STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 207,
Labor Organization-Respondent,

Case No. CU09 C-007

-and-

KENNETH GRAY, EDWARD D. COLLINS, SAMMIE BARBER, ANDREW DANIEL-EL, JAMES CHARLES WILLIAMS, AND PAUL CHEATHAM, JR.
Individuals-Charging Parties.
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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

Scheff, Washington & Driver, P.C., by George Washington, Esq., for AFSCME Local 207

DECISION AND ORDER

On August 4, 2009, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter, finding that the unfair labor practice charge filed by Charging Parties, Kenneth Gray et al, against Respondent AFSCME Council 25 and AFSCME 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 a breach of the Union's duty stemming from its handling of various grievances that challenged violations of the collective bargaining agreement between the Union and the City of Detroit (Employer). After finding the charge and amended pleadings deficient, the ALJ concluded that no material factual issues existed and recommended summary dismissal of the charge. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. After receiving an extension, Charging Parties filed exceptions to the ALJ's decision on October 5, 2009. Respondent AFSCME Local 207 obtained an extension to file a response; however, its cross-exceptions were filed untimely on October 20, 2010 and will not be considered in this decision.

In their exceptions, Charging Parties contend that the ALJ erred in recommending summary dismissal. They argue that oral argument is required before a charge can be summarily dismissed. They also contend that their pleadings contain sufficient factual allegations to support the existence of a PERA violation. After carefully reviewing the exceptions, we find them to be without merit.

Factual Summary:

We accept the ALJ's factual summary as set forth in the Decision and Recommended Order and will not repeat it here, except where necessary. We also accept as true, Charging Parties' allegations in reviewing the ALJ's recommendation for summary dismissal.

Charging Parties are employees with the City of Detroit (Employer) and members of a bargaining unit exclusively represented by the Union. During a close to three year period, between 2005 and 2008, they filed various grievances against the Employer alleging a number of contract violations. The Union advanced these matters through several steps of the grievance procedure, but, later, elected not to arbitrate many of the grievances. Charging Parties disagreed and filed unfair practice charges alleging a breach of the duty of fair representation against the Union and a breach of contract against the Employer[1]. The allegations recited in each charge were identical and provided the most detail relating to the complaint against the Union. On March 11, 2009, the ALJ ordered Charging Parties to amend the complaint to provide a more definite statement of a PERA violation by the Union. After reviewing the amended pleadings, the ALJ concluded the allegations were insufficient to establish a valid claim, and recommended summary dismissal.

Discussion and Conclusions of Law:

This matter stems from separate complaints filed by Charging Parties against the Union and the Employer based on various allegations of contract breach. Charging Parties contend that the Union breached its duty of fair representation by not timely providing information and by not advancing their 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 pursue a grievance, alone, is insufficient to constitute a breach of the duty of fair representation. *American Federation of Teachers*. Even if a union reaches a "wrong" decision due to a misinterpretation of facts, there is little basis for a charge. *City of Detroit*, 1997 MERC Lab Op 31.

In this matter, we find that Charging Parties' pleadings and exceptions do not allege sufficient facts to support a claim that the Union acted inappropriately by its delay in communicating information to Charging Parties, or reaching its decision not to arbitrate certain grievances. At best, the record reflects Charging Parties' discontent with the Union, which alone, does not give rise to an unfair labor practice charge. Charging Parties allege that the Union delayed the processing of their grievances and the communication of information on the status of various grievances. Charging Parties also claim that Respondent did not timely provide notice to the Employer of its intent to seek arbitration. However, as the ALJ correctly indicated, 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. Also, a union's failure to relay grievance information to a member does not give rise to a charge, unless the lack of communication has caused harm to the employee's rights. *Detroit Police Officers Ass'n,* 1999 MERC Lab Op 227, 230.

[1] Refer to a separate decision issued concurrently in MERC case number C09 C-030.

We find that the record before the ALJ does not reasonably support a conclusion that the grievances were denied or refused arbitration due to a lack of communication, delay, or time bar caused by Union. Conversely, Respondent's submissions indicate that its decisions to proceed with or withdraw grievances were based on meritorious grounds. As such, this Commission will not evaluate whether the Union reached the right conclusion in its handling of these 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 Parties' 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 a charge that fails to state a valid PERA claim 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 205-251. A party, however, waives this opportunity if they fail to make a request for oral argument. *Teamsters Local 214*, 16 MPER 8, 18 (2003). In this matter, the record before the ALJ does not indicate that Charging Parties ever requested oral argument. While in their pleadings Charging Parties specifically request that the ALJ conduct an evidentiary hearing, this Commission has previously held that a request for evidentiary hearing, alone, does not serve as a request for oral argument. *Muskegon Hts Pub Sch Dist*, 1993 MERC Lab Op 869, 870. Further, under Commission Rule 165 (3), R 423.165(3), when a party, such as Charging Parties 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." Therefore, we find that the ALJ appropriately recommended summary dismissal of the charge against the Union.

Finally, we have carefully examined the remaining issues raised in the exceptions 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

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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:

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Individuals-Charging Parties.
_____/

APPEARANCES:

George B. Washington, Esq., for Respondent Local 207 and Aina N. Watkins, Esq., for AFSCME Council 25

Eric I. Frankie, Esq., for Charging Parties.

