day. The Employer further alleged that, on the morning of September 27, 2012, Greiner refused his project leader's directive to help lift a guardrail onto a trailer. Greiner was informed that he

was on administrative leave pending investigation of the above incidents and was also notified that a *Loudermill* hearing on the charges was scheduled for October 19, 2012.[1]

The *Loudermill* hearing was held as scheduled on October 19, and AFSCME Staff Representative Paul Long was present as Greiner's union representative. Although Long requested that the hearing be continued on another day so that Greiner and the Union could prepare a defense and bring in witnesses, the Employer ultimately denied Long's request.

On November 7, 2012, Greiner was discharged. The discharge letter stated that Greiner continued to be insubordinate and to demonstrate unsatisfactory job performance, as evidenced by recurrent carelessness and negligence in performing his daily functions. On November 14, 2012, Greiner filed a grievance over his termination.

On December 19, 2012, the Union notified Greiner that it would not arbitrate his termination grievance. On January 8, 2013, the Union again notified Greiner that it would not arbitrate his termination grievance. The January 8, 2013, letter stated that the Union's panel had reviewed the file and the additional evidence submitted by Greiner and that it was standing by its December 19, 2012 rejection. The letter also stated:

> The Panel finds a lack of evidence with which to refute the Employer's allegations and their application of progressive discipline. This is especially true when the "last chance agreement" was signed on February 3, 2010.

The Union continued to reject this grievance for arbitration despite Greiner's requests for reconsideration.

On April 30, 2013, Greiner filed the instant charge against the Union alleging that the Union acted in bad faith and in an arbitrary manner. Greiner argued that on or around December 19, 2012, the Union notified him that it would not arbitrate his termination grievance and that the Union continued to reject this grievance for arbitration after Greiner appealed its decision not to arbitrate. Greiner alleged that the Union's refusal to arbitrate his grievance violated its duty of fair representation, because the decision was made in bad faith. He also alleged that the Union's decision not to arbitrate his termination grievance was arbitrary.

On April 30, 2013, Greiner also filed a charge against the Employer alleging that his discharge violated §10(1)(a) and (c) of PERA because the Employer lacked good cause for terminating him.

On March 12, 2014, ALJ Stern issued an interim order in which she concluded that Greiner's charge against the Employer should be summarily dismissed because: (1) Greiner had neither established a *prima facie* case that activities protected by PERA were a motivating cause

[1] In *Cleveland Bd of Ed v Loudermill*, 105 S Ct 1487 (1985), the Supreme Court held that public employees who possess a property right in continued employment are entitled, as a constitutional right, to due process before being terminated. According to the Court, due process in this situation requires that the employer provide the employee, before termination, with notice and an explanation of the allegations and an opportunity to respond either in writing or in person.

of his termination, nor had he given any indication that he would be able to do so in an evidentiary hearing; and (2) other claims made by Greiner in his charge did not state claims upon which relief could be granted under PERA. In the same interim order, the ALJ scheduled an evidentiary hearing on Greiner's charge against the Union and an evidentiary hearing on this charge was held on May 19, 2014.

On November 3, 2015, the ALJ recommended that the charges against the Employer and the Union both be dismissed.

Discussion and Conclusions of Law:

The Charge Against the Union

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. To this end, the union is not required to follow the dictates of any individual employee, but rather it may investigate and handle the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. Poor judgment, or ordinary negligence, on the union's part, is not sufficient to support a claim of unfair representation. *Goolsby* at 672; *Whitten v Anchor Motor Freight, Inc*, 521 F 2nd 1335 (CA 6 1975). See also *Detroit Fed of Teachers*, 21 MPER 5 (2008) (no exceptions); *Wayne Co Cmty College*, 19 MPER 25 (2006) (no exceptions); *Wayne Co Sheriff Dept* 1998 MERC Lab Op 101 (no exceptions).

The Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. A union's decision on how to proceed is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35. The mere fact that a member is dissatisfied with their union's efforts or ultimate decision, is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131; *Wayne Co DPW*, 1994 MERC Lab Op 855. To prevail on a claim of unfair representation, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993).

The majority of Charging Party's "exceptions," as we read them, express disagreement with the testimony of Union Staff Representative Paul Long.

Although Charging Party alleges that some of Union Representative Long's testimony was untrue, it is not clear what Charging Party contends Long lied about or how this allegedly false testimony was material to the outcome of the case. As noted by the ALJ, Greiner had the opportunity, after he was terminated, to provide the Union with evidence contesting the Employer's position that he was guilty of misconduct on September 26 and 27, 2012. The Union could have used this evidence to argue, in the grievance procedure, that Greiner should not have been discharged. However, Greiner failed to provide the Union with such evidence. Under such circumstances, §3 of the last chance agreement prohibited the Union from arbitrating Greiner's discharge grievance. Contrary to Charging Party's contention, the Union kept fighting for him until it could do no more. Consequently, the ALJ correctly concluded that the Union made a reasoned, rationale decision that it should not attempt to arbitrate Greiner's discharge grievance. The Union was, therefore, not guilty of arbitrary conduct or of acting in bad faith when it refused to arbitrate this grievance.

The Charge Against the Employer

PERA does not prohibit all types of discrimination or unfair treatment; nor does the Act provide an independent cause of action for an employer's breach of the collective bargaining agreement. Rather, the Commission's jurisdiction with respect to claims brought by individual charging parties against public employers is limited to determining whether the employer interfered with, restrained and/or coerced an employee with respect to his or her right to engage in union or other protected activities under § 10(1)(a) or discriminated against the employee under § 10(1)(c).

In order to establish a *prima facie* case of discrimination under § 10(1)(c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *NLRB v Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). Ultimately, however, the charging party bears the burden of proof. See *Waterford Sch Dist*, 19 MPER 60 (2006); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

In the present case, although Greiner engaged in protected concerted activity when he filed and pursued a number of grievances under the collective bargaining agreement between December 2010 and November 2012, Greiner failed to establish Employer hostility toward this activity. As noted by the ALJ, Greiner failed to even allege, in his charge or the lengthy narrative he submitted in support of his charge, that any representative of the Employer ever explicitly expressed hostility toward his grievances. Consequently, the ALJ properly concluded that Greiner failed to allege facts sufficient to establish a *prima facie* case that his concerted protected activities were a motivating cause of his termination. On this basis, the ALJ correctly

held that his charge against the Employer should be dismissed. Notwithstanding this, even if Greiner could prove Employer hostility toward any protected activities in which he engaged, the record establishes that his discharge was not a result of antiunion animus but a result of his violation of the terms of a last chance agreement.

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

ORDER

The unfair labor practice charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 25, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MACOMB COUNTY,
Public Employer-Respondent in Case No. C13 D-074/Docket No. 13-002118-MERC,

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 893,
Labor Organization-Respondent in Case No. CU13 D-017/Docket No.13-002119-MERC,

-and-

JOHN P. GREINER,
An Individual-Charging Party.
_____/

APPEARANCES:

McConaghy and Nyovich, P.L.C, by Timothy McConaghy, for the Public Employer

Shawntane Williams, Staff Counsel, AFSCME Council 25, for the Labor Organization

John P. Greiner, appearing for himself

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On April 30, 2013, John P. Greiner filed the above unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against his former employer Macomb County (the Employer), and his collective bargaining representative, AFSCME Council 25 and its affiliated Local 893 (the Union), pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charges were consolidated and assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

Based upon the entire record, including facts alleged by Greiner in the charge and a supplemental pleading he filed on August 13, 2013, testimony and exhibits presented at the hearing, and the post-hearing briefs filed by both parties on October 21, 2014, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges and Procedural History:

The Charge Against the Employer

Greiner was discharged by the Employer on November 7, 2012. The stated grounds were insubordination and unsatisfactory work performance. Although the incidents allegedly precipitating his discharge occurred on September 26 and 27, 2012, his termination letter cited his "recurrent negligence and carelessness in performing [his] daily functions" and his prior disciplinary record. In his April 30, 2013, charge, Greiner alleged that his discharge violated §10(1)(a) and (c) of PERA because the Employer lacked good cause for terminating him. Greiner did not allege in his original charge that he had engaged in any union or other activity protected by §9 of PERA, or that there was a connection between his discharge and any activity protected by the Act. On May 7, 2013, pursuant to my authority under Rule 165 of the Commission's General Rules, 2002 AACS R 423.165, I issued an order directing Greiner to show cause why this charge should not be dismissed for failure to state a claim upon which relief could be granted under PERA. Greiner filed a timely response to this order on August 14, 2013. Greiner's response included a lengthy statement of facts and a clarification of his claims against the Employer.

