STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES AND ITS
AFFILIATED LOCAL 1659,
Labor Organization-Respondent,

Case No. CU05 D-013

-and-

TRACY D. BYRD,
An Individual-Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.C., by Richard G. Mack, Jr., Esq., for the Respondent

Tracy D. Byrd, *In Propria Persona*

DECISION AND ORDER

On October 23, 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

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES AND ITS
AFFILIATED LOCAL 1659,
Labor Organization-Respondent,

Case No. CU05 D-013

-and-

TRACY D. BYRD,
An Individual-Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.C., by Richard G. Mack, Jr., Esq., for the Respondent

Tracy D. Byrd, 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 January 11 and February 23, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before April 14, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and History of the Proceeding:

Tracy D. Byrd filed this charge against her former labor organization, the American Federation of State, County and Municipal Employees (AFSCME) and its affiliated Local 1659, on April 8, 2005. Byrd's charge read as follows:

> Duty of fair representation.
> I am aware that you cannot just make serious accusations against an individual without proof, that's why I sent you those collective bargaining violations that I have experienced. These violations are what lead up to my termination. It is my position that Local 1659 and its business agents refused to discuss my dispute with Wayne

> County based on personal hostility inasmuch as I have not agreed with Mr. Johnson's leadership. For this reason, Johnson and his business agents have continually refused to represent me fairly regarding to my termination as well as other matters. In regards to other matters at which time I called Mr. Johnson he told me that he would not represent me due to the charge I have pending against him. I find it hard to believe Mr. Johnson and his business agents would work diligently in this matter of my termination to have me reinstated as an employee with Wayne County. If this local would have fairly represented me from the beginning I'm sure this matter would not have had to be brought before an arbitrator. I would like to know why the local and its business agents think this case is hopeless and does not deserve to be disputed with Wayne County. Wayne County said that I went "AWOL." However, I stayed in touch with my job constantly. I know that other employees of Wayne County have been reinstated to their jobs for worse offenses then my being taken off work by my doctor.

On April 22, I sent Byrd a letter directing her to comply with Rule 151(2) of the Commission's General Rules, 2002 AACS, R 423.161(2) and provide a clear and complete statement of the facts which alleged a violation. I sent a copy of this letter to Respondent Local 1659 with a copy of Byrd's charge attached.

In the statement Byrd submitted in response to my letter on May 10, 2005, Byrd stated that her charge was not that Respondent had refused to file a grievance, but that Respondent, including its arbitration department, had failed to represent her fairly. Byrd asserted that on February 17, 2004, she and eleven other members of Local 1669 had filed charges against Local president Timothy Johnson. She alleged that that Respondent "and its arbitration department" had refused to discuss her dispute with Wayne County because of personal hostility toward her. On May 17, 2005, I issued a complaint and notice of hearing for October 13, 2005. A copy of the charge was attached to the notice of hearing mailed to Respondent. The hearing was later adjourned to January 11.

On December 6, 2005, Respondent filed a motion for summary disposition asserting that Byrd's charge was untimely filed under Section 16(a) of PERA because it was not filed within six months of August 30, 2004, the date Byrd received a letter from Respondent's arbitration department stating that Respondent did not intend to arbitrate her grievance. On December 7, I denied the motion, noting that the subject of the August 30, 2004 letter appeared to be a grievance filed by Byrd prior to her termination. On December 29, Respondent filed a renewed motion to dismiss the charge as untimely. Respondent attached to this motion letters from its arbitration review panel to Byrd dated October 27 and November 15, 2004. The first letter notified Byrd that Respondent had decided not to proceed to arbitration on her termination grievance, and notified her of her right to appeal. The second letter notified Byrd that her appeal had been rejected. In its renewed motion, Respondent argued that under Section 16(a), Byrd had an obligation to both file her charge and serve it on Respondent within six months of the date of this second letter, or May 15, 2005. According to Respondent, it was not served with a copy of the charge until "sometime after May 17" when it received a copy of the charge from the Commission along with the complaint and notice of hearing. On December 29, I denied the renewed motion. I informed Respondent that I would give it the opportunity to provide testimony under oath or some other evidence at the hearing as to when it was served with the charge.

