STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COUNTY ROAD COMMISSION,
Public Employer-Respondent in MERC Case No. C18 F-059

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Respondent in MERC Case No. CU18 F-018

-and-

DARREN SCOTT HICKONBOTTOM,
An Individual Charging Party.
_____/

APPEARANCES:

Michael Kluck and Associates, by Thomas H. Derderian, for the Public Employer-Respondent

Dwight Thomas, for the Labor Organization-Respondent

Jeffrey S. Burg, for Charging Party

DECISION AND ORDER

On March 27, 2019, 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 any 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

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: MAY 20 2019

[1] MAHS Hearing Docket Nos. 18-014024 & 18-012971

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WASHTENAW COUNTY ROAD COMMISSION,
Public Employer-Respondent in Case No. C18 F-059/Docket No. 18-014024-MERC,

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Respondent in Case No. CU18 F-018/Docket No. 18-012971-MERC,

-and-

DARREN SCOTT HICKONBOTTOM,
Individual-Charging Party.
_____/

APPEARANCES:

Michael Kluck and Associates, by Thomas H. Derderian, for the Public Employer-Respondent

Dwight Thomas, for the Labor Organization-Respondent

Jeffrey S. Burg, for Charging Party

DECISION AND RECOMMENDED ORDER
ON SUMMARY DISPOSITION

On June 15, 2018, Darren S. Hickonbottom filed an unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his collective bargaining representative, Teamsters Local 214 (the Union). On June 25, 2018, Hickonbottom filed a charge against his former employer, the Washtenaw County Road Commission (the Employer). Both charges were filed pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. Pursuant to Section 16 of the Act, the charges were consolidated and assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System.

On June 21, 2018, I scheduled a hearing on Hickonbottom's charge against the Union and directed the Union to file a position statement in response to the allegations in

that charge. The Union filed its position statement on July 12, 2018. On July 20, 2018, the Union filed a motion for summary disposition. Hickonbottom filed his response to the motion on September 4, 2018.

On September 14, 2018, I issued an order to Hickonbottom, per Rule 165(1) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.165(2)(d), to show cause why his charge against the Employer should not be dismissed because it did not allege a violation of PERA. On October 12, 2018, Hickonbottom filed his response to my order to show cause and requested oral argument on the motions. Oral argument was held on January 11, 2019.

Based on the facts as set out below, and the arguments made by the parties in the above pleadings and at oral argument, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

From May 11, 2015, until he was terminated on January 31, 2018, Hickonbottom worked as truck driver for the Employer and was a member of a bargaining unit represented by the Union. According to his termination letter, Hickonbottom was terminated under the Employer's progressive discipline policy after receiving three "Group II" disciplines within a two-year period.

Hickonbottom alleges that his termination was improper under the progressive discipline policy and was discriminatory.[1] He argues that the first discipline in the sequence, a three-day suspension issued to him on October 24, 2017 for an accident he had with his truck in June 2017, was improper because it did not qualify as a "major chargeable accident," as defined in the Employer's own disciplinary policy. Therefore, according to Hickonbottom, the accident should not have been considered a Group II violation and should have warranted no more than a written reprimand. Hickonbottom also asserts that the Employer improperly reneged on its supervisor's promise that the suspension would be revoked, and Hickonbottom made whole, if the monetary damages from the accident were under $7500. In addition, Hickonbottom alleges that the Employer falsely claimed, at the time of his discharge, that no grievance had been filed over the three-day suspension. Finally, Hickonbottom maintains that his three-day suspension was improperly issued under the collective bargaining agreement because it was not issued until four months after the accident. While Hickonbottom also asserts that the second and third disciplines should not have been issued because he was not at fault in either incident, his primary argument is that his termination on January 31, 2018, was not justified because the level of discipline he received for the June 2017 accident was improper.

The Employer and the Union both agree that no formal grievance was filed over Hickonbottom's October 24, 2017, three-day suspension. The Union filed a grievance

[1] After Hickonbottom received the second of the three disciplines, he filed a complaint against the Employer alleging racial discrimination with the Michigan Civil Rights Department. (MCRD).

over Hickonbottom's termination, but its internal grievance panel decided not to proceed to arbitration on this grievance. Hickonbottom's charge against the Union is that it violated its duty of fair representation against him by failing to make a good faith, reasoned decision not to pursue arbitration of his discharge grievance.

Facts:

The facts below are set out in Hickonbottom's pleadings. I have also included facts set out in documents the Union attached to its motion for summary disposition, the authenticity or accuracy of which Hickonbottom does not dispute. These facts are specifically identified below.