Greiner's discharge in November 2012 followed his receipt of a two day suspension in June 2012, a three day suspension in July 2012, and a ten day suspension in August 2012. These disciplinary actions were issued to Greiner by his immediate supervisor, Richard Sabaugh. Greiner alleges that both his termination and the disciplinary actions that preceded it constituted unlawful retaliation by Sabaugh because Greiner had filed grievances over, and made complaints about, Sabaugh's conduct. Greiner also asserts that Sabaugh, and possibly Sabaugh's supervisors, wanted Greiner discharged because they feared that Greiner would expose their participation in overtime fraud taking place within their department.

In addition, Greiner alleges that his discharge violated §10(1)(a) and (c) of PERA because he was terminated for asserting his right to be represented by the Union. As set out below, the Employer conducted a so-called *Loudermill* pre-termination hearing before Greiner was discharged.[2] During the *Loudermill* hearing, the Union asked that it be continued to another day so that Greiner and the Union could prepare a defense and bring in witnesses to establish that Greiner was not guilty of the acts of which he was accused. However, despite Greiner's demand that it do so, the Union did not renew its request after the day of the hearing. The hearing was not continued, and Greiner was terminated. Greiner asserts that the Employer would not have terminated him had Greiner not insisted that the Union demand that a second day be scheduled for the *Loudermill* hearing.

The Charge Against the Union

Greiner's April 30, 2013, charge against the Union alleged that Union acted in bad faith and in an arbitrary manner by "support[ing] the employer by allowing the employer to create a list, or group of, fictions and unchallenged and unsubstantiated disciplinary charges against me that [the Employer] presented as justifiable causes to terminate my employment."

[2] See *Cleveland Bd of Ed v Loudermill*, 105 S Ct 1487 (1985).

The only specific act by a Union representative mentioned in Greiner's charge was the attendance by Union representatives at the *Loudermill* pre-termination hearing mentioned above, and Greiner did not explain what the Union allegedly did or failed to do at this hearing that breached its duty of fair representation. In an order to Greiner to show cause why his charge against the Union should not be dismissed issued on May 7, 2013, I pointed out that Rule 151(2)(c) of the Commission General Rules, 2002 AACS R 423.151(2)(c), requires an unfair labor practice charge to include a clear and complete statement of the facts which allege a violation of PERA, including the date of occurrence of each particular act. I stated in my order that Greiner's charge against the Union, as filed, did not comply with Rule 151(2)(c) and did not allege a factually supported claim against the Union upon which relief could be granted under PERA.

In his August 14, 2013, response to my order to show cause, Greiner provided additional facts with respect to his claim against the Union. On August 19, 2013, I directed the Union to submit a position statement in response to Greiner's allegations. On September 13, 2013, the Union filed a motion for summary disposition. On October 23, 2013, Greiner filed a response to that motion.

In his charge, as clarified, Greiner asserts that on or around December 19, 2012, the Union notified him that it would not arbitrate his termination grievance. The Union continued to reject this grievance for arbitration after Greiner appealed its decision not to arbitrate. Greiner alleges that the Union's refusal to arbitrate his grievance violated its duty of fair representation because that decision was made in bad faith. He asserts that the Union, like Sabaugh, wanted him terminated because it feared that if he remained employed he would expose the overtime fraud involving the Union's members as well as the Employer's supervisors. He also alleges that the Union's decision not to arbitrate his termination grievance was arbitrary because: (1) the Union failed to take account of the fact that Greiner had grieved his prior discipline, including the 10 day suspension issued to him on August 20, 2012, and that the Employer lacked just cause for these disciplinary actions; (2) the Union improperly relied on a last chance agreement signed by Greiner in 2010 and ignored an arbitration decision interpreting that agreement; and (3) the Union failed to give Greiner the opportunity to demonstrate that he was not guilty of the acts which the Employer cited as the basis for his discharge. Finally, Greiner alleges that the Union violated its duty of fair representation by failing to demand that the Employer provide him with the *Loudermill* hearing to which he was entitled before he was terminated, i.e., failed to insist that Greiner's *Loudermill* hearing be continued so that Greiner would have the opportunity to present evidence that he was not guilty of the actions of which he was accused.

On March 12, 2014, I issued an interim order in which I concluded that Greiner's charge against the Employer should be summarily dismissed because: (1) Greiner had neither established a *prima facie* case that activities protected by PERA were a motivating cause of his termination nor given any indication that he would be able to do so in an evidentiary hearing; and (2) other claims made by Greiner in his charge did not state claims upon which relief could be granted under PERA. In the same interim order, I denied the Union's motion and scheduled an evidentiary hearing on Greiner's charge against the Union. An evidentiary hearing on Greiner's charge against the Union was held on May 19, 2014.

Both Greiner and the Union presented evidence at the hearing about Greiner's discharge and the circumstances leading to it, as well as the Union's handling of Greiner's grievances.

At the hearing, Greiner was represented by counsel. After the hearing, Greiner's attorney filed a motion to withdraw as Greiner's counsel. On August 22, 2014, I granted his counsel's motion. On October 21, 2014, Greiner filed a brief on his own behalf.

Findings of Fact:

Background Facts

Greiner was hired by the Employer in November 2000 as a laborer. He was later promoted to maintenance leader in the Highway Maintenance Department and, in May 2007, promoted again to the position of heavy truck driver in that department. On December 8, 2009, he was involved in an accident in his truck. As a result of that accident, he was suspended by the Employer pending an investigation. In February 2010, under threat of termination, he signed a last chance agreement to which the Employer and the Union were also parties. The last chance agreement included the following language:

> Understanding the severity of an at fault accident on December 8, 2009, and John Greiner's negligence, accident history, and insubordination, the parties to this Agreement agree as follows:
>
> 1. The employment of John Greiner with the Road Commission of Macomb County shall be continued as a Highway Maintenance Person in a department(s) to be determined by the Road Commission for the remainder of his employment.
>
> 2. As a condition of his continued employment with the Road Commission of Macomb County, John Greiner shall accept a 20 day unpaid disciplinary layoff beginning on the date this Agreement is signed by all parties.
>
> 3. *Any further acts of negligence, insubordination or unsafe activity on John Greiner's part shall be cause for his immediate discharge from employment with the Road Commission of Macomb County. John Greiner and his union agree that no Grievance of any kind will be filed challenging his discharge from employment under the terms of this Last Chance Agreement. The parties agree that the Arbitrator shall be without authority to hear a discharge case if the terms of this Agreement are violated. Further, John Greiner knowingly and willingly waives his right to pursue any form of legal or equitable relief, including any grievance or civil action, if he is discharged from employment pursuant to the terms of this Last Chance Agreement.* [Emphasis added]

> 4. For the balance of his employment with the Macomb County Commission, John Greiner will not be permitted to operate a Road Commission vehicle or equipment of any type.
>
> 5. The Memorandum of Understanding dated February 3, 2010, is hereby incorporated by reference.

The February 3, 2010, Memorandum of Understanding provided, among other terms, that after serving his disciplinary suspension Greiner would return to work on March 3, 2010, as a highway maintenance person and be assigned to the sign division of the Highway Maintenance Department. The Memorandum of Understanding also stated that if Greiner was found not guilty of all charges relating to the accident, he could bring a grievance challenging the last chance agreement.

