STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Respondent-Public Employer in Case No. C00 A-7,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1583,
Respondent-Labor Organization in Case No. CU00 A-4,

-and-

JOSEPH GANT,
An Individual Charging Party.
_____/

APPEARANCES:

Butzel Long, by Lynne E. Deitch, Esq., for the Public Employer

Miller Cohen, PLC, by Gail Wilson, Esq., for the Labor Organization

Joseph Gant, in pro per

DECISION AND ORDER

On September 20, 2000, Administrative Law Judge (hereafter "ALJ") Roy Roulhac issued his Decision and Recommended Order in the above matter finding that Respondents University of Michigan and American Federation of State, County & Municipal Employees (hereafter "AFSCME"), Local 1583, did not violate Section 10 of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint. The Decision and Recommended Order of the ALJ was served on the interested parties in accord with Section 16 of the Act. On October 13, 2000, Charging Party Joseph Gant filed timely exceptions to the Recommended Order of the ALJ. Respondent University of Michigan filed a timely brief in support of the ALJ's Recommended Order on October 23, 2000. On November 8, 2000, Charging Party filed what appears to be a reply to the brief submitted by the University of Michigan.

As a preliminary matter, we must determine whether the reply brief filed by Charging Party may be considered in this matter, and we must address the admissibility of various documents submitted by Charging Party for the first time on exception. Rules 66 and 67 of the General Rules and Regulations of the Employment Relations Commission, R 423.466 and R 423.467, give parties the right to file exceptions or cross-exceptions to an ALJ's Decision and Recommended Order, and the right to file a brief in support of the ALJ's decision. The rules do not, however, provide for the filing of replies to the latter. See *City of Grand Rapids*, 1997 MERC Lab Op 358, 361; *Taylor School District*, 1994 MERC Lab Op 285, 289. Charging Party did not request special permission to file a reply brief, nor has he set forth any compelling reason for doing so. Accordingly, we will not consider the reply brief filed by Charging Party on November 8, 2000, in deciding this case. See *St Clair ISD*, 2000 MERC Lab Op ____, n 1 (Case No. CU98 H-44, issued March 9, 2000; *Univ of Michigan*, 1997 MERC Lab Op 671, 673, n 1.

Attached to Charging Party's exceptions, as well as his reply brief, are various documents which were not previously submitted into evidence in this case. Under Rule 68(2) of our General Rules and Regulations, R 423.468(2), this Commission may reopen the record in a case and receive further evidence after the close of a hearing. However, the proponent of such evidence must satisfy two requirements: (1) the evidence could not have been, with reasonable diligence, discovered and produced at the original hearing, and (2) not merely the materiality, but the evidence itself, must be newly discovered. *Id.* See also *City of Lansing (P.D.)*, 1974 MERC Lab Op 625. Furthermore, a party seeking to admit new evidence must make a motion to have such evidence considered. R 423.468(2). See also *Grand Rapids, supra* at 363. Charging Party did not make such a motion in the instant case, and most of the documents at issue are dated well-before the close of hearing on June 8, 2000. Nonetheless, we have carefully reviewed the evidence submitted by Charging Party on exception and fail to see how any of these documents are even remotely relevant to the unfair labor practice charges filed herein.

Turning to the exceptions, we conclude that the document filed on October 13, 2000, by Charging Party fails to comply with our General Rules and Regulations. Pursuant to Rule 66(2), R423.466, exceptions must set forth specifically the question of procedure, fact, law, or policy at issue, identify that portion of the ALJ's decision to which objection is made and state the ground for the exceptions, including citation of authority, if any. In the instant case, no exception has been taken to any specific factual finding or legal conclusion of the ALJ. Rather, Charging Party essentially repeats the allegations set forth in his unfair labor practice charge and post-hearing brief, and supplements them with arguments and assertions which have no bearing whatsoever on these proceedings. In any event, we have carefully reviewed the exceptions in light of the record, including the transcript and exhibits submitted by the parties, and agree with the ALJ's determination that Charging Party failed to establish that either the University of Michigan or AFSCME violated PERA.

Where it is alleged that discipline or discharge is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor. *MESPA v Evart Public Schools*, 125 Mich App 71, 74 (1982). The elements of a prima facie case of discrimination under Sections 10(1)(a) or (c) of PERA include: (1) employee, union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. Here, the record establishes that Charging Party engaged in protected activity by filing an unfair labor practice charge, and that he was terminated eleven days later.

