STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

REGISTERED NURSES AND PHARMACISTS OF
HURLEY MEDICAL CENTER,
Labor Organization-Respondent, Case No. 20-G-1051-CU

-and-

PATRICIA PICKENS,
Individual Charging Party.
_____/

APPEARANCES:

Scheff & Washington, P.C., by George B. Washington, for the Respondent-Labor Organization

Patricia Pickens appearing on her own behalf

DECISION AND ORDER

On March 30, 2021, Administrative Law Judge Travis Calderwood issued his 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 charge 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

Tinamarie Pappas, Commission Chair

Issued: July 1, 2021

William F. Young, Commission Member

[1] MOAHR Hearing Docket No. 20-010664

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

REGISTERED NURSES AND PHARMACISTS OF HURLEY MEDICAL CENTER,
Respondent-Labor Organization, Case No. 20-G-1051-CU
Docket No. 20-010664-MERC

-and-

PATRICIA PICKENS,
Individual Charging Party.
_____/

Appearances:

Scheff & Washington, P.C., by George B. Washington, for the Respondent-Labor Organization

Patricia Perkins appearing on her own behalf

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

On July 2, 2020, Patricia Perkins (Charging Party) filed the present unfair labor practice charge against her bargaining representative, Registered Nurses and Pharmacists of Hurley Medical Center (Union or Respondent). 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 charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, formerly the Michigan Administrative Hearing System (MAHS), on behalf of the Michigan Employment Relations Commission.

Unfair Labor Practice Charges and Procedural History:

Charging Party's allegations against her Union are predicated on her claims that the Union failed in its duty to fairly represent her relative to several disciplinary actions issued by her employer, the Hurley Medical Center (HMC or Employer) beginning in 2018 through the present. The two most recent disciplinary actions identified by the Charging Party resulted in a five-day suspension being issued on January 3, 2020, and her eventual termination from employment effective January 20, 2020.

This matter was initially set for hearing on August 10, 2020. On July 13, 2020, Counsel for the Respondent requested the matter be adjourned pending the filing of a motion for

summary disposition. That request was granted. Respondent filed its motion, under Rule 165(2)(f) of the Commission's General Rules, R. 426.165(2)(f), on August 4, 2020. Charging Party, following one extension, timely filed her response to the motion on September 3, 2020.

Factual Background:

The following factual background is derived from the parties' pleadings, including but not limited to the affidavit of Gina Forbes, the Union's Bargaining Chair since 2014. Charging Party did not file her own affidavit and did not dispute the claims made within the Forbes affidavit in her response to the motion.

The most recent collective bargaining agreement ratified by the Union and the HMC is effective from May 13, 2019, through June 30, 2022. Despite the contract's ratification by both parties, the contract has not yet been signed. Irrespective of any question regarding the contract's validity, the Union and the HMC specifically agreed to abide by the contract's disciplinary language, set forth in Articles 4 and 10, and the grievance and arbitration language, Article 9. That contract agreed to following a period of no contract from September 16, 2017, through May 13, 2019. The May 13, 2019, contract was not made retroactive.

Article 4, entitled Management Rights and Responsibilities, states in Subsection B and C the following:

> B. The Medical Center retains the sole right to discipline and discharge Employees for cause, provided that in the exercise of this right it will not act in violation of this Agreement. Complaints that the Medical Center has violated this paragraph shall be taken up solely through the grievance procedure, including all suspensions and discharges.
>
> C. It is the right of the Medical Center to make such reasonable rules and regulations, not in conflict with this Agreement, as it may from time to time deem best for the purposes of maintaining order, discipline, safety, and/or effective operations, the Medical Center will provide fourteen (14) days advance notice to the Organization President and Bargaining Chair, before requiring compliance therewith by Employees unless immediate implementation is required by law. The Organization reserves the right to question the reasonableness of the Medical Center's rules and regulations through the grievance procedure, and may request a joint conference meeting or provide comments to the Chief Nursing Officer/Pharmacy Director during the fourteen (14) day period mentioned above and before such rules and regulations are to become effective. The parties acknowledge that nationally recognized patient care procedures are not subject to adjustment.