Greiner was issued two driving citations in connection with the accident and challenged both in court. He was found responsible for driving an overweight vehicle and for speeding; the original charge of disregarding a traffic control device was dropped. On April 22, 2010, Greiner filed a grievance questioning the validity and enforceability of the last chance agreement. The Union agreed to arbitrate this grievance. The Employer objected, arguing that since Greiner had not been "found not guilty of all charges," the grievance was not arbitrable under the language of the last chance agreement. Both parties presented evidence to the arbitrator about the December 8, 2009 accident. In a decision issued on June 28, 2011, the arbitrator dismissed the Union's challenge to the last chance agreement. He concluded that Greiner had failed to stop at a red light and had caused a serious accident. He also noted that Greiner's disciplinary record at the time of the accident included evidence of previous incidents where his driving performance had fallen short, and that Greiner's driving privileges had been suspended and reinstated prior to the accident. He found that there was just cause for the 20 day suspension, for disqualifying Greiner from operating an Employer vehicle or equipment in the future, and for subjecting Greiner to a last chance agreement. Although the arbitrator refused to declare the last chance agreement void, he stated that, as he interpreted it, the sentence in the last chance agreement, "The parties agree that the arbitrator shall be without authority to hear a discharge case if the terms of this Agreement are violated," did not prohibit an arbitrator from determining whether Greiner engaged in the acts of negligence, insubordination or unsafe activity of which he was accused. That is, in his view, the Union was not prohibited by the last chance agreement from bringing a grievance challenging the factual basis for the Employer's claims of misconduct. However, he also stated that the application of this language, as well as whether the last chance agreement could go on indefinitely, "must be left for a determination if and when action under the Last Chance Agreement is implemented."

Greiner suffered lingering physical problems as a result of the December 2009 accident. On March 3, 2010, Greiner returned to work as a laborer in the sign shop, but immediately experienced discomfort doing the work. Greiner's physician ordered physical therapy and placed him on work restrictions. Beginning on March 23, 2010, Greiner was off work because the Employer had no light duty jobs for him within his restrictions. Greiner filed a claim for worker's compensation benefits and underwent a series of tests and physical therapy. On June 1, 2010, Greiner was examined by the Employer's worker's compensation doctor. On June 3,

Greiner was informed by the Employer that he had been cleared to return to work without restrictions, and was directed to report to the sign shop. However, Greiner did not return to work until about July 28, 2010. When he returned, Greiner still had the same restrictions from his doctor regarding lifting and prolonged standing that he had received in March 2010. The Employer refused to officially honor thee restrictions. However, according to Greiner, he was able to work because his co-workers did tasks that were too difficult for him or assisted him when he needed help.

Greiner Files His First Grievance Against Sabaugh and Events in 2011

Richard Sabaugh was Greiner's immediate supervisor in the sign shop. On December 16, 2010, Sabaugh instructed Greiner not to speak to the department's payroll clerk after Greiner had complained to the clerk that he had been charged sick time for time spent reviewing his personnel file. On December 28, 2010, Greiner filed a grievance over this directive. The grievance was settled with an agreement that Greiner could ask the clerk for the amount of his accrued leave time.

On April 20, 2011, Greiner filed a grievance over being bypassed by Sabaugh for overtime. Under Article 7.3 of the collective bargaining agreement between the Union and Employer, the Employer is obligated to assign a steward or alternate steward to work overtime whenever overtime is assigned as long as a steward or alternate steward can perform the work. According to the grievance, Steve Morisette, then the Union steward in the sign shop and an employee in the "B-operator," classification, accepted and was allowed to work overtime as a laborer, while another B-operator worked overtime as a B-operator. "B-operator" is a higher classification than laborer. Had the overtime worked by Morisette been assigned to an employee with a laborer classification, Greiner would have received it. When Greiner discussed this with Morisette, Morisette explained that when both laborers and B-operators were assigned overtime, the practice in the sign shop was for him to alternate between accepting overtime as a laborer and accepting it as a B-operator so that the other B-operators would not be deprived of overtime opportunities. Greiner, however, contended that the practice was contrary to the collective bargaining agreement and told Morisette that he should simply decline some of the overtime. Morisette told Greiner, "You are making waves."

According to Greiner, after Sabaugh discovered that Greiner was planning to file a grievance, Sabaugh began giving Greiner direct orders to do work that was outside the work restrictions issued by his doctor, including ordering Greiner to stand for prolonged periods to flag traffic and refusing to allow Greiner to use a stool to climb in and out of the sign truck. Greiner complained to Sabaugh's supervisors about these directives, but the supervisors merely instructed Greiner to file a harassment complaint with the Employer's Human Resources Department. Greiner decided he did not want to file a harassment complaint at that time. According to Greiner, after he spoke to Sabaugh's supervisors, Sabaugh assigned him even more frequently to work outside his restrictions, including performing custodial duties in the sign shop and making and lifting sandbags.

On April 28, 2011, Greiner was ordered by Sabaugh to fill sandbags. Although Greiner had already arranged to leave early that day, he decided to leave two hours earlier to avoid this

assignment which he believed would aggravate his back and knee problems. Sabaugh told him to fill the sandbags the following day. When Greiner came to work on April 29, Sabaugh reminded him again about the sandbags, and Greiner said that he did not feel well and was going home. On April 29, 2011, Greiner filed a grievance alleging that Sabaugh was violating the contract by assigning him custodial work outside his classification, another grievance alleging that Sabaugh was assigning employees with higher classifications to do laborers work so that Sabaugh could order Greiner to do the custodial work, and a third grievance protesting that Sabaugh had failed to follow the correct procedure when telephoning him for overtime.

On or about April 29, 2011, Greiner visited his doctor. When he explained to the doctor the work he had been assigned to do, he was told by the doctor to take a week off work. Greiner asked the Employer's Human Resources Department about receiving worker's compensation leave for this time, but the Employer told him that because the Employer's doctor had released him to work without restrictions the previous year, he would have to use sick time for his absence.

On May 2, 2011, Sabaugh gave Greiner a verbal warning and a written reprimand for misusing sick time on April 28 and April 29 and refusing Sabaugh's direct order to fill the sandbags. On May 5, 2011, Sabaugh gave Greiner a one day suspension for failing to follow directions given to him by his crew leader on that date and for failing to do his morning duties. Greiner grieved these three disciplinary actions. In addition, on May 6, he filed a grievance over Sabaugh's refusal to permit him to discuss a grievance with his steward except at the end of the shift. On May 7, 2011, Greiner filed a grievance over Sabaugh's refusal to allow him to select a job assignment based on seniority.

On May 12, 2011, Greiner received a written reprimand and a one day suspension. The discipline alleged that on April 27, 2011, Greiner had failed to follow proper safety procedures while removing vines from a fence and had violated procedure by not completing an accident report for the injury he suffered while cutting these vines. Greiner also grieved these disciplines.

On May 18, 2011, Greiner had a meeting with AFSCME Local 893 President Cheryl Carroll, Local 893 Vice President Andre Guibalt, and AFSCME Council 25 Staff Representative Terry Campbell to discuss the disciplinary actions he had received over the previous month and the grievances he had filed. At this meeting, Greiner gave the Union representatives a copy of a harassment complaint he had prepared against Sabaugh and told them that he had been afraid to submit it to the Human Resources Department for fear of retaliation. Greiner also told the three Union representatives that while working overtime in the sign shop he had observed employees punching the time cards of employees who were not present. He said that he believed that this overtime fraud had occurred on other occasions.

On July 22, 2011, Employer personnel director Bo Kirk, Sabaugh, Carroll, Union chief steward Steve Lorway, and Greiner met to discuss Greiner's disciplinary actions and grievances. Over Greiner's strong objection, the Union agreed to withdraw all Greiner's outstanding grievances in return for removal of all the discipline in his file.

According to Greiner, Sabaugh continued to assign Greiner work that was not within his doctor's restrictions while assigning work that Greiner could have done to younger and fitter co-workers. It appears that Greiner performed the duties assigned to him. In any case, Greiner was not disciplined again until June 2012.

Greiner's June 2012 Suspension and other Events in Early 2012

On March 29, 2012, Sabaugh called Greiner into his office and asked him how he was getting along with his co-workers. At this time, Greiner was regularly assigned to a sign truck. During this meeting, Greiner explained to Sabaugh in detail how he and his co-workers were performing the sign truck work. According to Greiner, Sabaugh later used this information to restructure the job so that Greiner could not perform it.

On April 19, 2012, Greiner got into a dispute with a co-worker during which the co-worker threatened to "break [Greiner's] neck." Sabaugh, over Greiner's objection, refused to report this incident to the Employer's Human Resources Department as a violation of the Employer's harassment policy.

On April 28, 2012, Greiner accepted and worked some overtime. Greiner believes that this upset his co-workers because his presence on the job meant that all the employees assigned overtime had to actually show up to work. After this date, according to Greiner, some co-workers who had previously helped Greiner perform work that he could not physically handle refused to assist him.

