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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPT OF TRANSPORTATION),
Public Employer-Respondent in MERC Case No C17 F-048,

-and-

MICHIGAN AFSCME COUNCIL 25, LOCAL 312,
Labor Organization-Respondent in MERC Case No. CU18 A-002,

-and-

CHARLES CRUMP,
An Individual Charging Party.
____/

APPEARANCES:

Letitia Jones, City of Detroit Law Department, for the Respondent Employer

Nicholas Caldwell, Staff Counsel, AFSCME Council 25, for the Respondent Labor Organization

Keefe Braxton, for Charging Party

DECISION AND ORDER

On December 6, 2018, Administrative Law Judge Julia Stern issued her Decision and Recommended Order[1] in the above matter, finding that Respondents did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The ALJ found that the charge filed by Charging Party against the Respondent Employer in Case No. C17 F-048 should be closed because it was withdrawn by Charging Party at the hearing. With respect to the charge filed by Charging Party against the Respondent Union in Case No. CU18 A-002, the ALJ found that the Charging Party failed to establish that the Union's actions or decisions were in any way based on an unlawful motive or otherwise arbitrary, discriminatory or outside the bounds of reasonableness and did not violate its duty of fair representation. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Charging Party filed exceptions and a brief in support of his exceptions to the ALJ's Decision and Recommended Order on January 2, 2019. The Union did not respond to Charging Party's exceptions. In his exceptions, Charging Party contends that the ALJ erred in concluding that the Union's handling of his discharge grievance, which Charging Party characterizes as

[1] MAHS Hearing Docket Nos. 17-013205 and 18-002347

arbitrary, did not violate the duty of fair representation. Charging Party did not take exception to the ALJ's findings with respect to the dismissal of the case against the Respondent Employer in Case No. C17 F-048.

We have reviewed the exceptions filed by Charging Party and find them to be without merit.

Factual Summary:

Charging Party Charles Crump was employed by the City of Detroit's Department of Transportation (Employer) as a bus mechanic from 1994 until he was discharged on January 9, 2017. As such, he was a member of a bargaining unit represented by Respondent AFSCME Council 25, Local 312 (Union).

The Employer maintains a disciplinary policy in which infractions are grouped into Class I, Class II, and Class III offenses. Under the policy, the normal progression of disciplinary actions for commission of Class II offenses is a written reprimand for the first offense, a three-day suspension for the second offense, a five-day suspension for the third offense, and a thirty-day suspension, pending discharge, for the fourth offense.

The Employer's disciplinary policy further provides:

> An employee's record will only be considered for the twelve months immediately prior to a current infraction of the rules for determining the effect of prior infractions upon the severity of the penalty for a current infraction.

On June 23, 2015, Crump was assessed a written reprimand for low productivity, a Class II offense.

On June 27, 2015, Crump was issued a notice of a three-day suspension for low productivity. The suspension notice stated that Crump was to serve the suspension on July 6, July 7, and July 8, 2015. The Union filed a grievance over the suspension and, in accordance with Article 11(C) of the collective bargaining agreement, Crump's three day suspension was held in abeyance pending further discussion of the grievance with management. Union Chief Steward/Grievance Committeeman Karl Graham informed Crump of this on or about July 2, 2015.

On February 10, 2016, Crump was issued a notice of a five-day suspension again for low productivity, and the Union filed a grievance over this suspension. The grievance over the five-day suspension was then appealed by the Union to Step 3 of the grievance procedure, and the Employer and Union ultimately agreed that Crump would serve his June 27, 2015 three-day suspension and February 10, 2016 five-day suspension "concurrently." That is, Crump would be suspended without pay for five days instead of eight. Crump served the five-day suspension in late February 2016.

On November 29, 2016, Crump was given a notice of a 29-day suspension with a recommendation for discharge for low productivity in connection with certain work he performed

on November 22, 2016.[2] The Union filed a grievance over this discipline, and Crump met with the Union and the Employer on January 4, 2017 to discuss the grievance. During this meeting, the Employer offered to return Crump to work on conditions that Crump found unacceptable. Against the Union's advice, Crump refused the Employer's offer. Crump was then terminated on January 9, 2017.

