

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION (SMART),
Public Employer-Respondent in Case No. C05 K-262,

-and-

AMALGAMATED TRANSIT UNION, LOCAL 1564,
Labor Organization-Respondent in Case No. CU05 K-049,

-and-

CORNELIUS IRBY,
An Individual-Charging Party.

APPEARANCES:

John E. Young, Employee and Labor Relations Specialist, for the Respondent-Employer

Sachs Waldman, by Marshall J. Widick, Esq., for the Respondent-Labor Organization

Cornelius Irby, *In Propria Persona*

DECISION AND ORDER

On March 14, 2006, 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

Eugene Lumberg, Commission Member

Dated: _____

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Cornelius Irby, *in propria persona*

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTIONS FOR SUMMARY DISPOSITION

On November 2, 2005, Cornelius Irby filed unfair labor practice charges against his Employer, the Suburban Mobility Authority for Regional Transportation (SMART), and his former collective bargaining agent, Amalgamated Transit Union Local 1564 (ATU), pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. On January 5, 2006, SMART filed a motion for summary disposition pursuant to Commission Rule 165(2)(c) and (d), 2002 MR 1, R 423.165. SMART asserts that Irby's charge against it is untimely under Section 16(a) of PERA, and also that the charge fails to state a claim upon which relief can be granted under PERA. On February 2, 2006, I ordered Irby to show cause why this motion should not be granted. Irby filed a response to the motion on February 17, 2006

On February 10 2006, ATU filed a motion for summary disposition pursuant to Rule 165(2)(d) and (f). ATU maintains that Irby failed to state a claim upon which relief could be granted against it, and that there is no material dispute of facts and that it is entitled to judgment as a matter

of law. On February 13, I ordered Irby to show cause why ATU's motion should not be granted. Irby filed a response to this motion on March 7. Based on the facts as set forth in Irby's charge and in his response to Respondents' motions, documents attached to SMART's motion whose authenticity Irby did not dispute, and the arguments contained in the motions and responses, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

Irby was originally employed by SMART as a line-haul bus driver and was a member of a bargaining unit represented by ATU. Irby went on medical leave in July 2002. In October 2004, SMART notified Irby that he had been terminated, allegedly because his medical leave had expired. SMART then offered Irby a position as a customer service operator (CSO) in a bargaining unit represented by Teamsters Local 247 (the Teamsters). Irby alleges that SMART violated the ATU collective bargaining agreement by terminating him and by refusing to recognize his accumulated seniority after he accepted the CSO position. He also asserts that SMART discriminated against him because of his ATU membership by failing to offer him an open position for which he was qualified in March 2004.

After Irby accepted the CSO position, he asked both ATU and the Teamsters to file grievances. In June 2005, after the Teamsters informed Irby that it would not take the grievance it filed for him to arbitration, ATU filed a grievance under its contract. On July 12, 2005, ATU notified Irby that it would not take this grievance to arbitration. Irby alleges that ATU violated its duty of fair representation toward him by failing to consult with him regarding his grievance, refusing to acknowledge his claim that his termination was improper, and refusing to arbitrate his grievance.

Facts:

Irby was hired by SMART as a line-haul bus driver in March 2000. On July 1, 2002, Irby was injured on the job. Irby was on medical leave from July 1, 2002 until October 2, 2003. At some point during that period, he began receiving worker's compensation benefits. On October 2, 2003, Irby returned to work as a driver for one day. He then went on medical leave again for the same injury. In March 2004, Crystal Freeman, a representative in SMART's human resources department, told Irby that there were several open positions for which Irby was qualified and that she had applied for them on his behalf. It is not clear whether these were positions in the ATU unit. Irby was later informed that he had not been considered for the positions but was not told why.

On October 19, 2004, SMART sent Irby a letter offering him the position of part-time customer service operator (CSO), a position in the Teamsters' bargaining unit. Irby admits that in October 2004 he had medical restrictions preventing him from working as a line-haul driver and that he continues to have these restrictions. The duties of the CSO position are within Irby's medical restrictions.

