**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

UNITED SKILLED MAINTENANCE TRADE
EMPLOYEES UNION,
Labor Organization-Respondent,

Case No. CU05 A-003

-and-

DAVID A. MILLER,
An Individual-Charging Party.
_____/

APPEARANCES:

Lee & Clark, by Michael K. Lee, Esq., for the Respondent

David A. Miller, *In Propria Persona*

## DECISION AND ORDER

On April 12, 2006, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was 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

_____
Eugene Lumberg, Commission Member

Dated: _____

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Lee & Clark, by Michael K. Lee, Esq., for the Respondent

David A. Miller, *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, this case was heard at Detroit, Michigan on August 30, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the record made at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On January 5, 2005, David A. Miller filed this charge against his collective bargaining representative, the United Skilled Maintenance Trade Employees Union, alleging that it breached its duty of fair representation by refusing or failing to file or process grievances on his behalf. Miller was laid off from his position as a journeyman carpenter for the Pontiac Public Schools (the Employer) on July 28, 2004. After he was laid off, Miller asked Respondent to file three grievances. In his charge, but not at the hearing, Miller alleged that Respondent refused to file or process the grievances because his reinstatement would have resulted in the layoff of a union officer. Miller also alleges that Respondent's actions were arbitrary.

Facts:

## The Collective Bargaining Agreement

Respondent represents a bargaining unit of "all painters, carpenters, heating and ventilating employees, electricians, plumbers, roofer-masons and electronic technicians, including journeymen and apprentices in such classifications," employed by the Employer. Respondent's collective bargaining agreements with the Employer have contained the same layoff language since at least 1980. Article VIII (I)(3) of the most recent contract states:

> Reduction in the work force shall be effected through the following procedures:
>
> 1. The necessary number of apprentices shall be removed first from the affected department according to departmental seniority. When two (2) or more apprentices in the affected department have the same departmental seniority date, then the date of employment by the Board will determine the least senior employee(s) to be laid off.
>
> 2. The necessary number of journeymen shall then be removed from the affected department according to classification seniority as a journeyman. A journeyman's classification seniority shall be determined by the date the employee was authorized for the journeyman classification plus one-half (1/2) credit for years served as an apprentice in the trade with the Board, if applicable. When two (2) or more journeymen in the affected department have the same classification seniority date, the date of employment by the Board will determine the least senior employee(s) to be laid off.

Under the contract, employees must be given at least ten workdays advance notice of a layoff. The contract contains no provision for bumping.

Employees accrue vacation pay based on length of service pursuant to Article XII (I) of the contract. Vacation days earned within one year must be taken within the following fiscal year. Article XII (I)(8) provides that employees will not be reimbursed for earned vacation time that is not used unless "serious extenuating circumstances" exist.

Employees receive thirteen days of sick leave per year under Article X of the contract. They may accumulate unused sick leave up to a maximum of 180 days. Article X (A)(5) states that accumulated sick leave shall be forfeited if the employee resigns or is dismissed, "except when the employees qualifies for reimbursement on retirement" or when the employee dies while employed by the Employer.

## Miller's Employment History and Layoff

Miller was hired by the Employer as a custodian in 1975. A few years later, he took a position within the Respondent's bargaining unit as roofer-mason. Miller was not at that time a qualified journeyman, but he was classified as a helper rather than an apprentice because he had previous experience as a roofer. Sometime between 1982 and 1984, Miller took classes and became

a journeyman roofer-mason. In about 1984, the Employer transferred Miller and its only other roofer-mason journeyman from its carpentry to its paint department. In 1988, because of conflict with another employee in the paint department, Miller applied for and was awarded a vacant position as a journeyman carpenter in the carpentry department. Sometime after Miller took the carpenter position, roofer-masons were transferred back to the carpentry department. Miller worked as a journeyman carpenter from 1988 until 2004.

In 1981 or 1982, when Miller was still a roofer-mason helper in the carpentry department, he received a layoff notice. When Miller questioned why he had been selected for layoff when there were journeymen in the carpentry department with less seniority in the department, Respondent's president at the time told him that as the "low classification" i.e. a helper, he was first in line to be laid off. The Employer decided not to go forward with the layoffs, and Miller's layoff notice was rescinded before its effective date.

In the spring of 2004, the Employer was again considering layoffs. By 2004, the Employer employed no helpers or apprentices; all its maintenance employees were journeymen. In May 2004, a Respondent representative met with unit employees to discuss what would happen if there were layoffs. She stated that under the contract, the journeymen with the lowest seniority in their classifications, e.g., roofer-mason, carpenter, heating and ventilation, or painter, would receive layoff notices. Miller had less seniority as a carpenter than any other employee. However, he had been a journeyman longer than any of the employees currently working as roofer-masons. At the May 2004 meeting, Miller argued that the roofer-masons should be laid off before him because they were in the same department and had less seniority as journeymen. Based on what Respondent's president had told him in 1981, Miller argued that the practice had been to consider "journeyman" to be a classification. Miller also asked Respondent's representative at this meeting whether he would be paid for his accumulated sick and vacation days if he were laid off. According to Miller, she said that the Employer was going to put leave days in a bank for four years before paying them off.

In early June 2004, the Employer told Respondent president Gene Jackson that it was planning to lay off one carpenter and one painter from his unit by the end of July. On the most recent seniority list, Miller was listed as a carpenter with a classification seniority date of March 7, 1977.1 The Employer told Jackson that, according to its records, the carpenter with the least classification seniority was Jim Spurrier. However, Spurrier told Jackson that he had more classification seniority than Miller, and Jackson passed this information on to the Employer. After checking its records, the Employer changed Miller's classification seniority date to September 6, 1988, the date that he transferred from the paint department to the carpentry department. This change made Miller the carpenter with the least classification seniority. When Jackson warned Miller that he was going to be laid off, Miller explained to Jackson why he believed that a roofer-mason should be laid off instead. Jackson was not convinced.

