STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT,
Public Employer-Respondent in Case No C02 E-103,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL WORKERS, (AFSCME), and its LOCAL 1600,
Labor Organization-Respondent in Case No. CU02 E-025,

-and-

JAMES BYE,
An Individual-Charging Party.
_____/

APPEARANCES:

Keller Thoma, by Richard W. Fanning, Jr., Esq., for the Respondent Employer

Miller Cohen, by Bruce A. Miller, Esq., for the Respondent Labor Organization

James J. Zimmer, Esq., for the Charging Party

DECISION AND ORDER

On July 20, 2005, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

Dated: _____

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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, this case was heard at Detroit, Michigan on May 11, August 3, August 4, and November 16, 2004, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 18, 2005,[1] I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

[1] Because of the complexity of the factual record, I granted the Employer's request to file a brief in excess of 50 pages. See R 423.184(1).

James Bye filed these charges on May 2, 2002 against his employer, the City of Flint (the Employer), and his collective bargaining agent, the American Federation of State, County and Municipal Employees (AFSCME) and its Local 1600.[2] On July 25, 2001, Bye was terminated from his position in the Employer's street maintenance department, allegedly for failing to report his absence. Bye was a member of a bargaining unit represented by AFSCME Local 1600. Bye alleges that the Union violated its duty of fair representation by its handling of his grievance. Specifically, he asserts that the Local failed to conduct an investigation of the facts surrounding his termination or his claim that he had complied with the Employer's instructions for reporting absences, failed to present any arguments to the Employer in support of his reinstatement, and failed to file a written grievance on his behalf in a timely fashion. Bye also alleges that Council 25 representatives failed to ascertain the facts of his case and made an arbitrary decision to withdraw his grievance before arbitration in August 2003.

Bye did not initially allege that the Union acted in bad faith. On the third day of hearing, after Bye had completed his testimony, Bye's counsel recalled him to the stand to testify that Bye had been among a group of employees who had criticized Local President Sam Muma. I sustained Respondents' objections to this testimony, and ruled that permitting Bye to amend his charge to allege that Muma acted out of personal malice at that point in the proceeding would not be consistent with due process. See R 423.153 (3). In his brief, Bye argues that Muma deliberately failed to take action on his grievance because Muma wanted Bye out of the workplace while Muma was running for reelection as union president. As these arguments are outside the scope of the charge, I have not addressed them in this decision.

Bye's charge against the Employer alleges that he was wrongfully discharged. Bye asserts that his termination violated Respondents' collective bargaining agreement. In his post-hearing brief, Bye, a diabetic, also alleges that the termination violated his rights under the Family Medical Leave Act, (FMLA) 29 USC 2601 et seq.

Findings of Fact:

The "No-Call, No-Show" Rule

Article 16, Section 5(4) of Respondents' contract states that an employee who fails to show up for work or call in for three consecutive days is considered a voluntary quit:

> Absence for three (3) consecutive days on which the employee was scheduled to work without proper notification to the Employer. Because of unreported absence, the employee is considered to have resigned (voluntary quit) and is no longer in the employ of the City of Flint. In proper cases exceptions shall be made upon the employee producing convincing proof of his inability to give such notice.

Respondents refer to this provision as the "no-call, no-show" rule. A separate provision, Article 27, provides that when an employee is absent for three or more consecutive days the Employer may require the employee to submit a written doctor's excuse and may also require the

[2] I refer here to Local 1600 as the Local, to its parent AFSCME Council 25 as Council 25, and to both entities together as the Union.

employee to undergo an examination by the Employer's clinic to determine whether the employee has recovered sufficiently to return to work.

If employees are ill and know they are going to be absent for more than a few days, they do not need to call in every day. However, they must tell the Employer when their doctor says they can return. In any case, employees must either call in every day or provide the Employer with the date they expect to return to work. The no-call, no-show period under Article 16 begins to run if employees do not return to work when they said they would or call in again to explain their continued absence. None of Bye's witnesses contradicted the Employer's testimony as to how this rule has been applied.

