STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 101,
Labor Organization-Respondent,

MERC Case No. CU15 L-044

-and-

KENNETH H. MONTROY,
An Individual Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.L.C., by Keith D. Flynn, for Respondent

Michael Johnson for Charging Party and Charging Party, appearing on his own behalf

DECISION AND ORDER

On December 7, 2017, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] 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: February 9, 2018

[1] MAHS Hearing Docket No. 15-063072

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 101,
Labor Organization-Respondent,

Case No. CU15 L-044
Docket No. 15-063072-MERC

-and-

KENNETH H. MONTROY,
An Individual-Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.L.C., by Keith D. Flynn, for Respondent

Michael Johnson for Charging Party and Kenneth H. Montroy on his own behalf

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard on January 25 and March 1, 2017, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on April 24, 2017, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

This charge was filed on December 11, 2015, by Kenneth J. Montroy against Michigan AFSCME Council 25 and AFSCME Local 101. [2] The charge was amended on January 27, 2016. Montroy was formerly employed by Wayne County (the Employer) as a driver/crew leader in the Employer's alternative work force program (AWF). In that position, he was part of a collective

2 Respondent argued at the hearing that AFSCME Local 101 was not properly a party to the charge because the charge was not served upon it. Respondent did not make this argument in its brief. I assume, therefore, that Respondent has elected not to pursue it. I note, however, that on the charge form Montroy named both Council 25 and Local 101 as the "labor organization against which the charge is brought," and that the charge was mailed to the street address of a building that houses both the offices of Council 25 and those of Local 101, albeit in separate suites.

bargaining unit represented by Michigan AFSCME Council 25 and its affiliated Local 101. Montroy alleges that Respondent violated its duty of fair representation under Section 10(2)(a) of PERA by its handling of a grievance it filed over his termination on November 18, 2014, including its refusal to arbitrate that grievance and its failure to file a second grievance after Montroy was terminated again in July 2015.

Findings of Fact:

At the time he was first terminated, Montroy had worked as driver/crew leader in the Employer's Alternative Work Force program for approximately twelve years. The Employer's AWF program was part of the Employer's Department of Children & Family Services. The AWF provided a way for individuals sentenced by Wayne County courts to perform community service to carry out their sentences. Participants in the AWF program were required to check in at the AWF offices each day at 8 am and were assigned to a crew. They were then supervised by a crew leader until 4 pm, when they were allowed to leave. During the day, participants performed a variety of low-skill tasks at various locations throughout Wayne County. Examples included picking up trash along the roadside, moving office furniture, and picking up used paper and transporting it to a recycling center. Some of these tasks were performed for other governmental entities which reimbursed the Employer for the participants' services. In those cases, the Employer billed the other entity after the work was performed. The AWF also did work for other Employer departments, including its Department of Public Services (DPS), and the Employer billed these departments for these services in the form of charge-backs. Some work the participants performed was not billed or charged back. For example, crews sometimes shoveled snow for elderly residents who called the Employer for assistance.

The AWF prepared a monthly report which listed the names of all the participants assigned to the AWF that month, the dates that they worked during the month, and the court from which they were sentenced. This report did not include the actual work the participants had performed. The AWF sent this report to the courts, and the sentencing courts reimbursed the Employer on a per day, per participant, basis.

Each crew leader was given a daily schedule showing the location or locations where his or her crew was to work that day and the times they were to be there. The crew leader drove the crew from the AWF offices to each of these locations and returned them to the AWF office at the end of the day. Participants were to be under the supervision of a crew leader at all times during the day. However, a crew leader sometimes left part of his crew to be supervised by the foreman at a work site while the leader took the rest of the crew to another location. The crew leader was responsible for making sure that the crew had restroom, lunch and other breaks. Since lunch was not provided, the crew leader was permitted to take his crew to buy food, although they were not allowed to go to a sit-down restaurant. If a crew leader had to leave some or all of his crew in his van, the van's doors were supposed to be locked from the outside. At the end of the day, the crew leader filled out a daily log indicating where he had been and the times he left and arrived at each location.

On occasion, the crew had no daily assignment. When this occurred, the crew remained at the AWF offices all day, and the crew leader supervised them there.
There were also occasions where the crew completed their work at one location before they were scheduled to report to the next location. In this case, the crew leader was supposed to check in with

his supervisor. Depending on the circumstances, the supervisor might tell the crew leader to bring the crew back to the AWF offices or to simply drive around with them until it was time to check in at the next site.

The AWF policy manual stated that AWF vehicles were to be used only for AWF business. It also contained the following language:

> All AWF employees are required to complete accurate and truthful verbal and written reports, documents and any/all correspondence. Failure to do so may constitute falsification of documents.
>
> Failure to perform or adhere to the requirements of this policy may result in disciplinary action up to and including termination.