The Employer mailed layoff notices by certified mail on an unspecified date during the week of July 13, 2004. When Miller went on vacation on Friday, July 16, he had not yet received a layoff notice. When he returned home a week later, his mailbox had been knocked down and he had no mail. On Monday, July 26, Miller reported to work and was directed to the personnel office. There

1 Miller became a mason-roofer helper around this time.

he was given a copy of a certified letter stating that he was to be laid off effective Wednesday, July 28, 2004.

Late in the day on Miller's last day of work, he contacted Jackson and asked him to file three grievances on his behalf. Miller told Jackson that he wanted to file a grievance over his layoff because he was not the lowest seniority journeyman in his department. He also wanted to file a grievance stating that the Employer had failed to provide him with proper notice of his layoff and a grievance asking that he be paid for his unused sick and vacation days. Jackson gave Miller three blank grievance forms and Miller signed and returned them. According to Miller, Jackson said that he would have Respondent's vice-president fill them out. According to Jackson, he said that he had to investigate first to determine whether there was a contract violation.

Jackson asked members of the unit what the practice had been regarding selection of employees for layoff and was told that there had never been any layoffs in the maintenance unit. He decided not to file a grievance asserting that someone other than Miller should have been selected for layoff. Jackson also looked into the circumstances surrounding Miller's layoff notice and decided that there was no contract violation. Jackson talked to the Employer about Miller's being paid for his sick and vacation time and was told that the Employer was going to put laid off employees' leave time on hold in case the employees were called back. According to Jackson, he did not believe that there was any language in the contract that required the Employer to pay laid off employees for their leave time.

Sometime in August 2004, Miller learned from the Employer's personnel director that Respondent had not filed a grievance alleging that he had been wrongly selected for layoff. According to Miller, he phoned Jackson and was told that Respondent had filed the grievances but that they had been denied. Miller also testified that in early October 2004, after repeatedly asking to see the grievances, he received a copy of a grievance on the notice issue and the Employer's statement denying the grievance. According to Jackson, sometime in August he told Miller in a phone call that there were no grievances to be filed because there were no contract violations.

At the same time Miller was laid off, the Employer also laid off one of its maintenance foremen. The vacation and sick pay provisions in Respondent's contract and the contract covering the foremen are identical. The union representing the foremen filed a grievance asserting that the Employer should have paid the foreman his accrued vacation pay. According to a representative of the union representing the foremen, the union did not grieve the Employer's refusal to pay the foreman for his sick leave since he had neither retired nor died. In July 2005, an arbitrator ordered the Employer to pay the foreman his accrued vacation leave. She held that the foreman's layoff constituted a "serious extenuating circumstance" since, due to his layoff, he could not use the vacation leave before it would be forfeited.

Discussion and Conclusions of Law:

The duty of fair representation under PERA requires a union to: (1) serve the interests of all members without hostility or discrimination; (2) exercise its discretion with complete good faith and honesty; and (3) avoid arbitrary conduct. *Goolsby v Detroit,* 419 Mich 651, 679 (1984), *citing Vaca v Sipes,* 386 US 171, 177 (1967); *Wayne State Univ,* 18 MPER 32 (2005). A union has latitude to investigate claimed grievances by members against their employers, has the power to abandon frivolous claims, and, in determining whether to proceed with a grievance, may take into account the burden upon the contractual machinery, the amount at stake, and the likelihood of success. *Lowe v Hotel & Restaurant Employees Union, Local 705,* 389 Mich 123, 146 (1973); *East Jackson Pub Sch Dist,* 1991 MERC Lab Op 132, *aff'd,* 201 Mich App 480 (1993).

Miller alleged in his charge that Respondent refused to file or process his grievances because if his grievances had been successful a union officer would have been laid off in his stead. However, he did not identify the union officer or present any evidence to support this claim. I find no evidence to indicate that in refusing to file or process Miller's grievances Respondent acted in bad faith or for reasons unrelated to the merits of the grievances.

A union's failure to exercise its discretion with respect to a grievance is arbitrary if that failure can reasonably be expected to have an adverse effect on any or all of its members. *Goolsby* at 679. However, when a union makes a deliberate decision not to pursue a grievance that decision is not arbitrary as long as it is within the range of reasonableness. *Air Line Pilots Ass'n v O'Neill,* 499 US 65, 67 (1991); *Ann Arbor Pub Schs,* 16 MPER 15 (2003); *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35. Here, Respondent concluded that the phrase "classification" in Article VIII (I)(3) of its contract referred to the various classifications listed in the recognition clause, and that "classification seniority as a journeyman" meant the length of time a journeyman had worked in his current classification. It did not file a grievance maintaining that Miller had been wrongly selected for layoff because, based on its interpretation of the contract, there was no contract violation. Respondent decided not to file or proceed with a grievance asserting that the Employer violated the notice provision of the contract because Miller's failure to receive a timely layoff notice appeared, at least in part, to be the result of his decision to go on vacation. Although Miller interpreted the contract language differently, I conclude that Respondent's decisions were within the range of reasonableness. Respondent also decided that Miller had no contractual rights to be paid for his accrued sick or vacation leave under Article X or XIII of its contract. While another union successfully persuaded an arbitrator that its laid off member was entitled to accrued vacation pay under language identical to Article XIII, I find that Respondent's decision was not so far outside the range of reasonableness as to be arbitrary. I conclude, therefore, that Respondent did not violate its duty of fair representation by refusing to file or process grievances on Miller's behalf after his July 2004 layoff.

In accord with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order.

## RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____