STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25, LOCAL 207,
Labor Organization-Respondent,

Case No. CU08 C-012

-and-

KENNETH GRAY,
An Individual-Charging Party.
_____/

APPEARANCES:

Eric I. Frankie P.L.C., by Eric Frankie for Charging Party

Aina N. Watkins, Esq., Staff Attorney, AFSCME Council 25, for Respondent Union

DECISION AND ORDER

On August 31, 2009, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the unfair labor practice charge filed by Charging Party, Kenneth Gray, against Respondent AFSCME Council 25 and its affiliated Local 207 (Union) should be dismissed for failure to state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The charge and amended pleadings allege the Union breached its duty of fair representation by not adequately pursuing several grievances against Charging Party's employer, the City of Detroit (Employer). Following the recommended summary dismissal of a related charge involving these same parties and similar allegations, the ALJ ordered Charging Party to explain why the instant charge should not be dismissed. In responding, Charging Party failed to address any of the specific issues raised in the show cause order. The ALJ recommended summary dismissal finding that the allegations did not support a claim against the Union for violating PERA. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. After obtaining two extensions, Charging Party filed exceptions to the ALJ's decision on October 5, 2009, to which Respondent did not file a response.[1]

In his exceptions, Charging Party contends that the ALJ erred in recommending summary dismissal of his charge. He argues that, in accordance with *Smith v Lansing Sch Dist*, 428 Mich 248 (1987), oral argument is required before a charge can be summarily dismissed. He also contends that the Union breached its duty to Charging Party when it failed to select an arbitrator by the

[1] On September 8, 2009, Respondent untimely filed a motion for summary disposition that is not part this decision.

deadline set forth under the collective bargaining agreement, thereby barring him from any continued relief under the grievance procedure. We have reviewed the exceptions and find them to be without merit.

Factual Summary:

We accept the factual summary set forth by the ALJ and will not repeat it here, except where necessary. We also accept as true Charging Party's allegations for purposes of reviewing the appropriateness of the ALJ's recommendation for summary dismissal.

Charging Party is an employee with the City of Detroit and member of the bargaining unit exclusively represented by Respondent. Between May, 2005 and February, 2008, Respondent processed nine grievances filed by Charging Party alleging various contract violations by the Employer. After advancing these matters through several steps of the grievance procedure, Respondent decided not to seek arbitration on many of the pending grievances. Charging Party objected, and on March 5, 2008, he filed an unfair labor practice charge alleging the Union's "failure to represent these and other members' grievance matters. Non (*sic)* ever go to arbitration." During a pretrial conference on August 4, 2008, the ALJ adjourned the matter allowing time for the parties to resolve their disputes.

On March 6, 2009, a new charge was filed by a group of bargaining unit members (including Charging Party) against Respondent Union that appeared to include "related" or "similar" allegations already raised in the instant case. Shortly thereafter, Charging Party resumed the action in the instant case and amended his charge. He also requested that the ALJ consolidate both cases, but later withdrew that request.

On August 4, 2009, a decision was issued in the related case recommending summary dismissal of the charge against the Union.[2] Although ordered to explain why the instant case should not be dismissed and to distinguish the allegations in the related case, Charging Party failed to do so. He also failed to provide sufficient factually based allegations to support his claim against the Union.

Discussion and Conclusions of Law:

We note foremost that Charging Party's failure to adequately respond to the ALJ's show cause order may, in itself, warrant dismissal of the charge. *Detroit Federation of Teachers*, 21 MPER 3 (2008). We also note that in his exceptions, Charging Party attempts to introduce allegations which are not part of the record before the ALJ; they shall not be considered here. *American Federation of Teachers, Local 2000*, 22 MPER 21 (2009).

Charging Party contends that the Union breached its duty of fair representation by not timely advancing his grievances to arbitration. Since a union's duty is to the membership overall, it has considerable discretion in deciding what action to undertake regarding a grievance (*Michigan State Univ Admin-Prof'l Ass'n, MEA/NEA*, 20 MPER 45 (2007)), so long as its decisions are not arbitrary, biased, discriminatory or in bad faith. *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21; 466 NW2d 333 (1991). A member's dissatisfaction with a union's efforts or ultimate decision not to

[2] Refer to the Decision and Recommended Order issued by ALJ Julia C. Stern in MERC case number CU09 C-007.

pursue a grievance, alone, is insufficient to constitute a breach of the duty of fair representation. *American Federation of Teachers*. Even upon a showing that a union reached a "wrong" decision due to a factual misinterpretation, there would be insufficient basis to sustain an unfair labor practice charge. *City of Detroit*, 1997 MERC Lab Op 31.

