STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION),
Public Employer-Respondent in MERC Case Nos. C17 F-051, C17 F-052 & C17 F-053;

-and-

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 312,
Labor Organization-Respondent in MERC Case Nos. CU17 F-021, CU17 F-022 & CU17 F-023;

-and-

JERMAINE SMITH,
An Individual Charging Party.
____/

APPEARANCES:

Dwight Thomas, Labor Relations Specialist, for the Public Employer

Katherine L. DeLong, Staff Attorney, for the Labor Organization

Jermaine Smith, appearing on his own behalf

DECISION AND ORDER

On January 23, 2018, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

[1] MAHS Hearing Docket Nos. 17-012666, 17-012667, 17-012668, 17-012669, 17-012670 & 17-012671

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: March 20, 2018

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION),
Respondent-Public Employer in Case Nos. C17 F-051, C17 F-052 & C17 F-053; Docket Nos. 17-012666-MERC, 17-012667-MERC & 17-012668-MERC,

-and-

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 312,
Respondent-Labor Organization in Case Nos. CU17 F-021, CU17 F-022 & CU17 F-023; Docket Nos. 17-012669-MERC, 17-012670-MERC & 17-012671-MERC,

-and-

JERMAINE SMITH,
An Individual Charging Party.
____/

APPEARANCES:

Dwight Thomas, Labor Relations Specialist, for the Public Employer

Katherine L. DeLong, Staff Attorney, for the Labor Organization

Jermaine Smith, appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from unfair labor practice charges filed on June 9, 2017, by Jermaine Smith against his employer, the City of Detroit, Department of Transportation (DDOT or the Employer), and his labor organization, American Federation of State, County and Municipal Employees Council 25, Local 312 (AFSCME or the Union). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charges were assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC or the Commission).

The Charges and Procedural Background:

The charges in Case No. C17 F-053; Docket No. 17-012668-MERC and CU17 F-021; Docket No. 17-012669-MERC arise from a three-day suspension served by Smith in May of 2017. Smith asserts that DDOT did not follow the proper disciplinary steps set forth in the collective bargaining agreement and that AFSCME did not fairly represent him in the course of challenging the suspension. Charging Party also asserts that both Respondents violated PERA by failing to provide him with information relating to the suspension and that Respondents conspired against him in retaliation for Smith speaking out against an AFSCME official during Union meetings.

Case No. C17 F-051; Docket No. 17-012666-MERC and CU17 F-022; Docket No. 17-012670-MERC pertain to the Employer's implementation of the overtime equalization requirements set forth in the collective bargaining agreement. Smith asserts that he was denied the same opportunity to work overtime as one of his co-workers, Darryl Canty, and that the Union failed to take action on his behalf to remedy the contract violation.

In Case No. C17 F-052; Docket No. 17-012667-MERC and CU17 F-023; Docket No. 17-012671-MERC, Charging Party alleges that the Employer breached the collective bargaining agreement by making changes to the chain of command. According to Smith, these changes resulted in confusion amongst employees over whom they were to report which affected their wages, hours and other conditions of employment. Charging Party also contends that the Union breached its duty of fair representation by failing to file a grievance regarding the change in reporting requirements.

The cases were consolidated and an evidentiary hearing was scheduled for August 15, 2017. On August 11, 2017, AFSCME filed a motion seeking summary dismissal of the charges against the Union. At the start of the hearing on August 15, 2017, the Employer similarly moved to dismiss the charges against DDOT. After taking oral argument on the motions, I held that the allegations set forth against the Employer in Case No. C17 F-051; Docket No. 17-012666-MERC and C17 F-052; Docket No. 17-012667-MERC asserted only contract violations by the DDOT and, therefore, failed to state claims upon which relief could be granted under PERA. However, the motions for summary disposition were denied with respect to the remaining allegations against the Employer and the Union and the matter proceeded to evidentiary hearing.

Findings of Fact:

I. Background

Jermaine Smith has been employed by the City of Detroit, Department of Transportation for more than 20 years. At the time of the events giving rise to this dispute, he was working as a storekeeper in the Employer's materials management division. Materials management, which is part of DDOT's vehicle maintenance department, is responsible for maintaining inventory at the Shoemaker, Gilbert and Coolidge bus terminals, as well as plant management. Charging Party works out of the Shoemaker terminal.

