STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND HAVEN BOARD OF LIGHT AND POWER,
Public Employer-Respondent in Case No. C04 D-101,

-and-

UTILITY WORKERS, LOCAL 582,
Labor Organization-Respondent in Case No. CU04 D-021,

-and-

JOHN CONLEY,
An Individual-Charging Party.
_____/

APPEARANCES:

Scholten Fant, by John S. Lepard, Esq., for Respondent Employer

D. Michael Langford, for Respondent Labor Organization

John Conley, *In Propria Persona*

DECISION AND ORDER

On March 3, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter dismissing Charging Party's unfair labor practice charges. The ALJ held that Respondent Grand Haven Board of Light and Power (Employer) did not violate Section 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a). She also dismissed Charging Party's allegation that Respondent Utility Workers, Local 582 (Union) violated its duty of fair representation.

The ALJ's Decision and Recommended Order was served on the parties in accordance with Section 16 of PERA. Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order on March 24, 2005. The Employer filed a motion to strike arguing that the exceptions did not comply with Rule 423.176 with respect to service or form and should be rejected on that basis. However, because Charging Party was not represented by counsel, we have nevertheless reviewed the record to determine if any violation of PERA has been demonstrated.

In his exceptions, Charging Party essentially reargues his assertions made before the ALJ that the Employer violated his *Weingarten*[1] rights and the Union failed to fairly represent him. After carefully reviewing the record, we have decided to adopt the ALJ's findings of fact and conclusions of law and to affirm the ALJ's dismissal of Charging Party's unfair labor practice charges.

With respect to the alleged violation of *Weingarten* rights, we find the ALJ's conclusion that Charging Party did not request union representation to be supported by competent evidence in the record. Two of the Employer's witnesses testified that not only did Charging Party fail to request the presence of a union steward, but that he declined the Employer's advice to seek union representation. The ALJ observed the demeanor of these witnesses during the hearing and found their testimony to be credible. We decline to overturn the ALJ's credibility findings. *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507.[2]

As to his charges against the Union, the record establishes that after Charging Party's termination, the Union filed a grievance on his behalf despite the fact that the last chance agreement specifically prohibited any challenge to Charging Party's discharge. Under these circumstances, we agree with the ALJ's conclusion that the Union's refusal to pursue arbitration on his behalf was neither arbitrary nor in bad faith. *Lowe v Hotel and Restaurant Employees Union*, 389 Mich 123 (1973).

For the foregoing reasons, we issue the following Order:

ORDER

The unfair labor practice charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

[1] See *NLRB v Weingarten, Inc.*, 420 US 251 (1975).

[2] We also agree with the ALJ's conclusion that the charge regarding federal confidentiality laws does not raise a colorable claim under PERA. See *Muskegon Heights Pub Schs*, 1993 MERC Lab Op 654.

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APPEARANCES:

Scholten Fant, by John S. Lepard, Esq., for the Respondent Employer

D. Michael Langford, Esq., for the Respondent Labor Organization

John Conley, 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 Lansing, Michigan on October 12, 2004, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the testimony and exhibits submitted at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On April 25, 2004, John Conley filed unfair labor practice charges against his former employer, the Grand Haven Board of Light and Power (the Employer), and against his labor organization, Utility Workers Local 582 (the Union). As set out in his charge, on November 18, 2003, Conley disclosed to his department head that he was addicted to illegal drugs. Later that

day, Conley was called to a meeting with Jon Hofman, the Employer's human resources manager, and suspended. The Employer later offered him a last chance agreement as an alternative to immediate discharge. On November 25, Conley and his Union representatives signed the agreement, and Conley returned to work. He was discharged on December 12, 2003 after he violated a term of the last chance agreement. Despite the last chance agreement, the Union filed a grievance over Conley's discharge and processed it through all steps of the grievance procedure short of arbitration. On March 10, 2004, the Union decided not to take Conley's grievance to arbitration.

