STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURON AREA TRANSIT CORP,
Respondent-Public Employer in Case No. C03 J-213,

Case Nos. C03 J-213
CU03 J-040

-and-

TEAMSTERS LOCAL 214,
Respondent-Labor Organization in Case No. CU03 J-040,

-and-

RANDY D. COLLINGS,
An Individual Charging Party.
_____/

APPEARANCES:

Tomkiw Dalton, PLC, by Daniel P. Dalton, Esq., for the Public Employer

Rudell & O'Neill, PC, by Wayne A. Rudell, Esq., for the Labor Organization

Randy D. Collings, In Propria Persona

DECISION AND ORDER

On June 13, 2005, 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

_____
Nino E. Green, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURON AREA TRANSIT CORP,
Respondent-Public Employer in Case No. C03 J-213,

-and-

TEAMSTERS LOCAL 214,
Respondent-Labor Organization in Case No. CU03 J-040,

-and-

RANDY D. COLLINGS,
An Individual Charging Party.
_____/

APPEARANCES:

Tomkiw Dalton, PLC, by Daniel P. Dalton, Esq., for the Public Employer

Rudell & O'Neill, PC, by Wayne A. Rudell, Esq., for the Labor Organization

Randy D. Collings, In Propria Persona

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 May 20, 2004, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript, exhibits and briefs of the parties filed on or before July 19, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On October 15, 2003, Randy D. Collings (Charging Party) filed unfair labor practice charges against his former employer, Huron Area Transit Corporation (Huron or the Employer), and his bargaining representative, Teamsters Local 214 (the Union). The charge in Case No. C03 J-213, alleges that Collings was wrongfully terminated by Huron because of his membership in the Union. In Case No. CU03 J-040, Charging Party asserts that the Union failed to represent him fairly with respect to his termination.

On December 22, 2003, the Union filed a motion to dismiss arguing, in part, that the charges did not give the parties proper notice of the incidents and violations of PERA which Collings intended to litigate. On January 27, 2004, I directed Charging Party to file a more definite statement in conformance with Rule 151(c) of the Commission's General Rules and Regulations. Charging Party filed a response on February 13, 2004, and, in an order entered on February 20, 2004, I held that the evidentiary hearing would proceed as scheduled. The Union's arguments in support of dismissal were taken under advisement.

Findings of Fact:

Teamsters Local 214 represents a bargaining unit of bus drivers employed by Huron Area Transit Corporation. The collective bargaining agreement in effect between the Employer and the Union contains a grievance procedure culminating in arbitration. The contract provides that discharges and suspensions "must be by written notice to the employee and the Union, and the Employer shall cite specific charges against the employee." Grievances pertaining to suspensions and discharges begin at the third step of the grievance procedure. Under the contract, employees are permitted to attend hearings at the third and fourth steps only by mutual agreement of the Employer and the Union.

Charging Party began working as a bus driver for Huron Area Transit Corporation in 1991. During the period December 1995 to October 24, 2000, Charging Party was involved in four accidents while driving a bus for Huron, including at least two collisions with parked vehicles. In April of 2001 and February of 2003, the Employer issued final warnings cautioning Collings that he would face termination for any future misconduct. As of February 28, 2003, Charging Party's personnel file contained twenty separate instances of discipline issued by Huron since October 24, 2000, none of which had ever been grieved.[1]

On April 14, 2003, Charging Party was transporting a group of school children and three chaperones from school to a local church. The bus hit a parked minivan, sending eighteen passengers, including fifteen children, to the hospital for various injuries. The bus and minivan were completely destroyed. The police concluded that Charging Party was at fault for the accident and ticketed him for careless driving. Following the accident, Charging Party was immediately suspended by the Employer "pending advisability of discharge." By letter dated April 16, 2003, Ken Jimkoski, the director of Huron Area Transit Corporation, notified Collings that the suspension had been converted to a discharge effective immediately. In explaining the reasons for the discharge, Jimkoski cited the severity of the accident, Charging Party's "grossly negligent manner of driving" and his "well documented and extensive disciplinary history."