II. Three-Day Suspension

In early April 2017, Charging Party received a notice of suspension signed by repair foreman Felton Mack and Shoemaker superintendent Michael Eason. The notice indicated that Smith was suspended from employment with the City of Detroit for three calendar days beginning on April 17, 2017. The reason for the suspension was listed as "Insubordination." The notice was provided to Smith at a disciplinary meeting attended by Mack, Eason, foreman Dale Bates and Local 312 representative Michael Moore. Charging Party was informed that the suspension related to his failure to follow directives issued to him in an email from management. Mack indicated that the Employer had photographs substantiating the insubordination charge. Smith and Moore both asked Mack for a copy of the email and photographs, but Mack refused to provide them. Mack told Smith to "take the write-up and just leave."

Charging Party drafted a grievance fact sheet on April 10, 2017, and submitted it to AFSCME Local 312. The following day, the Union filed a grievance with the Employer which was assigned Grievance Number VV-17—2017. The grievance asserted that the suspension of Smith constituted unjust discipline in violation of Article 11 of the collective bargaining agreement and that DDOT breached Article 6 of the supplemental agreement by failing to provide notice to the union. In the statement of facts, the Union denied that management had ever provided Smith with notice of his job duties. As a remedy for the alleged contractual violations, the Union sought to have the discipline removed from Smith's record, that DDOT adhere to "proper protocol" and that the Employer communicate to AFSCME's members in person when contemplating any disciplinary action. After the grievance was filed, Charging Party made several unsuccessful attempts to get records and other documents from both AFSCME and the Employer's human resources department.

A Step 3 hearing was held on the grievance on April 27, 2017. Among those in attendance were Smith, Eason, chief union steward Cornell Pore and Karl Graham, a member of AFSCME Local 312's grievance committee. Eason presented to the Union and Smith evidence, including e-mails and photographs, pertaining to the disciplinary action. At the conclusion of the hearing, the Employer denied the grievance. For reasons not explained on the record, a written Step 3 denial was not issued by DDOT until July 5, 2017. That document states, in pertinent part:

> The Union contends that Jermaine Smith was issued a three-day suspension for insubordination, unjustly. It is the belief of the employee that instructions on ordering supplies is unclear and no supervisor has given proper instructions as it relates to this matter.
>
> The department's position is Mr. Smith failed to follow a directive given by supervision to refrain from ordering supplies. Clear instructions were sent via email by Alicia Miller. According to the time stamp in Groupwise the employee read the email. If the employee was unclear about the process at no time did he reach out to his supervisor nor the garage supervisor for clarity.

Following the Step 3 hearing, the notice of suspension was reissued. The new disciplinary notice, dated May 22, 2017, was identical to the first except that the reason for the suspension was changed from "Insubordination" to "Low Productivity." Charging Party drafted a grievance fact sheet challenging the suspension on May 23, 2017, and asked Graham to file it on his behalf. Charging Party testified that Graham refused to do so and instead advised Smith to "just take the discipline" since it would only be on his record for 12 months. Graham offered a different account of this conversation at the hearing in this matter. According to Graham, Charging Party wanted the Union to compel DDOT to remove the discipline from his record. Graham testified that he told Smith that he did not have the power to force the Employer to take such action but that the Union would continue to process the grievance by taking it to Step 4. Graham testified that he assured Smith that "worst case scenario it would be in 12 months and it will go away, but it was going to Step 4 and it was not dead." Graham's testimony was corroborated by a copy of a written request for a step 4 hearing on the Smith grievance dated May 21, 2017, which the Union introduced into evidence in this matter.

Charging Party served the three-day suspension beginning on May 26, 2017. On July 27, 2017, Graham appeared at a Step 4 hearing on the Smith grievance. Graham testified credibly and without contradiction that the grievance discussed at the hearing covered both the original notice of suspension for insubordination and the reissued notice which cited low productivity. At the time of the hearing on Smith's unfair labor practice charge, the Union had not yet received a Step 4 answer from the Employer.

III. Equalization of Overtime

In January of 2017, Charging Party became aware that a fellow employee had been receiving overtime since August of 2016. Charging Party contacted the Union and a grievance was filed asserting that Smith had been denied the right to work overtime in violation of the overtime equalization provisions set forth in Article 9 of the supplement agreement between the Employer and AFSCME, Local 312. Specifically, the grievance stated, in pertinent part:

> I Jermaine Smith am aggrieved that I have been denied the right to work overtime in the Storeroom at the Shoemaker location. The Storekeepers at this location are under the supervision of the Location Supervisor and should be rotated and equalize [sic] as such. The overtime hasn't been equally afforded or offered to me as it has been afforded to the other shifts. This practice is ongoing and has been going on since August 2016 and has not been resolved as of January 2017.