At the beginning of the hearing on January 11, Respondent again made a motion to dismiss the charge as untimely. Its counsel stated that Respondent could not say exactly when it was first served with a copy of the charge, except that sometime after May 17 it received a copy of the amended charge from the Commission along with a notice of hearing. Respondent did not present a witness to testify regarding receipt of the charge. Byrd affirmed that she did not mail a copy of the charge to Respondent when she filed it with the Commission on April 8, 2005. After hearing argument, I stated on the record that I intended to recommend to the Commission that it dismiss Byrd's charge as untimely. However, on February 1, 2006, however, I sent the parties a letter stating that upon review of the record I had concluded that the evidence was not sufficient to find that Byrd's charge was untimely filed, and that I was reopening the record for an evidentiary hearing on the merits. This hearing was held on February 23, 2006.

Facts:

Tracy Byrd was hired by Wayne County on March 27, 2000 in a clerical position in its risk management department. Byrd was a member of a bargaining unit represented by Respondent Local 1659. Local 1659 is an affiliated local of AFSCME Council 25. On February 17, 2004, Byrd and eleven other Local 1659 members in the risk management department filed a charge under the AFSCME constitution against Local 1659 president Timothy Johnson. They alleged that Johnson improperly signed an agreement with the County to allow it to promote an employee in violation of the collective bargaining agreement. Local 1659's executive board reviewed the charge and dismissed it on April 13, 2004. Pursuant to the AFSCME constitution, AFSCME Council 25's judicial panel then assumed jurisdiction. The parties were given the opportunity to select a hearing officer, and the matter was set for trial on July 19, 2004.

Employees in Local 1659's bargaining unit have the right under the collective bargaining agreement to transfer to vacant positions in their classifications and specialties based on their seniority, although they must serve a thirty-calendar day trial period in their new positions. Byrd requested a transfer and, effective March 29, 2004, moved to a position in the retirement department. On April 30, Byrd was told that she had not passed her probationary period. An employee who fails to pass probation after a voluntary transfer is usually allowed to return to his previous position, but the County informed Byrd that her position in the risk management department had been eliminated. Byrd was told that she would continue to work in the retirement department until a vacant position could be found for her. On May 5, Byrd was told to report to the County register of deeds office on May 10. Thereafter, Byrd contacted Respondent and filed a grievance asserting that the County violated the contract by eliminating her position in the risk management department before she had completed her probationary period in her new position.1

Byrd reported to the register of deeds office on the morning of May 10, 2004. On May 11, Byrd felt ill. Byrd had exhausted her banked sick leave, but asked for and received four hours of personal leave for that day. Byrd left work and went to a medical clinic where she was examined by an internist and diagnosed with depression. The doctor gave her this note:

1 AFSCME's arbitration review panel notified Byrd on August 30, 2004 that it would not proceed to arbitration on this grievance. Respondent's handling of this grievance is not part of this charge.

Tracy Byrd was examined and treated in our clinic on 5/11/2004.

I am recommending the following based on the patient's condition:

(x) No work 5/11/02 and 5/12/04
(x) May resume full work load/activities after evaluation by Psychiatry.

Byrd was referred to the psychiatric department at the clinic, where she was given an appointment for May 27. On May 12, Byrd came to the register of deeds office and gave her supervisor, Paul Brown, the doctor's note dated May 11 and a document from the clinic stating the doctor's diagnosis and indicating that she had a May 27 follow-up appointment with a psychiatrist. Byrd also filled out an employee injury report and gave it to Brown. In the section asking her to describe the events that caused her injury, Byrd wrote "the continual harassment of risk management department involving personnel and retirement." The injury report form Byrd filled out stated that it would constitute notice of a leave of absence request, "subject to the approval of the Worker's Compensation claim."2

Byrd did not return to work on May 13. The County generally requires employees to request a leave of absence for medical absences over three days or any absences for which they do not have banked leave time. Sometime between May 12 and May 28, Byrd called the County's personnel department and asked for a leave of absence request form. The County mailed Byrd a three-page form to be filled out by her doctor (Certification of Health Care Provider – US Department of Labor Form WH-380). This form requires the doctor to state, along with other information, the approximate date the patient's disabling condition commenced and the probable duration of the patient's incapacity. Byrd did not take the form WH-380 to the internist she had seen on May 11 at the clinic. She testified that she believed that the documents she had already submitted were sufficient to explain her absence until she saw the psychiatrist.

