STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SUBURBAN MOBILITY AUTHORITY
REGIONAL TRANSPORTATION,
Respondent-Public Employer in Case No. C03 A-013,

-and-

AMALGAMATED TRANSIT UNION, LOCAL 1564,
Respondent-Labor Organization in Case No. CU03 A-004,

-and-

MONICA L.B. JOHNSON,
An Individual Charging Party.
_____/

APPEARANCES:

Fink, Zausmer & Kaufman, P.C., by Harvey Wax, Esq., for the Public Employer

Sachs Waldman P.C., by I. Mark Steckloff, Esq., for the Labor Organization

Monica L.B. Johnson, *in pro per*

DECISION AND ORDER

On August 12, 2004, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

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Nino E. Green, 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 and 423.216, this case was heard at Detroit, Michigan on July 22, 2003, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing and exhibits, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Background Matters:

On January 21, 2003, Monica L.B. Johnson filed unfair labor practice charges against her former employer, Suburban Mobility Authority Regional Transportation (SMART), and her bargaining representative, Amalgamated Transit Union, Local 1564 (ATU). In Case No. C03 A-013, Johnson alleges that she was wrongfully terminated by SMART because of "previous grievance filing and complaints filing with [the Department of Consumer and Industry Services] and local agencies regarding the unhealthy and hazardous (unsafe) working conditions." In Case

No. CU03 A-004, Johnson asserts that Respondent ATU failed to represent her fairly with respect to her termination.

On March 26, 2003, Respondent SMART filed a motion requesting that Johnson be directed to file a more definite statement of the allegations contained within her charge against the Employer. The motion was denied by the undersigned in an order issued on April 3, 2003. The hearing in this matter was originally scheduled for May 21, 2003. On that date, however, Charging Party was not prepared to proceed with her case and the matter was adjourned until July 22, 2003.

Following the conclusion of Charging Party's case-in-chief, Respondent SMART moved to dismiss the charge against it on the ground that Johnson had failed to prove that her termination was motivated by her protected concerted activities. Respondent ATU also sought dismissal, arguing that there was nothing in the record to establish that it had acted arbitrarily, discriminatorily or in bad faith in connection with its representation of Johnson. I granted the motions, with a written order to follow. Although Johnson indicated at the conclusion of the hearing that she wished to file a post-hearing brief, no brief was received before or after the September 30, 2003 due date.

Findings of Fact:

Respondents SMART and ATU are parties to a collective bargaining agreement governing the terms and conditions of employment of all coach operators employed by SMART. The contract contains a four-step grievance procedure which culminates in binding arbitration. Charging Party Monica Johnson began working for SMART as a coach operator in October of 1993. Between July 2, 2001 and August 28, 2001, Charging Party filed approximately ten grievances concerning matters ranging from a lack of air conditioning in the drivers lounge to various disciplinary issues.

On September 5, 2001, Respondent SMART terminated Johnson after receiving complaints from customers about her behavior. Respondent ATU filed a grievance on Johnson's behalf which was ultimately settled prior to arbitration. Under the terms of the October 19, 2001, settlement, Johnson was returned to her position as coach operator and was awarded over $11,000 in back pay. All of the grievances which Johnson had previously filed against the Employer were withdrawn as part of the settlement.

In February of 2002, Respondent SMART suspended Charging Party for six weeks for allegedly refusing to submit to a drug test following an accident. On February 20, 2002, Johnson grieved the suspension, arguing that the Employer had failed to provide her with a copy of its written policy concerning drug testing. The Union settled the grievance at the fourth step, and Johnson was reinstated with back pay.

In late April or early May of 2002, SMART suspended Johnson for five days because of customer complaints. Johnson filed a grievance concerning the suspension on May 14, 2002, alleging that the discipline was without just cause. While that grievance was still pending,

Johnson was suspended yet again by SMART, this time as a result of an incident which occurred on July 23, 2002.

On the morning of July 23, Charging Party refused to drive the bus to which she had been assigned on the ground that it was emitting smoke. She also found problems with the next two busses assigned to her that morning. Johnson was then provided a fourth bus. However, almost immediately after beginning her route, she experienced a problem with the vehicle's brakes. Johnson radioed the dispatcher and said, "I'm bringing run 307 back off the road, and I'm going home because I'm tired of being late every day. Goodbye." Shortly after returning to the depot, Johnson was suspended.

On July 26, 2002, a disciplinary meeting was held concerning Charging Party's conduct. Johnson attended the meeting along with representatives from ATU Local 1564. At the meeting, the Employer granted a request by the Union to review a recording made in Johnson's bus on July 23, as well as a tape of another incident involving Johnson. In addition, the Employer presented Johnson with copies of numerous customer complaints which it had received since her last suspension in May of 2002. At the conclusion of the meeting, Johnson was terminated because of those complaints, and for abandoning her route three days earlier.