A Step 2 hearing was held on the grievance on January 25, 2017. In attendance were Graham, Eason and Mack. Graham began the hearing by arguing that Charging Party should be afforded the same amount of overtime as other employees. In response, Eason denied that there had been a violation of the overtime equalization requirements, but assured Graham that if there were any problems with the issuance of overtime, those issues would be remedied. Eason also informed Graham that Charging Party had in fact worked overtime the previous evening. Based on Eason's explanation, Graham determined that there was no reason to process the grievance further. Following the Step 2 hearing, Eason sent Graham a letter formally denying the grievance.

The letter stated, “The department position is that Mr. Smith was given the opportunity to work overtime consistent with other [sic] at location and in classification.” That same date, Graham notified Charging Party in writing that overtime was being distributed equally and that the grievance was denied. Smith later followed up with the Union’s grievance committee, asserting that Eason was lying and that another employee had been allowed to work an extra 20 hours of overtime. No further action was taken by the Union.

IV. Chain of Command

Charging Party testified that in February of 2015, employees working in the materials management division at the Shoemaker terminal were transferred to the rolling stock division, which also includes mechanics and body shop employees. Charging Party claims that following the transfer, questions arose regarding the proper chain of command. Charging Party believed that the transfer had caused uncertainty regarding duties, pay, overtime and other terms and conditions of employment because materials management employees did not understand to whom they were supposed to report. On two occasions, the first of which was January 16, 2017, Charging Party attempted to file a grievance over this issue, but he never heard back from the Union. Smith also began attending AFSCME Local 312 meetings at which he repeatedly voiced concerns about the new chain of command. According to Charging Party, the Union took the position during these meetings that Smith and his fellow employees were under the supervision of Eason, the superintendent of the Shoemaker terminal. Although it is not entirely clear from the record, Charging Party apparently believes that he should instead be reporting to the supervisor of the materials management division.

At the hearing in this matter, Graham denied that there was ever a transfer involving materials management employees to rolling stock. Rather, he testified that Charging Party’s complaints arose from a directive issued by management which stated that as of January 16, 2015, materials management employees would be reporting to the superintendent of the garage to which they were assigned, rather than to the supervisor of the materials management division. Graham testified that the announcement did not result in any changes to employees’ classifications, pay, hours or duties. The Union took the position that no grievance could be filed because the City has the right to manage its workplace, including determining the chain of command. Although this view was expressed to Charging Party both verbally at Union meetings and in writing, Graham testified that Smith and one other employee continued to raise questions about the appropriate chain of command for materials management employees. At the hearing in this matter, Graham emphasized that, while the Shoemaker superintendent was indeed Charging Party’s supervisor, DDOT policy states that any supervisor has the authority to direct the work of any employee. Graham testified, “Whoever gives you a directive you’re supposed to follow it.”

Discussion and Conclusions of Law:

As noted above, both Respondents moved for summary disposition of the charges filed by Smith in this matter. During oral argument, it was established that the allegations against the Employer in Case No. C17 F-051; Docket No. 17-012666-MERC (overtime equalization) and Case No. C17 F-052; Docket No. 17-012667-MERC (chain of command) were based solely on a breach of contract theory.

PERA does not prohibit all types of discrimination or unfair treatment by a public employer, nor does the Act provide a remedy for a breach of contract claim asserted by an individual employee. The Commission's jurisdiction with respect to claims brought by individual employees against public employers is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in, or refusal to engage in, union or other concerted activities protected by PERA. Accordingly, the charges against the Employer in Case No. C17 F-051; Docket No. 17-012666-MERC and Case No. C17 F-052; Docket No. 17-012667-MERC must be dismissed for failure to state a claim under the Act. For the same reason, summary disposition is also appropriate with respect to Charging Party's breach of contract allegation in Case No. C17 F-053; Docket No. 17-012668-MERC (three-day suspension).