Three of Montroy's daily logs were entered into the record. The significance of these three dates is discussed below. All three daily logs had a space for the driver to sign at the end of the day certifying that the vehicle he drove had no known defects. The daily log for November 8, 2013, and March 7, 2014, also required the crew leader's supervisor to initial and date this statement: "To the best of my knowledge, the information on this work report is complete, accurate, and truthful. I certify the above information for billing and payment." Montroy's signature appears alongside the supervisor's initials on the March 7 log, but not the November 8 log. The third log, dated March 21, 2014, required the driver and his supervisor to sign separate statements. The driver's statement, signed by Montroy, states, "I confirm that the work information on this Report is complete, accurate and truthful." The supervisor's statement states: "I confirm that the billing and payment information noted on the reverse is complete, accurate and truthful."

Despite the language on the log form, Montroy testified that it was not the practice of crew leaders to log their every movement during the day, and that their supervisors did not require this. For example, according to Montroy, if the crew was assigned to a job that the crew leader knew would not be billed, the crew leader did not have to record that job. According to Montroy, crew leaders also did not log in stops they made to conduct personal business that had been authorized by their supervisors, or stops to allow participants to buy food or use a restroom. Montroy explained that, as he understood it, the object of the AWF program was to ensure that the participants remained under AWF supervision for the number of hours required by their sentences. Montroy further testified that, as he understood it, the sentencing courts did not concern themselves with what the participants actually did while under AWF supervision, as long as they reported to the AWF for the full number of days the court required. According to Montroy, if there were jobs to be done, especially jobs for which the Employer could bill another entity, the crews would do them. He testified, however, that this was secondary to keeping the participants "incarcerated" by the AWF for the required number of days.

On or about November 12, 2013, the grandmother of a female assigned to Montroy's crew complained to the Employer that Montroy had sexually harassed her granddaughter on November 8, 2013. An AWF supervisor interviewed the alleged victim, who said that Montroy had appeared intoxicated, left her as a lone female sitting locked in the van with men for long periods of time during the day while he performed personal errands, and had spent most of the day simply driving

around with the crew. With respect to the sexual harassment allegation, the complainant said that all that she could specifically remember was Montroy telling her to "sit in the back and look beautiful." The supervisor submitted her report, along with a tape she had made of the interview, to her supervisors on or about December 9, 2013.

After receiving the supervisor's report, a representative from the Employer's Human Resources Department interviewed the complainant/victim again. The Employer then assigned a Wayne County Sheriff's Department detective to investigate. The detective conducted a third interview of the complainant and obtained more details about the activities of Montroy's crew on November 8, including the complainant's statement that Montroy had allowed the other male participants in the van to direct lewd comments at her. The complainant had only ridden with Montroy on one day, November 8. However, she told the detective that another participant told her that "he liked riding with [Montroy] because you don't do any work." The detective compared the complainant's account with Montroy's daily log for November 8, 2013. According to the log, except for a half-hour lunch break, the crew had picked up litter along various roads and freeways from 9:00 am until 3:20 pm. The log contained no mention of the personal errands the complainant had described.

After receiving the detective's report, Respondent's Human Resources Department and the deputy director of the Department of Children & Family Services arranged for a private investigator to follow Montroy and his crew. The private investigator did this on March 7, 2014, and again on March 21, 2014. The investigator reported that on March 7 between about 11:00 am and 12:45 pm Montroy did the following: (1) took his crew to a gas station and entered with two men from the crew; (2) stopped at a pizza restaurant and went briefly in and out; (3) went to another gas station which he briefly entered and left; (4) stopped at a residence and went in for about five minutes; (5) went to a Coney Island restaurant, went in for about five minutes with one of the participants, and came out with a carry-out order; and (6) stopped at a Comcast Customer Service Center and went inside for about fifteen minutes. Montroy then took his crew to the Employer's DPS Sibley road maintenance yard, their next scheduled work location, and remained there until 2:15. At about 2:30 pm, the crew arrived at their next work location, the DPS Wyoming road maintenance yard. At about 3 pm, Montroy drove the van back to the AWF office. The detective compared Montroy's daily work log for March 7 with the surveillance report. According to the log, on the morning of March 7 Montroy left half his crew at the AWF offices and took six participants to the Sibley Yard. Montroy recorded that they arrived at 10:55 am and remained there until 2:25 pm. He did not record any lunch break on that day's log. According to his log, he arrived at the Wyoming Yard at 2:50 pm, dropped off his crew there, and left at 3:00 pm to take the van back to the AWF office. He did not log in any of the stops the investigator saw him make between 11:00 am and 12:45 pm.

On March 21, the investigator lost track of Montroy's van in traffic for about 90 minutes at the beginning of the work day. However, he recorded Montroy and his crew entering a Wayne County Regional Service Agency (RESA) location, their first work location for the day, at about 11:30 am. They left that location at 1:15 pm, and Montroy drove to a resale store.
Montroy went in and remained there about ten minutes. He then drove to the Employer's DPS Goddard road maintenance yard, where the crew remained for about 45 minutes, then to a recycling center, and then back to the AWF office. The detective also compared this surveillance report with Montroy's daily log for March 21, 2014. Montroy recorded that he arrived at the RESA location with

two crew members at 9:00 am and left at 2:25 pm, during which they took a lunch break between 12:00 and 12:30. According to Montroy's log, he then drove the crew to the recycling center, arriving at 2:35 pm and leaving at 2:50 pm, after which he drove the crew back to the AWF office. Montroy's log for March 21 did not mention stopping at the resale store or at the Goddard Yard.