On June 6, 2017, at the Union's request, the Employer again met with the Union and Crump to consider the Union's proposal that Crump be allowed to return to work on the condition that he sign a "last chance" agreement. The Employer agreed but placed additional conditions on Crump's return to work. Although Crump initially signed the last chance agreement, he later rescinded the agreement because he felt it provided him with no "job security."

After the June 6, 2017 meeting, the Union did not take any further action on Crump's grievance and, on December 11, 2017, informed Crump that it had closed his file because he had refused two Employer settlement offers. According to the record, Mr. Crump was unemployed at the time of the hearing.

On June 5, 2017, Crump filed an unfair labor practice charge with the Michigan Employment Relations Commission against the Employer alleging that he was unlawfully terminated.

On January 24, 2018, Charging Party also filed a charge against the Union alleging that it breached its duty of fair representation by arbitrarily handling his discharge grievance and by refusing to proceed to arbitration on his grievance after he rejected settlement offers from the Employer.

The two charges were consolidated and heard on June 14, 2018.[3]

Discussion and Conclusions of Law:

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 to proceed with a grievance. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Mere negligence is not sufficient to establish a breach of the duty of fair representation, and a Union's decision on how to proceed with a grievance is not unlawful 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.

[2] Sometime in October 2016, Crump received a verbal discipline for careless workmanship. Because careless workmanship, like low productivity, is a Class II offense, the Employer could have suspended Crump for 29 days for this offense under its policy, but no action was taken.

[3] At the hearing, Crump withdrew his charge against the Employer. Consequently, the hearing was only conducted on the charge against the Union.

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. *AFSCME Council 25, Local 345,* 32 MPER 2 (2018); *Grand Rapids Education Assoc, MEA/NEA*, 30 MPER 72 (2017); *Detroit Dept of Trans,* 30 MPER 61 (2017); *Macomb Cnty*, 30 MPER 12 (2016); *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993).

In the instant case, the record does not establish that any failure to act by the Union was based on an unlawful motive or was otherwise discriminatory. In his exceptions, Charging Party argues that the Union acted arbitrarily in its handling of the grievance over his discharge because it failed to argue that the Employer erroneously relied on disciplinary actions that should not have been considered in determining the severity of discipline for his November 22, 2016 infraction. According to Charging Party Crump, the Employer's disciplinary policy removes from consideration any discipline that he received prior to November 22, 2015, or twelve months prior to his November 22, 2016 infraction. Consequently, Crump argues that he should have received no more than a three-day suspension on November 27, 2016, because this infraction was only his second Class II infraction within the prior twelve months.

According to the Union's Chief Steward Graham and the Employer's Labor Relations Manager Anita Ellsworth, however, the last discipline assessed against an employee remains on his record as assessed for a 12-month period. As noted by Graham, the Union and Employer have consistently interpreted the disciplinary policy to mean that the twelve-month clock is reset by each new infraction within the same class:

> And every time you incur an infraction, that's when the clock actually starts ticking again. The clock never stops as long as you're getting wrote up. If you stop getting wrote [sic] up, the clock will stop.

In the present case, Crump was suspended for five days on February 10, 2016 and then disciplined again for the same offense in November 2016. He never worked 12 months without incurring discipline subsequent to February 2016. His discharge was, therefore, proper under the Employer's disciplinary policy. Consequently, the Union's failure to argue that the Employer had violated its disciplinary policy was based on its reasonable belief that the policy was not violated. Consequently, the ALJ properly concluded that the Union's failure to make this argument was not arbitrary and did not violate its duty of fair representation.

