STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMALGAMATED TRANSIT WORKERS UNION, LOCAL 26,
Labor Organization-Respondent,

MERC Case No. CU18 E-010

-and-

EVA M. TURNER,
An Individual Charging Party.
_____/

APPEARANCES:

Fred Westbrook, Jr., President and Business Agent, for Respondent

Eva M. Turner, appearing on her own behalf

DECISION AND ORDER

On July 24, 2018, 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 either 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 31, 2018

[1] MAHS Hearing Docket No. 18-009259

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

AMALGAMATED TRANSIT WORKERS UNION, LOCAL 26,
Labor Organization-Respondent,

Case No. CU18 E-010
Docket No. 18-009259-MERC

-and-

EVA M. TURNER,
An Individual-Charging Party.
_____/

APPEARANCES:

Fred Westbrook, Jr., President and Business Agent for ATU Local 26, for Respondent

Eva M. Turner, appearing for herself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On May 2, 2018, Eva M. Turner, formerly employed as a bus driver by the City of Detroit, Department of Transportation (the Employer), filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against her collective bargaining representative, the Amalgamated Transit Workers Union, Local 26 (Respondent), pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

Pursuant to Rule 172(2)(a) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.172(2)(a), on May 14, 2018, I directed Respondent to file a position statement in response to the allegations in Turner's charge. The position statement was filed on May 29, 2018.

On June 7, 2018, pursuant to Rule 165(2)(f), R 423.165(2)(f), I issued an order directing Turner to show cause why her charge should not be dismissed because there appeared to be no material dispute of fact and Respondent was entitled to judgment as a matter of law. Turner did not file a response to that order.

The Unfair Labor Practice Charge:

On November 3, 2017, when visiting the Employer's offices to turn in paperwork from her doctor, Turner learned that she had been discharged. Turner believed that the discharge resulted from the Employer not properly entering into its system the fact that she had requested a medical leave of absence. She contacted Respondent President Fred Westbrook, who refused to file a grievance on her behalf. Turner alleged that Respondent violated its duty of fair representation, and Section 10(2)(a) of PERA, by refusing to grieve or take other action to represent her with respect to her discharge.

Facts:

I issued an order to show cause to Turner in this case after Respondent, at my directive, filed a position statement. Respondent attached to its statement the following documents: (1) statement of disciplinary charges against Turner dated August 28, 2017; (2) statement of disciplinary charges against Turner dated February 20, 2017; (3) excerpt from Employer's policy entitled "Procedures for Administering Disciplinary Action Following Accidents (Collision);" (4) excerpt from Article 8 of the collective bargaining agreement between the Employer and Respondent; (5) notice of 29-calendar day suspension, with recommendation for discharge, issued to Turner on August 30, 2017; (6) notice of Turner's discharge by the Employer, dated November 3, 2017, but stating that it was effective September 30, 2017; (7) accident reports filed by Turner for accidents occurring on July 10, 2016, May 11, 2017, and August 3, 2017. Nothing in Respondent's position statement directly contradicted any of the assertions made by Turner in her charge. My order to Turner included this statement:

> If Turner disagrees with the facts as asserted by Respondent in its position statement, or has reason to believe that any of the documents it attached to its statement are not genuine, she must explain with what she disagrees in her written response to my order.

As noted above, Turner did not respond to my order. The facts below are those set forth in Turner's charge and in Respondent's position statement, as supplemented by the documents listed above.

Turner completed her training and began working for the Employer as a bus driver on August 28, 2015. On August 3, 2017, Turner struck the driver-side rear bumper of a car as she was making a left hand turn with her bus, an incident which was deemed by the Employer to be a preventable accident. The Employer's written policy defines a "preventable" accident as follows:

> A preventable accident is considered one in which a driver did not exercise such reasonable care and caution which could have prevented the accident. It is a situation in which the diligence and good judgment of observation were not applied in adjusting to road conditions, traffic congestion, or other factors that would have allowed the driver to anticipate events and take appropriate preventative actions. In a preventable accident, the driver is either completely at fault or is a contributor to the accident or the driver is issued a traffic violation as a result of the accident.

The Employer's written policy provides for issuance of a written reprimand for the first preventable accident, a three-day suspension for the second, and suspension with recommendation for discharge for the third. In accord with Article 8(F) of the collective bargaining agreement, which precludes the Employer from taking into account disciplinary actions occurring more than fourteen

months previously, a driver must have at least three preventable accidents within a period of fourteen months to be subject to discharge. Different rules apply for accidents that result in a fatality, serious personal injury, or major property damage.