On March 25, 2014, the Employer placed Montroy on paid administrative leave pending investigation of charges of misconduct. The detective continued his investigation. He interviewed about fifteen participants who had been assigned to Montroy's crew at one time or another. Nearly all mentioned that Montroy stopped at gas stations and fast food restaurants, many said that Montroy routinely stopped at private residences, and some said that he had driven around with them for hours. The detective interviewed Montroy, who, according to the detective's report, told the detective that he was allowed a certain amount of leeway during the day to perform personal errands, and that his log was only a generic description of the work performed. Montroy also told the detective, according to his report, that everyone at the AWF behaved the same way. Montroy also denied using drugs or alcohol on the job. According to the deputy's report, the deputy asked Montroy about the surveillance report showing that he stopped at a residence on March 7, and Montroy first said that he did not recognize the address but later admitted that this was his brother's house.

On or about October 24, 2014, the detective, at the Employer's request, filed an application with the Wayne County Prosecutor's office for a criminal warrant against Montroy. The charges listed in the application were fraud for receiving compensation for work not performed on November 8, 2013, and on March 7, 2014, for causing the Employer to improperly bill the courts, and for causing the Employer to improperly bill its DPS for services not provided in November 2013 and on March 7, 2014.

On or about November 14, 2014, after the Employer held a pre-termination hearing, Montroy was discharged by the Employer for using a County vehicle for personal use and failing to adhere to AWF policies and rules.[3] According to his written discharge notice, his rule and policy violations consisted of: (1) falsifying time, mileage, location and the work performed information on his daily work logs; (2) failing to ensure that the participants' community service hours were accurately reported to the supervising probation agent or sentencing court; (3) receiving compensation for work not performed on November 8, 2013, and March 7 and March 21, 2014; (4) wasting time and loitering on those dates; and (5) engaging in incompetent and inefficient job performance on those dates. The discharge letter did not list violation of the Employer's rules against sexual harassment as a cause of the termination.

Respondent filed two separate grievances, the first over the November 7, 2014, termination and the second, on November 18, 2014, over Montroy's November 14, 2014, discharge. The

3 The Employer first scheduled a pre-termination hearing for November 7, 2014. After neither Montroy nor his union representative appeared at the hearing, the Employer issued a notice of discharge. Respondent complained to the Employer that Montroy had not received notice of the pre-termination hearing and that Respondent had not had time to prepare. The Employer then scheduled another pre-termination hearing for November 14, 2014, after which Montroy was given another discharge notice.

grievance over the November 7, 2014, termination alleged that Montroy did not get a proper hearing. The November 18 grievance asserted that the Employer had erred by failing to interview Montroy's fellow crew leaders. It also asserted that the Employer should not have credited the testimony of participants assigned to Montroy's crew because they were criminals who had a motive to lie. The grievance also asserted that progressive discipline should have been applied in light of Montroy's clean disciplinary record, and that discharge was too heavy a penalty. Both grievances were filed by Local 101 President Thomas Richards. Local 101 Committeeman Garrett Presnell was assigned to investigate the grievances. Then-Local 101 Committee Chairperson Ralph Lewis also participated in handling the grievances. AFSCME Council 25 Staff Representative Richard Johnson provided advice to the Local 101 representatives and represented Montroy at his Step IV grievance hearing.

Despite the lengthy list of charges, Johnson testified that he viewed Montroy's discharge as a termination for falsifying records, i.e., his daily logs. Both Johnson and Presnell testified that in their experience handling grievances, falsification of records was considered by the Employer to be a dischargeable offense in the same category as fighting, theft and insubordination.

Presnell and Montroy agree that Montroy did not dispute the accuracy of the surveillance reports or that he had not logged all his movements on the surveillance dates. According to Presnell, Montroy told him that other crew leaders behaved the same way. Presnell testified that in the late 1980s and early 1990s he worked for the Employer as an equipment operator and that during that period he sometimes worked weekend overtime as an AWF crew leader. He testified that when he worked that job, he understood that it was necessary to keep accurate records of where he went with his crew, including gas stations and fast food restaurants. He also testified that he had understood that discipline could result from misrepresenting the facts on the daily log. Presnell testified that in his first conversation with Montroy, he informed Montroy that his was a difficult case considering the voluminous evidence the Employer had compiled against him.

In January 2015, Montroy provided Presnell with a letter from Ron Massey, who had been his supervisor at the AWF from 2007 until Massey resigned his employment with the Employer in June 2014. Massey wrote that Montroy had been an outstanding employee. Massey also wrote that on March 7, 2014, Massey had suggested that Montroy stop and check on his ill mother, who lived along the route to one of that day's work locations. In addition, Massey wrote that on March 17, 2014, he had given Montroy permission to stop at a clothing store to pick up work gloves and other items for his crew. Massey's letter did not mention March 21, 2014. Finally, Massey wrote that it was common practice for crew leaders to stop at service stations and restaurants to allow participants to make purchases. In the letter he gave Montroy, Massey did not say anything about the daily logs that crew leaders had to fill out. Presnell testified, without contradiction, that he told Montroy that Massey's letter was insufficient to rebut the charges that Montroy had falsified his work logs.