The Employer has reinstated a number of employees terminated for violation of the no-call, no-show rule over the years. As set out in Article 16, an employee may be reinstated if he can demonstrate that he was unable to call in. The Employer has also reinstated employees who tried to call in or had valid explanations for not calling in, and has rescinded no-call, no-show terminations when the Employer sent out the termination letter prematurely. According to the Employer's records, between 1998 and 2001 it reinstated five of the forty employees it terminated for violating the no-call, no-show rule. Both Tony Morolla, Employer labor relations director between 1996 and 2002, and Tom Smela, Employer labor relations specialist since 1996, testified that during that period the Employer did not reinstate any employee who failed to call in simply because he demonstrated that he had been ill.

Local 1600 representatives disagreed. Local 1600 grievance chair Guy Baumgart estimated that between 1996 and 2002, the Employer reinstated about twenty employees terminated for violating the no-call, no-show rule. According to Baumgart, he resolved many cases simply by showing the Employer's labor relations staff proof that the employee was sick on the no-call, no-show days, even if the employee had not called in. If this did not work, he usually filed a complaint under the Employer's civil service procedures. Baumgart testified that he did not recall the Employer ever refusing to reinstate an employee who was legitimately ill, although sometimes the Employer kept the employee off work for several months without pay or required the employee to sign a last chance agreement. Union president Muma testified that, in his experience, the Employer reinstated almost all employees terminated for violating the no-call, no-show rule. According to Muma, of the 20 voluntary quit cases he remembered handling, the Employer voluntarily brought 95% of them back to work after they produced a doctor's note showing that they were ill on the days they did not call in.

Both Baumgart and Muma were vague about when the terminations they described had occurred. Baumgart frequently referred to his dealings with a particular Employer labor relations specialist who died in early 2001 and was ill for some time before his death. I find that both Baumgart and Muma genuinely believed that the Employer reinstated most no-call, no-shows who demonstrated that they were ill. However, I credit Morolla and Smela's testimony as to the Employer's actual practice after 1998.

Bye's Termination

James Bye was hired by the Employer as a code inspector in about 1994. In early 1998, he transferred to the street maintenance department. Bye is a "brittle" diabetic whose blood sugar levels are not well controlled and who suffers frequent illnesses related to his condition. On May 15, 2001, Bye's supervisor, Michael Szuch, issued him a written warning for a series of unexcused absences occurring in that month. In June 2001, Szuch suspended Bye for one day for an unexcused absence.

Bye testified that on Friday, July 6, 2001, Bye called Betty Wideman, the administrative clerk for the street maintenance division. Bye told her that he was sick and would not be in. According to Bye, he called in again on Monday and told Wideman that he was going to the doctor. On Tuesday, July 10, Bye came in to work and, accompanied by his Union steward Chris Harrison, went to talk to Wideman. According to Bye, he told Wideman that he had seen the doctor and that the doctor had diagnosed him with a kidney infection. Bye said that the doctor was going to "put him off for ten days, and that he should be back to work in ten days, maybe sooner." Bye asked Wideman if she wanted him to call in every day. Wideman said no, that the Employer knew what the situation was. According to Bye, she told him that when he was ready to return to work he should get a note from his doctor and take that to the clinic to show that he was able to work.

Although Bye later argued that Wideman had told him that he did not have to call in again before he was ready to work, Bye's own testimony did not support his claim. Wideman merely told him that he did not need to call in every day. From this statement, apparently, Bye concluded that he did not have to call in again until he was healthy, even though he had told Wideman that he would be back to work in ten days or less.