In this matter, we find that Charging Party's pleadings and exceptions do not allege sufficient facts to support that the Union acted inappropriately by not arbitrating his grievances. At best, the record reflects Charging Party's discontent with the Union's efforts, which by itself, does not establish grounds for an unfair labor practice charge. Charging Party alleges that the Union delayed the processing of his grievances by not selecting an arbitrator. However, a union does not breach its duty of fair representation merely by a delay in processing grievances, if the delay does not result in the denial of the grievances. *Teamsters Local 214*, 1995 MERC Lab Op 185, 189. Nothing in the record reasonably supports that the grievances were not submitted to arbitration because of a delay or time bar caused by Union. Conversely, Respondent Union's submissions indicate that the decisions to withdraw Charging Party's grievances were based on meritorious grounds. This Commission will not evaluate whether the Union reached the right conclusion in deciding not to arbitrate the grievances. *City of Flint*, 1996 MERC Lab Op 1, 11. Since the charge fails to state a valid claim under PERA, it is subject to dismissal under Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.165.

We also disagree with Charging Party's application of the oral argument requirement announced under *Smith v Lansing Sch Dist*, 428 Mich 248 (1987). In *Smith*, the Michigan Supreme Court clarified that this Commission is authorized to summarily dispose of any charge that fails to state a valid PERA claim, and can do so without conducting an evidentiary hearing, as long as the parties have an opportunity to present oral arguments on issues of law and policy. *Id* at 250 - 251. However, a party waives this requirement by failing to request an oral argument. *Teamsters Local 214*, 16 MPER 8, 18 (2003). In this matter, Charging Party has made no request for oral argument that is in the record before the ALJ. Further, under Commission Rule 165 (3), when a party, as Charging Party here, fails to respond to a show cause order issued from a motion for summary disposition, the motion "shall be considered and decided without oral argument." As such, we find that the ALJ appropriately recommended summary dismissal.

Finally, we have carefully examined the remaining issues raised by Charging Party and find that they would not change the results. Accordingly, we agree with the Administrative Law Judge's conclusion that the charge must be summarily dismissed.

ORDER

The unfair labor practice charge against the Union is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

_____

Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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

In the Matter of:

AFSCME COUNCIL 25, LOCAL 207,
Respondent-Labor Organization,

-and- Case No.: CU08 C-012

KENNETH GRAY,
An Individual Charging Party.
_____/

APPEARANCES:

Eric I. Frankie, PLC, by Eric I. Frankie, for Charging Party

Aina Watkins, for Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed on March 5, 2008 by Kenneth Gray against his labor organization, AFSCME Council 25, Local 207. 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 assigned to David M. Peltz, Administrative Law Judge (ALJ) for the State Office of Administrative Hearings & Rules, acting on behalf of the Michigan Employment Relations Commission.

An evidentiary hearing on the charge was set for August 4, 2008. On that day, the parties engaged in a pretrial conference with the undersigned, during which it was discovered that the gravamen of the charge is Gray's assertion that the Union failed to pursue various grievances on his behalf. At the conclusion of the settlement conference, it was agreed that the case would be adjourned without date while the parties engaged in an attempt to settle the matter. Gray, who at that time was not represented by counsel, agreed to notify the undersigned if he wanted another hearing date to be scheduled in this matter.

Almost one year later, on June 4, 2009, I received a letter from attorney Eric Frankie requesting that the instant case be consolidated with Case Nos. C09 C-030 & CU09 C-007, which was pending at that time before Administrative Law Judge Julia Stern. The case before Judge Stern involved a charge filed by Gray and five other individuals against the City of Detroit, AFSCME Council 25 and its Local 207. In the request for consolidation, Frankie asserted that he represented Gray in the matter pending before Judge Stern and that all of the cases involved allegations which were "related to and/or similar" to each other.

Following receipt of the consolidation request, I contacted Frankie and asked him to clarify whether he was appearing as Charging Party's representative for purposes of the instant case. In a letter dated July 8, 2009, Frankie confirmed that he was in fact representing Gray in both matters. Once again, Frankie indicated that there was "overlap" between the cases. However, he also asserted that the charges pending in the two matters were "different in significant ways." Although Frankie listed various issues pertaining to litigants other than Gray, which were obviously unique to the matter pending before Judge Stern, he did not explain how the cases differed with respect to Gray's allegations against AFSCME Local 207.