Presnell did not talk to Massey during his investigation of Montroy's grievance. He also did not attempt to interview other AWF crew leaders or their supervisors. He did attempt to interview the foremen at work locations mentioned in the surveillance reports. Presnell hoped to find evidence to contradict the information from the surveillance reports that Montroy had spent less time at certain locations than he reported on his log. However, none of the foremen would speak to him.

There is no indication that Montroy asked or suggested that Presnell interview Massey in person. However, Montroy did call Massey as a witness at the unfair labor practice hearing. Massey testified that he had been aware that Montroy, and other crew leaders under his supervision, were doing daily logs that did not reflect all the places they had gone during the day. He stated that crew leaders were not required to chronicle every single moment of the day. He explained that what the AWF was interested in on the daily logs was "billable information that we could bill to our clients," not whether the crew was at a location and working for the entire period reflected by the crew leader's log. Massey explained that, for example, if a crew leader took his crew on a bathroom break during a job, the crew leader did not have to log that he left the site at 2:15 and returned at 2:30. Massey also agreed with Montroy that when the AWF certified to a court that a participant had fulfilled his or her sentence to perform "community service," it was certifying that the participant had showed up and remained under AWF supervision for the required number of hours, and not that he or she had spent the entire number of hours performing actual work. Massey testified that when Montroy asked him to write a letter, Montroy did not tell him that Montroy was accused of not properly documenting what he did during the day.

A Step IV grievance hearing was held on both of Montroy's grievances on January 22, 2015. As noted above, Montroy was represented at that hearing by Council 25 Staff Representative Johnson. The Employer issued its written grievance answer at this step on February 23, 2015. In its answer, the Employer agreed to grant the grievance over Montroy's November 7 termination and to reimburse him a week's pay for the period between November 7 and November 14, 2014. The answer discussed the allegations leading to the November 14, 2014, termination at some length. The Employer rejected Respondent's argument that the testimony of the crew members should not be credited because they were criminals. The Employer acknowledged Massey's statement that he had given Montroy permission to stop and see his mother and to make a purchase on March 7 and March 17. According to the Employer, however, "Massey's statement did not excuse Montroy's conduct of spending hours of County time simply riding around, while making multiple stops at gas stations, restaurants and bill payment centers." According to the Employer, the evidence "painted a picture of an AWF Crew Leader with a reputation for being lax but deliberate in his actions." The Employer also found that Massey's statement provided no excuse for Montroy submitting false logs, including logs that omitted the stops that he claimed Massey had authorized him to make. The Employer concluded that Montroy had violated established County and/or AWF policies and work rules, especially the rule requiring him to accurately and truthfully report his activities. However, the Employer announced that, in light of Montroy's clean employment record, it was rescinding his termination and reducing the discipline. The answer stated:

> The Grievant will not be permitted to continue as a supervisor for the AWF, and as a result, he will be suspended for 90 days without service credits [for retirement or retiree health care benefits, or credits toward his sick leave banks or any kind of remuneration for any holiday occurring during the 90 day period], and demoted to a position within Local 101 that he is qualified for, with a 3.5% wage decrease, provided that the new wage rate is not less than the minimum rate nor greater than the maximum rate of the lower classification.

Respondent informed the Employer that the new discipline imposed was still excessive, and that it was moving the grievance to Step V, which is arbitration. However, after February 23, 2015, Presnell and Teri Dennings, Respondent's labor relations representative, began looking for jobs

outside of the AWF in which Montroy might be placed. At that time, according to Presnell, he understood that they were looking for a job with a wage rate similar to Montroy's previous rate despite the Employer's announcement that Montroy had been demoted. Among the jobs he and Dennings discussed were bridge operator, which was not yet open; radio operator, for which Montroy would have to be trained; and equipment operator. The Employer made no formal offer to place Montroy in any of these positions. According to Presnell, he recommended to Montroy that he accept any job offered that was comparable in pay grade to his old position, and told Montroy that Respondent would continue to pursue his grievance. However, according to Presnell, Montroy rejected each of the potential jobs because he was concerned with issues such as what shift he would be on and what seniority he would have.

The Employer considered Montroy reinstated as of the date of its Step IV answer, although it did not yet have a job for him and was not paying him. Sometime after the end of February 2015, the Employer reinstated Montroy's health insurance.. Respondent's position was that since it had not accepted the discipline the Employer had imposed as a condition of Montroy's reinstatement, Montroy was still terminated. As indicated above, Respondent told Montroy that it would continue to process the November 18, 2014, grievance seeking his reinstatement to his old job or another job at the wage rate he was paid at the time of his discharge, with no suspension.