Byrd kept her appointment with the psychiatrist on May 27 and gave him form WH-380. Instead of filling out the form, the psychiatrist wrote a letter dated May 28 explaining Byrd's symptoms, his diagnosis, and his plan of treatment. The psychiatrist's letter stated that that Byrd was unable to work at that time and that her status would be reevaluated on June 14, 2004. Byrd telephoned Brown to report the results of her doctor's appointment and sent a copy of the May 28 letter to the risk management department to be added to her injury claim file. On June 16, she received another letter from the psychiatrist stating that she was still unable to work and would be reevaluated on June 28. Byrd again telephoned her supervisor Brown to report the results of her appointment. She also sent a copy of the June 16 letter to the risk management department. On June 21, she was given a letter from the psychiatrist stating that she was able to return to work without restrictions. Byrd phoned the County's personnel department to relay this information and was told that she had been terminated effective June 10 for being absent without approval. Byrd asked that

2 On June 2, Byrd received a letter from the County's accident fund stating that it was investigating her injury claim. On July 1, the accident fund sent her a letter indicating that the information she had provided was insufficient to support her claim.

the termination notice be mailed to her. Byrd also called Local 1659 and left a message for Johnson that she had been discharged. On June 28, Johnson filed a grievance over Byrd's termination.

The trial on the charges brought against Johnson by Local 1659 members in the risk management department took place on July 19, 2004. One of the employees who signed the charge presented the case against Johnson. Six others, including Byrd, testified.

Respondent and the County met to discuss Byrd's termination grievance on August 19 and again on September 2, 2004. Michael Grundy, Local 1659 vice-president, represented Byrd at the fourth step meeting on September 2. Byrd also attended this meeting. The County maintained that Byrd was a voluntary quit under Article 16.06(3) of the collective bargaining agreement because she was "absent without leave for five or more consecutive workdays without sufficient notification to the Employer as to the reason for said absence." Grundy argued that the County should have sent Byrd a letter warning her that she would be terminated if she did not return to work. The County maintained that it had no such obligation since Byrd had never been granted a leave of absence. Byrd gave Grundy and the County representatives copies of the clinic documents and injury report form that Byrd had given Brown on May 12 and the doctor's letters that she had sent to Brown after that date. Byrd and Grundy pointed out that the injury report form stated that it constituted notice of a request for a leave of absence. The County told Byrd and Grundy that its information was that Byrd had not given her supervisor copies of the doctor's letters dated May 11 or May 27. The County's labor relations representative told Grundy that there was no proof that Byrd had notified anybody of the reasons for her absence, and another County representative said that Byrd spoke to someone but not to the right person. After the September 2 meeting, Grundy faxed Byrd's doctors' letters to Local 1659's office to be put in her file.

On September 11, AFSCME Council 25's judicial panel issued a written decision dismissing the charges filed by Local 1659 members against Johnson. The panel found that Johnson had negotiated a horizontal transfer for an employee as part of a last chance agreement and that the agreement did not violate the collective bargaining agreement or constitute collusion with management.

On September 14, the County issued a written denial of Byrd's termination grievance at step four of the contractual grievance procedure. The County's answer stated that even if Byrd gave the doctor's letters to her supervisor, they did not excuse her absence between May 13 and May 26. On September 16, Johnson served the County with a demand to arbitrate Byrd's grievance. A local union affiliate of AFSCME Council 25 is required to submit any grievance that it wishes to have arbitrated to Council 25's arbitration panel.3 The arbitration panel reviews the file and decides whether the grievance will be arbitrated. Johnson submitted Byrd's termination grievance to the arbitration panel. Johnson testified that ninety-five percent of the time he sends the arbitration panel only the documents contained in the grievant's file, without a memo or recommendation. According to Johnson, he did not make a recommendation to the panel in Byrd's case. Johnson also testified that when he sent the panel Byrd's file it did not contain any medical documentation. On October 27, 2004, the panel sent Johnson and Byrd the following letter:

3 Respondent's arbitration panel and its judicial panel are separate bodies. Officers of AFSCME's local unions do not sit on the arbitration panel.

> The above referenced grievance has been reviewed by the Arbitration Review committee and has been rejected based upon the following.
>
> The panel feels the grievance must be denied unless the local or grievant can show that the employee in question called the employer representative within the 5 day time frame as outline in Article 16 – Seniority 1606. C. Resignation/Voluntary Quits.

