STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MASS TRANSPORTATION AUTHORITY,
Respondent-Public Employer,

Case Nos. C99 D-72 &
CU99 B-4

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, LOCAL 3437,
Respondent-Labor Organization,

-and-

LE VERN W. HARRIS,
An Individual Charging Party.
_____/

APPEARANCES:

Michael T. Joliat, Esq., for the Public Employer

Miller Cohen PLC, by Richard G. Mack, Jr., Esq., for the Labor Organization

Le Vern W. Harris, in pro per

DECISION AND ORDER

On December 15, 1999, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act (PERA), 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 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

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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APPEARANCES:

Michael T. Joliat, Esq., for the Respondent Employer

Miller Cohen PLC, by Richard G. Mack, Jr., Esq., for the Respondent Labor Organization

Le Vern W. Harris, in pro per

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), as amended, MCL 423.210 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Detroit, Michigan on May 4, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before July 21, 1999, I make the following findings of fact, conclusions of law, and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The charge in Case No. CU99 B-4 was filed on February 26, 1999, by Le Vern W. Harris against his bargaining representative, the American Federation of State, County, and Municipal Employees, Local 3437 (the Union). On April 8, 1999, the Union filed a motion for a bill of

particulars, which Harris provided on April 26, 1999. The charge in Case No. C99 D-72 was filed by Harris on April 15, 1999 against his employer, Mass Transportation Authority (the Employer). In Case No. C99 D-72, Harris alleges that in October 1998 the Employer disciplined him in violation of the collective bargaining agreement. As clarified in his bill of particulars, in Case No. CU99 B-4 Harris alleges that the Union violated its duty of fair representation by purposely neglecting and misrepresenting his case before the Employer, and by failing to file a timely grievance on his behalf regarding this discipline.

Facts:

The Employer is a public transit authority providing service in the Flint, Michigan area. Le Vern Harris was hired by the Employer in October 1997. Harris works as a "Your-Ride" driver out of the Employer's Swartz Creek center. He drives a specially-equipped van designed to transport elderly and disabled passengers. Harris is a member of a bargaining unit of "Your-Ride" drivers represented by the Union.

Events of October 2, 1998

At 2:00 p.m. on October 2, 1998, Harris left the Employer's main terminal in Flint with two passengers in his van. Harris crossed the northbound lanes of the street in front of the terminal and drove onto a strip of road located between the northbound and southbound lanes. The record indicates that this strip is a "no-man's land" created by the proximity of a freeway overpass. It was not specifically designed to be used by vehicles for any purpose. A "right turn only for buses" sign is posted at the end of the terminal driveway, so the Employer's buses cannot use this strip. The Employer has no policy regarding its use by Your-Ride vans. However, the strip in the middle of the road is often used by cars turning left out of the main terminal. A car was in the strip, waiting to turn left, when Harris pulled up on its right and turned left, headed south. Soon thereafter, Harris was waved over by the driver of the car. The driver was Veronica Lowe, a supervisor at the main terminal. Lowe parked alongside Harris and berated him for blocking her view. Lowe told Harris he would be hearing more about this, and drove off.

Later that afternoon, Harris' immediate supervisor, Bryan Tietz, sent him a radio message asking him to either stop by the office or call him on the phone. Harris had one passenger remaining in his van. Since the office was on the way to the passenger's home, Harris decided to stop in before delivering his passenger. Leaving the passenger in the van, Harris went to talk to Tietz. Tietz told Harris that Lowe had complained about Harris' driving earlier in the day. Lowe believed that Harris could have caused an accident by blocking her view. She also believed that Harris had endangered his passengers by using the narrow "no-man's land" to make a turn. Harris denied that he had done anything wrong, and said he felt that Lowe owed him apology for how she had acted. Harris was angry at Lowe. When it became clear that Tietz intended to take Lowe's side, Harris became agitated. The record indicates that at one point Harris referred to Lowe as a "b__," or "stupid b__ ." Harris may also have told Tietz that he was an "a__ h__," if he believed Lowe. Approximately five to ten minutes after he arrived at the Swartz Creek office, Harris left and went home. According to Tietz, he suggested that they continue the discussion another time, and asked Harris to please take

his passenger home. According to Tietz, Harris replied that this was his (Tietz's) problem, and walked out the door. Harris admitted that he did not take the passenger home, but denied that Tietz had specifically asked him to do so.