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On March 6, 2009, Kenneth Gray, Edward D. Collins, Sammie Barber, Andrew Daniels-El, James Charles Williams and Paul Cheatham, Jr., employees of the City of Detroit (the Employer) filed the above charge with the Employment Relations Commission against AFSCME Local 207 alleging that it violated 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 Julia C. Stern, administrative law judge for the State Office of Administrative Hearings and Rules.

On June 11, 2009, the charge was amended to add AFSCME Council 25, of which Local 207 is an affiliate, as a Respondent.[2] The charge against Council 25 and Local 207 (collectively, the Union), as amended on March 31 and June 11, 2009, alleges that the Union violated its statutory duty of fair representation by failing to provide Charging Parties with information about pending grievances and the distribution of monies awarded by an arbitrator. The charge also alleges that the Union violated its duty by negligently failing to make timely demands to move Charging Parties' grievances to the next step of the grievance procedure, thus forfeiting the

[2] Charging Parties also filed a charge against the Employer, docketed as Case No. C09 C-030.

Union's and employees' rights to arbitrate the grievances under the collective bargaining agreement between the Union and Employer.

On April 13, 2009, Local 207 filed a motion for summary disposition pursuant to Rule 165 (2)(f) of the Commission's General Rules, 2002 AACS R 423.165(2)(f), asserting that there was no genuine issue of material fact and that the Union was entitled to judgment as a matter of law. Charging Parties filed a response in opposition to the motion on May 29. Local 207 filed a reply to the response, and submitted additional documentary evidence in support of its motion, on June 2 and June 4. Charging Parties filed a supplementary response on June 9, 2009. On July 28 and 29, Council 25 filed an answer to the charge and a request to join in Local 207's motion. The Union contends that it provided Charging Parties with information about the status of their grievances, but that any failure on its part to respond to Charging Parties' requests for information did not, as a matter of law, violate its duty of fair representation. The Union also denies that it missed any deadlines for advancing Charging Parties' grievances. According to the Union, it deliberately withdrew two of the grievances mentioned in the charge. Most of the other grievances have been advanced to arbitration, and all are still pending in the grievance procedure.

Based on the facts as alleged in the charge and other undisputed facts as set forth in the pleadings, and the arguments set forth by the parties in the documents referenced above, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The charge, as amended, alleges that the Union has breached its duty of fair representation by:

> 1. Failing to adequately respond to requests for information about the status of Grievance No. 0123-08, filed on behalf of Andrew Daniels-El and dated April 23, 2008, pursuant to requests made in April 2008, on January 7, 2009, and February 2, 2009, and in March of 2009. Requests for this information were made separately to several representatives of Council 25 as well as to Local 207 president John Riehl.
>
> 2. Failing to provide copies of correspondence to Andrew Daniels-El about the January 7, 2009 MERC hearing over the failure of Respondent City of Detroit to provide a copy of the videotape, despite multiple requests made between January 7 and March 18, 2009 to Riehl and to Council 25 representatives.[3]
>
> 3. Failing to adequately respond to requests for information about the status of and documents related to a grievance that may or may not have been filed over

[3] Daniel-El's grievance concerned an alleged assault upon him by a supervisor. According to Charging Parties, in September 2008 the Union filed an unfair labor practice charge over the Employer's refusal to provide it with a copy of a videotape showing the incident. A hearing before an administrative law judge was scheduled for January 7, 2009. However, the Union withdrew the charge before the hearing. Daniel-El was not advised that the hearing had been cancelled.

the Employer's alleged failure to pay Sammie Barber for working outside of his classification in February 2007. This information was requested from Council 25 in March 2007 and again on August 18, 2008 and from Riehl on February 2, 2009;

4. Failing to provide the status of and documents related to Grievance No. 0054-07, filed February 27, 2007 on behalf of Kenneth Gray and alleging unfair treatment, pursuant to requests made to Riehl on March 25, 2008 and February 2, 2009;

5. Failing to timely process and submit to arbitration the following grievances filed on behalf of Kenneth Gray and to adequately respond to Gray's requests regarding the status of these grievances:

(a) Grievance No. DT-26-05, dated May 16, 2005 and addressing the Employer's refusal to pay Gray for working out of classification;

(b) Grievance No. DT-28-05, dated August 24, 2005 and addressing the assignment of Gray to work outside of his job title;

(c) Grievance No. WW-26-06, dated February 6, 2006, and asserting that Gray was harassed by a supervisor;

(d) Grievance No. 0069-06, dated May 11, 2006, also asserting harassment by a supervisor;

(e) Grievance No. 0053-07, dated February 23, 2007, asserting unfair treatment by a supervisor;

(f) Grievance No. 0086-07, dated March 14, 2007, asserting violation of contract provisions providing for the equalization of overtime.