With respect to Case No. C17 F-053; Docket No. 17-012668-MERC and Case No. CU17 F-021; Docket No. 17-012669-MERC, Charging Party asserted that the three-day suspension which was initially issued to him in April 2017, and which was reissued on May 22, 2017, constituted retaliation against him by both management and AFSCME representatives for speaking out against Graham during Union meetings. However, beyond the conclusory allegation that management and the Union were colluding against him, Charging Party presented no credible evidence which would suggest that the suspension was retaliatory in nature or that it was in any way connected to his protected concerted activities. To conclude otherwise, based upon the record presented, would be to engage in speculation and conjecture. Such speculation as to motive has been expressly prohibited by the Michigan Supreme Court in *MERC v Detroit Symphony Orchestra*, 393 Mich 116 (1974). Similarly, there is no credible evidence in the record to support Charging Party's conclusory testimony that the Union treated Smith's case differently than it did grievances involving other employees.

Charging Party contends that AFSCME Local 312 breached its duty of fair representation with respect to the grievances filed concerning the three-day suspension and overtime equalization, and in failing or refusing to take action on his behalf over the chain of command issue. 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. An individual member does not have the right to demand that his grievance be pressed to arbitration, and the union is not required to carry every grievance to the highest level. 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. *Lowe, supra.* To this end, a union is not required to follow the dictates of the individual grievant, but rather it may investigate and present the case in the manner it determines to be best. *Detroit Police Lts and Sgts,* 1993 MERC Lab Op 729.

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. The Union's decision on how to proceed with a grievance 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 Cty 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 record establishes that the Union filed grievances on Charging Party's behalf regarding both the three-day suspension and the overtime equalization issue. Although the charges assert that the Union failed to procure evidence regarding the suspension, Smith admitted at the hearing in this matter that AFSCME steward Michael Moore did in fact ask the Employer for copies of emails and photographs upon which management relied to support the disciplinary action. Moreover, Graham testified credibly that he attended a Step 3 hearing regarding the suspension grievance at which the Employer presented copies of emails and photographs. When the Employer denied the grievance at that step, the Union requested a Step 4 hearing which was held on July 27, 2017. Given that the grievance was still pending at the time of the hearing in this matter, no breach of the duty of fair representation can be established. Similarly, there is no evidence in the record to suggest that AFSCME acted unlawfully with respect to the overtime equalization issue. The Union filed a grievance asserting that Charging Party had been denied the opportunity to work overtime and Graham argued on Smith's behalf at a Step 2 hearing. However, upon learning from the Employer that Charging Party had actually worked overtime the prior evening, Graham determined that there had been no breach of contract. For that reason, the Union did not process the grievance to the next step. While Charging Party clearly disagrees with that decision, there is nothing in the record to establish that the Employer in fact violated the contract's overtime equalization requirements or that AFSCME acted arbitrarily, discriminatorily or in bad faith in connection with its dealings with Smith regarding the overtime equalization issue. As noted, the Union is not required to take every grievance to arbitration. *Lowe*, *supra*. Accordingly, the charges against the Union in Case No. C17 F-053; Docket No. 17-012668-MERC and Case No. CU17 F-021; Docket No. 17-012669-MERC must be dismissed.

Similarly, Charging Party failed to establish that the Union breached its duty of fair representation by not taking action to clarify the chain of command for materials management employees. Regardless of whether there was a transfer of employees assigned to materials management, as asserted by Charging Party, or merely a change in the supervisory structure, as claimed by Graham, it is clear that the real issue in this matter is Smith's belief that he has no obligation to take directives from Eason, the superintendent of the Shoemaker Terminal, and other management officials. An employer's decision with respect to its choice of supervisors is a management right about which the employer has no statutory duty to bargain.

See *Oakland Comm Coll*, 23 MPER 78 (2010) (no exceptions), citing *Hampton House*, 317 NLRB 144 (1995); *Bridgeport and Port Jefferson Steamboat Co and Local 333*, 313 NLRB 542 (1993); *Tesoro Petroleum Corp*, 192 NLRB 56 (1971); *KONO-TV Mission Telecasting Corp*, 163 NLRB 1005 1967. There is no credible evidence suggesting that the change in reporting structure affected Smith's wages, hours or other terms and conditions of employment. Therefore, I find that the Union did not breach its duty to fairly represent Smith under PERA by refusing to file a grievance regarding this issue.

I have carefully considered all of the remaining arguments asserted in this matter and conclude that they do not warrant a change in the result. Despite having been given a full and fair opportunity to do so, Charging Party has failed to meet his burden of proving that either Respondent violated PERA. Accordingly, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charges filed by Jermaine Smith against the City of Detroit, Department of Transportation and AFSCME Council 25, Local 312 are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 23, 2018