Upon arriving home, Harris called Tietz again. Tietz told him that he was suspended without pay until further notice. That evening, Harris called his union steward, Pat Kelso, and asked to file a grievance. Kelso told him that she could not file a grievance until she got written notice of the discipline from the Employer.

The Union's Handling of the Dispute

Harris and Kelso met with Tietz, and perhaps Lowe, on October 7, 1998. On October 8, Tietz prepared a "notice of personnel record entry," the formal disciplinary notice, suspending Harris without pay for five days. The suspension ran from October 3 through October 9. The disciplinary notice indicated that the suspension was based on Harris' violation of three Employer rules. Harris and Kelso attended another meeting with the Employer on October 14. It is not clear from the record who represented the Employer at that meeting. At this time Kelso was given a copy of the disciplinary notice and copies of three documents titled "evaluation reports." Each report set out a rule Harris was alleged to have violated, and what Harris was alleged to have done to violate the rule. Two of the evaluation reports dealt with the traffic incident; Harris was accused of unsafe driving and of violating Employer operating procedures and existing traffic laws. The third alleged that Harris had violated the Employer rule prohibiting "insubordination or disgraceful conduct toward Management," in his meeting with Tietz. The report stated that when questioned about the driving incident, Harris "became abusive and insubordinate," and that Harris left his vehicle with a passenger in the parking lot and told Tietz to take him home.

At the end of the October 14 meeting, Harris told Kelso that he wanted a grievance filed on all the charges and that he wanted back pay for the suspension. Kelso said that she "would have to get with Micah (Shamly, the local president) to find out which way to go about this," but promised to file the grievance by the end of the next week. On or about October 20, Harris went to the MTA office to find Kelso and ask her if she had filed the grievance. She told him she was still working on it. Harris asked Kelso about the time limits for filing a grievance, and asked her for a copy of the labor agreement. Kelso gave him one, but said that she was not worried about timeliness since she had filed late grievances before. The next week, Harris approached Kelso again. Kelso told him that she had not yet filed the grievance, and that she needed to talk to Shamly before she did so. She also said that she was trying to resign her position as union steward. At the hearing, Kelso explained that as a new union steward, she was not sure if a grievance should be filed over Harris' suspension. During the week following the October 14 meeting she called Shamly every day, but her calls were not returned. Kelso also tried to get in touch with AFSCME Staff Representative Ken Stovall, but he was on leave at the time. Kelso further explained that she was working 14 hours per day and was not given time to work on Harris' case. Because she was unable to reach Shamly or Stovall, Kelso did not file a grievance.

On November 9, Harris asked Tietz in a meeting if he had received Harris' grievance over his

suspension. Tietz told him that he had not. After leaving the meeting, Harris went to find Kelso. She told him she was still working on the grievance. Harris then made several unsuccessful attempts to get in touch with Shamly. Harris eventually reached Ken Beals, the Union steward for the Employer's line haul drivers. Beals told Harris that since Kelso had not filed a grievance he would have to take the matter up with Stovall.

Harris talked to Stovall on about November 24 and again on December 7. After the second conversation, Stovall called the Employer's director of human resources and arranged a meeting to discuss Harris' suspension. On December 28, 1998, Harris and Stovall met with Employer representatives. Stovall began the meeting by telling the Employer's representatives that he understood that a grievance would be untimely, but wanted to see if the matter could be resolved. During the meeting Stovall realized for the first time that Harris was accused of insubordination, and not merely unsafe driving. Stovall recalled that he was told by the Employer at the meeting that there had been a verbal confrontation between Tietz and Harris, that there were profanities used, that Harris had arrived at the facility prior to 4:00 with a passenger that he should have taken home, and that Harris had left the passenger in the vehicle and told Tietz to take him home. At this point, Stovall interrupted the meeting and took Harris outside the room to ask him about the incident. After reviewing the facts with Harris, Stovall told him that it was no use going over the events in the meeting, because Harris could have been fired for his conduct. Stovall offered to propose to the Employer that Harris be on probation for a stipulated time in exchange for expunging his record. Harris did not like this, but he agreed, and the two men returned to the meeting. The Employer representatives said they would think over Stovall's offer. On about January 7, 1999, Stovall called Harris to tell him that the Employer had rejected the offer, and that there was nothing more Stovall could do for him.