However, these factors alone are insufficient to establish a prima facie case of discrimination. There must be a showing of illegal motivation or causal nexus between the protected activity and the discharge. *County of Monroe*, 1995 MERC Lab Op 63*; Plainwell Schools*, 1989 MERC Lab Op 464, 466. We find that Charging Party failed to establish, either directly or indirectly, that his discharge was motivated by anti-union animus or hostility. As noted, the Employer was considering disciplining Gant at least six days before the charge was filed.

Similarly, we conclude that Charging Party failed to establish a violation of PERA by AFSCME. 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, 177; 87 S Ct 903; (1967); *Goolsby v Detroit*, 419 Mich 651(1984). "Arbitrary conduct," includes (a) impulsive, irrational, or unseasoned 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. *Goolsby*, *supra* at 679. See also *Detroit Fire Fighters Assn*, 1995 MERC Lab Op 633, 637-638. In the instant case, the Union attempted to gather information regarding Charging Party's termination by interviewing potential witnesses, and it filed a grievance on Charging Party's behalf which was processed to the third step. At the time of the hearing in this matter, the Union was still considering whether to advance the grievance to arbitration. We find nothing in the record to suggest that the Union's actions in connection with the grievance were arbitrary, discriminatory or in bad faith.

ORDER

For the above reasons, we hereby adopt the recommended order of the Administrative Law Judge as our final order in this case and dismiss the charges in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Maris Stella Swift, Commission Chair

_____

Harry W. Bishop, Commission Member

_____

C. Barry Ott, Commission Member

Dated:_____

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, *et seq.;* MSA 17.455(10) *et seq*., this case was heard in Detroit, Michigan on June 8, 2000, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. Based upon the record and briefs filed by August 7, 2000, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Charge:

On January 20, 2000, Charging Party filed unfair labor practice charges against Respondent University of Michigan alleging violations of PERA by failing to place him in a maintenance job and repeatedly retaliating against him "for things that never happened". Charging Party amended his charge on

February 23, 2000, and claimed, among other things, that the Employer terminated him in retaliation for filing his earlier charges. On March 13, 2000, the Employer filed a Motion to Dismiss or, in the alternative for a Bill of Particulars. The Employer argued that most of the claims raised by Charging Party related to events which occurred more than the six months prior to January 20, 2000, contrary to the provisions of Section 16(a) of PERA. On April 13, 2000, I granted the Employer's motion and dismissed all claims alleged by Charging Party except his charge that the Employer violated PERA by retaliating against him for filing charges with the Commission on January 20.

The charge against the Union was also filed on January 20, 2000. Charging Party claims that the Union has been repeatedly retaliating against him for filing charges with the Employment Relations Commission, refusing to take his racial discrimination case to arbitration, taking sides with the Employer, and threatening him for "standing up for his rights".

Findings of Fact:

Charging Party Joseph Gant is a member of Respondent AFSCME, Local 1583's bargaining unit and was employed by Respondent University of Michigan as a maintenance/custodial worker for over twenty years until on or about January 31, 2000, when he was discharged. On December 30, 1999, Charging Party was allegedly found asleep in the break room while on duty by his supervisor, Wiley Edwards.[1] Charging Party, who had been previously suspended for two days in May 1999, testified that he was not sleeping, but rather he walked out of the room and went back to his work area when Edwards entered. Two weeks later, on January 14, 2000, Charging Party was advised by the Employer that a disciplinary review conference (DRC) would be conducted on January 18 to review the facts regarding the December 30 incident.

Charging Party advised the Union that Shelisa Stevenson, a co-worker, was in the break room with him on December 30 and could verify his claim that he was not sleeping on the job. Stevenson, however, did not attend the DRC. On January 31, 2000, Charging Party was terminated. A few days later, on February 3, the Union filed grievance number 00-678 protesting his discharge. The Union requested, among other things, that Charging Party be made whole for all lost wages. During the Union's investigation, Local 1583 president Michael Edwards and Warren Jenkins, went to Stevenson's work site at 11:30 p.m. on March 2, 2000, to interview her regarding her recollection of the events of December 30, 1999. Stevenson signed a statement, written by Jenkins, which stated that Charging Party was sleeping when Wiley Edwards came into the room, but she did not want to get involved. Prior to the Union's March 2 interview with Stevenson, Local 1583's vice president had contacted Stevenson twice. Each time he was told by Stevenson that she did not want to get involved.

In the meantime, Charging Party filed a complaint with the United States Equal Employment

[1]The Union filed a grievance protesting the May 1999, suspension. As of March 14, 2000, it was still being reviewed by the Union's arbitration review panel.