Bye provided a different version of events in his July 15, 2002 answer to the Employer's motion for summary disposition of this unfair labor practice charge. According to that document, Bye first became sick on July 16, came to see Wideman on July 17, and told her he had a doctor's appointment on July 20. According to that document, Wideman told Bye to go home and call her after his doctor's appointment to inform her what the doctor said. Both Bye and his wife, Suzanne Bye, testified that Suzanne Bye prepared this document because the answer was due and Bye was ill at the time. According to Suzanne Bye, she, Harrison, and some other friends tried to make the dates in the answer fit with the dates in Bye's termination letter. According to the Byes, James Bye told his wife that the dates were wrong, but the answer was nevertheless submitted without correction.

I am convinced that Bye's testimony at the hearing was correct. The Employer's payroll records indicate that Bye did not work between July 6 and his termination date, and its call-in records show that Bye called in on July 6, 9, and 26. If Bye had not come in to talk to Wideman on July 10, the Employer would presumably not have waited until July 25 to terminate him as a no-call, no-show. Also, Bye's testimony regarding what Wideman told him on July 10 was not contradicted by credible evidence. Wideman affirmed that she had a conversation with Bye in which he told her that he had gone to the doctor and was ill. However, Wideman was not asked what she actually said to Bye on July 10, or what he said to her. Harrison's testimony was not reliable, as he gave contradictory versions of the June 10 conversation. Harrison testified that Wideman told Bye "just to bring in documentation when he was ready to return to work."

However, he also testified, on cross-examination, that Wideman said that Bye would not have to call in after he brought in a note stipulating when he would not be available for work.

According to Bye's doctor's records, Bye visited the doctor again on July 17, but not on July 20. The doctor apparently did not release him to return to work. Bye did not return to work on July 20, or call before that day to explain that he was still ill. Wideman testified that on either Thursday, July 19, or the following morning, Bye called and told her that he was going to the doctor and would call her back later. Bye could not recall whether he talked to Wideman on July 20. At the end of the shift on July 20, Szuch asked Wideman if she had heard from Bye. Wideman said that Bye had called, but that she was waiting for him to call back and let her know whether he had been cleared to return to work. On July 25, Szuch asked Wideman about Bye again. Wideman told Szuch she had not heard from him. Szuch told Wideman to send Bye a no-call, no-show termination letter. Wideman contacted Smela. On July 25, 2001 the Employer sent Bye a letter stating that he had been terminated for failing to call in on July 20, 23 and 24.

The Union's Handling of Bye's Grievance

Bye called Muma and explained that he had received a no call, no-show termination letter. On July 26 or 27, Bye met with Muma at Local 1600's office. Bye did not recall if he showed Muma a copy of the termination letter, but he explained its contents. Bye told Muma that he had been ill for a period of time, but that he had called in and talked to Wideman. Either during this conversation or after, Bye also said he had witnesses to his conversation with her. According to Bye, he did not understand the significance of the three dates in the letter, and told Muma that the termination letter must have been a mistake. Muma did not question Bye about the details of the incident. Muma explained to Bye that he needed a doctor's note stating what was wrong, how long he was going to be off, and when he could return to work. Muma also said that he would discuss the matter with Morolla, and told Bye not to worry.

On about August 1, Muma asked Morolla why Bye was a voluntary quit, and whether the Employer would reinstate him. Morolla told him that he would check on the facts, and to have Bye get a doctor's slip. Muma testified that he did not see the need to confirm the dates that Bye was absent or called in. According to Muma, he expected that when Bye provided a doctor's note confirming that he had been ill on July 20, 23 and 24, the Employer would reinstate him.

Bye waited until August 15, 2001,when his doctor released him to return to work, to obtain a letter from his doctor. Bye's doctor wrote that Bye was off work from July 5 through August 15 for a recurrent kidney infection, and that Bye was now able to return to full duty. Bye gave Muma his doctor's letter. Muma told Bye that he was going to get his job back, that mistakes happened all the time, and not to stress over it. Bye and Muma spoke several times between August 15 and August 30. Muma told him that a grievance was filed and that it was being handled.