Conley alleges that the Employer breached an oral contract made by Conley's department head that his disclosures would be confidential and that he would not be disciplined as a result. He also alleges that the Employer violated his rights under Section 9 of PERA by refusing his request for union representation at his meeting with Hofman on November 18.

In his charge against the Union, Conley asserts that he requested Union steward Todd Weavers to file a grievance over his suspension and over the Employer's denial of his request for union representation on November 18. Conley alleges that Weavers negligently failed to file a grievance over the latter and did not file a grievance over the suspension within the contractual time limits. In addition, Conley alleges that on or about February 10, 2004, Weavers extorted a gun scope from him by implicitly promising that he could help Conley get his job back if Conley gave him the scope. Conley also asserts that on or about November 25, 2003, Union international representative Jeff Bakker unlawfully coerced Conley into signing the last chance agreement by telling him that he "had no case" without listening to Conley's arguments for why the Employer did not have good cause to discharge him. According to Conley, Bakker also violated the Union's duty of fair representation by telling him, after he violated the last chance agreement, that he had no case and that he should look for another job. In addition, Conley alleges that on or about March 9, 2004, Union President Bill Hitsman violated the Union's duty of fair representation when he told Conley that he was not returning to his former job and that Hitsman did not want him to do so. Finally, Conley asserts that the Union violated its duty of fair representation by refusing to take the grievance over his discharge to arbitration.

Facts:

Conley was hired as a scubber operator in the Employer's power plant in late 2000. Conley operated the plant's emission control equipment. He worked mostly without supervision. In December 2001, Conley was incarcerated because of a drunken driving conviction. According to Conley, he was also addicted to crack cocaine, although the Employer did not know it. In order to avoid termination, Conley signed a last chance agreement with the Employer. Among other terms, the agreement required Conley to refrain from using controlled substances.

In March 2003, Conley received a written warning for excessive absenteeism. Although Conley's attendance record during the rest of 2003 was not bad enough for him to receive further discipline, and he performed his job capably, the Employer began to suspect that he again had a substance abuse problem. On November 11, 2003, Dan Bush, Conley's department head, called him to his office. Bush asked Conley why he was absent so frequently, and if he had a medical

problem. Conley denied having a problem. Bush told Conley "his door was always open," that he wanted to help him, and that there would be no discipline.

Conley was absent from work on Thursday, November 13 and Saturday, November 15. On Tuesday morning, November 18, Conley spoke to Todd Weavers, his Union steward, when Conley relieved Weavers in the scrubber. Conley confessed to Weavers that he was a crack cocaine addict and said that he had decided to seek help. Weavers congratulated him on his decision, and told him that he could get free treatment at a clinic through the Employer's employee assistance program (EAP). According to Weavers, Conley also told him that he was going to tell Bush about his drug problem. Weavers testified that he advised Conley to talk to the EAP counselor first.

Later that morning, Conley asked for a meeting with Bush. Bush brought Conley's immediate supervisor, John Harloff, with him to the meeting. Conley asked Bush if this meeting would be confidential, and was assured that it would be. Conley told Bush and Harloff that he had been a crack cocaine addict for five years, and that he had decided to seek help. Bush told Conley that they would get back to him later that day. According to Bush, after hearing what Conley had to say, Bush concluded that he would have to report their conversation to Hofman.

At 4:00 pm on November 18, Conley was called to a meeting with Hofman and Bush. Conley's version of this meeting is different from that of Hofman and Bush. Conley testified that he said immediately that he wanted help with his drug problem and union representation. It is not clear from Conley's testimony how or whether Hofman or Bush responded to his request, but no union representative attended the meeting. According to Conley, Hofman and Bush gave him the phone number for an outpatient drug treatment program and told him that he was suspended with pay until further notice. Conley testified that Hofman and Bush did not ask him questions about his drug problem at that time. Hofman and Bush denied that Conley asked for a union representative. In fact, according to both men, Hofman asked Conley if he wanted union representation and Conley said that he did not. Hofman testified that the three men had a fairly long discussion. During this meeting, Conley disclosed the length of his drug problem and talked about his desire to become clean, and the Employer stated that it needed to assure itself that Conley was not working under the influence of drugs. Hofman testified that either at this meeting or around this time Conley said that all of his absences since becoming employed in the scrubber were related to his cocaine addiction.