According to documents provided by Respondent, prior to her August 3, 2017, accident Turner had been involved in a series of accidents deemed by the Employer to be preventable. None of these accidents involved serious personal injury or property damage. After the first, on December 23, 2015, Turner was issued a written reprimand and was required to undergo retraining. After the second, on July 20, 2016, she was given a three-working day suspension and again required to undergo retraining. On February 1, 2017, Turner had a third accident which the Employer deemed preventable and the Employer scheduled a disciplinary hearing. However, according to Respondent's position statement, Respondent successfully persuaded the Employer that one of the previous accidents had not been preventable. Rather than being discharged, Turner was issued another three-day suspension.

On May 11, 2017, Turner had a fourth accident deemed by the Employer to be preventable. For this accident, Turner was issued another three-working day suspension and was again required to undergo retraining.

As noted above, on August 3, 2017, Turner had a fifth accident. On August 28, 2017, the Employer issued a notice to Turner charging her with having "three preventable accidents within a fourteen month period." The notice of charges cited Turner's accidents on July 10, 2016, May 11, 2017, and August 3, 2017. A disciplinary hearing was scheduled for August 30, 2017, and at that hearing Turner was given a notice suspending her for twenty-nine calendar days with a recommendation for discharge. According to statements made in Respondent's position statement, Respondent representatives tried during the disciplinary hearing to get Turner's discipline reduced but were unsuccessful. According to Respondent this was, in part, because with her February 1, 2017, accident, Turner had actually had four accidents deemed preventable within fourteen months. Turner refers to the August 30 meeting in her charge, but the charge does not say anything about what was said during this meeting. In its position statement, Respondent asserts that Turner was informed that at the end of the 29-day suspension she would be discharged. However, Turner believed that whether she would be discharged was still being decided.

While serving the 29-day suspension, Turner was told by her doctor that she needed surgery for injuries she received from the August 3 accident. Turner notified the Employer of her need for a medical leave. Turner was in the hospital at the time her 29-day suspension came to an end. Turner did not receive a notice of discharge from the Employer while she was in the hospital or at any time prior to November 3, 2017. On that date, Turner went to the Employer's offices to deliver some papers from her doctor. During her visit, Turner was informed that she had been discharged. The documents attached by Respondent to its position statement include a notice of discharge dated November 3, 2017, stating that Turner was discharged effective September 30, 2017, for "having had three chargeable accidents within a 14 month period." The notice states on its face that it was served on Turner both in person and by certified mail.

Turner, however, believed that she had been discharged not for the August 1, 2017, accident, but because the Employer had not put her request for a medical leave into its system. Turner contacted Westbrook. According to Turner, he "wished her luck in the future," but refused to provide her with any

other representation. According to Respondent's position statement, when Turner called Westbrook asking about the status of her employment, Westbrook explained that because "this was her second time going to a discipline hearing within a fourteen month period for three preventable accidents within a fourteen month period," there was no violation of the Employer's disciplinary policy or the collective bargaining agreement and no basis for grieving her discharge.

Discussion and Conclusions of Law:

Under Commission Rule 165(2)(h), a charging party's failure to file a response to an order to show cause can be grounds for dismissing the charge.

A union representing public employees in Michigan owes those employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty 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, 177 (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 Ass'n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass'n*, 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.

A union owes a duty to all its members, but its ultimate duty is to its membership as a whole. Therefore, a union, as long as it acts in good faith, has considerable discretion to decide how or whether to proceed with any particular grievance. A union is not required to file a grievance under all circumstances, and an employee does not have the right to demand that it do so. Rather, a union is permitted to assess each grievance on its individual merit and to weigh the likelihood of the grievance's success against the cost to the union of pursuing it. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Moreover, the Commission does not substitute its judgment as to the merits of the grievance for that of the union. Rather, a union's deliberate decision not to file or pursue a grievance, if made in good faith, is held to be lawful as long as it is not so far outside a wide range of reasonableness that it can be considered 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.

Rule 165(1) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423. 165(1), states that the Commission or administrative law judge designated by the commission may, on its own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party on grounds set forth in Rule 165, including that there is no material dispute of fact and the respondent is entitled to judgment as a matter of law.

According to Respondent's position statement and the documents it attached thereto, Turner was discharged by the Employer after having four preventable accidents within a period of fourteen months. The Employer's written policy and the collective bargaining agreement allow the Employer to discharge

a driver after three preventable accidents within fourteen months. According to Respondent, it concluded that a grievance over Turner's discharge would not be successful. It appears that Turner did not know that she was discharged, or why, until November 3, 2017 or thereafter. However, as noted above, the facts asserted by Turner in her charge do not contradict the material facts as stated by Respondent in its position statement and Turner did not respond to my order to show cause.

Turner does not claim in her charge that Respondent's decision not to file a grievance 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 a set out above and not in dispute, Respondent's decision not to file a grievance over Turner's discharge was not outside the range of reasonableness that could be considered rational. I conclude, therefore, that Turner's charge should be dismissed without a hearing. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: July 24, 2018