On March 2, 2015, Dennings sent Presnell a written settlement proposal offering Montroy a position as a delivery clerk. The offer stated that Montroy's annual salary would be 3.5% less than his salary at the AWF, which was at the approximate midpoint of the salary range for the delivery clerk position. The proposal stated that Montroy's employment records would reflect a suspension from November 14, 2014, to February 12, 2015, and the time period from February 12 until Montroy's start date in the new position would be marked as unpaid administrative leave. The final condition of the offer was that the Union accept it as a final settlement of Montroy's grievance and withdraw the grievance. Presnell discussed the offer with Montroy but recommended that he not accept it because of the 3.5% pay cut and his losing his rights to pursue the original grievance. According to Montroy's uncontradicted testimony, Respondent told the Employer that it would not agree to Montroy's accepting a job that paid less than Montroy's previous wage or was conditioned on his accepting a suspension.

On March 4, 2015, Dennings sent Presnell an email acknowledging Respondent's rejection of the delivery clerk position as the final settlement of Montroy's grievance.
Dennings' email said that the Employer was returning Montroy to the classification he had held prior to his promotion as crew leader, which was clerk. It informed Presnell that there was currently a vacant clerk positon in the Wayne County Sheriff's Department, and that Montroy would be contacted by the Sheriff's department shortly regarding a background check and drug test for that position. Nothing in the email suggested that Respondent would have to withdraw the grievance if Montroy accepted the position.

Presnell discussed the email with Montroy and recommended that he accept the position as Respondent could still pursue his grievance. The vacant clerk position was within the Wayne County Jail. According to Presnell, he told Montroy in this conversation that he would have to pass a criminal background check to work in the jail, and Montroy asked him why he had to have another

check since he had worked in the jail before. Montroy also said that he wanted to know more about the position, including the hours, the shift, and whether he would be treated as a new hire.

From about 1997 to 2005, when he took the AWF position, Montroy had worked for the Employer at the jail. Montroy also worked at the jail on a temporary basis around 2010, during the period he was working as an AWF crew leader. Criminal background checks were done for Montroy in 1997 and again in 2010, and possibly at other times in between. Montroy was convicted of misdemeanor drug possession in 1976, and this conviction was on his record when these background checks were done. Despite this conviction, he passed the background checks both times and was issued a security pass to work in the jail.

On March 31, 2015, John Asquini, a senior personnel officer with the Wayne County Sheriff's Department, telephoned Montroy about the clerk job in the jail. Montroy asked him questions about the job and Asquini said that he did not have the answers and would have to get back to him. According to Asquini, during his phone call with Montroy he explained that he needed to ask Montroy for some personal information in order to fill out the criminal history record request. One of the lines on the record request form is the question, "Have you ever been arrested, detained or taken into custody by any law enforcement agency?" The request form also states that a failure to truthfully disclose information on the form can result in disqualification. After Asquini testified that he read Montroy this question, that Montroy said no, and Asquini checked the "no" box on the form. After completing the form, Asquini passed it along to another employee, who ran the criminal history background check. Because Montroy's 1976 conviction was part of his record, and because the form indicated Montroy had answered "no" to the question of whether he had ever been arrested or detained by law enforcement, Montroy was disqualified from receiving a jail security pass.

Montroy testified that he had a telephone conversation with Asquini and that he asked Asquini questions about the jail job that Asquini could not answer. However, he did not recall providing Asquini with any personal information. He denied telling Asquini that he did not have a criminal record.

On April 13, 2015, the Employer notified Presnell and Johnson that Montroy had failed the criminal background check and sent them a copy of the criminal history record request filled out by Asquini on March 31, 2015.

On May 27, 2015, the Employer and Respondent held a special conference, during which the Employer told Respondent that Montroy was not qualified to work at the jail because he provided false information as part of the application process. Sometime in May 2015, the Employer eliminated the AWF program and, with it, Montroy's former crew leader position.

On June 16, 2015, Presnell sent an email to Dennings asking about the status of the "Montroy case." Dennings replied that she had confirmed that there were no vacancies into which the Employer could place Montroy. Her email also said that Montroy "should be receiving a letter regarding the status of his employment soon." On July 6, 2015, the Employer notified Montroy that his employment was terminated effective July 2, 2015. The letter noted that Montroy had been terminated on November 14, 2014, in significant part for falsification of documents, and that on February 23, 2015, he was reinstated with a demotion. As Montroy did not qualify for vacant positions in Local 101, he was demoted to a classification, clerk, which he had held in the past. A

clerk vacancy in the Jail Division of the Sheriff's office was available. However the Sheriff's office declined to issue Montroy a security pass because, on or March 31, 2015, Montroy completed a criminal history record request form on which he falsified his criminal history.

Montroy testified that he discussed his termination letter with any Respondent representative that he could reach, but that they did not discuss filing a separate grievance over the July 2015 termination. According to Johnson, it was Respondent's view that since Respondent had never accepted the Employer's Step IV answer as a settlement of the grievance, Montroy had never been reinstated and could not be terminated again. That is, there was no separate contractual violation and no reason to file a separate grievance.

During the period that the Employer was seeking a suitable position for Montroy to return to work, Respondent Local 101 submitted Montroy's November 2014 grievance and its grievance file to Respondent Council 25's arbitration review panel. Per Respondent's usual process, the Local representatives working on the grievance submitted Montroy's file to Johnson, who reviewed it before sending it to the panel.