After Muma received a copy of the doctor's letter, he called Szuch and the Employer's clinic to "try to find out what was going on" and then called Morolla to tell him that the Employer should bring Bye back to work. Muma did not indicate what Szuch or the clinic told him, and there is no indication in the record that Muma found out from Szuch what had

happened or the significance of the three dates in the termination letter. According to Muma, he gave the letter from Bye's doctor to Morolla, although Morolla did not remember seeing it. Morolla told Muma that he would have to look into the matter and talk to Szuch, and that if Szuch had no problem with Bye returning to work Morolla would reinstate him. According to Morolla, he meant that if Bye had in fact called in, or if there were any other circumstances justifying Bye's reinstatement, Szuch would know about it. Muma testified that he interpreted Morolla's remark as a commitment to bring Bye back to work.

Sometime in August, Morolla and Smela discussed the circumstances of Bye's termination. Smela told Morolla that Bye had told Wideman that he was going to the doctor on July 20 and would bring in a doctor's note on that day, but that he had not called in on July 20 or the next three workdays. Smela and Morolla decided that there was no reason to rescind Bye's termination.

The grievance procedure in Respondents' collective bargaining agreement requires a written grievance to be submitted within ten workdays of the event giving rise to the grievance. The first step in Respondents' grievance procedure is a meeting between the employee and his or her supervisor. Employer and Union representatives often discuss and settle grievances without a written grievance being filed. If Respondents reach a settlement before a written grievance is filed, their settlement agreements commonly refer to the grievance as an "orally initiated grievance." The Union introduced a number of written settlements of orally initiated grievances, including two involving Bye. Many of these settlements were reached after the ten-day time limit. According to Baumgart, when the parties were discussing a grievance, the Local's practice was not to file a written grievance until it got a "definite no" answer from the Employer. Baumgart testified that when the Local filed written grievances after the ten-day time limit, the Employer sometimes did and sometimes did not argue that the grievance was untimely. Baumgart testified, "There were probably a few cases [where the Employer argued that a grievance that had been discussed was not timely when the Union did not file a written grievance within ten days] before (Bye) but there weren't all that many."

According to Muma, he believed that talking to Morolla about Bye's termination initiated a grievance. He was not, therefore, concerned about contractual time limits and saw no need to file a written grievance. Muma did not conduct an investigation of the facts surrounding Bye's termination, and he did not approach Morolla with arguments for Bye's reinstatement. Between August and late November 2001, Muma and Baumgart tried "several times" to speak to Szuch about Bye, but Szuch did not return their calls. On November 23, 2001 Muma and Baumgart saw Szuch in the Employer's cafeteria. Szuch told them that whether Bye was reinstated was up to Morolla. When Muma told Szuch that this was not what Morolla had said, Szuch replied that it was what Morolla had told him and got up and walked away. Later that day, Muma and Baumgart met with Morolla. When they told him what Szuch had said, Morolla replied, "I guess you have your answer; Bye is not coming back to work." Muma and Baumgart were angry because they believed that Morolla and Szuch had "strung them along." Muma told Morolla that the Union was going to arbitrate Bye's case.

According to Bye, sometime between August and November Muma told him that his grievance was in AFSCME Council 25's office in Lansing awaiting arbitration. On November

26, 2001, Muma wrote a letter on Bye's behalf to the Genesee County Friend of the Court regarding Bye's child support obligations. The letter stated that the Union was involved in an "arbitration situation" involving Bye's employment and that Muma believed that Bye would soon be put back to work with backpay.

In late December 2001 or early January 2002, Bye called AFSCME Council 25's office in Lansing for information about when his grievance would be arbitrated. After conducting an investigation, Council 25 staff representative Leslie Carter informed Bye that no grievance had been filed on his behalf. According to Bye, when he tried to speak to Muma about this, Muma was evasive. Carter also spoke to Muma. On January 22, 2002, Muma told Baumgart, as grievance chair, to file a written grievance over Bye's termination and to backdate it. Baumgart filed the grievance with the date of November 23, 2001, the date of his and Muma's meeting with Morolla. The grievance stated:

> Grievant received a notice of voluntary quit. The union has made several attempts to rectify this situation with the City of Flint as the grievant is diabetic, and had been constantly under the care of his physician in an attempt to lower his blood sugar levels. The City realizes this and also realizes that diabetes is an ADA covered illness which qualifies the grievant for reasonable accommodations. The fact is that the City of Flint knew of his illness and should have immediately overturned the voluntary quit notice upon the medical documentation of the kidney infection dated 8/14/01. Any medical authority or documentation necessary will show that those who suffer from the condition of diabetes take longer to heal than the average person . . . Once the City knew that the grievant was off, the ADA should allow that some sort of understanding be used by the City of Flint for the illness and the recuperation time. The Union contends that once the employer is notified of an illness, that employee is ill with the same occasion until he/she fully recovers and returns to work. If an employee were in an accident, and comatose, would the employer discharge or voluntary quit that employee because they were unable to call daily? If an employee has a heart attack, is it incumbent upon the employee to notify the employer each and every day that the employee will be unable to attend work? Once notified, the contract states an employee is off until the employee is able to return to work and proof may need to be provided upon his return.

In its answer to the grievance, the Employer simply denied that it had violated the contract. It did not assert that the grievance was untimely. On February 7, 2002, Baumgart submitted the grievance to Council 25 for a determination as to whether the grievance should be arbitrated. In his letter, Baumgart stated:

> Brother Bye called in for an absence and reported it. Under the CBA, one call is all it should take and the return to work procedures should be followed as they were in his case. While the grievant was off for an extended period of time, he did [sic] violate the collective bargaining agreement as he brought proper medical documentation upon his return as required by the contract, therefore no violation of the contract. The City is aware that the grievant is a diabetic, and therefore would

fall under the Americans with Disabilities Act, as well as possible FMLA violations.

Baumgart also sent Council 25 a packet with the grievance, the Employer's grievance answer, and Bye's August 15, 2001 doctor's note. Council 25's arbitration review panel accepted the case for arbitration. According to Ruth Montgomery, Council 25's arbitration director, the arbitration review panel made this decision on the Local's representation that Bye had been excused for the three days in the termination letter.

In the late summer of 2002, Bye's case was assigned to Donald Gardner, a staff specialist who handles arbitrations for AFSCME Council 25. In October, the Employer's counsel informed Gardner, for the first time, that the Employer intended to raise the timeliness of the grievance as a threshold issue in the arbitration. According to Gardner, he did not consider this an obstacle to going forward with the arbitration because he believed that the Respondents' past practice provided a defense.

The arbitration was scheduled for February 26, 2003. On about February 20, 2003 Gardner met with Bye, his wife, and their friend and fellow employee Marshall Gill, to prepare for the arbitration. During this meeting, Gardner explained to Bye that he was being charged with being a no-call, no-show on July 20, 23, and 24, 2001, and that the only issues were whether he called in and was ill on those days. According to Gardner, Bye told him that on July 20, he called in, talked to Wideman, and said he was sick. Bye said that he then went to the doctor and the doctor diagnosed him with a kidney infection and put him off work for ten days. According to Gardner, Bye told him that the following Monday, July 23, he went to work and told Wideman that he needed to be off for ten days. According to Gardner, this was the only version of events he was given by Bye, his wife, or anyone else. Gardner testified that when he heard this story he was pleased, because Bye claimed to have actually called in or contacted the Employer on two of the three no-call, no-show days. Gardner asked Bye if Wideman would support his testimony, and Bye said no, she had taken the position that he did not do those things. Gardner told Bye that he then needed a document from his doctor to support his testimony that he told Wideman that he went to the doctor on July 20 and the doctor put him off work for ten days. According to Gardner, Bye said he would do his best to get this information.

Bye did not have a good recollection of his meeting with Gardner. However, both Byes testified that they told Gardner "these dates [July 20, 23 and 24, 2001] aren't even right." The Byes were not sure if they explained to Gardner that July 20 was not the first date that Bye was ill. According to the Byes and Gill, Gardner said that the dates were not important, and that the dates were the Employer's problem. Bye testified that he told Gardner that he felt that the Union had not pulled the facts together, and asked Gardner to postpone the arbitration.