Subsections B and C of Article 10, entitled Maintenance if Discipline, state:

> B. Discipline will be of a corrective nature rather than punitive, and will be progressive; however, flagrant violation of rules or professional conduct may

> merit immediate discharge or suspension. Any disciplinary action issued for refusal of mandatory overtime on or after ratification of this contract will be removed from the Personnel file after one year if the Employee has no further disciplines.
>
> C. Individual disciplinary penalties shall be for just cause and may become subjects for the grievance procedure.

Article 9 sets forth the parties agreed upon grievance procedure which culminates in binding arbitration.

HMC Policy No. 3913, entitled Disciplinary Action, sets forth the Employer's disciplinary procedure. Section 2 of that policy states in the relevant part, the following:

> Discipline must provide a framework to deal with uncooperative employees. To that end, Hurley's disciplinary system provides for an application of corrective measures and the application of more severe corrective measures at any step of the procedure based on the severity of the in-Fraction, i.e. up to termination/discharge of the employee. When an employee has a non-serious, non-flagrant violation requiring corrective action, the following steps listed below will be used:
>
> - Verbal Warning
> - Written Warning
> - Suspension consisting of at least 6 hours of employees current shift or 1 scheduled shift off without pay
> - Suspension of 5 calendar days, which includes at least 6 hours of employees current shift or at least 1 scheduled shift off
> - Discharge/Termination

Section 3 of the policy provides that discipline issued thereunder would remain on an employee's record for one-year from the date of issuance.

Charging Party had been employed with HMC for over 46 years. Since at least 2010, the Union has filed several grievances, some of which resulted in arbitration, on behalf of the Charging Party, with the relevant grievances/arbitrations discussed in part below.

On April 18, 2018, Charging Party was issued a verbal warning as a result of alleged rude and discourteous behavior towards a supervisor. On April 24, 2018, Forbes filed a grievance on behalf of Charging Party challenging the verbal warning. HMC refused to rescind the discipline. As stated above, during this period the Union and the HMC were operating without a contract and the Union did not advance the grievance to arbitration. Charging Party was notified in writing by Forbes in July of 2018 that the Union would not advance the grievance to arbitration.

On November 27, 2018, Charging Party was issued a written warning for several alleged rude behavior and/or refusals to perform various work assignments. On or about December 17,

2018, the Union filed a grievance over the written discipline. Again the HMC refused to rescind the discipline. As stated above, during this period the Union and the HMC were operating without a contract and the Union did not advance the grievance to arbitration. Charging Party was notified by Forbes in late 2018 that the Union would not advance the grievance to arbitration.[1]

On or about June 4, 2019, HMC issued Charging Party a one-day suspension for alleged rude and discourteous behavior from May 29, 2019. On or about June 30, 2019, the Union filed a grievance challenging the suspension. Again, HMC refused to rescind the discipline. The Union advanced that grievance to arbitration.

On or about August 19, 2019, HMC issued Charging Party a five-day suspension for alleged discourteous behavior towards a mother of a child patient and to an employee at the patient's pediatrician. On or about September 16, 2019, the Union filed a grievance challenging this suspension. Again, HMC refused to rescind the discipline. The Union advanced that grievance to arbitration.

The HMC and the Union agreed to consolidate the two arbitrations and selected Patrick McDonald to arbitrate the disputes. The arbitration hearing occurred on December 6, 2019.

On January 3, 2020, HMC issued Charging Party a suspension pending permission to terminate. The most recent discipline was issued because Charging Party had failed to complete an online required education course before the end of 2019. Each year HMC advises all nurses in the unit that they must complete the course at some point during the year. HMC will routinely send notice emails to nurses that have not yet completed the course before December 31 of that year. Despite the notices and reminders some nurses do not complete the course in time. Regarding what actions HMC takes in that situation, Forbes states in her affidavit:

> Unless the employee was on an extended leave of absence at the end of the year, HMC has, to the best of my knowledge, disciplined each and every nurse who failed to complete those courses by the end of the year at whatever the next disciplinary step is for that nurse on the disciplinary progression.