Opportunity Commission (EEOC) alleging that the Union had discriminated against him in violation of Title VII of the Civil Rights Act of 1964. In its March 14, 2000, response to Charging Party's complaint, the Union's attorney indicated that the grievance protesting Charging Party's discharge had been processed through the contractual grievance procedure and it was currently awaiting the Employer step 3 response, which will presumably be to deny the grievance. The Union noted that while investigating the grievance, one of the witnesses whom Charging Party identified as supporting his case could not recall any of the facts, and the other witness, Seletha Stevenson, recalled that Charging Party was asleep when the supervisor entered the room.

On April 8, 2000, the Union sent the Charging Party a letter advising him that the Employer had denied his grievance at the third step and it was being reviewed by the arbitration review committee. In the meantime, while reviewing documents filed with the EEOC, Charging Party found the Union's response to his civil rights complaint and learned, for the first time, that Stevenson had signed a statement on March 2 indicating that he was sleeping on the job when the supervisor came into the room on December 30, 1999. At 8:00 a.m., on June 8, 2000, the date of the hearing in this matter, Charging Party obtained the following signed statement from Stevenson:

> I did not say that Joe was sleep. I told them that I didn't no if he was sleep or not and I didn't have any thing to do with that. No comment.

Conclusions of Law:

Charging Party claims that Respondent Employer discharged him on January 31, 2000, because he filed an unfair labor practice charge on January 20. To sustain a charge that an employer's discharge or other discriminatory action violated PERA, the charging party must establish: employee union or other protected activity; employer knowledge of that activity; union animus or hostility towards the employee's protected rights; and suspicious timing or other evidence that protected activity was a motivating cause of the employer's action. See *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, *enf'd*, CA Case No. 214734 (11/30/98); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6; *MESPA* v *Evart Public Schools*, 125 Mich App 71, 74 (1983).

I find that Charging Party has failed to sustain his burden of proving that the Employer discharged him because he filed a charge with this tribunal. The evidence presented by Charging Party reveals that he engaged in protected activity by filing a charge with this Commission on January 20, 2000. However, he presented no evidence that the Employer expressed hostility toward him for filing charges nor that the supervisor who terminated him knew that he had filed an unfair labor practice charge. In fact, the Employer was considering disciplining Charging Party at least six days before his charge was filed. He was advised on January 14 that a disciplinary review conference would be held on January 18. I conclude that Charging Party has failed to demonstrate that the Employer discharged him in violation of Section 10(1)(c) of PERA.

I also find that the Union did not violate its duty of fair representation. A union's duty of fair representation under PERA consists of three 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, 177 (1967); *Goolsby* v *Detroit*, 419 Mich 651, 679 (1984). A union has complete discretion regarding whether it will accept a grievance, how far it will proceed, and how it will be presented at arbitration. *Lowe* v *Hotel Employees Union*, 389 Mich 123 (1973). A Union representative need not follow the dictates of the grievant but may investigate and present the case in the manner determined to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. In his post-hearing brief, Charging Party claims that the Union did not fairly represent him because the March 2 letter which Stevenson signed indicating that he was asleep on the job was never discussed with him, the Union did not want him to see it, and it was given to management.

First, there is nothing in the record to support Charging Party's assertion that Stevenson's March 2 letter was given to management. I also find that the Union's failure to discuss or present a copy of Stevenson's letter to Charging Party does not, without more, constitute bad faith or arbitrary conduct.[2] Compare *Wayne County Sheriff Dep't*, 1999 MERC Lab Op 101. In this case, the Union was faced with the task of gathering information from a reluctant witness to process Charging Party's grievance and defending against Charging Party's claim that the Union violated his civil rights. Even while defending itself against Charging Party's civil rights claim, the Union continued to process his grievance. As of the date of the hearing, the Union's arbitration review panel was still considering whether to advance Charging Party's grievance to arbitration.

Based on the above discussion, I find that neither Respondent University of Michigan nor AFSCME Local 1583 violated PERA. Therefore, I recommend that the Commission issue the following order:

Order

It is hereby ordered that the unfair labor practice charges be dismissed.

[redacted]

_____

Roy L. Roulhac
Administrative Law Judge

Dated:_____

[2]Arbitrary has been defined as impulsive, irrational, or unreasoned conduct undertaken with little care or with indifference to the interests of those affected, or extreme recklessness or gross negligence. *Goolsby*, *supra.*