On October 23, 2004, Irby received a letter from SMART, dated July 26, 2004, informing him that he was terminated effective July 1, 2004. The letter stated that he had been on medical leave status from his job as a driver and unable to work since July 1, 2002. It cited Article 19,

Section 11 of the ATU contract:

After sick leave of 26 weeks, the Authority will request the operator to have a physical examination by a physician chosen by the Authority to determine if the operator should be disqualified from employment with the Authority. If the physician determines that the operator may be eligible at some future date to return to work, the operator will be given a disability leave for up to an additional 18 months. Such disability leave will be without pay or benefits. If the physician determines that the operator will not be able to return to work at a future date, and the operator meets the service requirements of MERS or other authority pension programs he/she will be eligible for a disability retirement under the terms of that program. In addition, the operator will be entitled to other benefits as provided for in Article 24 (group insurances and retirement benefits) Section 1.A.3. Operators not eligible for disability retirement will be terminated.

Irby did not believe that his termination was proper under Article 19, Section 11, but he accepted the CSO position and began work in early November 2004. SMART pays Irby the same compensation as a CSO that he earned as a driver. However, either shortly before or after he took the new position, Irby learned that his accumulated seniority would not carry over into this position. Irby asked both ATU and the Teamsters to file grievances. The Teamsters told Irby that it could not file a grievance under its contract alleging that he had been wrongfully terminated from his driver position. On January 25, 2005, it filed a grievance seeking reinstatement of Irby's seniority. The Teamsters processed Irby's grievance through the steps of its grievance procedure up to and including giving SMART notice that it intended to arbitrate. During grievance discussions, SMART maintained that Irby had been informed orally prior to his rehire that his prior service would not carry over and that he would have a new seniority date. On April 11, 2005, the Teamsters informed Irby that it would not proceed to arbitration on his grievance because it had not found a violation of its collective bargaining agreement or work rules.

On June 6, 2005, ATU filed a grievance on Irby's behalf alleging that Irby had been wrongfully terminated and his seniority "wrongfully taken away based on 2 year provision." The relief requested was reinstatement of Irby's seniority. On July 12, ATU notified Irby that his grievance had been denied by SMART at the fourth step of the grievance procedure and that it would not take his grievance to arbitration. Thereafter, ATU told Irby that the issue he complained about was "subject to the Teamsters' labor agreement."

Discussion and Conclusions of Law:

The Charge in Case No. CU06 K-049

A union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Vaca v Sipes*, 386 US 171, 177 (1967). A union is not required to carry every grievance to the highest level, but is permitted to assess each with a view to individual merit and has the power to abandon frivolous claims. *Lowe v Hotel Employees Union*, 389 Mich 123, 146 (1973). A union's decision not to proceed to arbitration with a grievance is not arbitrary 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. To prevail against a union on a claim of unfair representation, a charging party must establish a breach of the union's duty of fair representation and also a breach of the collective bargaining agreement. *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993).

Irby asserts, in effect, that it was irrational for ATU to refuse to take his grievance to arbitration. He argues that under Article 19 of the ATU contract, SMART could not properly terminate him until he had been off work on a medical leave continuously for two years. According to Irby, since he returned to work for one day on October 2, 2003, he had not been off work for two years on July 1, 2004. Therefore, he argues, he should not have been terminated from his position as a line-haul driver on that date. He also maintains that since he was not properly terminated, his seniority should have carried over when he accepted the CSO position. Irby complains that after the Teamsters told him that it could not grieve his termination, ATU refused to acknowledge his argument that his termination was improper. According to Irby, both unions told him that the relief he sought was obtainable only under the other's contract, and he was caught in a "Catch-22" situation with neither union willing to help him.

