

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

In the Matter of:

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 324,
Labor Organization-Respondent,

Case No. CU09 K-040

-and-

VICTOR MCCAUSTLE,
An Individual- Charging Party.

APPEARANCES:

Victor McCastle, *In Propria Persona*

DECISION AND ORDER

On January 21, 2010, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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. Dardarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

INTERNATIONAL UNION OF OPERATING ENGINEERS,
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-and-

VICTOR MCCAUSTLE,
An Individual-Charging Party.

APPEARANCES:

Victor McCastle, appearing for himself

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION**

On November 30, 2009, Victor McCastle filed the above charge with the Michigan Employment Relations Commission against his collective bargaining agent, the International Union of Operating engineers, Local 324, pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules.

On December 4, 2009, I issued an order directing McCastle to show cause why his charge should not be dismissed without a hearing because it failed to state a claim under PERA. McCastle was cautioned that if he did not respond to my order, his charge would be dismissed. He did not file a response or request an extension of time to do so. Based upon the facts as set forth in McCastle's charge, I make the following conclusions of law and recommend that the Commission take the following action.

The Unfair Labor Practice Charge:

McCastle alleges that Respondent violated its duty of fair representation toward him by failing to file a grievance on his behalf in October 2009.

Facts:

The facts as alleged by McCastle are as follows. McCastle is employed by the Detroit Public Schools (the Employer) as a building engineer. He is a member of a bargaining unit represented by Respondent. In January or February 2007, McCastle began working in the position of Class A Engineer at the Employer's Southeastern High School. In August 2009, the Employer reposted that position for bid. McCastle and another building engineer, Gregory Ray, bid on the position. The position was awarded to Ray, and McCastle was assigned a lower paid position at another school. Sometime thereafter, McCastle asked Respondent to file a grievance protesting his removal from the position at Southeastern. Respondent's chief steward, Kevin Seiler, and Respondent's executive director, Dan Ringo, determined that his claim lacked merit and refused to file the grievance.

On October 27, 2009, Seiler sent McCastle a letter explaining Respondent's decision. Seiler stated that, according to Respondent's investigation, when McCastle applied for the Class A Engineer position at Southeastern in November 2006, he lacked one of the qualifications for the position, a City of Detroit First Refrigeration Operator's license. McCastle obtained his Refrigeration Operator's license a few days after he applied for the Class A Engineer job, and he was the only applicant for the position. However, according to Seiler, the Employer representatives on the staffing committee refused to award the position to McCastle and insisted that it be reposted. Around this same time, McCastle filed a grievance seeking to be paid out-of-class pay for a number of assignments. According to Seiler's letter, the Employer agreed to appoint McCastle to the Class A Engineer position as a partial resolution of McCastle's out-of-class pay grievances. However, according to Seiler, the agreement was that McCastle's appointment would be provisional. Seiler stated that after the position was finally reposted in 2009, it was properly awarded to Ray because Ray had more seniority as a Class B engineer than McCastle.

At least one of Respondent's stewards, Ronald Diebel, disagreed with Seiler and Ringo's decision that the Employer had the right to repost the position in 2009. After McCastle received Seiler's letter, he filed an internal union appeal of Respondent's decision not to file a grievance, a decision supported by several stewards. At the time McCastle filed his charge, his internal appeal was still pending.

Discussion and Conclusions of Law:

The failure of a charging party to respond to an order to show cause may warrant dismissal of the charge. *Detroit Federation of Teachers*, 21 MPER 3 (2008). In this case, the facts as alleged by McCastle do not state a claim under PERA.

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(3) (a) (i) of PERA. The union's legal duty 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. *Goolsby v Detroit*, 419 Mich 651,679(1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967). "Bad faith" means an

intentional act or omission undertaken dishonestly or fraudulently, while “arbitrary” conduct is that which is impulsive, irrational, or unreasoned, or inept conduct undertaken with little care or with indifference to the interests of those affected. *Goolsby* at 679. 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. *Lowe v Hotel Employees*, 389 Mich. 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe, supra*. To this end, a union is not required to follow the wishes of the individual grievant, but may investigate and proceed with the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. A union satisfies the duty of fair representation as long as its decision is within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991). The fact that an individual member is dissatisfied with the union's efforts or its ultimate decision is insufficient to demonstrate a breach of the duty of fair representation. *Eaton Rapids EA, supra*.

According to the charge, Respondent investigated McCastle’s claim and, based on the facts it uncovered, exercised its discretion by deciding not to file a grievance. McCastle disagrees with Respondent’s reasoning and its interpretation of the facts. He also asserts that its decision was unfair. However, McCastle does not allege that Ringo or Seiler acted in bad faith for reasons unrelated to the merits of his grievance. I also find that the facts as he alleges them do not indicate that Respondent acted arbitrarily in its handling of this matter. I find that McCastle’s charge does not allege facts which, if true, would support a finding that Respondent acted arbitrarily, discriminatorily, or in bad faith as the Commission and Courts have defined these terms. I conclude, therefore, that the charge should be dismissed without a hearing. I recommend 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
State Office of Administrative Hearings and Rules

Dated: _____