On January 20, 2020, Charging Party's suspension pending termination was converted to an actual termination. Forbes claims in her affidavit that, in addition to Charging Party, the Employer also disciplined 12 other nurses for failing to complete the required course in 2019.

Despite 13 nurses in total receiving discipline for failing to complete the required course, Charging Party was the only nurse on whose behalf a grievance was filed. According to Forbes's affidavit, she did not believe that the Union could prevail on the merits of the grievance to overturn the discharge but hoped that a favorable outcome in the then pending arbitration before Arbitrator McDonald, could force the Employer to roll back Charging Party's discipline

[1] Charging Party makes several complaints regarding the way in which the Union handled these grievances during the period that the Union and the Employer were operating without a contract, however, those complaints are untimely under PERA's six-month statute of limitations and will not be discussed herein.

to the prior step.

During the course of the Union's investigation in the latest grievance for Charging Party, it discovered that Charging Party received her first email relative to the 2019 required course on January 1, 2019. The Union also discovered that Charging Party received 21 separate emails in November and December of 2019 reminding her that she needed to complete the required course. On December 30, 2019, Charging Party sent an email to the Employer requesting an extension of time to complete the required course. Shortly thereafter, that same day, Charging Party received a response indicating that an extension would not be given.

On January 28, 2020, Arbitrator McDonald issued his decision in the pending arbitration. McDonald sustained both prior suspensions but converted the five-day suspension to a three-day suspension. On February 14, 2020, the Union's attorney sent the Arbitrator a letter seeking clarification whether the Arbitrator's decision to reduce the suspension from five-days to three-days was meant to remove Charging Party from the last step in the discipline process before termination.

In an award dated March 12, 2020, the Arbitrator refused to clarify his previous award in the manner the Union's attorney had requested. That award stated in the relevant part the following:

> Therefore while I ordered the Employer to reimburse the Grievant for two days pay, this was because I felt the five-day suspension was unduly severe. My intent, however, was not to change or reverse the 4th step of the disciplinary action policy. Hence, for clarification purposes, the day suspension […] confirms it was for just cause and serves as the Grievant's 4th step of discipline in the five-step progressive policy.

Despite the above award having an issue date of March 12, 2020, the Union's attorney did not receive the award until May 7, 2020. By letter dated May 12, 2020, Charging Party was notified of the Arbitrator's decision.[2]

By letter dated May 28, 2020, Forbes, as the Union's Bargaining Chair, informed Charging Party that the Union had chosen not to advance the grievance challenging her termination to arbitration. That letter stated:

> As you know grievances #19-0149 and #19-0395 were arbitrated on your behalf. With the binding arbitration decision from the Arbitrator, the RNRPH Union sought clarification of his ruling. The end result was he kept your discipline at step 4, (5-day suspension) but, reduced it to a 3-day suspension, for pay purposes only. During which time you were disciplined for not completing the mandatory Healthstream learning tasks assigned to you. That discipline took you to the next

[2] Charging Party makes several complaints regarding the Arbitrator, including, but not limited to, that he showed bias towards the Employer, and/or got witness testimony wrong. However, it is unclear, and Charging Party does not articulate, how those complaints bear relevance to her allegations set forth against the Union.

> step in the disciplinary process which was termination of employment. Grievance #20-0004 was written on your behalf regarding the termination. Our hope was to have the 1st two grievances taken back to the 3rd step (1-day suspension), therefore the next step in the discipline would have been the (5-day suspension).
>
> The RNRPh HMC Union Executive Board has reviewed your case and it was ultimately decided that your particular grievance is not a winnable arbitration. Therefore we have decided to refrain from taking #20-0004 to arbitration. You have the right to plead your case to a panel of your peers through the Appeals Committee. Please sign below to let us know if you want to Appeal the Union decision or not and we can go from there.