On May 10, 2012, Greiner was ordered by his crew leader to lift a guard rail without assistance. The crew leader told him that if he could not perform this task he should punch out and go home. Previously, according to Greiner, another employee had helped him lift guardrails. Later that day, Greiner and his Union stewards met with Sabaugh to discuss the crew leader's order. Greiner pointed to a provision in the Employer's safety manual that stated that an employee should ask for help when needed and use mechanical assistance when it was available. Sabaugh, however, insisted that Greiner could not return to work until he could lift the guard rail alone. He told Greiner and the stewards that if Greiner could not perform this task by himself he would have to take disability or worker's compensation leave.

The next day, May 11, Greiner and the driver of his sign truck got into an argument, and, as a result, the driver drove the truck back to the shop. Sabaugh told Greiner that the driver was the boss. He also told Greiner to remove all his personal belongings from the truck except for his lunch box. He then instructed the two men to go back to work. When Greiner asked for a union representative, Sabaugh told him that he could have a meeting with a Union representative at the end of the day, but that he had to go back to work. When Greiner did not follow Sabaugh's directive, Sabaugh began shouting. Greiner punched out and prepared to go home but, on the advice of the Union steward, returned to work. Later that same week, there was a disagreement between Sabaugh and Greiner and his union steward over whether Greiner should be allowed to use a hand truck to move a propane tank. Greiner and the steward argued that Greiner should be

allowed to use the hand truck, but Sabaugh insisted that everyone in the sign shop should be able to lift 50 pounds unassisted.

On May 19, 2012, Greiner saw road maintenance crews performing work on a Saturday. Either by questioning employees at the site or talking to Sabaugh himself, Greiner learned that Sabaugh had come out to remove an old electrical pole and install the new pole himself rather than calling in unit employees on overtime. Had Sabaugh called in a crew, Greiner would have been the laborer assigned the overtime. Greiner filed a grievance over the incident. Greiner asserts that after he filed the grievance, Sabaugh began telling Greiner's co-workers not to help him with physical tasks that were too difficult for him to do.

In late May 2012, Sabaugh created a form entitled "Job Expectations for Highway Maintenance Person Classification," and on May 31 instructed the employees under his supervision to sign it. Greiner refused to sign the form without discussing it with a Union representative. It is not clear whether Greiner ever signed this form or, if not, if he suffered repercussions as a result. Later that day, Sabaugh told Greiner not to take rain gear with him in the sign truck, something that Greiner had been accustomed to doing.

In late May and early June, 2012, according to Greiner, there were multiple occasions when Greiner's co-workers refused to help him lift heavy items, pressed him to request a transfer to another department, and/or made fun of him because he had difficulty doing the work he was assigned.

On June 13, 2012, Greiner was asked by his sign truck driver to pull a post out of the ground but was unable to do so. He was then sent home for the remainder of the day without pay. On June 14, 2012, he was given a two-day disciplinary suspension for unsatisfactory work performance/inability to perform his work duties. In an employee meeting the same day, Sabaugh announced that employees would no longer be allowed to use hydraulic post pullers to pull posts from holes.

On June 22, 2012, Greiner filed a grievance over his June 14, 2012, suspension. In his grievance, Greiner stated that he was "currently working against medical advice." He also noted the weight and length of the post and the fact that it was stuck in clay and mud. The Employer denied the grievance, stating that Greiner had been insubordinate by disobeying a direct order to perform his duties. The Union demanded arbitration of this grievance on August 13, 2012, and the grievance was sent to the Union's arbitration review panel to decide whether to arbitrate it. On October 26, 2012, the panel sent Greiner a letter stating that the grievance would not be arbitrated. The letter stated, "Employees are expected to be able to perform the duties of their position unless they have provided the Employer with specific medical restrictions which the Employer has accepted." The letter stated that Greiner appeared to be claiming some medical restriction but had provided no evidence of a restriction. Greiner appealed the panel's decision and apparently sent the panel a letter from his doctor. On March 28, 2013, the panel sent Greiner a letter noting that according to the information Greiner had provided, he was to return to his regular duties without restrictions on May 27, 2011. The panel noted that Greiner had provided no information that he had medical restrictions in June 2012.

Greiner appealed this decision as well. On May 17, 2013, the panel sent him a letter stating that the appeal contained no new evidence and that the file would be closed.

Greiner's July 2012 Suspension and Other Events in July 2012

On July 2, 2012, Greiner was notified by the Employer that he had been charged with failure to perform his job duties and insubordination based on three incidents occurring in June 2012. One of these incidents occurred on June 20, 2012. Greiner was told by Sabaugh to lift and replace a water jug for the sign shop's water cooler. Greiner asked a co-worker, and then Sabaugh, to help him. Sabaugh refused to help and also ordered the other employee not to help him. Greiner refused to lift the jug by himself, asserting that lifting the jug was outside his medical restrictions and that he had aggravated his knee injury when lifting it on a previous occasion. The July 2, 2012, charges also accused Greiner of refusing to assist another employee with work on one occasion and of performing work in an unsafe manner on another occasion. The record does not include any details of these two incidents; Greiner asserts that neither took place. On July 12, 2012, the Employer conducted a *Loudermill* hearing on the July 2 charges.[3] Greiner asserts that this hearing was flawed because he was not provided with the Employer's evidence to support the charges before the hearing so that he could present rebuttal evidence.

On July 16, 2012, Greiner was on a job where he was required to lift a heavy object. When Greiner asked a co-worker for help, the co-worker told him that he had been told not to help him. Greiner had several other conversations during July in which co-workers told him that Sabaugh and/or other employees had told them not to help Greiner lift or carry.

On July 17, 2012, Greiner was issued a three day suspension on the July 2 charges. During the meeting held with Greiner and his stewards to announce the suspension, Sabaugh told Greiner that he was making Greiner do his job. Sabaugh also said to Greiner and his stewards that the Employer's Human Resources Department was prepared to terminate Greiner. On July 24, 2012, Greiner filed a grievance over the three day suspension. In this grievance, Greiner asserted that by refusing to help him or allow another employee to help, Sabaugh was violating the Employer's safety rules. He also alleged that Sabaugh was discriminating against him because other employees had restrictions that were honored or were given light-duty assignments.

The Employer denied the grievance and the Union made a written demand to arbitrate it on August 13, 2012. The grievance was then sent to the Union's arbitration review panel for a decision on whether to arbitrate. On October 19, 2012, the panel sent Greiner a letter rejecting the grievance for arbitration. The letter stated that the file showed that the grievant had been given a direct order to change the water bottle on the water cooler, that there was nothing

[3] In *Loudermill,* 105 S Ct 1487 (1985), the Supreme Court held that public employees who possess a property right in continued employment are entitled, as a constitutional right, to due process before being terminated. According to the Court, due process in this situation requires that the employer provide the employee, before termination, notice and an explanation of the allegations and an opportunity to respond either in writing or in person. *Loudermill* requirements have not been incorporated into the Respondents' collective bargaining agreement, i.e., the collective bargaining agreement does not require the Employer to provide an employee with any type of notice or opportunity to respond prior to the Employer's making a decision to discipline or discharge. The contract, at Article 15, does allow either the employee or Union to file a grievance over discharge or discipline they consider improper.

showing that the weight of the water bottle was beyond the weight limit set for employees to be able to lift, and that the file showed no other instances of employees requiring help to perform this task. Greiner appealed. The panel sent him a letter on May 17, 2013, rejecting his appeal on the basis that he had provided no new evidence and stating that the grievance file would be closed.

On July 30, 2012, an incident occurred between Greiner and a co-worker which resulted in both filing complaints of harassment against the other with the Employer's Human Resources department. The co-worker later told Greiner that he was willing to drop his harassment charges if Greiner dropped his. The co-worker also offered to meet privately with a representative from the Human Resources Department and tell him or her that Sabaugh had told employees not to help Greiner when he asked.

Greiner's August 2012 Suspension, Harassment Complaint, and Termination

On August 5, 2012, Greiner filed a formal harassment complaint against Sabaugh with the Employer's Human Resources Department. In response to the question of what action or change he was seeking, Greiner wrote:

> Present supervisor Sabaugh with a last chance letter. Offer him a laborers job for life or the extent of his remaining time to work at the Department or the New Haven Service Center, eliminating the risk that he will ever have the chance to harass and abuse employees due to his authority as a supervisor.
>
> Also, allow John Greiner the opportunity to examine every overtime call out starting with April 20, 2011, the date of the first grievance that I filed for the misappropriation of overtime by Supervisor Sabaugh, and pay Greiner the wages he would have earned had he been given the chance to work.