After his meeting with Hofman, Conley contacted Weavers and told him that he had asked for union representation and that the Employer had suspended him. Weavers said that the Employer could not suspend him because under the contract's progressive discipline system, his absences warranted only a second warning. Conley contends that he asked Weavers to file grievances over the suspension and over the Employer's refusal to let him have a union representative at the afternoon meeting. Weavers testified that he did not recall Conley asking him to file a grievance over being denied a union representative. According to Weavers, if Conley had asked him he would have filed that grievance.

Conley also had a telephone conversation with Union international representative Jeff Bakker. In this conversation, Bakker said that the Employer had mishandled his case. According

to Bakker, from what Conley told him at this time, he believed that Conley had been suspended after simply asking for an employee assistance referral.

On Friday, November 21, Conley and Weavers met with Hofman and Hofman presented Conley with a new last chance agreement. Weavers and Hofman argued heatedly over whether Conley should have to sign this agreement. They disagreed over whether Conley's addiction qualified as a disability. Weavers also pointed out that Conley's work had been satisfactory, that he had voluntarily admitted his addiction, and that his absenteeism did not warrant discharge. Hofman insisted that the fact that Conley was an admitted drug addict justified his termination. At the end of the day, Hofman changed Conley's suspension to a suspension without pay. Later that day, Conley enrolled in an outpatient addiction treatment program.

On November 24, Hofman sent an e-mail to Bakker complaining that Weavers had told Conley that his job was not in jeopardy and had advised him not to sign the agreement. Bakker investigated and learned that Conley had admitted to the Employer that he had given false reasons for most of his absences during the past several years.

On November 25, Conley, Weavers and Hitsman met with Hofman. Before this meeting, Bakker and Conley spoke on the telephone. Bakker told Conley that if he did not sign the last chance agreement, the Employer intended to discharge him for absenteeism and for falsification of records. Bakker advised Conley that it would be in his best interest to sign the agreement, and that if Conley chose not to sign, the Union would then decide whether his termination case had merit. Bakker either said or implied that Conley did not have a strong case. According to Conley, he was desperate to return to work. He asked Bakker if he could sign the agreement under duress. Bakker said no, that once he signed the agreement it was binding.

At the November 25 meeting, Hofman presented Conley with a second warning for absenteeism and a revised last chance agreement. The terms of this agreement required Conley to seek treatment of his addiction, undergo periodic random drug testing, and refrain from use of illegal drugs or improper use of legal drugs and alcohol. It also required Conley to receive prior permission for any absence, and set out the steps Conley would have to follow if he needed to be absent from work for any reason. Finally, the agreement stated that any violation of any provision of the last chance agreement would constitute just cause for immediate termination. Before the end of that day, the Union notified Hofman that Conley had agreed to sign the agreement. Conley, the Union and Employer executed the last chance agreement on that day and Conley returned to work.

After the November 25 meeting, Weavers filed a grievance asserting that Conley had been unfairly coerced into signing the last chance agreement under the threat of being discharged for absenteeism and that his suspension was improper. In its answer, the Employer asserted that to the extent the grievance challenged the last chance agreement, it was untimely and "procedurally not grievable" because Conley and the Union had already signed the agreement.