On April 18, 2003, Charging Party drafted a grievance challenging his termination on the basis that it was "unjust." The grievance was submitted to the Employer by a Union steward. Thereafter, Dennis Rasch, a business agent for Teamsters Local 214, began investigating the grievance. Rasch obtained copies of relevant documents, including the accident report and Charging Party's personnel file. He then met with Collings to discuss his past disciplinary record

[1] Charging Party contends that he was not made aware of many of these incidents until well after the fact. However, at the hearing, he could not identify which specific instances were added to his record without his knowledge.

and to get his perspective on the accident. Charging Party told Rasch that the accident occurred because he was distracted by a noise at the back of the bus, and he indicated that his "good work record" should be considered as a mitigating factor. Rasch recommended to Collings that he seek legal counsel on the careless driving charge because a conviction would hurt his chances of prevailing on the grievance.

Despite Rasch's advice, Charging Party decided not to fight the ticket. Instead, on or about May 14, 2003, he paid a fine for careless driving. Charging Party also contacted the Union and requested that Rasch be removed from handling his grievance on the ground that he was friends with Jimkoski, a former Union steward. Rasch refused to recuse himself as he was already knowledgeable about the situation and because there was no other business agent available to replace him. At the hearing in this matter, Rasch denied that there was anything about his relationship with Jimkoski which would have affected his handling of the grievance, and I find his testimony on this point credible. In fact, Charging Party conceded at the hearing, "I have no reason to believe that Dennis did anything to hurt my case."

At some point during the spring or early summer of 2003, Rasch attended a third step grievance meeting with Jimkoski on Charging Party's behalf, and he also met with Huron's personnel committee at the fourth step of the grievance procedure. Rasch sought consent from Huron to have Collings to attend both of the meetings, but the Employer would not agree to his presence. At each of the meetings, Rasch presented arguments on Charging Party's behalf, including Collings' assertion that his work record should be considered by the Employer as factor in his favor. In a three-page letter dated July 11, 2003, the Employer denied the grievance. In support of its decision, the Employer cited Charging Party's delay in filing the grievance and referenced his failure to identify which section of the contract Huron had allegedly violated. The Employer further concluded that just cause existed for the discharge based upon the "seriousness of the April 14th accident and the lack of excuse, explanation, or mitigating factors."

Following the Employer's denial of the grievance, the Union's grievance panel met for the purpose of determining whether to advance the matter to arbitration. In presenting Charging Party's case to the grievance panel, Rasch discussed Collings' personnel file, including his disciplinary record, length of service, and driving history. After considering the matter, the grievance panel decided not to take the grievance to arbitration. That decision was communicated to Charging Party on or about August 4, 2003.

Charging Party appealed the decision of the grievance panel to the Union's appeals board, and a hearing was scheduled for October 11, 2003. On September 5, 2003, Rasch wrote to the Employer seeking an extension of the contractual time limits for the Union to file for arbitration on Charging Party's grievance so that the appeals board would have an opportunity to consider the matter. Rasch did not hear back from the Employer and assumed that the request had been granted.

Charging Party had an opportunity to file a written statement with the Union's appeals board and to address the board directly at the October 11, 2003 hearing. On or about November 14, 2003, the appeals board conveyed to Charging Party its decision denying the grievance. The board cited the prior warnings issued to Collings concerning his careless driving, the seriousness

of the April 14, 2003, accident, and the lack of "mitigating circumstances that would cause us to take this grievance to arbitration."

At the hearing in this matter, Charging Party admitted some responsibility for the April 14, 2003, collision, as well as for the prior accidents. However, he alleged that part of the blame for these incidents should be attributed to the Employer. Charging Party testified that he was under constant stress as a result of anti-union harassment by Jimkoski. Charging Party contends that he never had any write-ups in his file until Jimkoski became director, and that only four of the thirty union members who were employed by Huron when Jimkoski took over are still working for the Employer.

According to Collings, Jimkoski divided up the work place in terms of people he liked and those he did not like, and that he made statements such as "Fly with the crows, you die with the crows." Charging Party contends that Jimkoski admonished him for "always stirring up trouble" and that he treated him differently than employees who were not members of the Union. For example, Charging Party contends that Jimkoski reprimanded him for stopping his bus at a gas station to buy a drink, but he allowed other employees, including alternate steward Sandy Rodomoski, to engage in the same conduct without punishment. Charging Party also contends that Jimkoski favored Rodomoski and her husband with respect to overtime.