Charging Party Crump also maintains that the Union should have argued that his discharge was improper because his June 27, 2015 three-day disciplinary suspension was "nullified" inasmuch as he never served the three-day suspension. There is no evidence, however, that the Employer ever agreed to remove the three-day suspension from Crump's record. To the contrary, the record establishes that Union filed a grievance over the three-day suspension and that, in accordance with the collective bargaining agreement, the suspension was held in abeyance pending further discussion of the grievance with the Employer. Subsequent to this, Crump was assessed a five-day suspension and the Union filed another grievance over this suspension. The grievance

over the five-day suspension was then appealed by the Union. Ultimately, the Employer and the Union agreed that Crump would serve his June 27, 2015 three-day suspension and February 10, 2016 five-day suspension "concurrently." That is, Crump would be suspended without pay for five days instead of eight in resolution of both disciplinary grievances. Crump then served the five-day suspension in late February 2016. Consequently, the Union's failure to argue that Crump's discharge was improper because his June 27, 2015 disciplinary suspension had been "nullified" was based on its reasoned decision that this argument lacked merit as the suspension had not been nullified. The ALJ, therefore, properly found that the Union's failure to make this argument was also not arbitrary and did not violate its duty of fair representation.

Notwithstanding this, even if the Union's actions somehow constituted poor judgement or ordinary negligence, such is not sufficient to establish a violation of PERA. *AFSCME Council 25, Local 207*, 23 MPER 101 (2010). A union is not expected to always make the right or best decisions, so long as it acts in good faith and avoids being arbitrary. *Detroit Police Officers Ass'n*, 26 MPER 6 (2012); *City of Detroit*, 1997 MERC Lab Op 31.

Additionally, Charging Party failed to put forth any credible evidence establishing that his discharge was a breach of the collective bargaining agreement by the Employer. The mere fact that an employer discharges an employee does not establish a violation of the collective bargaining agreement and Crump's charge against the Employer was withdrawn at the hearing. See *Plymouth-Canton Cmty Schs*, 32 MPER 54 (2019). Consequently, the ALJ correctly dismissed the charge filed by Charging Party Crump in Case No. CU18 A-002.

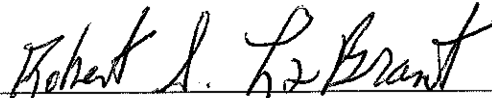
We have also considered all other arguments submitted by Charging Party and conclude that they would not change the result in this case.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair



Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: AUG 19 2019

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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT (DEPT OF TRANSPORTATION),
Public Employer-Respondent in Case No. C17 F-048
Docket No. 17-013205-MERC,

-and-

MICHIGAN AFSCME COUNCIL 25, LOCAL 312,
Labor-Organization-Respondent in Case No. CU18 A-002
Docket No. 18-002347-MERC,

-and-

CHARLES CRUMP,
An Individual-Charging Party.
____/

APPEARANCES:

Letitia Jones, City of Detroit Law Department, for the Respondent Employer

Nicholas Caldwell, Staff Counsel, AFSCME Council 25, for the Respondent Labor Organization

Keefe Braxton, for Charging Party Charles Crump

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

On June 5, 2017, Charles Crump filed an unfair labor practice charge with the Michigan Employment Relations Commission against his former employer, the City of Detroit, Department of Transportation (the Employer) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216.[1] Crump amended this charge on January 24, 2018. On this same date, Crump filed a charge under the same statute against his collective bargaining agent, Michigan AFSCME Council 25, Local 312 (the Union). The two charges were consolidated for hearing before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS). On the day of the hearing, June 14, 2018,

[1] Crump's charge against the Employer was held in abeyance, at Crump's request, while he pursued a charge against the Employer under the Michigan Occupational Safety and Health Act (MIOSHA), 1974 PA 154, as amended, MCL 408.1002 et seq.

Crump withdrew his charge against the Employer. A hearing was therefore conducted on the charge against the Union only. Based on the entire record, including testimony and exhibits admitted at the hearing and post-hearing briefs filed by Crump and the Union on or before August 3, 2018, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge Against the Union:

Crump was employed by the Employer as a bus mechanic from 1994 until he was discharged on January 9, 2017. His termination followed a 29-day suspension with a recommendation for discharge issued to him on November 27, 2016 for "low productivity." The termination was, according to the Employer, in accord with its progressive disciplinary policy for that type of infraction. The Union filed a grievance over his discipline and discharge. On January 4, 2017, after Crump had served his 29-day suspension, Crump met with the Union and Employer. The Employer offered to return Crump to work on conditions that Crump found unacceptable. Against the Union's advice, Crump refused the offer. Crump was then terminated. On June 6, 2017, at the Union's request, the Employer met with the Union and Crump to consider a proposal by the Union that Crump be allowed to return to work on the condition that he sign a "last chance" agreement. The Employer agreed but placed additional conditions on Crump returning to work. Crump signed the last chance agreement, but later changed his mind. He remained unemployed.