The Employer maintains a progressive disciplinary policy applicable to employees in the Union's bargaining unit. The policy is set out in a written document. The policy separates offenses into three categories. Major Group I violations are the most serious offenses. An employee is subject to immediate discharge for a single Major Group I offense. For the second category, Major Group II, the penalty for a first offense is three days suspension without pay and for a second offense is five days suspension without pay. An employee is subject to discharge for a third Group II offense committed within a two-year period. Included in the policy as examples of Group II offenses are "major chargeable accident (personal injury or property damage of $7500 or more)," and "three formal disciplines within a twelve-month period." The penalty for a first Major Group III offense, the least serious category, is a written reprimand. Included as examples of Group III offense are "minor chargeable accident," and "careless or reckless operation of the Employer's equipment."

In June 2017 the box of Hickonbottom's truck, while raised, came in contact with a power line and apparently pulled it down. Hickonbottom maintained that this accident was not his fault, and he was not immediately disciplined. However, on October 24, 2017, Hickonbottom was issued a three-day suspension for the June 2017 accident which the Employer then characterized as a "major chargeable accident" and a Group II offense. After receiving the notice of suspension, Hickonbottom went to the offices of Local 214, filled out a grievance over the suspension, and submitted it to a clerk. However, shortly thereafter, Hickonbottom was told by his Union steward, Mike Maebeck, that submitting his own grievance was not the correct procedure. Maebeck also told him that Maebeck had talked to a supervisor and that the Employer had not yet received an invoice from the utility company, DTE, for the damage to its property. Maebeck told Hickonbottom that the supervisor had agreed that if the invoice from DTE, when it arrived, was for less than $7500, Hickonbottom's suspension would be rescinded and he would be made whole. The document Hickonbottom submitted to Local 214's offices was not processed as a grievance and the Union did not file a grievance of its own over Hickonbottom's October 24, 2017, suspension. It is unclear from the pleadings whether Hickonbottom knew, prior to his termination three months later, that the three-day suspension was not formally grieved.

On October 23, 2017, the Employer called Hickonbottom in and told him that it had been notified by the Secretary of State (SOS) that Hickonbottom's CDL had been suspended from October 9 to October 12, although Hickonbottom had driven his truck as usual on October 9 and October 10. Hickonbottom told the Employer that he did not know that his CDL had been suspended. Hickonbottom's CDL suspension resulted from an unpaid traffic ticket Hickonbottom had received in July 2017 while driving his personal vehicle. Hickonbottom told his supervisor about the ticket, which he intended to contest, at the time he received it. However, Hickonbottom failed to contest the ticket in accord with the instructions on the citation and on or about August 22, 2017, Hickonbottom received a notice of default judgment from a district court directing him to pay the fine as well as fees and costs. The notice, which Hickonbottom saved, stated that if Hickonbottom did not pay this amount within twenty-eight days, his driving privileges might be suspended by the SOS. This statement, however, was on the back of the notice and Hickonbottom did not read it.

Hickonbottom did not have the money to pay the amount on the notice at the time but did not inform his supervisor of the default judgment. On October 9, 2017, the SOS suspended Hickonbottom's CDL effective that date, but did not mail Hickonbottom a letter notifying him of the suspension until October 11, 2017. On October 9 and October 10, Hickonbottom drove his truck as usual. By coincidence, Hickonbottom paid the entire amount he owed on October 12 and, as a result, his CDL was reinstated. The letter from the SOS arrived after October 12 and, because Hickonbottom had already paid the amount he owed, he did not open the letter but merely set it aside. When called into the Employer's offices on October 23, Hickonbottom told the Employer that he had not known of the suspension when he drove with a suspended license on October 9 and 10. In support, Hickonbottom brought the Employer the unopened envelope from the SOS as well as his notice of default judgment. The Employer did not accept his excuse. In a memo dated October 30, 2017, the Employer notified Hickonbottom that he was being suspended for five days for a second Group II offense, failure to notify the Employer that his CDL was suspended and operating the Employer's heavy truck on a public road with a suspended CDL. In the memo, the Employer stated that Hickonbottom should have known from his notice of default judgement that his CDL might be suspended if he did not pay within a certain time and that he should have notified the Employer of the problem. Insofar as the record indicates, Hickonbottom did not ask the Union to grieve this second suspension and no formal grievance was filed.