On July 10, 2009, an order was issued jointly by myself and Judge Stern. The order read, in pertinent part:

> It appears that all of the grievances covered by the charge before Judge Peltz (Case No. CU08 C-012) are also the subject of the charges before Judge Stern. If this is incorrect, we ask that you advise us within ten (10) days of the date of this letter, or before July 20, 2009. If we do not hear from you by this date, the three charges will be consolidated. As you are aware, there is a pending motion for summary dismissal filed by the Respondent Union in Case No. CU09 C-007.

Charging Party responded to the order by letter dated July 20, 2009. In his response, Charging Party disputed that all of the grievances at issue in the instant case were also the subject of the charges before Judge Stern. However, the letter did not provide any explanation as to these alleged distinctions, nor did Charging Party identify any specific allegation as being unique to the instant case.

On July 21, 2009, an order was issued jointly by myself and Judge Stern postponing a decision on the consolidation request until after the issuance of a ruling by Judge Stern on the motion for summary disposition in Case No. CU09 C-007. Thereafter, by letter dated July 24, 2009, Charging Party filed a written request to withdraw the motion for consolidation.

On August 4, 2009, Judge Stern issued a Decision and Recommended Order on Summary Disposition in Case No. CU09 C-007. With respect to the allegation that the Union breached its duty of fair representation by arbitrarily failing to move grievances to the next step of the grievance procedure, Judge Stern held that the charge raised no genuine issue of material fact. Judge Stern concluded:

> In this case . . . the Union maintains that it either deliberately withdrew or timely advanced all Charging Parties' grievances, and produced documents to support its claims. Charging Parties apparently question the timeliness of the Union's demands for arbitration, but have not alleged any facts to support their assertion that these grievances are not, in fact, still pending. Many of the grievances that are the subject of the charge were filed in 2005, 2006, and 2007. However, while there are time limits in the grievance procedure to keep grievances moving through the first three steps, there is no time limit for the scheduling of the fourth step pre-arbitration hearing. Moreover, because grievances may be referred to mediation even after they are advanced to the arbitration stage, they may remain pending for a considerable time after the arbitration demand is filed. Thus, one cannot infer that the Union allowed a grievance to lapse simply from the fact that the grievance was filed several years ago, but has not yet been arbitrated.

> Charging Party's [sic] suspicions are not sufficient to support a charge that the Union breached its duty of fair representation. It is well-established that a union does not breach its duty of fair representation merely by a delay in the processing of grievances as long as the delay does not cause the grievance to be denied. *Detroit Pub Sch*, 22 MPER 14 (2009) (no exceptions); *Service Employees International Union, Local 502*, 2002 MERC Lab Op 185 (no exceptions).

Following the issuance of the decision in Case No. CU09 C-007, I directed Gray to show cause why the instant charge should not be dismissed pursuant to the doctrines of res judicata, collateral estoppel or law of the case. Around the same time, Judge Stern issued an order requiring the charging parties in Case No. C09 C-030 to show cause why the charge against the City of Detroit should not be dismissed for failure to state a claim under PERA. Gray did not file a response to either order to show cause. Rather, in an August 20, 2009 letter to myself and Judge Stern, he opined that any response to the orders to show cause would be "pointless" and that the "only remedy of the Charging Parties is, therefore, with the Commission."

Discussion and Conclusions of Law:

In the instant case, Charging Party asserts that AFSCME Local 207 breached its duty of fair representation by failing to pursue various grievances which were filed on his behalf. Gray, along with several other individuals, made the same or similar allegations in Case No. CU09 C-007. Although Charging Party has been given numerous opportunities to explain how, if at all, these cases differed with respect to his allegations against Local 207, he has failed to do so in any meaningful respect. Morever, given that Charging Party has also refused to respond to the order to show cause, as evidenced by Frankie's August 20, 2009 letter, I find that dismissal of the instant charge on summary disposition is appropriate. See *Detroit Federation of Teachers*, 21 MPER 3 (2008) (the failure of a charging party to respond to an order to show cause may, in and of itself, warrant dismissal of the charge. *Detroit Federation of Teachers*, 21 MPER 3 (2008). Accordingly, I hereby recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge in Case No. CU08 C-012 is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____