STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

CITY OF LANSING (BOARD OF WATER & LIGHT),
Respondent-Public Employer in Case No. C04 A-030

-and-

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 352,
Respondent-Labor Organization in Case No. CU04 A-010,

-and-

RICKY J. HICKMAN,
Individual-Charging Party.
_____/

APPEARANCES:

Mary J. Dwyer, Human Resources Director, for the Public Employer

White, Schneider, Young & Chiodini, P.C., by James J. Chiodini, Esq.
for the Labor Organization

Ricky J. Hickman, *In Propria Persona*

DECISION AND ORDER

On January 20, 2006, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order in the above matter finding that Respondent, International Brotherhood of Electrical Workers Local 352 (IBEW or the Union), did not breach its duty of fair representation when it refused to process Charging Party's grievance to arbitration. The ALJ also found that Respondent, City of Lansing (Board of Water & Light) (BW&L or the Employer), did not engage in unlawful discrimination and that its actions were not in any way motivated by Charging Party's protected, concerted conduct. The ALJ found that neither Respondent violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, and recommended that the charges be dismissed.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. After receiving two extensions to file exceptions, Charging Party filed

timely exceptions on April 11, 2006. On April 25, 2006, Respondent IBEW timely filed a brief in support of the ALJ's decision. No filing was received from BW&L.

In his exceptions against the BW&L, Charging Party contends that the ALJ erred in "not following the protocol of the correct charges" filed and also that BW&L restrained, prevented, and coerced his concerted activities. We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

The facts have been adequately set forth in the ALJ's Decision and Recommended Order and need only be summarized here. Charging Party was off work for medical reasons; upon return, he presented a note from his doctor. Charging Party was told that he would need clearance from the Employer's doctor before returning to work, and was ordered to see the Employer's physician. When he refused, Charging Party was cited for insubordination and suspended pending a disciplinary hearing. When Charging Party failed to appear at the hearing, it was rescheduled.

Prior to the rescheduled disciplinary hearing date, Charging Party reported that he had another illness and was to be seen by a specialist. The hearing was adjourned, and Charging Party was informed that, prior to returning to work, he would be required to provide additional documentation from his treating doctor and submit to an examination by the company physician.

At Charging Party's request, the IBEW filed a grievance alleging hostile work environment and harassment. The BW&L again asked Charging Party for medical verification of the reason for his absence and told him that if he failed to provide it, he would be terminated. Charging Party responded that his absence was due to harassment and workplace violence rather than illness. He was warned once again that he would be terminated if he did not properly substantiate his absence. When he failed to respond, Charging Party was terminated.

IBEW filed a grievance challenging Charging Party's termination. When Charging Party failed to appear at a third step hearing, the grievance was advanced to the fourth step where it was denied by the BW&L. The IBEW made two attempts to meet with Charging Party, who failed to appear at either meeting. Following the second failed attempt to meet with Charging Party, the IBEW decided to drop the grievance and sent Charging Party a letter notifying him of its decision.

Discussion and Conclusions of Law:

Charging Party's exceptions address only dismissal of the charge against the Employer BW&L in Case No. C04 A-010, which asserts breach of contract and improper contract termination. We agree with the ALJ that in a hybrid action, as this, alleging breach of contract by an employer and violation of the duty of fair representation by a union, a party cannot pursue its contract claim unless it is successful in its duty of fair representation claim. *Knoke v East Jackson Sch Dist*, 201 Mich App 480 (1993); *City of Pontiac*, 17 MPER 22 (2004). Because no exceptions have been filed challenging the ALJ's recommended dismissal of the fair representation allegations against the IBEW, we have adopted the ALJ's recommended order in

that regard. It follows, therefore, that Charging Party's breach of contract claim against the BW&L must also be dismissed.

Charging Party also claims that the BW&L terminated his employment in retaliation for his complaint against his supervisor and his hostile work environment grievance. Here, too, we agree with the ALJ who found nothing in the record to support a conclusion other than that Charging Party was terminated because he failed to provide medical documentation to support his absence from work. The ALJ found Respondents' witnesses to be believable, crediting them "generally, and specifically, where there is any direct discrepancy between their testimony and the testimony of [Charging Party]. (Dec, p 2) We will not disturb the ALJ's credibility findings in the absence of clear evidence to the contrary. See *Bellaire Pub Schs*, 19 MPER 17 (2006); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507; *Michigan State Univ*, 1993 MERC Lab Op 52, 54.

ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LANSING (BOARD OF WATER & LIGHT),
Respondent-Public Employer in Case No. C04 A-030

-and-

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 352,
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-and-

RICKY J. HICKMAN,
An Individual Charging Party.
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APPEARANCES:

Mary J. Dwyer, Human Resources Director, for the Public Employer

White, Schneider, Young & Chiodini, P.C., by James J. Chiodini, Esq., for the Labor Organization

Ricky J. Hickman, *in pro per*

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 November 5, 2004, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcripts and exhibits, I make the following findings of fact, conclusions of law and recommended order.[1]

The Unfair Labor Practice Charges:

On January 30, 2004, Charging Party Ricky J. Hickman filed unfair labor practice charges against his former employer, City of Lansing, Board of Water & Light (BW&L), and his bargaining representative, International Brotherhood of Electrical Workers, Local 352 (IBEW). In Case No. C04 A-030, Hickman alleges that he was terminated by Respondent BW&L after he filed a "hostile work environment, harassment" complaint, and that the BW&L "broke [the] labor contract, failure

[1] No post-hearing briefs were filed in this matter.

to bargain, no hearing, discrimination, retaliation, falsified records." In Case No. CU04 A-010, Hickman asserts that Respondent IBEW did not "execute" the collective bargaining agreement and failed to represent him fairly with respect to his termination from employment with the BW&L.

Findings of Fact:

Ricky Hickman was employed by the BW&L as a power plant operator and was a member of a bargaining unit represented by the IBEW. Sometime prior to May of 2003, Hickman began suffering dizzy spells. On May 20, 2003, Hickman informed the Employer that he would be off work through May 28, 2003, while waiting for test results. He returned to the plant on the morning of May 28, 2003. At that time, Hickman presented a doctor's note to his foreman, Jesse Gutierrez. Gutierrez told Hickman that he would need to get clearance from the Employer's doctor before he would be allowed to return to work. Hickman indicated that he did not want to see the Employer's doctor, and that he felt the note from his personal physician should be sufficient. Gutierrez left to discuss the matter with the Employer's operations supervisor, David Nico.

Later that morning, Nico met with Hickman. Nico testified that he explicitly ordered Hickman to see the Employer's physician. Hickman, however, denied that Nico gave him any direct order. Rather, Hickman testified that Nico merely stated that it would be in his "best interest" to submit to a medical examination administered by a company physician. I found Nico and the other witnesses for Respondents to be believable and credit them generally, and specifically, where there is any direct discrepancy between their testimony and the testimony of Hickman. I did not find Hickman to be a credible witness, based upon his demeanor and the fact that he frequently contradicted his own testimony, as well as the documentary evidence submitted by the parties.[2]

Following his meeting with Nico, Hickman was cited for violating a work rule prohibiting employees from refusing to obey the order of a supervisor. Hickman was instructed to leave the property pending the results of a disciplinary hearing. With the agreement of the Union, the disciplinary hearing was scheduled for June 4, 2003. The Employer attempted to notify Hickman of the hearing date by telephone and mail. When Hickman did not show up for the hearing, the Employer sent a certified letter to Hickman informing him that he was considered absent without reasonable cause and that a new hearing date was scheduled for June 12, 2003.

On June 5, 2003, Hickman called the Employer's benefits administrator, David Oxender, and indicated that he had vertigo and that he would be seeing a specialist on June 16, 2003. As a result, the Employer adjourned the disciplinary hearing. Thereafter, Hickman provided the Employer with a doctor's note excusing him from work for the period June 5 to June 17, 2003. On June 11, 2003, the Employer sent a letter to Hickman informing him that he would be required to provide additional medical documentation from his treating physician and submit to an examination from the Employer's doctor before being allowed to return to work.

On June 23, 2003, Hickman saw a specialist who recommended that he have surgery on his ears. Hickman never had the surgery, nor did he seek a second opinion concerning his condition.

[2] For example, the Union introduced into evidence a letter which Hickman wrote and sent to the IBEW on or about August 26, 2003. In this letter, Hickman admitted that he was in fact ordered to see the Employer's doctor on May 28, 2003.

A few weeks later, Oxender called Hickman and left a message requesting that he provide the BW&L with additional medical documentation to substantiate the reason for his absence from work.

Sometime in July of 2003, Karen Allen, a Union steward, learned that Hickman might be terminated because he had not been in contact with the Employer. After discussing the matter with the Union's business agent, Curtis Gates, Allen made several unsuccessful attempts to reach Hickman by telephone. Finally, Allen was able to contact Hickman with the assistance of one of his co-workers. Hickman requested that Allen send him a copy of the contract between the Employer and the IBEW. Thereafter, Hickman contacted Gates and requested that he file a grievance on his behalf.

On or about July 23, 2003, Gates filed a grievance alleging that Hickman was being harassed by his supervisor and that he was being subjected to a hostile work environment. Two days later, Gates filed a "harassment/hostile work environment" complaint alleging that Hickman's supervisor had harassed him several months earlier when he told Hickman that his absences from work were becoming "excessive." The complaint was assigned to the Employer's benefits administrator, who tried unsuccessfully to contact Hickman by telephone to investigate his allegations.