On August 7, 2012, Greiner was notified by the Employer that he was being charged with insubordination and poor job performance for conduct that occurred on July 30. The Employer held a *Loudermill* hearing on August 14, 2012. At some point, either at the *Loudermill* or after, the Employer disclosed that the accusations had been made by a co-worker, Phil Pullizi. Pulizzi is a B-operator and is also the Union steward.

On August 17, 2012, Greiner filed a grievance alleging that Sabaugh was harassing him, and violating the Employer's safety rules, by not allowing him to use mechanical devices to assist him in performing his work.

On August 20, Greiner was issued a 10 day suspension. The suspension stated:

> On July 30, 2012, John was deliberately inefficient and incompetent in performing the most basic tasks of his classification. Throughout the day he pretended to not know what his everyday duties were and acted as if it was his first day on the job. John was unable to place the post driver on post, assemble signs, lift posts or stubs and get in and out of bucket in a competent manner.

The suspension said that Greiner was receiving a 10 day suspension because "this had been a recurring problem within the past two years," and that any further violation would result in more severe discipline up to termination.

Greiner filed a grievance challenging his 10 day suspension on August 20, 2012. The grievance asserted that Sabaugh had deliberately made false accusations against him. In addition, Greiner later provided the Union with a "grievance fact sheet," in which Greiner stated that he believed that Pulizzi had been instructed by Sabaugh to make a false accusation against him. The "grievance fact sheet," a Union form, instructs the grievant to list the names and titles of anyone involved, including witnesses. Greiner listed Pulizzi and another co-worker, Marty Balinski, as witnesses on the fact sheet. In the grievance and on the fact sheet, Greiner denied that he was guilty of any misconduct and accused Sabaugh of creating a false record, i.e., disciplinary action form.

Sometime in late August 2012, a co-worker told Greiner "We are going to make you do the work or get you fired." Another co-worker told him that he could not help Greiner anymore because "there were eyes on him." Around this same time, Local Union President Carroll warned Greiner that the Employer wanted to fire him.

On August 23, 2012, Greiner met with Karen Bathanti, from the Employer's Human Resources Department, to discuss his harassment complaint. On September 26, he received a letter from the Human Resources Department stating that the department had not been able to substantiate his claim of harassment.

On September 27, 2012, someone prepared and submitted three "disciplinary fact sheets." The first stated that on the morning of September 26, 2012, Greiner had been argumentative and disruptive after being directed by the project leader on where to stand while flagging on a guardrail crew. The second stated that on this same morning, Greiner had repeatedly been unresponsive on the two-way radio while flagging. The third fact sheet stated that on the morning of September 27, 2012, Greiner had refused the project leader's directive to help lift a guardrail onto a trailer. The fact sheets listed witnesses to each incident. The first and second fact sheets were signed by two members of Greiner's work crew, including Union steward Phil Pulizzi. At about 9 a.m. on September 27, 2012, Sabaugh told Greiner that he was fired. Later that day, Greiner received a letter from the Employer stating that he was on administrative leave pending investigation of the above incidents.

On September 28, 2012, the Employer and the Union held step 3 grievance meetings on Greiner's August 17 and August 20 grievances. At this meeting, the Union also learned of the accusations made about Greiner's conduct on September 26 and 27 and was told that the Employer now planned to discharge Greiner. There was discussion between the Employer and the Union at this meeting about Greiner's taking an early retirement. Long discussed this with Greiner, but Greiner said that he did not want to retire.

On October 2, Greiner sent Bathanti an email expressing disappointment with the Human Resources Department's rejection of his harassment charges and asking to meet with her again.

On October 9, 2012, the Employer issued written denials of both the August 17 and August 20 grievances. The Employer's written denial of the grievance over the 10 day suspension bears the Local Union reference number 46-12-012. The Employer's written denial of the August 17 grievance over Sabaugh's refusal to allow Greiner to use mechanical assistance in performing his duties bears the Local Union reference number 46-012-11. On October 13, 2012, the Union made separate demands to arbitrate both grievances.

On October 11, 2012, Greiner received a letter from the Employer charging him with insubordination and poor work performance on September 26 and September 27. The record does not include a copy of this letter. However, according to Greiner, the letter accused him of: (1) refusing a directive from the project leader as to where to stand while flagging on September 26, 2012, and being unresponsive on the two-way radio; and (2) refusing a directive from the project leader to help lift a guard rail onto a trailer on September 27, 2012. Greiner was notified that the Employer had scheduled a *Loudermill* hearing on the charges for October 19, 2012.

On October 18, Greiner met again with Bathanti to discuss his harassment allegations. During this meeting, Greiner explained to Bathanti in detail the difficulty he was having doing the work that he was being required to do, including standing for extended periods of time, and how he felt that this work was doing long term damage to his body. Greiner asked Bathanti whether the Employer would consider either directing the other employees in the shop to help him lift when he requested it or give him a different job, either returning him to his former job as a truck driver or creating a hybrid job that he could do. Greiner also told Bathanti that on two different occasions, he had been at work for an overtime callout when three employees were punched in, but only two were there. He also told her that he believed that this had happened on many other occasions. During the meeting, Greiner also told Bathanti that he had consistently not been assigned the overtime he should have received according to the overtime equalization chart, and asserted that examination of telephone bills, presumably those of Sabaugh's or the sign shop's phone, would demonstrate that he was not called for overtime when he should have been called. During the October 18 meeting, according to Greiner, he and Bathanti also discussed the most recent charges against him. Greiner gave Bathanti the names of two employees he wanted to offer as rebuttal witnesses and Bathanti promised him that he could be present when the Employer interviewed these witnesses.

Greiner's *Loudermill* hearing was held as scheduled on October 19. AFSCME Staff Representative Paul Long was present as Greiner's Union representative at the *Loudermill* hearing. As noted above, Greiner had received a letter on October 11 stating the basics of the charges. The Employer did not provide Greiner or the Union with any additional supporting documents, e.g., witness statements or the "disciplinary fact sheets" for the September 26 and September 27 incidents. However, Long testified that during the *Loudermill* hearing the Employer told Greiner and the Union that Phil Pulizzi had made the accusations. Greiner stated at the hearing that none of the charges were true, but that he felt that he was not given an adequate opportunity to respond to the charges given the information he had been provided.

During the *Loudermill* hearing, Long asked the Employer for all the information the Employer had in regard to the charges. According to Long, he expected to receive witness

statements collected by the Employer along with other documents. However, Long did not receive anything from the Employer until after he made a second request in January 2013. Long also asked during the *Loudermill* that a second day of hearing be scheduled after he received the information so that he and Greiner could present a defense. After the *Loudermill* hearing on October 19, Greiner told Long what he had told Bathanti about the overtime fraud in the department and also that he had told her about it the previous day.

On October 22, Bathanti sent Greiner an email telling him that their October 26 meeting would have to be rescheduled and that the *Loudermill* hearing held on October 19 might have to be continued. The email stated that Bathanti would let Greiner know after she spoke with Long. Bathanti also told Greiner that, as of that date, she was not planning to interview Greiner's two witnesses.

On October 23, Greiner was present while Bathanti interviewed one of his co-workers regarding his harassment complaint. During that meeting, Bathanti told Greiner that she was concerned that he did not have an opportunity to speak at his October 19 *Loudermill* hearing, and that she was waiting for a call from Paul Long about continuing the hearing. She also told him that the Employer would not give him the names of its potential witnesses prior to a *Loudermill* hearing.

Bathanti and Greiner met again on October 31. At this meeting, Greiner told her that the Employer did not have any evidence to support the October 11 charges. He asked her to personally interview his co-workers separately about the incidents and then require each co-worker to sign a written statement. Greiner also told Bathanti that Sabaugh was out to get him. When Bathanti asked Greiner why, Greiner cited the overtime fraud scheme that he had told her about on October 18. He told Bathanti that an examination of time records would show both the fraud and the fact that Sabaugh had not been calling in Greiner to work overtime when it was his turn. Greiner also told Bathanti that he believed that his co-workers were cooperating with Sabaugh because they had benefitted directly from the overtime scheme, had become complicit in it by not speaking out, or simply feared retaliation from Sabaugh.