Charging Party did appeal the Union's decision. As of the filing of the present matter the Union had not yet considered the appeal. The Union's attorney notified my office by email on February 24, 2021, that the appeal hearing was scheduled for March 15, 2021. On March 19, the Union's attorney again notified my office through email that Charging Party's appeal had been denied.

Discussion and Conclusions of Law:

The Commission does not investigate charges filed with it. Charges filed with the Commission must comply with the Commission's General Rules. More specifically Rule 151(2)(c) of the Commission's rules, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include:

> A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act, the names of the agents of the charged party who engaged in the violation or violations and the sections of LMA or PERA alleged to have been violated.

Under Commission Rule 165(2), summary disposition is appropriate where there is no genuine issue of material fact. Relying on *Smith v Lansing Sch Dist*, 428 Mich 248 (1987), the Commission has consistently held that an evidentiary hearing is not warranted where no material factual dispute exists. *AFSCME Council 25, Local 207*, 23 MPER 101 (2010). Where, however, a material factual dispute exists, summary disposition is not appropriate. *Saginaw Cnty Sheriff*, 1992 MERC Lab Op 639 (no exceptions).

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 Employee*s, 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. 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. To this end, the union is not required to follow the dictates of

any individual employee, but rather it may investigate and handle the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. Poor judgment, or ordinary negligence, on the union's part, is not sufficient to support a claim of unfair representation. *Goolsby* at 672.

Our 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. It is not the Commission's role to second-guess Respondent's judgment or strategy. In *Airline Pilots Assn v O'Neil*, 499 US 65 (1991), the Supreme Court held that unions have broad discretion in administrating their collective bargaining agreements and that their decisions are not actionable unless their judgment is "wholly irrational" and outside the "wide range of reasonableness" accorded to unions. Moreover, 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 Co DPW*, 1994 MERC Lab Op 855. Importantly, 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*, supra; *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993).

Here, Charging Party has not disputed the material facts that led up to her termination as set forth in the affidavit of Forbes. Rather the facts as established within that affidavit, the exhibits attached to the Union's motion, and Charging Party's own filings paint a picture where the Union attempted to do whatever it could do to assist Charging Party.[3] Notably, the Union took the two 2019 grievances to Arbitration, filed a grievance over her 2020 termination, and even sought to have the Arbitrator clarify his award in the 2019 grievances in such a way that would have given them a basis on which to challenge the termination through arbitration. Charging Party does not claim in her filings that Respondent's decision not to proceed to arbitration on her behalf was made in bad faith, i.e., that it was based on personal hostility or some factor unrelated to the grievance's merits. I find that, based on the facts as set out above and not in dispute, Union's decision not to arbitrate over the discharge was not outside the range of reasonableness that could be considered irrational.

Moreover, the Commission has held that to prevail on a claim of unfair representation in a case involving the handling of a grievance, 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. *Macomb Cnty*, 30 MPER 12 (2016); *Goolsby*, supra; *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993). Here there is no articulated rationale as to how the termination constituted a breach of the collective bargaining agreement.

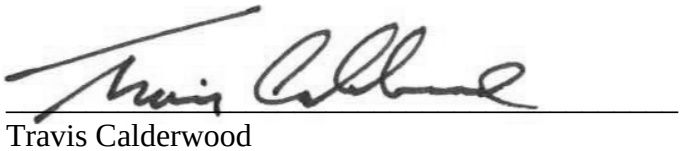
[3] As stated above, Charging Party does make certain complaints against the Union's action relative to grievances that were filed during the period of time that the Union and the Employer were operating without a contract. However, those complaints are not only untimely under PERA's statute of limitations, but also fail to make allegations, that if true could establish that the Union somehow breached its duty of fair representation.

I have considered all other arguments as set forth by the parties and conclude such does not warrant any change to my conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following recommended order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: March 30, 2021