It is clear that prior to February 20, 2003, Gardner did not know when Bye's absence began, when he talked to Wideman, or that Bye claimed that Wideman had told him he did not have to call in again. Bye testified that he did not understand why his not calling in on July 20 was significant. I credit Gardner's testimony that, in this atmosphere of mutual confusion, Bye told Gardner that he had talked to Wideman on July 20 and 23, rather than July 9 and 10, and that he told her he would be off for ten days from July 22 rather than July 10. I do not believe

that Bye was deliberately untruthful at any time during the hearing. However, Bye often looked and acted quite ill. At times, Bye seemed to lose his train of thought and to be answering questions almost randomly. Faced with Gardner's statement that the issue was whether Bye had called in on July 20, I can easily believe that Bye said that his first contact with Wideman was on that date. However, I credit the Byes' testimony that they told Gardner that the dates in the termination letter "weren't right," and that Gardner said that this did not matter. This is credible because, from Gardner's point of view, the Union had a better case if the Employer's letter named dates on which Bye had in fact called in, rather than other dates when he had not.

According to Gardner, on February 25, Bye called him and told him, in a panicky fashion, that he could not get the medical report Gardner had requested. Gardner agreed to obtain a postponement of the arbitration. On February 26, 2003, Gardner sent a letter to both Bye and Local 1600. The letter stated:

> This is a follow up to a request by Mr. Bye to postpone the above-captioned hearing. Mr. Bye has been experiencing a few roadblocks to get the medical information we all agreed was needed and relevant for his hearing. At Mr. Bye's request and with the approval of Ruth Montgomery, Arbitration Director, the case has been postponed. Jim, please continue to try and get the information I requested of you and get it to us as soon as possible. This case will be rescheduled as soon as possible.

On May 28, 2003, the Employer's new labor relations director, Steve Stratton, sent a letter to Council 25 formally notifying it that the Employer intended to raise the timeliness issue at Bye's arbitration. Respondents rescheduled the arbitration hearing for August 2003. After receiving Stratton's letter, Montgomery asked Gardner about Bye's case and the timeliness issue. Gardner told Montgomery that he was not concerned about that issue, but that he was concerned that Bye had still not provided him with the medical information that he needed for the case, i.e. a letter from his doctor stating that he had seen Bye on July 20, 2001. Montgomery decided that Bye's case should go back to the arbitration review panel.

On July 1, 2003, the arbitration review panel notified Bye that his grievance was being removed from the arbitration calendar because Bye had failed to provide the medical information needed to support his claim. On July 14, in response to a letter from Bye, the arbitration review panel sent him a letter stating that there were "serious conflicts between your claims and the facts shown on the record." The letter stated, among other things, that Bye had repeatedly failed to get the letter from his doctor that Gardner had requested.

On July 29, 2003, Bye obtained a letter from his doctor indicating that the doctor had seen Bye in his office on July 10, 17, and 23, 2001. Local 1600 submitted this letter to the arbitration panel. Sometime between July 29 and August 6, Bye appeared in person (a "live appeal") before the panel. Bye had no memory of this. According to Montgomery, the arbitration panel had a file that stated that Bye had gone to the doctor on July 20 and had been told that he should be off work for ten days. At the live appeal, the panel told Bye that it would go forward when he produced proof of this. According to Montgomery, Bye then told the panel that he had told Wideman on July 9 that he was going to be off for ten days. When the panel explained that

this still did not cover "his three AWOL days," Bye had no answer. Montgomery testified, "He then changed his story and said some secretary told him that all he had to do was just call once and then he would be off forever and just give me a doctor's note when you come back. The stories didn't mesh." Montgomery indicated that in deciding to deny Bye's appeal, the panel also considered the discipline Bye had received for unexcused absences in May and June 2001. On August 6, 2003, the panel notified Bye that it was rejecting his appeal and that his grievance would not be arbitrated.