On November 4 or 5, Greiner faxed a letter to Long, with copies to Bathanti and Long's supervisor, AFSCME representative Jimmy Hearns. Greiner asked Long to arrange for the *Loudermill* hearing to be continued so that two employees, Chris Knapp and Les Durr, could testify on his behalf. Greiner also asked to meet with Long before the continued *Loudermill* hearing to discuss strategy. Later that day, Greiner was called by Local 893 president Carroll who told him that the Employer wanted to have a meeting on November 9. Carroll said that the Union wanted to reschedule the meeting for November 16 so that the Union would have all the paperwork as evidence before the meeting and could present a defense.

The Employer did not schedule an additional meeting or *Loudermill* hearing. On November 7, 2012, Greiner was discharged. His discharge letter stated that the Employer had reviewed the October 11 charges of insubordination and unsatisfactory job performance and had concluded that he continued to be insubordinate and demonstrate unsatisfactory job performance, as evidenced by recurrent carelessness and negligence in performing his daily functions.

The letter stated that Greiner was discharged based on this information and his prior disciplinary record.

On November 8, before he received his copy of his termination letter, Greiner had a telephone conversation with Long, and possibly also Hearns, in which he asked the Union to request a continuation of the *Loudermill* hearing. Either during this conversation, or in a previous conversation around this time, Greiner explained to Long and Hearns what he had told Bathanti about the overtime fraud and apologized if this caused harm to other employees. Hearns told Greiner that he supported the fact that "Greiner needed to do what he needed to do to protect his job, and "whatever consequences fall for the union brothers then so be it." Long also said that he understood Greiner's position. [4]

Greiner also had a conversation on November 8 with Cheryl Carroll during which Carroll told him that the Employer had made the decision not to continue the *Loudermill.*

On November 9, 2012, Greiner received a letter from Bathanti stating that after further review of the file and witness statements, the Employer was reaffirming that a violation of its harassment policy had not been corroborated.

On November 14, 2012, Greiner filed a grievance over his termination.

The Union Refuses to Arbitrate Greiner's August Suspension and Termination Grievances

Long testified that he did not know about Greiner's last chance agreement until the Employer told him about it after Greiner had been terminated. After Greiner was terminated, the Union immediately sent both the grievance over his 10 day suspension and the grievance over his termination to the Union's arbitration review panel for a determination, even though no 3rd step meeting had been held on the termination grievance.

Greiner's November 14, 2012, termination grievance was not given a separate Local Union reference number. On December 19, 2012, the Union's arbitration panel sent Greiner two letters declining to arbitrate grievances. One letter, with the Local Union reference number 46-12-012, addressed the grievance Greiner filed on August 24 over Sabaugh's refusal to allow him to use mechanical assistance in performing his job duties. The second letter had the reference number 46-12-11 and was captioned, "John Greiner/Termination."[5] However, there was no mention of Greiner's termination in the body of the letter. The panel's letter stated that Greiner was given a 10 day suspension, and that the Employer alleged that the grievant was deliberately inefficient and incompetent in the performance of his duties. The panel's letter also stated that the grievance file provided no evidence to refute this allegation and that the grievant had been issued discipline for similar behavior in the past.

[4] Greiner also told Don Gardner, the head of the Union's arbitration review department, about the overtime fraud in a telephone conversation on December 16, 2012.

[5] As noted above, the Employer's written denial of the 10 day suspension grievance at the 3rd step refers to this grievance as 46-12-12.

Greiner understood the letter to be a rejection of his termination grievance, as indicated by the caption. On December 27, 2012, he sent the arbitration panel copy of the grievance he had filed over his 10 day suspension and the fact sheet he had filled out about this grievance, on the assumption that the panel had not received these documents.[6] He said that he disputed the allegations in the suspension, and referred the panel to the fact sheet. He also said that there was no current outstanding discipline on his record. In addition, he told the panel that the Employer's decision was "inherently biased" because Greiner did not get the evidence against him prior to the *Loudermill* hearing on his suspension.

On January 8, 2013, the Union sent Greiner another letter with the caption "John Greiner/Termination" and the reference number 46-12-11. This letter stated that the panel had reviewed the file and Greiner's additional evidence, and that it was standing by its December 19, 2012 rejection. The January 8, 2013 letter stated:

> The Panel finds a lack of evidence with which to refute the Employer's allegations and their application of progressive discipline. This is especially true when the "last chance agreement" was signed on February 3, 2010.

As noted above, at the *Loudermill* hearing held at October 19, 2012, Long had requested all the Employer's documents relating to Greiner's discharge. On January 9, 2013, Long sent a letter to the Employer which he labeled a second request for this information. On January 15, 2013, the Employer provided Long with the disciplinary fact sheets for the September 26 and September 27, 2012, incidents. It did not give Long any witness statements. Long forwarded the disciplinary fact sheets to the arbitration panel for its file.

On January 14, 2013, Greiner asked the arbitration panel to reconsider its January 8, 2013, refusal to arbitrate his grievance(s). This time, he attached a copy of the June 28, 2011, arbitration award in which the arbitrator had opined that the Union had the right, under Greiner's last chance agreement, to arbitrate whether he had engaged in acts of negligence, insubordination or unsafe activity. Greiner also told the panel that the actions perpetrated against him would be proven, at arbitration, to be retaliation against him for filing the first overtime grievance dated April 20, 2011.

On February 7, 2013, Greiner received another letter from the arbitration panel. The letter was captioned "John Greiner/10-Day Suspension (Termination/L.C.A.)." This letter bore the reference number 46-12-012. In that letter, the panel stated that it had reviewed the file and the matter remained rejected based upon the following:

> The file indicates a (10) day disciplinary suspension was issued to the grievant on August 17, 2012 [sic] for failure to perform work and insubordination. The file lacks evidence which counteracts the Employer's allegations. We understand the grievant was later terminated on November 7, 2012. The file also contains a "Last

[6] In his post-hearing brief, Greiner contends that the Union's arbitration panel never considered the grievance over his 10 day suspension. He asserts, contrary to Long's testimony, that Long deliberately held this grievance and did not forward it to the panel.

> Chance Agreement" signed by the grievant on February 3, 2010, which prevents the grievant from filing a grievance regarding discharge. The "Last Chance Agreement" in part, states "Any further acts, of negligence, insubordination, or unsafe activity, on John Greiner's part, shall be cause for his immediate discharge from employment with the Road Commission of Macomb County, John Greiner and his union agree that no Grievance of any kind will be filed challenging his discharge from employment pursuant to the terms of this Last Chance Agreement."

Greiner filed another appeal on February 11, 2013. Believing that the panel must not have received his grievance over the 10 day suspension, Greiner attached another copy of the grievance and the grievance fact sheet.

On March 21, 2013, Greiner got another letter from the panel titled "John Greiner/10-day Suspension (Termination/L.C.A.). This letter had the 46-12-012 reference number. This letter stated:

> The documents submitted were already contained in the case file and previously reviewed by the Panel. The grievant attempts to interpret the "Last Chance Agreement" signed by the grievant on February 3, 2010. The Last Chance Agreement clearly addresses that "any further acts of negligence, insubordination or unsafe activity, on John Greiner's part, shall be cause for his immediate discharge of employment. . . John Greiner and the Union agree *that no grievance* of any kind will be filed challenging his discharge from employment under the terms of this agreement." [Emphasis in original].
>
> It is for this reason the Panel upholds and remains consistent with our previous rejection notices of December 19, 2012, January 8, 2012 [sic] and February 7, 2012 [sic]; this file will now be moved to closure.

On March 28, 2013, Greiner wrote the panel again. He noted that the most recent letter had the wrong Local Union reference number. In this letter, Greiner said that "the 10 day suspension was not the cause of my termination," i.e., the termination and the 10 day suspension were based on separate incidents of alleged misconduct. He also said that the "last chance agreement had no bearing on the grievance." He noted that he had previously sent the panel a copy of an arbitrator's opinion which, according to Greiner, stated that an arbitrator would have the authority to determine whether the terms of Greiner's last chance agreement had been violated. He also said again that the file did contain evidence refuting the Employer's allegations, i.e., the grievance fact sheet he submitted in connection with his 10 day suspension grievance.