Discussion and Conclusions of Law:

Case No. CU03 J-040

With respect to the charge against Respondent Teamsters Local 214, I find that Charging Party has failed to present any evidence which would establish a breach of the duty of fair representation. 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 or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A union satisfies the duty of fair representation as long as its decision is within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe, supra*.

In the instant case, the record establishes that the Union submitted Charging Party's grievance to the Employer and conducted an investigation into the circumstances leading to his discharge, including examining relevant documents and interviewing Collings about the April 14, 2003, accident. Rasch provided advice to Charging Party concerning the careless driving ticket and how it might affect his chances at arbitration. The Union took the grievance to the fourth step of the grievance process. As requested by Charging Party, Rasch argued to the Employer that Collings' work record should be considered as a mitigating factor, and he

discussed Collings' personnel file when the matter came before the Union's grievance panel. After the grievance panel decided not to take the case to arbitration, the Union sought an extension from the Employer on the time limit for filing for arbitration so as to give Collings a chance to have his appeal heard. Collings was allowed to address the appeals board, both verbally and in writing. Given Charging Party's disciplinary history, prior accidents and, most importantly, the seriousness of the April 14, 2003, collision, I conclude that the Union did not act arbitrarily, discriminatorily or in bad faith in deciding not to process the grievance to arbitration. A union has no duty to pursue a grievance which has no merit or which would be futile to pursue, nor does an individual member have the right to demand that a grievance be filed or processed to arbitration. See *Wayne County Comm Coll*, 2002 MERC Lab Op 379, 381; *SEMTA*, 1988 MERC Lab Op 191, 195; *Grosse Ile Office & Clerical Ass'n*, 1996 MERC Lab Op 155.

Case No. C03 J-213

Although it was not clear from the original charge, Charging Party argues that the Employer breached the collective bargaining agreement by failing to issue a written suspension notice prior to making the decision to terminate his employment. PERA does not provide an independent cause of action for breach of a collective bargaining agreement by an employer. In a hybrid action alleging both a breach of contract by an employer and a breach of the union's duty of fair representation, a party cannot pursue the breach of contract claim unless it is successful in its claim of breach of the duty of fair representation. *Knoke v East Jackson School District*, 201 Mich App 480, 485 (1993); *City of Pontiac*, 17 MPER 22 (2004). As there is no evidence in the record showing that the Union violated its duty of fair representation, I find that Charging Party has failed to state a claim against the Employer based upon the alleged breach of contract.

Charging Party next contends that the Employer violated PERA by retaliating against him because of his membership in the Union. 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; (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 Dep't)*, 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).

Assuming arguendo that protected activity and knowledge are established by virtue of Charging Party's membership in the Union, I find that Collings has failed to sustain his burden of proving that the Employer harbored anti-union animus or hostility, or that his discharge was in any way motivated by his protected concerted conduct. While the statements which Collings

attributes to Jimkoski suggest that the director may have personally disliked certain employees, such evidence does not establish anti-union bias on Jimkoski's part. Similarly, the fact that a number of Union members have left Huron since Jimkoski became director does not, standing alone, prove that the Employer was hostile to the union. To infer anti-union animus based solely upon such evidence would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*, and I decline to do so here. Charging Party's allegations of disparate treatment are similarly unconvincing. Although Collings contends that non-union employees were allowed to engage in conduct for which he and other Union members were disciplined, the only individuals specifically identified by Charging Party as being the recipients of favorable treatment were Sandy Rodomoski, an alternate Union steward, and her husband.

Charging Party has also not shown any causal connection between his protected activity and his termination. To the contrary, the credible evidence on the record overwhelmingly establishes that Charging Party was discharged because of his driving record. On April 14, 2003, the bus Collings was driving plowed into a parked minivan, sending eighteen people to the hospital and destroying both vehicles. The police concluded that Collings was at fault for the accident, and he admitted responsibility by paying a fine for careless driving. At the time of the collision, Charging Party's personnel file contained twenty separate instances of discipline. Collings was involved in four prior accidents while driving a bus for Huron, and he was warned by the Employer on two separate occasions that any additional misconduct would result in his termination. Under such circumstances, I find that Charging Party has failed to establish that Respondent Huron Area Transit Corporation violated Section 10(1)(c) of PERA.

I have carefully considered all other issues raised by Charging Party and conclude that they do not warrant a change in the result. For the reasons set forth above, 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: _____