Discussion and Conclusions of Law:

Bye's Charge Against the Union

Alleged Breach of the Collective Bargaining Agreement

To prevail against a union on a claim of unfair representation involving a grievance, a charging party must establish both that that union breached its duty of fair representation and that a breach of the collective bargaining agreement occurred. *Goolsby v City of Detroit*, 211 Mich App 214 (1995); *Knoke v East Jackson Public School Dist,* 201 Mich App 480, 488 (1993).

Article 16 of Respondents' contract states that an employee who is absent for three consecutive workdays without proper notice to the Employer shall be deemed a voluntary quit, unless he can produce convincing proof of his inability to give such notice. The record establishes that under this provision, an employee who knows he will be ill for a period of time does not have to call in every day in order to provide proper notice. However, the employee must tell the Employer when he expects to return to work. If the employee is not able to return on that day, he must contact the Employer and explain why.

Bye argues that that the collective bargaining incorporates the requirements of the FMLA, and that he was entitled to FMLA leave for his absence in July 2001. Under the FMLA, however, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave. 29 CFR 825.302(d). See, e.g., *Gilliam v United Parcel Serv, Inc*, 233 F3d 969, 971-972 (CA 7, 2000), in which the Court upheld an employee's discharge for failing to call in under a no-call, no-show policy. The Court held that "nothing in the FMLA or implementing regulations prevents an employer from enforcing a rule requiring employees on FMLA to keep the employer informed about the employee's plans."

On July 10, 2001, Bye told Betty Wideman, his payroll clerk, that he had been diagnosed with a kidney infection and expected to return to work in "ten days, maybe less." Although Bye was not ready to return to work on July 20, the latest date he had told Wideman he would return, he did not call and tell the Employer that he would not be in on that date. The Employer obviously and reasonably expected Bye either to return to work on Friday, July 20 or call and explain why he could not. When Bye failed to call in on July 20 or the next two workdays, he was terminated for failing to provide proper notice in accord with Article 16. Bye did not claim that he could not have called in on July 20. Bye apparently believed that he did not have to call in again until he was ready to return to work. However, as discussed above, Bye failed to show any reasonable basis for this belief. I conclude that Bye's termination for violation of the no-call,

no-show rule was proper, and that his termination did not violate Respondents' collective bargaining agreement.

The Union's Handling of Bye's Grievance

Because Bye did not establish that the Employer breached the collective bargaining agreement, his charge against the Union must be dismissed. However, since the principal issue at the hearing was the Union's conduct in handling the grievance, I will touch briefly on this issue.

It has been long established that a union's duty of fair representation, both under federal and state law, 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, 177 (1967). The most significant case under PERA on a union's duty of fair representation in handling grievances is *Goolsby v Detroit*, 419 Mich 651, 679 (1984). The Court held in that case that arbitrary conduct does not require a dishonest or fraudulent intent. While agreeing with the federal courts that a union's "mere negligence" does not constitute a breach of the duty of fair representation, the Court held, at 679:

> Further, for purposes of PERA, we do not interpret a union's responsibility to avoid arbitrary conduct narrowly. In addition to prohibiting impulsive, irrational or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected. We think that latter proscription includes, but is not limited to, the following circumstances: (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 reckless or gross negligence which can reasonably be expected to have an adverse effect on any or all union members.

The Court held in *Goolsby* that the union's unexplained failure to comply with contractual time limits for processing grievances indicated inept conduct undertaken with little care or with indifference, extreme recklessness or gross negligence which could reasonably have been expected to have had an adverse effect on the grievants.