After the June 6, 2017, meeting, the Union did not take any further action on Crump's grievance. Crump, however, was not aware that his grievance had been dropped. Between June and December 2017, Crump contacted the Union several times to ask about the grievance and when it would be arbitrated. He did not receive a response until December 11, 2017, when he received a letter from Council 25 informing him that because he had refused two Employer settlement offers, the Union had closed his file.

Crump alleges that the Union violated its duty of fair representation, and Section 10(2)(a) of PERA, by arbitrarily failing to argue to the Employer that his discharge violated the Employer's progressive disciplinary policy because the Employer improperly considered infractions he committed more than twelve months prior to his last suspension. He also alleges that the Union arbitrarily failed to argue to the Employer that a disciplinary suspension issued to him on June 27, 2015 was subsequently nullified. In addition, Crump alleges that the Union violated its duty of fair representation by refusing to proceed to arbitration on his grievance after Crump rejected what he asserts were unreasonable settlement offers from the Employer.

Findings of Fact:

The Employer maintains a set of work rules and a disciplinary policy that apply to all employees in its Department of Transportation (DDOT). Under this policy, infractions are grouped into Class I, Class II, and Class III offenses. The policy states that the normal progression of disciplinary actions for commission of Class II offenses, or a

combination of those offenses, is a written reprimand for the first offense, a three-day suspension for the second offense, a five-day suspension for the third offense, and a thirty-day suspension, pending discharge, for the fourth offense. The disciplinary policy also states:

> An employee's record will only be considered for the twelve months immediately prior to a current infraction of the rules for determining the effect of prior infractions upon the severity of the penalty for a current infraction.

Respondent Chief Steward/Grievance Committeeman Karl Graham testified that under this rule a disciplinary action is null and void after twelve months and cannot be used against an employee. However, the Employer goes back to the last issued or last served disciplinary action in determining the appropriate discipline for a new offense. That is, according to Graham, the clock starts running again with each new infraction. To start the progression over with a reprimand, an employee must go at least twelve months without receiving any discipline for that class of offense. Graham testified that the Employer and Union have consistently applied the rule in this fashion. Anita Ellsworth, an Employer labor relations manager, agreed that this is how the Employer and the Union have applied the rule.

On June 23, 2015, Crump was disciplined for low productivity, a Class II offense, and on June 27, 2015, was issued a notice of three-day suspension, also for low productivity. The suspension notice stated that Crump was to serve the suspension on July 6, July 7, and July 8, 2015. The Union filed a grievance over the suspension.

Under Article 8-A of the Union's collective bargaining agreement, the first step of the grievance procedure is an informal discussion between an employee and/or the Union steward and the employee's supervisor. If the grievance is not resolved at Step 1, it is reduced to writing by the chief steward and submitted by the Local Union's president or vice-president to the employee's division head or designated representative. Two Employer representatives, including the division head or designated representative, meet with the local Union president, and the Local Union vice-president or chief steward, to discuss the grievance at Step 2. The Step 2 meeting is to occur within five days of the filing of the written grievance. The contract states:

> The division head's written answer shall be presented to the Local Union President within five (5) working days after the meeting and shall set forth the facts he/she took into account in answering the grievance.

If the grievance is not settled at Step 2, the Local Union president or designated member of the grievance committee may submit an appeal to the department head or his/her designated representative, Step 3, within five working days of receipt of the Employer's written answer at Step 2.