On December 11, 2003, Conley failed to show up for work and failed to call in until two hours after the beginning of his shift. On December 12, Conley admitted to Hofman that his absence was due to drug use. Hofman again suspended Conley without pay, and scheduled a

meeting for December 18. On the morning of December 18, Conley called to say he would be unable to attend the meeting because he was attempting to check himself into an inpatient drug treatment facility. Hofman told Conley on the phone that he would be terminated.

Conley was notified in writing of his termination for breach of the last chance agreement by letter dated December 18, 2003. Later that day, the Union filed a grievance protesting Conley's discharge. The grievance argued that under the Employer's disciplinary policy, Conley's December 11 absence merited only a second warning. The Employer denied the grievance, citing the last chance agreement. This grievance and Weaver's earlier grievance asserting that Conley had been coerced into signing the last chance agreement were processed together. During discussion of the grievances, Hofman told the Union that if he had it to do again, he would require Conley to take a longer leave without pay until it was proven that Conley had his problem under control. Hofman insisted, however, that Conley's discharge was justified.

Sometime between December 2003 and March 2004, Bakker and Conley had a conversation about Conley looking for other employment. Bakker said something to the effect that it would be better for his case in mediation or arbitration if Conley could show that he had been trying to find another job.

On February 4, 2004, Conley successfully completed his drug treatment program. At that time, Conley's grievances were scheduled for mediation, the last step before arbitration in Respondents' grievance procedure. On or about February 10, Conley came over to Weaver's house to talk about his grievances. According to Conley, Conley and Weavers spoke in the driveway of Weavers' house. A gun scope was lying on the front seat of Conley's car. Conley testified that, as they were speaking about his case, Weavers said, "Boy, I could do a lot better job if I had that 22 caliber scope." Conley interpreted Weaver's remark as a reference to his representation of Conley in the grievance procedure. Conley told Weaver to take the scope, and he did. Weavers testified that he and Conley had many discussions about his grievances while they were being processed, and had also talked about general topics. On one of these occasions, according to Weavers, he saw the gun scope and asked Conley if he wanted to sell it. Conley said he did not. Weavers testified that sometime around February 10, Conley came to his house and knocked on his door. Conley had the gun scope behind his back. After the two men discussed Conley's case for a moment, Conley handed Weavers the gun scope and said that he wanted him to have it. Weavers asked him why he was giving it to him, and what money he wanted for it. According to Weavers, Conley said, "Don't insult me." Weavers said he took the scope because he did not know what else to do.[3]

On March 9, 2004, the parties met with a mediator to discuss Conley's grievances. Conley brought his progress report from the drug treatment program and pleaded for his job back. The Employer maintained its position that Conley's termination was justified. During the mediation session, Union President Bill Hitsman pointed out that Conley was a good worker, and that no one had a problem with his work. The Union proposed allowing Conley to come back to work as a custodian, where he would have more direct supervision, but the Employer would not agree. While Hofman and Bakker were meeting with the mediator, Hitsman told Conley, "You

[3] Weavers mailed the scope back to Conley after Conley filed the unfair labor practice charges.

are not going back to the scrubber." Hitsman said that he did not want Conley to get his old job back. Hitsman testified that he feared that Conley would endanger other employees by working under the influence of drugs if he went back to his former position.

The parties were unable to resolve the grievance at mediation. After the mediation, the Union's executive board met and decided not to take Conley's grievance to arbitration because he had violated the last chance agreement. Conley was notified of this decision by letter dated March 10, 2004.

Discussion and Conclusions of Law:

Charge Against the Employer

In *NLRB v Weingarten, Inc*. 420 US 251 (1975), the Supreme Court held that an employee covered by the National Labor Relations Act (NLRA), 29 USC 150 et seq., has the right, upon request, to the presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to discipline. The Court, at 157, stated specifically that this right arises only when the employee requests representation. In *University of Michigan*, 1977 MERC Lab Op 496, the Commission applied the so-called *Weingarten* doctrine to public employees covered by PERA. Under this doctrine, employees have no right to union representation unless or until they request it. See, e.g., *City of Marine City (Police Dep't),* 2002 MERC Lab Op 219 (no exceptions). An employee also has no right to union representation at a meeting held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. *City of Kalamazoo*, 1996 MERC Lab Op 556, 562; *City of Detroit (DOT)*, 1991 MERC Lab Op 390 (no exceptions); *Baton Rouge Water Works Co*, 246 NLRB 995,997 (1979). However, *Weingarten* rights do attach when the employer proceeds to question the employee about the incident. *PPG Industries, Inc*, 251 NLRB 146 (1980).