On January 12, 2018, an Employer truck suffered damage while Hickonbottom was washing it on the Employer's premises. According to the Employer, Hickonbottom caused the damage by failing to lower a passenger side safety strut before lowering the truck's dump box, but Hickonbottom denied that he was responsible for the damage. On January 31, 2018, Hickonbottom was terminated. According to Hickonbottom's termination letter, the January 12, 2018, incident resulted in approximately $6,425 worth of damage to the truck. For this incident, the Employer deemed Hickonbottom guilty of "careless or reckless operation of the Employer's equipment," a Group III offense. However, the Employer's termination letter cited Hickonbottom's October 24, 2017, discipline for "a major chargeable accident," a Group II offense, and his second offense

Group II violation for the CDL incident issued on October 30, 2017. The letter concluded, "Your incident of January 12, 2018, and resulting Group II violation converts to a third offense Major Group II violation for receiving three formal disciplines within a twelve-month period," thus justifying Hickonbottom's termination.

The Union filed a grievance over Hickonbottom's termination. The Union attached to its motion for summary disposition a copy of an internal Union memo prepared for the Union's grievance panel which included discussion of the Employer's position with respect to the grievance. According to this memo, during the Step III meeting on the grievance, the Union brought up the agreement between Maebeck and Hickonbottom's supervisor that if the DTE invoice was received and was in an amount less than $7,500, Hickonbottom's October 24, 2017 suspension for the June 2017 accident would be rescinded. According to this memo, the Employer's Human Resources Director told the Union that the Employer had still not received an invoice from DTE.[2] However, it pointed out that no formal grievance had been filed over the October 24, 2017, discipline. The Human Resources Director said that the Employer was not going to honor the agreement between Maebeck and the supervisor because the accident caused significant damage. According to the internal memo, the Employer said that in addition to the damage to DTE's equipment, "several fire departments were present for several hours and [Hickonbottom] tied up two work crews because of the accident, as well as damage to [Hickonbottom's] truck."

After the grievance was denied by the Employer at the third step of the grievance procedure, the Union submitted the case to its grievance panel for a determination as to whether the grievance should be arbitrated. The grievance panel received the internal memo referenced in the paragraph above along with a copy of Hickonbottom's file including his disciplinary record dating back to his date of hire. The record indicated that Hickonbottom had received disciplinary "write-ups" in October 2016 and May 2017 in addition to the discipline cited by the Employer to support his termination.

On March 5, 2018, the Union grievance panel sent Hickonbottom a letter stating that the panel had met to review his grievance on February 26, 2018, and had reached the following decision:

> Based on the record proved, you were progressively disciplined within a twelve-month period. Based on that record and the fact that you have just two and one-half years with this Employer, we do not feel we could prevail at an arbitration hearing.

The letter advised Hickonbottom of his right to appeal the decision and attached a document indicating how to appeal and that the decision of the grievance panel's appeal board would be final. On March 21, 2018, Hickonbottom submitted a written appeal. In his appeal, Hickonbottom told the panel that he believed that ever since he refused to tell

[2] The Employer eventually received an invoice from DTE which it provided to the MCRC in connection with Hickonbottom's complaint against it with that agency. The invoice was for less than $7,500.

the Employer that another employee was sleeping on the job in the late spring of 2016, the Employer had been seeking to terminate him. Hickonbottom noted the fact that the three-day suspension for the June 2017 accident was issued the day after the Employer questioned him about his suspended CDL. Finally, Hickonbottom explained that the truck he was washing on January 12, 2018, had preexisting damages "which should be enough to fight for."

On April 18, 2018, the appeal board sent Hickonbottom a letter indicating that since no additional information had been presented to the board, his case remained rejected for arbitration and would be closed.

Discussion and Conclusions of Law:

Hickonbottom's Charge Against the Employer

Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. The types of activities protected by PERA include filing or pursuing a grievance under a union contract, participating in union activities, joining or refusing to join a union, and joining with other employees to protest or complain about working conditions. Sections 10(1)(a) and (c) of PERA prohibit a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities protected by PERA. For example, an employer who disciplines or discharges an employee because the employee has filed a grievance under a union contract violates PERA.

However, not all types of unfair treatment of its employees by a public employer violate PERA. There are federal statutes, and Michigan statutes in addition to PERA, which address some aspect of the relationship between a public employer and its employees. These include statutes that prohibit discrimination based on race, sex, religion, age and disability. The Commission's jurisdiction, however, is limited to the enforcement of PERA. Absent an allegation that the employer interfered with, restrained, coerced, or retaliated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by PERA, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions. See, e.g., *City of Detroit (Fire Dep't)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

Here, Hickonbottom alleges that his termination was improper under the Employer's progressive discipline policy, was unfair and was discriminatory. He also complains that the Employer improperly reneged on an agreement with the Union to rescind his October 24, 2017 suspension if it was billed less than $7500 by DTE for damages caused by his accident. However, as discussed above, not all unfair employer actions violate PERA and, absent a violation of that statute, the Commission has no

jurisdiction to determine whether a public employer's actions were improper. Hickonbottom has not alleged in this case that his termination was connected to his status as a union member or to any activity engaged in by him of the type protected by PERA, nor has he alleged any facts which would support the existence of such a connection. Hickonbottom has also not explained how the Employer actions of which he complains interfered with his exercise of his rights under Section 9 of PERA.