I believe that the Union's failure to file a formal written grievance on Bye's behalf until January 22, 2002 was not arbitrary conduct under the *Goolsby* standards. Although the Employer eventually made a timeliness argument, there was sufficient evidence of a past practice of failing to enforce time limits that the Union's failure to file a written grievance within ten days of Bye's termination was not arbitrary. See *Ruzicka v General Motors Corp*, 523 F2d 306 (CA 6, 1975) (*Ruzicka I)* and *Ruzicka v General Motors Corp*, 649 F 2d 1207 (CA 6, 1981) (*Ruzicka II)*, discussed in *Goolsby* at 666-672. I also find that the conduct of Gardner and Council 25's arbitration panel was not arbitrary as *Goolsby* defined that term, since, as I found above, Bye gave Gardner the wrong story when they met to prepare for the arbitration.

However, I find that the Local was grossly negligent in failing, without explanation, to investigate the facts of Bye's termination between August 2001 and January 2002. During this

period, the Local did not try to determine how long or when Bye had been absent, when he talked to Wideman, or what Bye and Wideman had said to each other. It appears that the Local never even obtained an explanation from the Employer of why Bye was terminated even though he claimed to have called in. If Bye had had a valid grievance – for example, if Bye had told Wideman that he would be off for twelve days, rather than ten, and the Employer had sent Bye's termination letter prematurely, or if Wideman had in fact told Bye that he did not have to call in again until he was well – the Local would not have known this.

Muma's explanation for his failure to investigate was that, based on his prior experience, he expected the Employer to reinstate Bye after Muma submitted the letter from Bye's doctor indicating that Bye had been ill on the three no-call, no-show days. A union's failure to take a necessary action in mistaken reliance on a past practice constitutes only "ordinary negligence," and is not a breach of its duty of fair representation. *Goolsby*, at 672. However, Muma testified that after he gave Bye's letter to Morolla sometime after August 14, Morolla said that if Szuch had no problem with Bye returning to work Morolla would reinstate him. I believe that no reasonable person could have interpreted Morolla's remark as a commitment to bring Bye back to work. I find that Muma's mistaken reliance on what he believed was the past practice might have justified his initial failure to investigate Bye's termination. However, after his conversation with Morolla, Muma knew that Bye's August 14 doctor's letter would not be sufficient to get Bye reinstated.

In its brief, the Union attempts to justify the Local's failure to act by the fact that Bye's grievance was a "kneepad" case, i.e. a grievance without contractual merit in which the union can only plead for leniency. However, neither Muma nor Baumgart described Bye's grievance this way. Both insisted that they expected Bye to be reinstated, and were indignant when informed by Morolla on November 23, 2001 that the Employer did not intend to do this. In fact, Muma and Baumgart did not have enough information to determine whether Bye's grievance was a "kneepad" case.

I conclude that under the circumstances of this case the Local's unexplained failure to determine the facts surrounding Bye's termination between August 2001 and January 2002 was inept conduct undertaken with little care and indifference to Bye's interests, and was gross negligence on par with the union's unexplained failure to process the plaintiffs' grievance in *Goolsby*. However, since Bye had no valid grievance, the Union's arbitrary conduct in this case did not harm him. I conclude that the Union did not violate its duty of fair representation because, as discussed above, Bye's termination did not violate Respondents' contract.

Bye's Charge Against the Employer

Bye's charge against the Employer alleges only that he was wrongfully terminated in violation of Respondent's collective bargaining agreement, and that his termination violated the FMLA. The Commission does not have jurisdiction to find violations of statutes other than PERA. See *Health Source Saginaw,* 1999 MERC Lab Op 379, 381; *Muskegon Heights Pub Schs,* 1993 MERC Lab Op 654, 657. Moreover, an employee does not state a claim under PERA simply by alleging that his or her employer has violated the collective bargaining agreement. *City of Detroit, (Fire Dep't),* 1997 MERC Lab Op 31, 35; *City of Detroit (Wastewater Treatment*

Plant), 1993 MERC Lab Op 793, 794. Bye's charge against the Employer was also clearly untimely under Section 16(a) of PERA because his charge was filed more than six months after his termination. I conclude that Bye did not state a timely claim against the Employer, and that this charge should also be dismissed.

In accord with the findings of fact, discussion and conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____