According to ATU, the only issue in Irby's grievance was whether he had the right to carry over his seniority from the ATU bargaining unit to a position in another unit. That is, whether Irby was properly terminated from his driver position, or whether he lost his seniority as a result of this termination, was irrelevant since Irby did not seek reinstatement to his former position as a line haul driver or to another position in the ATU unit. ATU maintains that arbitrating Irby's grievance would have been futile because he had no right under the ATU contract to the relief he was seeking. It adds that whether Irby had this right under the Teamsters contract depended on the language of that contract. ATU asserts that Irby's claim that it violated its duty of fair representation by failing to consult with him regarding his grievance lacks merit, since nothing indicates that Irby's input would have changed the disposition of the grievance. *Detroit Bd of Ed*, 1996 MERC Lab Op 449, 453 (no exceptions).

I agree with ATU that there is no material dispute of fact and that the charge against it should be dismissed as a matter of law. As indicated above, a union does not breach its duty of fair representation by refusing to proceed to arbitration on a grievance if it has made its decision in good faith, its decision is not discriminatory, and the decision is within a wide range of reasonableness. Here, ATU made a reasoned determination that Irby did not have the right under its contract to carry over his seniority to his new position in another bargaining unit. It appears from Irby's pleadings that ATU may not have adequately communicated the reason for its decision not to arbitrate his grievance. However, the Commission has consistently held that a union's failure to communicate with a member about his or her grievance is not in itself a breach of its duty of fair representation. See, e.g., *Wayne Co (Sheriff's Dep't)*, 1998 MERC Lab Op 101, 105 (no exceptions); *Southeastern Michigan Transportation Authority*, 1988 MERC Lab Op 191, 196 (no exceptions); *AFSCME Local 1600*, 1981 MERC Lab Op 522, 527 (no exceptions). Based on the facts as set out in Irby's charge and response to the motions, I find no breach of ATU's duty of fair representation in this case.

Charge in Case No. C05 K-262

Irby's charge against SMART states, in part:

My employer discriminated against my membership in the ATU by not offering me another position while still employed for SMART even though I was advised by Crystal Freeman, Human Resources person at SMART, that positions were available in March 2004 and I was considered eligible for the positions and she applied for the positions for me. I was later advised that I was not being considered for the position I was qualified for without an explanation, prior to my termination.

An employer commits an unfair labor practice under Section 10(1)(c) of PERA when it discriminates against employees because of their union activities or membership. However, Section 16(a) of PERA prohibits the Commission from remedying unfair labor practices occurring more than six months prior to the date the charge is filed with the Commission. In this case, the discrimination alleged in the charge occurred in 2004, but Irby did not file his charge until November 2, 2005. Irby argues that his charge against SMART was timely because he could not file it until he had exhausted his remedies under the contract. However, Irby was not required to exhaust his remedies under the grievance procedure before filing a charge against SMART alleging that it discriminated against him because of his membership in the ATU. The filing of a grievance does not toll the statute of limitations on a charge alleging a statutory violation by an employer. *Troy Sch Dist*, 16 MPER 34 (2003). I conclude that Irby's allegation that SMART discriminated against him because he was an ATU member was untimely.

Irby's second allegation is that SMART breached the collective bargaining agreement by discharging him from his driver position in July 2004, and by refusing to credit him with his accumulated seniority when he accepted the CSO position. An individual does not state a cause of action under PERA merely by alleging that his or her contractual rights were violated. *Utica Cmty Schs*, 2000 MERC Lab Op 268; *Detroit Bd of Ed*, 1995 MERC Lab Op 75. Moreover, Irby learned of the alleged contract breaches - his termination and SMART's refusal to credit him with his accumulated seniority - almost a year before he filed this unfair labor practice charge. I conclude that Irby's second allegation is both untimely and fails to state a claim upon which relief can be granted under PERA.

For reasons set forth above, I find that Irby failed to set forth facts showing that Respondent ATU breached its duty of fair representation. I also find that Irby failed to state a timely claim upon which relief could be granted against Respondent SMART. I recommend that the Commission grant both Respondents' motions for summary disposition, and that it issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____