According to the testimony of Kenneth Bailey, who was part of the panel that reviewed Montroy's grievance, Council 25's arbitration panel reviewed the grievance for arbitration and decided not to arbitrate it sometime in late June 2015. On August 18, 2015, the panel sent a letter to Montroy and Local 101 Committee Chairperson Lewis which read:

> The above referenced grievance has been reviewed by the Arbitration Review Committee and has been rejected based upon the following:
>
> A review of the file shows the grievant was discharged, which was later reduced to a long term suspension, for allegedly violating number of work rules, including those relating to sexual harassment, falsifying work orders, use of County vehicles for personal use, etc.
>
> The Employer received complaints from a participant or relative of a participant in the Alternative Work Force, of which the grievant is Crew Leader.
> The Employer had the grievant followed by an investigator who attempted to corroborate some of the allegations. From the investigator's notes, it is fairly clear that the grievant's daily work logs do not match up with his actual activities during his work day, including the times he indicates arriving to or leaving from specific places, as well as whether he engaged in personal business while on County time. The investigator's notes clearly indicate the grievant entering private residences as well as businesses which have no clear relation to his job duties.
>
> The Panel notes that page 5 of the Employer's February 23, 2015 grievance response is missing from the file.[4] Further, the file references the grievant claims a supervisor instructed him not to arrive until 2:30 on March 27, 2014 [sic] and was given two weeks to provide a

4 The Employer's disposition of Montroy's November 18 grievance, which I quoted above, appeared on page five of the February 23 grievance answer. Montroy attached a copy of the missing page to his appeal of the panel's decision.

written statement from that supervisor. Was this statement ever procured?[5] Any appeal should address/provide this missing information.

Copies of the letter addressed to Montroy and Lewis were sent to Thomas Richards and Johnson. The letter stated that if they believed the panel had erred in the facts, they should notify the panel in writing within 10 days of the date of the letter. It also said that a failure to respond within 10 days would result in the file being closed without further notice. Bailey testified that if Montroy or Lewis had called the arbitration panel offices to request an extension, it would have been granted.

Presnell testified that he saw the panel's letter and spoke with Montroy about it a few days later. According to Presnell, Montroy said that he did not understand why the grievance was denied for arbitration, and Presnell told him that the letter clearly stated why. He also told Montroy that the Employer had done a lot of investigation, and that Respondent "couldn't provide any facts to overturn what was stated in the investigation." According to Presnell, Montroy asked him to confirm that he (Montroy) had ten days to file an appeal, and Presnell said that he did. Presnell also told Montroy that based on his experience with these types of appeals, the panel was not likely to change its decision without new information.

Presnell testified that he did not say anything to Montroy that could have led Montroy to assume that Respondent would file an appeal on his behalf, and Montroy did not dispute this. However, according to Montroy, he spoke to Ralph Lewis and Lewis told him that he (Lewis) would filed the appeal. Lewis did not testify at the hearing. On or about September 15, 2015, Montroy received a letter from the arbitration panel stating that as no appeal of its earlier decision had been filed, the file on his grievance had been closed. Montroy then filed his own appeal. However, on November 13, 2015, Respondent sent Montroy a letter stating that as no timely appeal was filed, his file had been closed and would not be reopened.

Discussion and Conclusions of Law:

A union representing public employees in Michigan 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 *Goolsby,* at 678-679, "arbitrary" means "[W]ithout adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or

5 According to the Employer's Step IV answer, Montroy claimed at one point that on March 7, 2014, he received a directive from his supervisor not to return to work until 2:30 pm.

adjustment with reference to principles, circumstances, or significance. . . decisive but unreasoned." The Court held that in addition to prohibiting "impulsive, irrational, or unreasoned conduct," a union's duty of fair representation also proscribes "inept conduct undertaken with little care or with indifference to the interests of those affected." The Court explained 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. In *Goolsby,* the Court held that a union's unexplained failure to process a grievance to the next step of the grievance procedure constituted arbitrary conduct and a breach of its duty of fair representation. The *Goolsby* Court, however, drew a distinction between "ordinary negligence," e.g., failure to take proper care, and "gross negligence," i.e., reckless disregard for the interests of a member or members. *Goolsby,* at 672.

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. *Lowe,* at 146-147. The union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success at arbitration. *AFSCME Council 25 Local 2394,* 28 MPER 25 (2014). 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 Commission has "steadfastly refused to interject itself in judgment" over decisions made by unions about the handling of grievances despite frequent challenges by employees who perceive themselves as adversely affected. See, e.g., City *of Flint,* 1996 MERC Lab Op 1, 11.