Discussion and Conclusions of Law:

The Charge Against the Employer

The Employer argues that the charge against it should be dismissed because Harris did not allege that the Employer discriminated against him for engaging in union or other activity protected by the Act. It also argues that any claim against it would be untimely under Section 16(b) of PERA, since the discipline was issued more than six months prior to the date Harris filed the charge with the Commission, April 15, 1999, and more than six months prior to the date the Employer was served with a copy of the charge. The Employer is correct in both its arguments. Harris alleged here only that the Employer breached its collective bargaining agreement with the Union by disciplining him unfairly. Harris, therefore, failed to state a claim against the Employer under PERA. Moreover Harris received notice that he had been suspended for five days on about October 8, 1998. Harris' charge against the Employer was untimely. I conclude that the charge against the Employer should be dismissed.

The Charge Against the Union

Harris alleges that the Union breached its duty of fair representation in handling his complaint.

In order to show this, Harris must demonstrate that the Union acted in bad faith or in an arbitrary or discriminatory manner. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973), citing *Vaca v Sipes*, 386 US 171, 177 (1967). "Bad faith" indicates an intentional act or omission undertaken dishonestly or fraudulently. *Goolsby v Detroit*, 419 Mich 651, 679 (1984). The Court in *Goolsby* also outlined what constitutes "arbitrary" conduct by a Union in processing a grievance:

> In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected. We think the latter includes, but is not limited to, the following circumstances: (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members. *Goolsby*, at 679.

There is no evidence that the Union intentionally neglected Harris' grievance, or that it acted in a discriminatory manner here. The Union argues that neither Stovall, its staff representative, nor Kelso, its steward, acted arbitrarily in the handling of Harris' grievance. According to the Union, Stovall met with Employer representatives and was told that Harris had used profanity toward his supervisor and then ignored the supervisor's order by leaving the premises with a passenger still in his van. The Union asserts that after hearing the Employer's story, Stovall, an experienced staff representative, concluded in good faith that Harris' offenses not only warranted the suspension, but could have legitimately resulted in his discharge. According to the Union, Kelso also had doubts about whether Harris' claim had merit. The Union asserts that Kelso did not file a grievance for Harris because she wanted to be sure first that the grievance would have merit. Moreover, Kelso expended much time and effort in trying to contact more experienced union officials to discuss Harris' case. Finally, according to Union, Harris was not substantially prejudiced by Kelso's neglecting to file a grievance which the Union in good faith felt lacked merit.

The record indicates that the reason Kelso did not file a grievance was that she was unsure whether the grievance had merit, and felt she first needed the advice of a more experienced union representative. However, the Union local president, Shamly, failed to return her calls. When she was not able to reach another representative, she elected to do nothing more. Yet Kelso never told Harris that she was not going to file. In fact, she led him to believe a grievance would be filed and that it would be timely. However, by Stovall's own admission, by the time Harris managed to contact Stovall it was too late for a grievance to have been timely. I find that the record shows that the Union negligently failed to exercise its discretion within the time limits provided by the contract.

However, as *Goolsby* makes clear, a breach of the duty of fair representation cannot be based on "mere," as opposed to "gross," negligence. In order to constitute a breach of the duty of fair representation, a union's conduct, even if inept, must manifest "indifference to the interests of those affected." Moreover, a union's failure to exercise its discretion in a proper fashion must be accompanied by a showing that this failure could reasonably have been expected to have an adverse effect on a member or members. In this case, Kelso's failure to file Harris' grievance was not a result

of simple indifference to his interests but was, as the Union asserts, based in part on her doubts about whether a grievance would have merit. Secondly, the record indicates that Stovall, after hearing both Harris' and the Employer's version of the events of October 2, 1998, came to the conclusion, based on his experience, that Harris' grievance would have lacked merit. In this case the contractual time limits for filing a grievance had expired before Stovall made this decision. The evidence indicates, however, that had a grievance been filed, it would not have been resolved in Harris' favor short of arbitration. In addition, because of Stovall's reasoned, good faith, assessment of its merits, the Union would not have taken the grievance to arbitration. For these reasons, I agree with the Union that Harris was not substantially prejudiced by the negligence of the local Union representatives. I conclude that the Union should not be held liable for a breach of its statutory duty of representation on the facts as set forth herein. For this reason, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The charges in Case No. C99 D-72 and Case No. CU99 B-4 are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____