On July 28, 2003, Oxender sent a certified letter to Hickman informing him that he was considered absent without reasonable cause and that he would be terminated if he did not contact the BW&L and provide the appropriate medical documentation by August 1, 2003. On or about July 31, 2003, Hickman left a message for Oxender alleging that he was off work due to the fact that he was being subjected to harassment and workplace violence rather than because of a medical condition. Later that day, Oxender called Hickman and left a message warning him that he would be terminated if he failed to properly substantiate his absence.

Hickman failed to provide any additional medical documentation to the Employer. On August 1, 2003, the BW&L terminated his employment. Five days later, Gates filed a grievance challenging Hickman's discharge. In a letter attached to the grievance, Gates alleged that Hickman had an excellent work record and asserted that he was terminated because he was "afraid to return to a hostile workplace with harassment occurring." Gates also argued that the discharge constituted a violation of Hickman's right to due process because the BW&L had failed to conduct an investigation into the harassment allegations. A third-step hearing on the grievance was scheduled for August 27, 2003. Hickman was notified of the hearing by a letter from the Employer dated August 21, 2003.

On or about August 26, 2003, Hickman faxed a letter to IBEW International vice president, Lawrence Curley, requesting the International's assistance at the grievance hearing. That same day, Curley faxed a letter back to Hickman informing him that that Local 352 was his exclusive bargaining representative and that the International had no authority to intervene in the matter. Nevertheless, Curley promised to assist Hickman "in an informal way" by requesting that International representative Alan Goddard conduct an investigation.

Hickman did not appear for the third-step hearing on August 27, 2003, and the Employer and the Union agreed to immediately advance the grievance to the fourth step. The BW&L denied the grievance on the ground that no contract violation had occurred.

Around this same time, Goddard contacted Gates, who provided a summary of what had transpired in the case thus far. Gates informed Goddard that Hickman was alleging that he was afraid to return to work because his supervisor, for whom he had been working for many years, had been arrested and convicted for shooting someone with a blow dart gun at a gay pride parade three years earlier. Goddard and Gates decided to arrange a meeting with Hickman to discuss the situation. The meeting was initially scheduled for October 15, 2005. Although Goddard drove from his home in South Bend, Indiana to Lansing to attend the meeting, Hickman failed to show up at the scheduled time and place. Thereafter, Gates arranged another meeting for November 11, 2003, and Goddard once again drove from South Bend to Lansing to meet with Hickman. When Hickman failed to show up for this second meeting, Gates decided to drop the grievance. Gates notified Hickman of this decision by letter that same day.

Discussion and Conclusions of Law:

With respect to the charge against Respondent IBEW in Case No. CU04 A-010, I find that Hickman 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 interest 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. *Goolsby v Detroit,* 419 Mich 651 (1984), citing *Vaca v Sipes*, 386 US 171 (1967). *Goolsby*, at 679, defined "arbitrary conduct" as conduct that is impulsive, irrational, or unreasoned, or inept conduct undertaken with little care or with indifference to the interests of those affected. 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.

In the instant case, Gates, the Union's business manager, filed two grievances on Charging Party's behalf, as well as a complaint alleging harassment/hostile work environment. In a letter attached to the second grievance, Gates praised Hickman's work record and argued that his termination was improper. Gates advanced the grievances to a third-step hearing, which Hickman failed to attend. Gates then arranged two successive meetings with Hickman and a representative of the International to discuss the situation further and determine whether to take the grievance to arbitration. It was only after Hickman failed to show up for both meetings that Gates decided to withdraw the grievance. Although Hickman apparently disagrees with the position taken by the Union, he has not established that Respondent IBEW acted unlawfully in refusing to process his grievance to arbitration or that it in any way breached its duty under PERA to represent him fairly.

In his charge in Case No. C04 A-030, Hickman alleges that Respondent BW&L violated PERA by breaching the collective bargaining agreement between the Employer and the Union. 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 (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 any alleged breach of contract.

Charging Party next contends that Respondent BW&L unlawfully terminated his employment in retaliation for his filing a grievance and hostile work environment complaint against his supervisor. 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 activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's exercise of his or her protected rights; and (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 anti-union discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 707.

I conclude that Charging Party has failed to sustain his burden of proving that the Employer harbored anti-union animus or hostility, or that his discharge on August 1, 2003, was in any way motivated by his protected concerted conduct. There is simply nothing in the record to suggest that the Employer terminated Hickman in retaliation for filing a grievance. In fact, the grievance and complaint to which Hickman refers were filed by the Union in July of 2003, long after Hickman had already been suspended by the BW&L for refusing to submit to a medical examination from the Employer's doctor. I find that the credible evidence on the record overwhelmingly supports the conclusion that Hickman was terminated because he failed to comply with the Employer's order to provide medical documentation to support his absence from work.

I have carefully considered all other arguments raised by Charging Party at hearing and have determined that they do not warrant a finding of a PERA violation as to either Respondent. In accord with the above discussion, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated:_____