Montroy does not allege that Local 101 representatives or the arbitration panel intentionally deceived him or that their actions were motivated by personal dislike or some other improper motive unrelated to the merits of his grievance. Rather, Montroy asserts that Respondent acted irrationally and/or with "little care or indifference" to Montroy's interests. Montroy's arguments are encapsulated in the following paragraph from his post-hearing brief:

> It appears that Respondent has simply taken the position that the various allegations asserted against Mr. Montroy in support of his termination are true and accurate and could not have been defended. Not only did the Respondent attempt to establish as true all of the reasons cited by the Employer for Montroy's termination, the Respondent added a few of its own. If the Respondent's effort investigating and preparing defenses for Mr. Montroy had been just a fraction of the effort it put in defending itself, then Mr. Montroy would still be working and his matter would be moot.

In this case, Montroy received a letter from Respondent's arbitration panel dated August 18, 2015, which informed him, and Local 101 Grievance Committee Chairperson Lewis, that the panel had rejected the Local's request to arbitrate Montroy's grievance. Although Montroy believed that he had

been cleared of charges of sexual harassment, the letter from the panel suggested that sexual harassment had been one of the reasons he was discharged. The letter also stated that Montroy's discharge was reduced to a long term suspension, suggesting that the panel might have believed the discipline that the Local had challenged was merely a suspension. In the paragraph that followed, the panel mentioned that the Employer had Montroy followed. The panel noted that his daily work logs did not match up with the times he actually arrived or left specific locations on the dates he was followed. Montroy had claimed to Respondent that his behavior was normal practice for crew leaders at the AWF or that his supervisor was aware of what he was doing, including not logging all his stops and not always accurately reporting the times he arrived and left a work location. The arbitration panel's letter, however, did not mention these claims or explain why it was rejecting them.

The Commission, however, has held that a union does not breach its duty of fair representation by failing to adequately communicate with a member unless that failure results in some actual harm to the member. *Detroit Police Officers Ass'n,* 1999 MERC Lab Op 227, 230. *See also Wayne Co (Sheriff's Dep't),* 1998 MERC Lab Op 101, 105 (no exceptions). Unless a union's good faith decision not to arbitrate a grievance is arbitrary, as that term is defined in this context, the fact that the member did not understand the basis for the union's decision is not relevant.

Kenneth Bailey, a member of the panel which reviewed Montroy's grievance, explained in some detail at the hearing the panel's reasons for rejecting Montroy's claims. Montroy argues that it was irrational for the arbitration panel to rely on unfounded allegations of sexual harassment in deciding not to arbitrate his grievance. Bailey testified at the hearing that even though the Employer did not give sexual harassment as a reason for Montroy's termination, the panel believed that the Employer might bring these allegations up again if the discharge was arbitrated. As Bailey's testimony made clear, Respondent did not reject Montroy's grievance for arbitration because of the sexual harassment allegations, or because it believed that Montroy had only received the lesser discipline of a suspension.

As Montroy's November 2014 discharge notice indicates, the Employer had two separate but related reasons for terminating him. First, his daily logs did not accurately reflect every place he took his crew or the times they arrived and left each work location, which the Employer considered falsification of records. Second, he was accused of wasting time by performing personal errands and driving his crew around in the van when the crew should have been working. As noted above, Montroy consistently insisted it was not the normal practice, or required, for AWF crew leaders to log in every place they went or to accurately record in all instances the times they left or arrived at a location. The Employer, however, disputed this. It pointed out, first, that AWF had a written policy that stated that all employees were required to complete accurate and truthful verbal and written reports, documents, and correspondence, and that failure to comply with this rule could constitute a dischargeable offense. It also pointed out that crew leaders, or at least their supervisors, were required to certify by their signature on each daily log that to the best of their knowledge, the information on the log was "complete, accurate, and truthful." In an arbitration hearing, the Employer would undoubtedly have presented testimony from higher level supervisors in the AWF and the Department of Children's and Family Services that, under the policy, crew leaders were to record their every movement during the day, and also that the courts expected participants to be performing actual community service all or most of the time when they were under AWF supervision. The Employer might even have found a current crew leader supervisor or supervisors to

testify that they understood that the log had to be detailed and accurate. The Employer would also likely attack Montroy's credibility, and might, as Bailey pointed out at the hearing, have brought up the March 2015 incident in which Montroy allegedly denied having a criminal history as proof that Montroy was not truthful. In an arbitration, the Employer has the burden of showing it had just cause for discharging an employee. In order for Respondent to win Montroy's grievance, however, the arbitrator would have had to credit Montroy's testimony – obviously self-serving even if true - over that of the Employer's witnesses. Although Montroy had given Local 101 a letter from his former supervisor Massey, the letter did not address the issue of how accurate the logs were supposed to be or how much detail they had to include. Therefore, when it reviewed Montroy's grievance for arbitration, the panel viewed Montroy's claims as unsupported by any other evidence. However, even if Massey had been called to testify to what he said during the unfair labor practice hearing, the arbitrator might have discounted Massey's testimony because he was an ex-employee or concluded that Massey had also been guilty of violating the rules. As Bailey testified, the arbitration panel decided that it was unlikely, based on the evidence, that Respondent would succeed in winning Montroy's grievance under these circumstances. I find that this decision was not so outside the range of reasonableness that it could be deemed irrational. I conclude, therefore, that the arbitration panel's decision to not arbitrate Montroy's grievance was not arbitrary and did not violate its duty of fair representation.