There is no dispute that Conley did not ask for union representation during his meeting with Bush and Harloff on the morning of November 18, 2003. Since he made no request, the Employer had no obligation under PERA to provide him with a union representative. Whether Bush led Conley to believe that he did not need a union representative because the Employer would not discipline him for confessing his drug addiction is irrelevant.

Conley maintains that he did ask for union representation in his meeting with Bush and Hofman in the afternoon of November 18. However, if Conley's testimony is credited, this meeting consisted of nothing more than Hofman and Bush giving him the address of the Employer's drug treatment clinic and telling him that he was suspended with pay. According to Conley, the Employer did not question him about his drug problem. If Conley is credited, the purpose of the meeting appears to have been to inform him of the Employer's decision to suspend him, not to investigate his alleged wrongdoing. As discussed above, an employee has no *Weingarten* rights at a meeting held solely to inform him of a disciplinary decision the Employer has already made.

However, I credit Hofman's testimony that he, Bush and Conley did discuss the extent of Conley's drug problem at the afternoon meeting, and that during that discussion Conley may have disclosed information, such as the fact that he had lied about the reasons for previous absences, that may have contributed to the Employer's decision to discharge him if he did not sign a last chance agreement. I also credit Hofman and Bush's testimony that Hofman asked Conley if he wanted a union representative present and Conley refused. I base my credibility determination partly on the demeanor of the parties. I also note that Conley had already voluntarily disclosed his drug addiction to both Weavers and Bush that day. This evidence of Conley's confessional state of mind makes it more likely that he would have talked freely about the extent of his problem before he knew that he was to be suspended as a result. Because I credit Hofman and Bush's testimony that Conley did not ask for union representation at their meeting on the afternoon of November 18, 2003, I conclude that the Employer did not violate Conley's *Weingarten* rights at that meeting.

Conley also alleges that the Employer violated PERA by breaching an oral contract made by Bush that his disclosure of his drug addiction would be kept confidential and that he would not be disciplined as a result. Allegations by an individual that his employer has violated his rights under a collective bargaining agreement do not state a claim under PERA. *Detroit Bd of Educ*, 1995 MERC Lab Op 75, 78; *Wayne Co Comm College*, 1985 MERC Lab Op 930. Conley did not explain why a breach of an alleged individual contract between him and the Employer would violate PERA. I conclude that Conley's allegation that the Employer breached an oral contract with him does not state a claim under the Act.

Charge Against the Union

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 (1967); *Goolsby v Detroit*, 419 Mich 651(1984). The *Goolsby* Court, at 679, defined "arbitrary" conduct as impulsive, irrational or unreasoned conduct, or inept conduct undertaken with little care or with indifference to the interest of those affected. It held that arbitrary conduct included the negligent failure of a union to comply with the contractual time limits for filing a grievance, in the absence of a reasoned, good faith, and nondiscriminatory decision not to process it. *Goolsby*, at 682.

A union's duty of fair representation, however, does not require it to carry every grievance to the highest level, and an individual member does not have the right to demand that his grievance be taken to arbitration. Rather, the union is permitted to assess each grievance with a view to individual merit. In doing so, the union must consider the good of the general membership and may weigh the burden upon contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and even the desirability of winning the award, in determining whether to pursue a given grievance. See *Lowe v Hotel and Restaurant Employees Union*, 389 Mich 123, 146-147 (1973); *Detroit Public Schools*, 2002 MERC Lab Op 151, 152-153.