Rule 165(1) of the Commission's General Rules, states that an administrative law judge assigned to hear a case for the Michigan Employment Relations Commission may, on his or her own initiative or on a motion by any party, order dismissal of a charge or issue a ruling in favor of a party without a hearing based on grounds set out elsewhere in this rule, which include failure to allege a claim on which relief may be granted by the Commission. I conclude that Hickonbottom has failed to allege a claim under which relief can be granted under PERA against the Employer, and that his charge against the Employer should be dismissed on that basis.

Hickonbottom's Charge Against the Union

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty toward the employees it represents 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. Also see *Vaca v Sipes*, 386 US 171 (1967). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . ." *Merritt v International Assn of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010)., citing *Spellacy v Airline Pilots Assn*, 156 F3d 120, 126 (CA 2, 1998). "Arbitrary" conduct by a union was described by the Court in *Goolsby* as: (a) impulsive, irrational or unreasoned conduct; (b) inept conduct undertaken with little care or with indifference to the interests of those affected; (c) the failure to exercise discretion; and (d) extreme recklessness or gross negligence.

Although the union owes a duty of fair representation to every employee it represents, its primary duty is to its entire membership as a whole. *Lowe v Hotel Employees*, 389 Mich 123 (1973). If it acts in good faith and not from improper motives, e.g., personal hostility toward the member that has nothing to do with the merits of the dispute, a union has considerable discretion to decide how to handle and how far to proceed with a grievance. That is, it does not have to arbitrate every grievance but can weigh the likelihood of the grievance succeeding against the costs of the arbitration. See, e.g., *Ann Arbor Pub Schs*, 16 MPER 15 (2003). If it does not fall so far outside the range of reasonableness that it can fairly be characterized as "irrational," a union's good faith decision about how to handle a grievance does not breach its duty of fair representation. *Air Line Pilots Int'l Assn v O'Neill*, 499 US 65, 66 (1991). Moreover, a decision made by a union with respect to the handling of a grievance is not irrational simply because it

turns out in retrospect to have been the wrong decision or a mistake. *O'Neill,* at 77; *City of Detroit (Fire Dept),* 1997 MERC Lab Op 31, 34.

In the instant case, the Union did not file a formal grievance over Hickonbottom's October 24, 2017 suspension, possibly because of the supervisor's promise that the discipline would be rescinded if the Employer received an invoice from DTE for less than $7500. Given subsequent events, this may have been the wrong decision. However, because of the nature of Hickonbottom's June 2017 accident, and the attention it apparently attracted from local authorities, there was always the possibility that the Employer might insist that the accident was "major" regardless of the amount of the DTE bill. Filing a grievance might even have increased the likelihood of this occurring. I find that the Union's decision not to pursue a formal grievance over the suspension under these circumstances was within the range of reasonableness and was not arbitrary.

According to the Union, the fact that no grievance was filed over the October 24, 2017, suspension was a factor in its decision not to arbitrate the grievance. Other factors leading the Union to conclude that an arbitrator was not likely to overturn Hickonbottom's termination were the fact the Hickonbottom had less than three years seniority when he was terminated and had received several "write-ups" during that short period. Third, contrary to his claim here, Hickonbottom was progressively disciplined under the Employer's disciplinary policy. Finally, the Union determined that that the Employer had substantial proof that all the incidents for which he was disciplined had occurred and were significant enough to warrant the discipline he received. As noted above, along as it does not fall so far outside the range of reasonableness that it can fairly be characterized as irrational, a union's good faith decision not to arbitrate a particular grievance does not breach its duty of fair representation. Here, Hickonbottom has set forth no facts which, if true, would establish that the Union' motives for not pursuing his grievance to arbitration were improper or that its decision not to arbitrate was arbitrary under the law as set out above. I conclude, therefore, that Hickonbottom's charge against the Union does not allege a proper claim under Section 10(2)(a) of PERA and that his charge against the Union should also be dismissed.

In accord with the facts and conclusions of law set forth above, I conclude that Hickonbottom has failed to state a proper claim upon which relief can be granted under PERA against either the Employer or the Union in this case. I therefore recommend that the Commission grant the Union's motion for summary disposition and that it issue the following order.

RECOMMENDED ORDER

The charges against the Washtenaw County Road Commission and Teamsters Local 214 are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 27, 2019