Section 9 is entitled "Stipulation to the Grievance Procedure." Section 9(G) reads as follows:

> The Union may withdraw a grievance without prejudice at any step of the grievance procedure. *If a grievance is not scheduled or answered by management within the prescribed time limits, the Union shall move the grievance to the next step of the grievance procedure. The appeal will be considered timely if filed at the next step within sixty (60) calendar days of the date that management was required to answer.* However, if management submits a written answer subsequent to the date when the answer was due, the limits on appealing to the next step stated in Paragraph C shall apply beginning as of the date of the answer. Grievances appealed to the next step of the procedure shall be scheduled and answered within the prescribed time limits.[2] [Emphasis added]
>
> Grievances not scheduled or answered within the prescribed time limits shall not be referred back to a prior step in the grievance procedure.

Section 11 of the Union's collective bargaining agreement allows the Union to request to hold a disciplinary action that has been grieved, except for a 29-day suspension or discharge, in abeyance until the Step 3 meeting has been held. Around July 2, 2015, Graham told Crump that his suspension was in abeyance for at least 30 days or until the Step 3 meeting on his grievance was held.

In mid-August 2015, Crump asked Graham about the status of his grievance. Graham told Crump that a Step 2 hearing had been held but that the Employer had not provided its written answer at Step 2. According to Crump, Graham told him that the Employer's failure to answer the grievance resulted in "the grievance not being able to be referred back to a prior step." Crump testified that Graham also told him to "stay out of the way." As Crump understood it, the Employer's failure to file a timely Step 2 answer had the effect of wiping out his suspension. Graham admitted telling Crump to keep quiet about the suspension but did not admit telling him that the suspension had been nullified. Graham explained that when the Employer fails to file a written Step 2 answer, the assumption is that the grievance has been denied. According to Graham, in Crump's case he hoped the three-day suspension would fall off Crump's record due to the passage of time without Crump having to serve the suspension. The Union did not appeal the grievance over Crump's three-day suspension to Step 3, but the Employer did not set new dates for Crump to serve the suspension.

On February 6, 2016, Crump's foreman, Felton Mack, prepared a "disciplinary action fact sheet" asking that Crump be disciplined again for low productivity. On February 10, 2016, Crump was issued a notice of five-day suspension. After receiving the suspension notice, Crump met with Graham and brought to his attention the fact that Crump had never served the three-day suspension he had received in June 2015. Graham

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[2] Paragraph C states that to be timely, a grievance must be appealed in writing from a decision at Step 2 to Step 3 within five working days.

promised to bring this up in the Union's discussions with the Employer of his current discipline. The Union filed a grievance over Crump's five-day suspension. The grievance asserted that the five-day suspension should be stricken because Crump had never served his previous three-day suspension.

This grievance over the five-day suspension was advanced by the Union to Step 3 of the grievance procedure. On February 19, 2016, the Employer provided the Union with its written Step 3 answer. According to the answer, the Union had contended at the Step 3 meeting that Crump's discipline was "undeserved and too severe," but that it was willing to settle the matter by reducing the time suspended to three days. According to the written answer, the Employer rejected that argument, as well as Crump's argument that "the total of eight days suspended be eliminated from his employment record and that he be made whole."

Graham testified that the Employer's initial position, after it issued Crump a five-day suspension in February, was that Crump should now have to serve both suspensions, for a total of eight days. However, according to Graham, after the Employer issued its Step 3 answer, the Employer agreed that Crump could serve the three-day and five-day suspensions "concurrently." That is, Crump would be suspended without pay for five days instead of eight. Crump served the five-day suspension in late February 2016.

Sometime in October 2016, Crump complained to his current foreman, James Reaves, about the lack of proper personal protection equipment and training for mechanics with respect to the use of welding equipment. On or around October 16, 2016, Crump filed a complaint with MIOSHA about this issue, and MIOSHA opened an investigation of this complaint on November 21, 2016.

Graham testified without contradiction that around this time, but before November 23, Crump received verbal discipline for careless workmanship. Because careless workmanship, like low productivity, is a Class II offense, the Employer could have suspended Crump for 29 days for that offense.