On May 17, 2013, the panel sent Greiner four letters. The first was identical to its March 31, 2013, letter except that that the Local reference number was 46-12-11. The three other letters also stated that his appeals contained no new information and the grievances remained rejected. These letters were captioned, "John Greiner/Work Assignment-Safety Rules," Local reference number 46-12-012; "John Greiner/3-Day Suspension," Local reference number 46-12-010; and "John Greiner/Suspension," Local reference number 46-12-009.

On May 30, 2013, Greiner called Long to ask about the status of Local reference numbers 46-12-009, 46-12-010, 46-12-011, and 46-12-012. Long told him that all four cases had been submitted to the arbitration panel in December 2012 and were no longer in his possession. On this same date, May 30, Greiner wrote again to the arbitration panel. On July 17, 2013, he received a letter from the panel stating that the Union no longer represented employees of the Macomb County Road Department and that the files he had appealed had been closed.

Discussion and Conclusions of Law:

The Charge Against the Employer

Section 10(1)(a) of PERA prohibits a public employer, or its officers or agents, from interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed in §9 of PERA. The rights guaranteed in §9 of PERA are: (1) the right to organize together or form, join or assist in labor organizations; (2) the right to engage in lawful *concerted* activities for the purposes of *collective negotiation or bargaining or other mutual aid and protection;* (3) the right to negotiate or bargain collectively with an employer through a representative of the employees' own free choice, and (4) the right to refrain from any or all or the above activities. [Emphasis added].

PERA protects concerted or collective, not individual, action. An individual is protected by §9 of PERA from retaliation by his or her employer for filing and/or pursuing a grievance under a collective bargaining agreement as long as the employee is acting in good faith. *MERC v Reeths-Puffer Sch Dist*, 351 Mich 253 (1974). This is because, as the courts have recognized, a collective bargaining agreement is itself the result of concerted activity for mutual aid or protection. However, an individual employee's complaints to management about working conditions or a supervisor are not protected by PERA unless they are "concerted." That is, the individual employee must be asserting a right under a collective bargaining agreement, acting with or on the authority of other employees, attempting to persuade other employees to take group action on a complaint, or bringing a truly group complaint to the attention of management. *Meyers Indus, Inc v Prill*, 268 NLRB 493 (1984) ("'Meyers I"), rev'd sub nom *Prill v NLRB*, 755 F2d 941 (DC Cir), cert, denied, 487 US 948, (1985), on remand, *Meyers Indus, Inc v Prill*, 281 NLRB 882 (1986), ("Meyers II"), aff'd sub nom *Prill v NLRB*, 835 F2d 1481 (DC Cir, 1987), cert denied, 487 US 1205 (1988).

One of Greiner's claims is that the Employer violated PERA by discharging him to prevent him from disclosing the overtime fraud taking place in the Highway Department. Greiner argues that Sabaugh, and possibly Sabaugh's supervisors, wanted to get rid of Greiner because they feared that Greiner would expose their participation in a scheme in which employees were punched in for overtime that they did not work. In fact, Greiner did tell Human Resources Representative Bathanti about the scheme on October 18, 2012. However, there is no indication in the pleadings that Greiner acted with or on the authority of other employees in reporting the fraud, that he attempted to persuade other employees to join him in reporting the fraud, or that he engaged in any activity related to the fraud that could be considered "concerted" under §9 of PERA.

Greiner obviously had an obligation to the Employer to report his suspicions to the Employer's Human Resources Department. However, I find that Greiner engaged in no activity protected by PERA with respect to the overtime fraud in this case. Accordingly, even if Greiner's supervisors had been motivated by a fear that Greiner would disclose their participation in overtime fraud when they decided to discipline him, the discipline would not violate PERA.

However, Greiner clearly engaged in union activity protected by PERA when he filed and pursued grievances and complained that the collective bargaining agreement was not being followed. I also conclude that Greiner engaged in activity protected by PERA when he sought his Union representatives' assistance in obtaining a continuation of his *Loudermill* hearing, even though Respondents' collective bargaining agreement did not give Greiner the right to a pre-termination hearing.

A public employer violates §10(1)(c) of PERA if it discriminates or retaliates against an employee for engaging in union activity. However, the charging party must prove that the union activity was the cause of the discrimination. See e.g., *Univ of Michigan*, 1990 MERC Lab Op 272; *MESPA v Evart Public Schools*, 125 Mich App 65 (1983). A public employer does not violate §10(1)(c) merely by disciplining or discharging an employee without just cause, even if the employee is covered by a collective bargaining agreement that requires just cause for discipline. *Utica Cmty Schs,* 2000 MERC Lab Op 268; *Detroit Bd of Ed*, 1995 MERC Lab Op 75.

A charging party's initial burden is to allege facts sufficient to make out a *prima facie* case of unlawful discrimination under PERA. The elements of a *prima facie* case of unlawful discrimination under PERA are: (1) union or other activity protected by §9; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's exercise of protected rights; (4) an adverse employment action taken by the employer, such as a discipline or demotion in status or responsibilities; and (5) suspicious timing or other evidence sufficient to support an inference that protected activity was a motivating cause of the alleged discrimination. *Wayne County Sheriff's Dept,* 21 MPER 58 (2008); *City of Detroit*, 27 MPER 11 (2013). Only if the charging party establishes a *prima facie* case that the adverse action was motivated by his or her protected activity does the burden shift to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct, *MESPA v Evart Public Schools*, at 74.

The fact that the adverse employment action occurrs soon after the protected activity is circumstantial evidence that may demonstrate a causal relationship between the activity and the employer's action. However, the timing of the adverse employment action is not normally sufficient, by itself, to establish that the employee's protected concerted activity was a motivating factor in the employer's decision to discipline or discharge him. *City of Detroit Water and Sewerage Dept*, 1985 MERC Lab Op 777, 780.

One of Greiner's claims is that the Employer retaliated against him for insisting that the Union demand that his pre-termination hearing be continued for a second day by deciding to terminate him.

He argues that the Employer did not want to schedule another *Loudermill* hearing because it knew Greiner would make his overtime fraud allegations public in any subsequent hearing. Greiner copied Bathanti on his November 4 written request to Long, and Bathanti knew that Greiner was insisting that the Union demand a continuation of the *Loudermill* hearing. However, as noted above, the Employer was not required by the collective bargaining agreement to provide Greiner with a pre-termination hearing. Even if the Union had renewed its request that the *Loudermill* hearing be continued, the decision whether to continue that hearing was the Employer's alone. The Employer, therefore, had no reason to retaliate against Greiner for insisting that the Union demand that the hearing be continued. Moreover, according to Long's uncontested testimony, the Employer had already told the Union, during a September 28, 2012, meeting on another of Greiner's grievances, that it planned to fire Greiner as a result of his alleged misconduct on September 26 and September 27. I conclude that neither Greiner's pleadings nor the additional evidence produced at the hearing support a finding that Greiner's insistence that the Union demand a second *Loudermill* hearing was a motivating factor in the Employer's decision to discharge him.

Between December 2010 and his termination in November 2012, Greiner engaged in protected concerted activity when he filed and pursued a large number of grievances under the collective bargaining agreement and when he complained that the overtime provisions of the contract were not being followed. It is not enough, however, for Greiner to show that he engaged in protected activity and that the Employer unfairly disciplined him. He must allege facts that support the inference that animus toward this activity was at least a motivating factor in the Employer's decision to terminate him.

Greiner argues that two grievances in particular, both concerning the assignment of overtime, inspired Sabaugh's animosity. One of these was a grievance filed on April 20, 2011, challenging what was apparently the practice in the sign shop of allowing B-operators to perform laborer's work on overtime. The second was filed on or shortly after May 16, 2012, when Greiner learned that Sabaugh had personally performed work that should have been assigned to a unit employee as overtime. Greiner argues that Sabaugh's anti-union animus is demonstrated by the fact that within a week of the April 20, 2011, grievance, Sabaugh began ordering Greiner to do work that was more physical than the work Greiner had been doing and that Sabaugh knew was outside the work restrictions issued by his doctor. This was followed by discipline for failure to follow Sabaugh's orders and for failing to follow safety procedures. After the May 16, 2012, grievance, according to Greiner, Sabaugh began telling Greiner's co-workers not to help him with difficult physical tasks and began restricting Greiner from using mechanical devices to perform these tasks. Greiner was given a two day suspension in June 2012, a three day suspension in July 2012, and a ten day suspension in August 2012 before being terminated as a result of alleged misconduct on September 26 and 27, 2012.