Johnson and Byrd were given ten days to appeal. Byrd sent the panel copies of the documents she handed out at the fourth step grievance meeting on September 2. On November 15, 2004, the panel sent Byrd a letter renewing its rejection of her grievance. The letter stated:

> The panel reviewed the appeal of the above case and determined that the information provided is not sufficient to dispute the charge of being absent in excess of five workdays.
>
> The doctor's memo of May 11, 2004 only covers the dates of May 11 and May 12, with a resumption of "full work load/activities after evaluation by psychiatry." No further information or medical documents were provided to cover the other time in dispute.

Byrd and Johnson were given another ten days to appeal. Neither submitted any further documentation to the panel.

Richard Johnson, an experienced AFSCME advocate who is assigned to review grievances sent to AFSCME's arbitration review panel, testified that, in his opinion, the documents Byrd submitted would not have been sufficient for her grievance to succeed at arbitration since they did not authorize her absence between May 13 and May 26. Grundy testified that based on his experience handling grievances at the local level, Byrd's case was strong enough that the County might have agreed to settle her grievance before arbitration if the panel had decided to proceed to that stage.

Discussion and Conclusions of Law:

A union's duty of fair representation under PERA 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 with complete good faith and honesty; and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 661-665 (1984); *Vaca v Sipes*, 386 US 171, 177 (1967). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and is permitted to assess each grievance with a view to its individual merit and the interests of the unit as a whole. *Lowe v Hotel Employees,* 389 Mich 123, 146-147 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A union has the 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; East Jackson Pub Sch Dist,* 1991 MERC Lab Op 132, *aff'd*, 201 Mich App 480

(1993). 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.

Byrd alleges that Respondent violated its duty to process her termination grievance in good faith. She maintains that Local 1659 and AFSCME did not diligently pursue her grievance because Byrd had filed internal union charges against Local 1659 president Johnson. Byrd does not take issue with the representation provided her by Local 1659 vice-president Grundy, who assumed primary responsibility for processing the grievance through the steps of the grievance procedure before arbitration and for arguing her case to the County. She asserts that Johnson deliberately failed to forward her doctors' letters and her injury report to the AFSCME arbitration panel. Even if this was a deliberate act on Johnson's part, however, it was not the reason the arbitration panel ultimately decided not to arbitrate her grievance. On October 27, the arbitration panel notified both Byrd and Johnson that it had no evidence that Byrd had called the County to report her absence and gave them an opportunity to provide this evidence. Byrd then sent the panel the relevant documents. After receiving the documents, the panel concluded that they did not constitute sufficient notification to the County of the reasons for Byrd's absence between May 13 and May 26.

As the panel's November 15, 2004 letter points out, the letter Byrd obtained from the internist at the clinic she visited on May 11, 2004 clearly indicates only that Byrd should not work on May 11 and May 12. The doctor's letter states that Byrd "can return to full duties after evaluation by psychiatry," but not that Byrd should remain off work until she saw a psychiatrist even if her appointment was not for several weeks. This is apparently what Byrd understood the doctor to have told her, but the May 11 letter was contradictory and confusing. Even if Byrd's injury report constituted a request for a leave of absence, it did not provide the County with medical verification of her inability to work. Had the doctor who saw Byrd on May 11 filled out the County's form WH-380, he would have had to explain more clearly what his May 11 letter meant. However, the documents Byrd provided to the County and Respondent's arbitration panel do not provide a clear explanation for her absence between May 12 and May 26. One might argue that Byrd's initial diagnosis of depression, subsequent treatment, and her psychiatrist's decision not to allow her to return to work after seeing her on May 27, constituted sufficient notice to the County by the time it discharged her on June 10 of the reason for her absence between May 12 and 26. However, as indicated by the opinions of Richard Johnson and Grundy, this was an issue upon which reasonable minds could differ. I find that the arbitration panel's conclusion that Byrd did not provide the County with sufficient notice of the reasons for her absence was "within the range of reasonableness," and I find no evidence to indicate that the panel's conclusion was not made in good faith.

I conclude that Byrd did not establish that Respondent violated its duty of fair representation in the handling of its grievance over her June 10, 2004 termination. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____