On November 23, 2016, Reaves filled out a disciplinary action fact sheet requesting that Crump be disciplined for low productivity in connection with the work he performed on November 22, 2016. On November 29, 2016, Crump was given a notice of 29-day suspension with recommendation for discharge. On December 22, 2016, Crump filed a complaint with MIOSHA alleging that he had been disciplined in retaliation for filing a MIOSHA safety complaint.

On December 6, 2016, Crump wrote a grievance over the 29-day suspension and submitted it to the Union. This grievance asserted that the discipline was unwarranted but did not mention any of Crump's previous suspensions. However, according to Crump, Graham told him that he would bring up the fact that Crump had not served the three-day suspension at a meeting to be held with the Employer in January. On or around January 4, 2017, after Crump had completed his 29-day suspension, Crump, the Union and the Employer met to discuss Crump's future. Both Graham and Douglas attended this

meeting as representatives of the Union. The Union appealed to the Employer to allow Crump to come back to work and the parties discussed this issue for almost two hours. The Union did not bring up Crump's three-day suspension at this meeting. According to Crump, the Employer insisted at this meeting that he withdraw both MIOSHA complaints before it would return him to work. According to Douglas and Graham, however, the Employer said it had no problem with Crump's safety complaint, but that Crump had to drop his MIOSHA retaliation charge before returning to work. The Union recommended that Crump accept the Employer's offer, but Crump rejected it. According to Graham, Crump wanted backpay for his most recent suspension. When the Employer told him that he was not going to receive it, Crump said that he would take his chances with MIOSHA. On January 9, 2017, Crump was notified that he was terminated.

On June 5, 2017, as noted above, Crump filed an unfair labor practice charge against his Employer which was held in abeyance until his MIOSHA retaliation complaint was resolved. On June 6, 2017, the Union and the Employer, at the Union's request, met again to discuss Crump's situation. Present for the Union at this meeting were AFSCME Council 25 Staff Representative DeAngelo Malcolm and Graham. Crump was not at this meeting. The Union asked the Employer if it would agree to return Crump to work if he entered into a last chance agreement. The Employer agreed on the condition that Crump also drop his MIOSHA retaliation case and his claims for any backpay. By this time, Crump's MIOSHA safety complaint, which had resulted in a citation to the Employer on February 22, 2017, was no longer pending. A last chance agreement was drafted that stated that if Crump committed any Class I or Class II offense within the next two years he could be automatically terminated and would not have the right to grieve his termination. After the meeting, the Union presented the offer to Crump and recommended that he accept it. Crump initially agreed, and even signed the last chance agreement, but later changed his mind. After the June 6, 2017, meeting, the Union did not take any further action on Crump's grievance

Between June and December 2017, Crump wrote and left several phone messages for Union representatives asking about his grievance and requesting that it be arbitrated. On December 11, 2017, he received a letter from Council 25 stating that as he had twice refused the Union's recommendation that he accept reasonable Employer settlement offers, the Union had closed his file.

Discussion and Conclusions of Law:

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 in deciding whether and how far the grievance should be pressed. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973). A union does not have a duty to arbitrate every grievance, and a member 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; International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. The Commission does not substitute its judgment for that of the union. Rather, a union's deliberate decision not to 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. It is widely recognized that this standard also applies to tactical decisions made by a union in the course of handling a grievance. See, e.g., *Garrison v Cassens Transp Co*, 334 F3d 528, 539 (CA 6, 2003).

Here, Crump's argument is that the Union acted arbitrarily in its handling of the grievance over his 29-day suspension and discharge by failing to assert, as an affirmative defense, that the Employer erroneously relied on disciplinary actions that should not have been considered in determining the severity of discipline for Crump's November 22, 2016, infraction. Although Crump knew that the Union did not challenge the validity of his discipline at the January 4, 2017 meeting he attended, Crump's charge against the Union was not filed until January 28, 2018, considerably more than six months after that meeting. However, there is no evidence that Crump knew or should have known before December 2017 that the Union had ceased pursuing his grievance after the June 6, 2017 meeting. The Union did not argue that the allegations that it mishandled Crump's grievance were untimely under Section 16(a) of PERA I conclude that these allegations were in fact filed within six months of the date Crump knew or should have known of the actions constituting the unfair labor practice.