Respondent's arbitration panel relies on its local unions to investigate and gather the information on which the panel bases its decisions. Although Montroy's complaint was directed primarily at the panel's decision, he also challenged the Local's handling of his grievance. Presnell, the Local representative assigned to investigate Montroy's grievance, had experience in the AWF crew leader job, although he last worked the job more than ten years before Montroy began it. Montroy's claims regarding what was expected of an AWF crew leader did not correspond to Presnell's personal experience. To support his claims, Montroy gave Presnell a letter from his supervisor, Ron Massey.

However, as noted above, that letter did not address the issue of how much detail regarding their movements crew leaders were supposed to enter into their daily logs. Presnell did not attempt to speak to Massey in person. He also did not attempt to interview other crew leaders or crew leader supervisors about established practices for keeping logs. As reflected by his testimony at the hearing, Massey had additional information that might have helped Montroy's case. However, there is no indication in the record that Montroy gave Presnell any reason to believe that Massey might support Montroy's claims about the logs. Presnell did not explain why he decided not to interview other AWF crew leaders or supervisors. However, I note that even if these individuals agreed with Montroy's claims about practices in the AWF, they might have been reluctant to testify for fear of being accused themselves of violating the rules. There is no indication in the record that Montroy gave Presnell the names of any employees, other than Massey, who he believed would support his claims. I find that Presnell's failure to attempt to interview Massey or other AWF employees was not irrational and/or constitute gross negligence or "inept conduct undertaken with little care or with indifference to [Montroy's] interests." I conclude, therefore, that Respondent did not violate its duty of fair representation in the investigation of Montroy's grievance.

Montroy also argues that Local 101's failure to file a grievance over Montroy's July 2015 termination violated its duty of fair representation. As discussed above, after its February 23, 2015, decision on Montroy's grievance the Employer viewed Montroy as reinstated even though he was not actually working or being paid. Respondent's view, however, was that Montroy was still terminated.

In fact, according to Respondent, it believed that the Employer would not accept a separate grievance over Montroy's July 2015 "termination," since the Employer had earlier told Respondent that Respondent could not grieve the February 23 "reinstatement." For this reason, Respondent did not investigate the Employer's allegation that Montroy falsified his criminal history, and or attempt to grieve Montroy's July "termination" as a separate contract violation. The decision not to investigate or grieve this second "termination," was a deliberate decision made by Respondent's representatives in good faith, and within the range of reasonableness. I find, therefore, that Local 101's failure to file a separate grievance over Montroy's July 2015 termination did not violate its duty of fair representation.

Montroy asserts, in addition, that Local 101 violated Respondent's duty of fair representation by failing to appeal the panel's decision on his behalf. Montroy testified that Ralph Lewis, to whom the panel August 18, 2015, letter was addressed, assured him that Lewis would file an appeal. However, he did not appeal the panel's decision. I conclude, however, that Respondent's duty of fair representation did not extend to assisting Montroy in appealing Respondent's decision not to proceed further with his grievance. The proviso to Section 10(2)(a) of PERA explicitly protects a union's rights to prescribe its own rules. A union's failure to follow its own internal rules or procedures does not, standing alone, breach its duty of fair representation toward its members. *Amalgamated Transit Union, Local 1039*, 25 MPER 61(2012) (no exceptions); *Registered Nurses and Registered Pharmacists of Hurley Hospital*, 2002 MERC Lab Op 394 (no exceptions). Although a union may establish an internal procedure for its members to appeal the union's own decisions not to arbitrate grievances, a union is not required by its duty of fair representation to have such an appeal procedure. Moreover, as the Commission said in *Michigan State Univ*, 25 MPER 30 (2011), a procedure established by a union for its members to appeal its decisions regarding arbitration is "an internal union protocol," which the Commission has no authority to regulate or monitor.

As Montroy points out, in *Goolsby*, supra, the Michigan Supreme Court held that a union's failure to move the charging parties' grievance to the next step in the grievance procedure in a timely fashion violated its duty of fair representation. By the terms of the contractual grievance procedure, the union's failure to act in that case foreclosed the union and the charging parties from pursuing the grievance further. The Court found that the union's inexplicable failure to comply with the grievance procedure time limits was inept conduct manifesting indifference to the charging parties' interests and constituted a breach of its duty of fair representation. However, unlike Respondent in this case, the union in *Goolsby* did not make a reasoned, good faith, nondiscriminatory decision not to process the grievance further. Rather, the union's carelessness was the sole reason charging parties' grievance did not go forward. In this case, I find, Respondent obligations under its duty of fair representation ended when the arbitration panel reviewed Montroy's grievance and made a good faith, reasoned decision that the grievance did not warrant arbitration. I find that Lewis' failure to file a timely appeal of the arbitration panel's decision under Respondent's internal appeal procedure, or the panel's refusal to accept Montroy's late appeal, did not violate Respondent's duty of fair representation.

In accord with the findings of fact and discussion and conclusions of law set forth above, I conclude that Respondent did not violate its duty of fair representation in this matter. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 7, 2017