I find that Conley's first allegation, that Weavers negligently failed to file a grievance over his November 18 suspension within the contractual time limits, is not supported by the facts. Weavers filed a grievance protesting Conley's suspension on November 25, 2003, well within the time allowed by the contract. The Employer never asserted that this grievance failed to comply with the contract's time limits. Rather, it argued that the Union could not sign the last chance agreement and then grieve the Employer's attempt to force the Union and Conley to sign it.

Conley's second allegation is that Weavers failed to file a grievance for him over the Employer's denial of his request for union representation at his meeting with Hofman on November 18. Weavers denied that Conley asked him to file this grievance, and I credit his testimony. As discussed above, I do not believe Conley's testimony that he asked for union representation at that meeting.

I also fully credit Weavers' testimony regarding the gun scope incident. Weavers' demeanor on the stand was that of a credible witness. Weavers, moreover, had been Conley's most consistent advocate within the Union, and it is not implausible that Conley might have impulsively decided to reward him with the gift of the gun scope.

I find no evidence that Bakker acted in bad faith or in an arbitrary manner. Conley alleges that Bakker coerced him into signing the last chance agreement on November 25 by suggesting that a grievance over his discharge would not have merit; that Bakker made that decision without listening to Conley's arguments for why the Employer did not have just cause to terminate him; and that Bakker "conspired" with the Employer to force him to sign the agreement. However, by November 25, Bakker had investigated the circumstances of Conley's suspension and was aware of the pertinent facts. These included Conley's earlier last chance agreement, Conley's admission to the Employer that he was an active drug user and had been one for five years, and his admission that he had given false excuses for at least some of his previous absences. I find that Bakker made a reasoned decision based on these facts that a grievance over Conley's discharge would be unlikely to succeed. The fact that Bakker and Weavers had reached different conclusions about the merits of Conley's case does not mean that Bakker's conclusion was arbitrary, or that Bakker was guilty of "conspiring" with the Employer to force Conley's discharge.

Conley also alleges that Bakker violated the Union's duty of fair representation by telling him, after he was discharged, that he had no case and should look for another job. As indicated above, Bakker did not violate the Union's duty of fair representation by taking the position in November 2003 that Conley had a weak case that was unlikely to succeed at arbitration. Conley's case after he violated the last chance agreement was clearly even weaker. Moreover, according to Conley's own testimony, when Bakker suggested that Conley look for another job after he was discharged, Bakker was not expressing his opinion that Conley's case had no merit, but informing Conley that this would improve his chances in mediation or arbitration.

I also find that Hitsman did not violate the Union's duty of fair representation by telling Conley, at the March 9, 2004 mediation session, that he "was not going back to the scrubber," and that Hitsman did not want him to get his old position back. Hitsman admitted that his view

was that Conley should not go back to his old job because he might endanger other employees if he worked there under the influence of drugs. As discussed above, a union must always consider the good of the membership as a whole. I find that Hitsman's conclusion that Conley should not go back to the scrubber was not arbitrary, but based on the objective facts of Conley's history of drug use and the requirements of the job. I also find no evidence that Hitsman reached this conclusion in bad faith.

Conley's final allegation is that the Union violated its duty of fair representation by refusing to take his discharge grievance to arbitration. On November 25, 2003, Conley and the Union signed a last chance agreement stating that any violation of that agreement would constitute just cause for termination. Conley admitted that he violated the agreement in December 2003 and was terminated. Despite these facts, the Union processed Conley's grievance through the last step of the grievance procedure before arbitration. I find that the Union's March 10, 2004 decision to withdraw the grievance was neither arbitrary nor made in bad faith.

For reasons discussed above, I conclude that Conley's allegations that the Union violated its duty of fair representation are without merit. Based on the findings of fact, discussion and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____