On July 30, 2002, Charging Party filed a grievance challenging her termination on the ground that it was without just cause. The Union president assisted Johnson in drafting the grievance and processed it through each step of the grievance procedure. After the Employer denied the grievance at the fourth step, the Union's executive board met on September 20, 2002, to consider whether to take the matter to arbitration. Johnson attended the meeting and was allowed to argue the merits of her case before the board. She also was given an opportunity to present her case at a general membership meeting held later that evening. Following her presentation, the Union's executive board recommended that the grievance not be taken to arbitration, and the membership voted to follow that recommendation. On December 18, 2002, Johnson filed a timely appeal of that decision. In a letter dated January 16, 2003, Respondent ATU notified Johnson that her appeal had been denied on that ground that Local 1564 had "fully complied with the applicable standards and principles in processing of [the] grievance arbitration."

In early 2003, Respondents entered into a conditional settlement of the May 14, 2002 grievance concerning Charging Party's five-day suspension. The Union notified Johnson of the settlement in a letter dated January 29, 2003, which provided, in pertinent part:

> Under the settlement, SMART, without acknowledging that your discipline was without just cause, will compensate you for your 5 days of lost wages in the amount of $763.62. However, the Authority will do so only if the later grievance over your discharge is not arbitrated. If your discharge is arbitrated, then no payment will be made under the settlement, but your suspension grievance will also be arbitrated together with the discharge grievance.
>
> You should note that this settlement does <u>not</u> hinder or prevent you in any way from undertaking any action to require the Union and SMART to arbitrate your

> discharge grievance. While you will be paid the 5 suspension days' wages if you do not pursue such action, you remain entirely free to do so. (Perhaps you already have.) If you do pursue such action, you will be paid the five days under this settlement only if you ultimately fail in such action. In the unlikely event you succeed, there would be no payment to you under this settlement, but as previously stated, the Union would arbitrate your suspension grievance. The grievance would be arbitrated together with the discharge grievance. Also, any argument that can be made on your behalf regarding the validity of the 5-day suspension is preserved under this conditional settlement. [Emphasis in original.]

Discussion and Conclusions of Law:

Johnson alleges that she was terminated in retaliation for the many grievances and complaints which she filed prior to her discharge. The elements of a prima facie case of unlawful discrimination or retaliation under Section 10(1)(c) of PERA are: (1) employee, union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's exercise of his or her protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Department)*, 1998 MERC Lab Op 703, 707. Once the prima facie case is met by the charging party, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419. See also *MESPA v. Evart Public Schools*, 125 Mich App 71 (1983).

I find that Charging Party has failed to sustain her burden of proving that Respondent SMART harbored anti-union animus or hostility, or that her discharge on July 26, 2002, was in any way motivated by her protected concerted conduct. There is simply nothing in the record to suggest that the Employer terminated Johnson in retaliation for filing grievances or complaints. In fact, the only grievance which Johnson filed within five months of her discharge concerned her May 2002 suspension, and there is no evidence to connect that or any other grievance with SMART's decision to terminate her employment. To the contrary, credible evidence on the record supports the conclusion that Johnson was terminated because she abandoned her route on July 23, 2002, and due to the numerous customer complaints which SMART had received concerning her behavior.

I also find nothing in the record to establish that Respondent ATU violated its duty to fairly represent Charging Party. 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). A union satisfies the duty of fair representation as long as its

decision was within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991); *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

In the instant case, representatives from the Union attended the July 26, 2002, disciplinary meeting on Charging Party's behalf. At that meeting, the Union took steps to investigate the allegations concerning Johnson's conduct. After SMART terminated Johnson, the Union president helped her to draft a grievance challenging that decision, and the ATU represented Johnson at each step of the grievance process. The Union also allowed Charging Party to address both its executive board and the membership at large concerning whether to take the matter to arbitration. After the members voted to drop the grievance, Johnson was given the right to appeal that decision to the International. There is nothing in the record to indicate that the Union acted irrationally, arbitrarily or in bad faith with respect to its handling of the termination grievance. An individual member does not have the right to demand that her grievance be pressed to arbitration. Rather, the union must be permitted to assess each grievance with a view to its individual merit, and may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe v Hotel Employees*, 389 Mich 123, 146 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1.

I also find no merit to Charging Party's contention that the Union violated its duty of fair representation by agreeing to settle the May 14, 2002 suspension grievance. The agreement reached between SMART and ATU in January of 2003 was a conditional settlement which, by its own terms, preserved Charging Party's right to argue the merits of the grievance in the event that it was arbitrated. The fact that the Union did not obtain Johnson's consent before entering into the agreement or include her in the settlement discussions does not, as Charging Party contends, establish a PERA violation. See e.g. *Wayne County Community College*, 2002 MERC Lab Op 379.

For the reasons set forth above, I conclude that Charging Party has failed to establish a valid claim under PERA. Accordingly, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____