Greiner does not allege that Sabaugh or any other supervisor ever explicitly expressed hostility toward his grievances. As discussed above, the fact that adverse employment actions occurred in close proximity to protected activity is not normally sufficient to establish anti-union animus. However, as I noted in my May 14, 2014, interim order, Greiner alleges that immediately after he filed the 2011 overtime grievance, Sabaugh ceased allowing Greiner to avoid performing some physically difficult tasks. Had Greiner filed a timely charge in 2011, he

might have been able to establish a *prima facie* case that the discipline he received in April and May 2011 was unlawfully motivated. This discipline, however, was removed from Greiner's file in July 2011 pursuant to a grievance settlement, and Greiner was not disciplined again until June 2012. According to the facts as alleged by Greiner, when he filed the May 16, 2012, grievance over Sabaugh's performance of unit work, Greiner had already begun to experience conflicts with his co-workers over whether they were required to help him with certain tasks. Greiner's job classification was laborer. As Greiner acknowledges, there were physical tasks in the sign shop that he was unable to do without mechanical assistance or the assistance of others. Greiner also acknowledges that the Employer never formally recognized him as having any permanent medical restrictions or excused him from performing any of the physical work associated with the laborer position. The facts indicate that this situation created ongoing problems between Greiner and Sabaugh and between Greiner and his co-workers. Whether Greiner had the right, under the collective bargaining agreement, the Employer's policies, or other statutes to be allowed to use mechanical assistance or the assistance of other employees to perform physical work which he found difficult is not the issue before me. I conclude that Greiner failed to allege facts sufficient to establish a *prima facie* case that his concerted protected activities were a motivating cause of his termination. I conclude, therefore, that his charge against the Employer should be dismissed.

The Charge Against the Union

A union representing public employees owes these employees a duty of fair representation under §10(2)(a) of PERA. The union's legal duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See also *Vaca v Sipes*, 386 US 171, 177 (1967). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Merritt v International Ass ' n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass ' n*, 156 F3d 120, 126 (CA 2, 1998).

As the Court noted in in *Goolsby*, at 678-679, "arbitrary" in general means "[W]ithout adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance. . .decisive but unreasoned." The Court also held that, in addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes "inept conduct undertaken with little care or with indifference to the interests of those affected." Id. As examples, the Court held that the duty of fair representation encompasses: (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members.

Because a union's ultimate duty is toward its membership as a whole, a union does not have the duty to take every grievance to arbitration, and an individual member does not have the right to demand that it do so. A union has considerable discretion to decide how or whether to proceed with a grievance and is permitted to assess each grievance with a view to its individual

merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. In determining whether to proceed to arbitration, the union must consider the good of the general membership, which may include the likelihood that the grievance will succeed. *Lowe*, at 146-147. A union's good faith decision not to proceed with a grievance is not arbitrary unless it falls so far outside a broad range of reasonableness as to be considered irrational. *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35, citing *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991). The fact that an individual member is dissatisfied with the union's decision, or its efforts on his behalf, does not establish that the union has breached its duty of fair representation. *Eaton Rapids EA*, supra.

Greiner alleges that the Union's decision not to demand a second *Loudermill* hearing, and its decision not to arbitrate his termination grievance, violated its duty of fair representation because the Union acted in bad faith. Greiner argues that the Union actually wanted him to lose his job because it feared that its other members would suffer if Greiner exposed the overtime fraud in which they had participated. Had Greiner been able to establish this as a basis for the Union's decision, the Union would, of course, be guilty of a breach of its duty of fair representation. However, although Greiner told his Union representatives on May 18, 2011, about the overtime fraud he had observed, and also informed various Union representatives that he had told Bathanti about the fraud on October 18, 2012, none of these representatives expressed hostility toward his efforts to expose the fraud or tried to persuade him not to pursue the issue. The Union subsequently took actions with which Greiner disagreed, including failing to make another request for a second *Loudermill* hearing and refusing to arbitrate his termination grievance. However, there is simply no evidence in the record of a causal connection between these actions and Greiner's attempts to expose the overtime fraud. That is, there is no evidence that the Union failed to request that the *Loudermill* hearing be continued or refused to arbitrate Greiner's termination grievance out of a desire to protect its other members from the consequences of their wrongdoing. I conclude that the record does not support a finding that the Union acted out of an improper motive or in bad faith.

Greiner also argues that the Union's actions were arbitrary. At the conclusion of the *Loudermill* hearing on October 19, 2012, Union staff representative Long requested that a second day be scheduled. There is no evidence that he renewed this request between October 19, 2012, and November 7, 2012, when Greiner was terminated. However, although Greiner had no right under the collective bargaining agreement to a *Loudermill*-type pre-termination hearing, Greiner did have the right under the collective bargaining agreement to grieve his discharge. Greiner had the opportunity, after he was terminated, to provide the Union with evidence in additional to his own testimony supporting his claim that he was not guilty of misconduct on September 26 and 27, 2012. The Union could then have used this evidence to argue, in the grievance procedure, that Greiner should not have been discharged. However, Greiner failed to provide the Union with such evidence. I conclude that Long's failure to renew his October 19, 2012, request that the Employer schedule a second *Loudermill* hearing before making a decision to terminate Greiner did not constitute arbitrary conduct.

Greiner also argues that the Union acted arbitrarily in deciding not to arbitrate his termination grievance. First, he asserts that the Union neglected to take account of the fact that he had grieved his prior discipline and, in particular, the 10 day suspension issued to him on

August 20, 2012. However, the letters Greiner received from the Union's arbitration panel clearly establish that the panel was aware of his previous grievances. Greiner was issued a two-day suspension on June 14, 2012, for being unable to pull a post out of the ground, and a three-day suspension on July 17, 2012, for refusing to lift a water bottle. Grievances filed over both suspensions were rejected for arbitration by the Union in October 2012, before Greiner was terminated, on the grounds that the work Greiner had been told to do was within his job classification and he had no approved medical restriction excusing him from performing the work. On August 20, 2012, Greiner was suspended for 10 days on the grounds that on a particular day, July 30, 2012, he had deliberately pretended to be unable to perform his job duties. The grievance filed over this suspension was awaiting a decision by the Union's arbitration panel when Greiner was terminated on November 7, 2012. I conclude that, although this letter was captioned "John Greiner Termination," the letter the Union's arbitration panel sent Greiner on December 19, 2012, was actually a rejection of the grievance over his 10 day suspension. In that letter, the panel noted the discipline, concluded that there was no evidence to refute the Employer's claims, and also noted that Greiner's record contained prior evidence of similar conduct. In other words, the panel concluded, on or before December 19, 2012, that the grievance filed over Greiner's 10 day suspension was unlikely to succeed before an arbitrator given Greiner's disciplinary history and the lack of corroborating evidence for Greiner's version of events on July 30.

Greiner also argues that the Union improperly relied upon the language of his last chance agreement stating that "no grievance of any kind will be filed challenging [Greiner's] discharge from employment," while ignoring the arbitrator's June 2011 decision interpreting the agreement as giving Greiner and the Union the right to grieve and arbitrate the issue of whether Greiner actually engaged in acts of "insubordination, negligence or unsafe activity." Greiner sent the panel a copy of this arbitration decision on January 14, 2013, when he was appealing what he believed was the panel's December 19, 2012, rejection of his termination grievance. It is true that the panel's subsequent letters to Greiner do not acknowledge this arbitration decision. However, as the arbitrator stated in his decision, how the last chance agreement should be interpreted is a issue to be decided "if and when action under the Last Chance Agreement is implemented." That is, a different arbitrator hearing the grievance over Greiner's termination might interpret the last chance agreement differently. In addition, the Employer would undoubtedly argue to an arbitrator that Greiner's disciplinary history, which included previous discipline for insubordination, supported its termination decision. The panel may have failed, in its brief letters responding to Greiner's lengthy appeals, to fully explain the basis for its decision not to arbitrate Greiner's termination grievance. However, I conclude that the Union made a reasoned, rationale decision that Greiner's discharge grievance was not likely to succeed in arbitration, and that it was not guilty of arbitrary conduct in refusing to arbitrate this grievance.

Based on the findings of fact and conclusions of law set forth above, I conclude that Greiner's charge against the Union, like his charge against the Employer, should be dismissed. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges in this case are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 3, 2015