STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25,
Labor Organization-Respondent,

MERC Case No. CU17 F-020
-and- Hearing Docket No. 17-013204

KENNETH DAVIS,
An Individual Charging Party.
_____/

Kenneth Davis, appearing on his own behalf

DECISION AND ORDER

On July 27, 2017, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: September 14, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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Docket No. 17-013204-MERC

-and-

KENNETH DAVIS,
An Individual Charging Party.
_____/

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON ORDER TO SHOW CAUSE

On June 7, 2017, Kenneth Davis filed the above unfair labor practice charge against AFSCME Council 25. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission).

Charging Party alleges that the Union breached its duty of fair representation when it rejected Charging Party's request to arbitrate a grievance challenging his termination. Charging Party claims that the Union made the decision without meeting with him first. Charging Party further asserts that the last chance agreement he was on prior to his termination was not signed by a Union representative.

On June 29, 2017, I issued an Order directing Charging Party to show cause in writing why his charge against the Union should not be dismissed without hearing for failing to state a claim upon which relief could be granted under PERA. Charging Party provided his response on July 24, 2017.

Background:

According to Charging Party's filings he was employed as a bus driver with the Mass Transportation Authority (MTA) in Flint, Michigan. In that role, he was represented for collective bargaining purposes by AFSCME Council 25 and its local affiliate Local 3437A.

Sometime in 2016, Charging Party's employment with the MTA was terminated for reasons not identified in the filings.

AFSCME Council 25 and/or AFSCME Local 3437A filed a grievance challenging that termination. In December 2016, the Union and MTA agreed to reinstate Charging Party without back-pay subject to a last-chance agreement. That agreement provided that if Charging Party was found to have violated any MTA policy or rule during a period of two years after returning to work, he would be discharged. The agreement also provided that the MTA could review video of Charging Party at any time to monitor Charging Party's compliance with MTA policies. On December 8, 2016, both Charging Party and a Local 3437A Union Steward signed the agreement. A MTA representative signed the agreement on December 14, 2016. Charging Party claims, and the document appears to indicate, that it was not signed by any representative of AFSCME Council 25.

On March 21, 2017, Charging Party was suspended following an alleged inappropriate conversation between himself and another individual while driving a bus, as well as for allegedly pulling away from a stop with the bus door still open. The MTA, by letter, directed Charging Party to appear at a meeting on April 4, 2017, so that he could present evidence in his defense; it is not clear from the pleadings whether the meeting took place. On April 11, 2017, the MTA provided notice to Charging Party that he was found to have violated Company Rule #12, which required MTA employees to treat passengers with dignity and respect, and Procedure 3.32, which required bus doors be closed before moving. The MTA terminated Charging Party per the last chance agreement.

Charging Party and/or Local 3437A filed a grievance challenging the termination. Eventually that Grievance was presented to AFSCME Council 25's Arbitration Review Committee where, by letter dated May 18, 2017, the Union declined to pursue the matter any further. That letter provided in relevant part:

> The file as submitted lacks evidence with which to refute the Employer's allegations of violations of Company Rule #12 and Procedure #3.32. The Employer is alleging that the grievant violated the Last Chance Agreement.
>
> The grievant entered into a twenty-four (24) month Last Chance Agreement with the Employer on December 14, 2016. The Last Chance Agreement clearly states:
>
> > "The grievant and the Union specifically acknowledge that the MIA may review video of the grievant at any time during the twenty-four (24) month period, to monitor his compliance with MTA 's work requirements and expectations. If the grievant is found to have violated any policy at any time during this twenty-four (24) month period, the grievant will be discharged"
>
> Based upon the above, this grievance lacks merit and is therefore rejected for arbitration.

By letter dated May 23, 2017, Charging Party requested that the Union reconsider its decision. The Union, by letter dated June 14, 2017, once again rejected Charging Party's request that further action be taken. That letter stated in the relevant part:

> The Panel has reviewed the most recent appeal. In the appeal, the Grievant does not directly deny making the comment about a passenger's hygiene or lack thereof, but simply indicates there is no definitive proof who made the comment. The Grievant also indicates the door of the bus often malfunctions and does not close, and this has never been fixed. Finally, the Grievant takes issue with the fact that his Last Chance Agreement was not signed by the Council 25 Staff Representative.
>
> Assuming that an arbitrator would find the video evidence regarding the inappropriate comment inconclusive, there is still the issue of operating the bus while the door was open, which appears to be a clear rule violation. While the Grievant claims this is an issue on multiple buses which has never been fixed, he provides no evidence that this issue was ever raised to the Employer. More importantly, the Grievant does not address whether he could have gotten out of the driver's seat in order to manually close the door before operating the bus instead of waiting for the bus to hit a bump or flex in order for the door to close.
>
> Finally, it does appear that Council 25 did not sign the [Last Chance Agreement] the Grievant signed in December of 2016; however the Grievant cannot now, after accepting the benefit of the Agreement and returning to work for months, suddenly claim the Agreement is not binding on him due to the lack of a signature from the Council 25 Staff Representative.

Discussion and Conclusions of Law:

The Commission does not investigate charges filed with it. Charges filed with the Commission must comply with the Commission's General Rules. More specifically, Rule 151(2)(c), of the Commission's General Rules, 2002 AACS; 2014 MR 24, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include:

> A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act, the names of the agents of the charged party who engaged therein, and the sections of LMA or PERA alleged to have been violated.

Charges which comply with the Commission's rules, are timely filed, and allege a violation of PERA are set for hearing before an administrative law judge. In order to be timely filed, the charge must be filed within six months of the alleged unfair labor practice. MCL 423.216(a).

Rule 165 of the Commission's General Rules, 2002 AACS, 2014 MR 24, R 423.165, states that the Commission or an administrative law judge designated by the Commission may, on their own motion or on a motion by any party, order dismissal of a charge without a hearing for the grounds set out in that rule, including that the charge does not state a claim upon which relief can be granted under PERA. See, *Oakland County and Sheriff*, 20 MPER 63 (2007); *aff'd*

282 Mich App 266 (2009); *aff'd* 483 Mich 1133 (2009); *MAPE v MERC*, 153 Mich App 536, 549 (1986), *lv den* 428 Mich 856 (1987).

It is well-established law that a union's obligation to its members is comprised of three responsibilities: (1) to serve the interest 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 City of Detroit*, 419 Michigan 651 (1984). Furthermore, a union's actions are lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Airline Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991). Commission case law is clear that a member's dissatisfaction with their union's effort, with the union's ultimate decision or with the outcome of its decisions is insufficient to constitute a proper charge of a breach of the duty of fair representation. See, *Eaton Rapids Education Association*, 2001 MERC Lab Op 131.

Charging Party has not alleged any facts that, if proven true, could establish that the Union actions or decisions were in any way based on an unlawful motive or that its refusal to arbitrate his grievance was otherwise arbitrary, discriminatory or outside the bounds of reasonableness. While Charging Party claims the Union did not meet with him prior to making its decisions, he does not allege that it failed to investigate the facts relevant to his grievance or that the ultimate decision not to proceed with his grievance was motivated by anything other than what was stated in the two letters, dated May 18, 2017, or June 14, 2017, respectively. Furthermore, to the extent that Charging Party is complaining of the last chance agreement or challenging the Union's actions in relation thereto, such allegations are not timely filed as the instant charges were filed more than six months from the date the last chance agreement was executed.

Simply put, Charging Party failed to state a claim for which relief can be granted under PERA against the Union and despite being given the opportunity to clarify his allegations to do so, he has not. For this reason, it is the opinion of the undersigned that the charge should be dismissed. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated July 27, 2017