As part of Crump's argument that the Union mishandled his grievance, he asserts that the Union should have argued that the provision in the Employer's disciplinary policy stating that "an employee's record will only be considered for the twelve months immediately prior to a current infraction of the rules" removed from his record any discipline Crump received prior to November 27, 2016, or twelve months prior to his last infraction. As I understand his argument, Crump asserts that he should have received no more than a three-day suspension on November 27, 2016, because his November 2016 infraction was only his second Class II infraction within the prior twelve months. The evidence established, however, that the Union and Employer had consistently interpreted the twelve-month rule to mean that the twelve-month clock was reset by each new infraction within the same class. Crump was suspended for five days on February 10,

2016, and then disciplined again for the same offense in November 2016. I find that the Union made a deliberate decision in this case not to argue that Crump's discharge violated the twelve-month rule and that this decision was based on its reasonable assessment that this argument would be futile. I conclude, therefore, that the Union's failure to make this argument was not arbitrary and did not violate its duty of fair representation.

Crump also maintains that the Union should have argued that his 29-day suspension was improper because his June 27, 2015 disciplinary suspension had been nullified by the Employer's failure to answer the grievance filed over that suspension at Step 2 of the grievance procedure. He points to the fact that he did not serve the three-day suspension as proof that it was nullified. However, nothing in the Union's collective bargaining agreement states that a grievance is effectively granted by the Employer's failure to answer a grievance. To the contrary, Section 9(G) gives the Union the right, in this circumstance, to move the grievance to the next step within sixty days of the date the answer would have been due. In Crump's case, the Union did not move the grievance over Crump's three-day suspension to Step 3 after the Employer failed to answer. Graham's testimony indicates that the Union made a tactical decision that Crump was less likely to have to serve the suspension if the Union simply did nothing. However, there is no evidence that the Employer ever agreed to remove the three-day suspension from Crump's record. Indeed, when Crump was disciplined again for low productivity in February 2016, the Employer initially proposed to make him serve the prior three-day suspension in addition to the current five-day suspension. I find that the Union's failure to argue to the Employer that Crump's discharge was improper because his June 27, 2015 disciplinary suspension had been nullified was based on its reasoned decision that this argument lacked merit and that making it would be futile. I conclude that the Union's failure to make this argument was also not arbitrary and did not violate its duty of fair representation.

Crump also asserts that the Union violated its duty of fair representation by refusing to process his grievance to arbitration after he rejected what he claims were unreasonable offers by the Employer to settle his grievance. Leaving aside the demand that Crump withdraw his MIOSHA safety complaint, which according to Graham and Douglas the Employer did not make, it was not unreasonable for the Employer to demand as a condition of settling the grievance that Crump drop his demand for backpay and any claim, such as his MIOSHA retaliation complaint, which might result in a backpay award. I agree with Crump that a last chance agreement in these circumstances was a harsh condition. However, nothing in this record suggests that the basis of Union's insistence that Crump accept the Employer's conditions was anything other than its good faith assessment that Crump's grievance was not likely to succeed at arbitration. As discussed above, unless its decision is so beyond the range of reasonableness as to be deemed irrational, a union's good faith decision not to arbitrate a grievance does not violate its duty of fair representation. I conclude that the Union did not violate its duty of fair representation by refusing to process Crump's discharge grievance to arbitration.

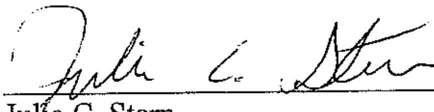
In accord with the findings of fact and conclusions of law above, I conclude that the Union did not violate its duty of fair representation toward Charles Crump in this

case. As the charge against the Employer was withdrawn at the hearing, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge against Michigan Council 25 and Local 312 is dismissed in its entirety. The charge against the City of Detroit (Dept of Transportation) has been withdrawn, and the file in that case shall therefore be closed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 6, 2018