(g) Grievance No. 0190-07 dated July 31, 2007, alleging that Gray had been given an improper temporary work assignment;

(h) Grievance No. 0052-08, dated February 2, 2008, asserting violation of contract provisions providing for the equalization of overtime;

6. Failing to provide the status of and information related to a policy grievance filed on or about October 7, 2008 over the subcontracting of work performed by mechanical maintenance garage mechanics to a private company, Arrow Truck, and failing to timely process and submit this grievance to arbitration. Requests for information about the status of this grievance were made to Riehl in November 2008, December 2008, January 2009, and on February 2, 2009.

7. Failing to provide the basis for, and documents supporting, the calculation of amounts received by individual employees pursuant to an arbitration award issued on February 4, 2009, as requested on February 9, 2009.

I.

Facts:

Time Limits in the Grievance Procedure

Article 8 of the collective bargaining agreement between the Employer and the Union contains a five step grievance procedure culminating in binding arbitration. Step three of the grievance procedure consists of a meeting between a Union grievance committee and three representatives of the Employer department involved in the grievance. The meeting is to take place within seven working days of the date that the grievance is appealed to step three. The contract provides that the department head or designated representative is to answer the grievance in writing at step three within five working days of this meeting. If the grievance is not settled at step three, it may be appealed by Council 25 to step four, the pre-arbitration panel, within fifteen days of the Union's receipt of the step three answer. The pre-arbitration panel consists of the local union president, a representative of Council 25, an Employer labor relations representative, and another Employer representative. The contract does not set a time limit for the scheduling of the pre-arbitration panel hearing. However, the Employer is to answer the grievance in writing within twenty days after this hearing. Article 8 then provides:

> If the grievance is not settled at Step 4 it may be referred to arbitration (Step 5) within sixty (60) calendar days from the date of receipt of the City's answer at Step 4. All grievances not referred to Step 5 arbitration within the prescribed time limits shall be considered settled based on the City's last answer.

Article 9, entitled "Stipulations to the Grievance Procedure" states:

> The Union may withdraw a grievance without prejudice at any step of the grievance procedure. If a grievance is not scheduled or answered by management within the prescribed time limits, the Union shall move the grievance to the next step of the grievance procedure. The appeal will be considered timely if filed at the next step within sixty (60) calendar days of the date that management was considered [sic] to answer.

The Union and the Employer have agreed to a permanent panel of four arbitrators who hear the majority of their grievances. After the Union notifies the Employer of its intent to move a grievance to step five, the grievance may be referred to the mediation process set out in the contract. The purpose of the mediation process is to reduce the backlog of grievances awaiting arbitration. In the summer of 2009, the Union and the Employer were still mediating grievances awaiting arbitration that were filed under their 2001-2005 collective bargaining agreement.

Charging Parties' February 2, 2009 Letter to Local 207 and Response

As indicated above, Charging Parties allege that they made numerous requests for information about the status of their grievances. On February 2, 2009, Charging Parties wrote to John Riehl, president of Local 207, requesting information about the status of each of the grievances mentioned in the charge. It also requested a copy of an interim arbitration award issued on August 15, 2008 addressing the equalization of overtime. Riehl responded in a letter dated February 16, 2009. Riehl wrote that the final arbitration award on the overtime issue had been issued on February 4, 2009, and that copies of the award had been distributed and discussed at Local 207's February membership meeting. He stated that he had no information about the unfair labor practice charge referenced in paragraph two above, as that charge was being handled by Council 25's attorney. Riehl told Charging Parties that the Union considered the dispute over Barber's out-of-class pay, referenced in paragraph three, to have been settled when Barber received a pay increase. According to Riehl, the Union also considered the dispute in Grievance No. 0054-007, referenced in paragraph four, to have been settled when John Gray successfully completed his probationary period. Riehl told Charging Parties that the July 31, 2007 grievance referenced in paragraph 5(g), Grievance No. 0190-07, was still pending at the fourth step of the grievance procedure. According to Riehl, the Union had submitted all the other grievances referenced in the February 2, 2009 letter to arbitration. Riehl's letter gave a date of submission for each grievance.

In support of its motion for summary disposition, the Union submitted the following documents.

1. A form, dated February 6, 2009, submitted to Council 25 by Local 207 requesting arbitration of Grievance No. 0123-08, filed on behalf of Daniel-El on April 28, 2008, and a letter from Council 25 to the Employer dated November 5, 2008, demanding arbitration of this grievance.

2. A letter from Council 25 to the Employer dated January 17, 2008, demanding arbitration of Grievance No. DT-26-05, filed on May 16, 2005 on behalf of Gray.

3. A form, dated March 25, 2008, submitted to Council 25 by Local 207 requesting arbitration of Grievance No. DT-28-05, filed on behalf of Gray on August 24, 2005, and a letter from Council 25 to the Employer dated January 15, 2008, demanding arbitration of this grievance.

4. A form, dated September 28, 2007, submitted to Council 25 by Local 207 requesting arbitration of Grievance No. WW-26-06, filed on behalf of Gray on February 6, 2006, and a letter from Council 25 to the Employer, undated, demanding arbitration of this grievance.

5. A form, dated September 28, 2007, submitted to Council 25 by Local 207 requesting arbitration of Grievance No. 0069-06, filed on behalf of Gray on May 11, 2006, and a letter from Council 25 to the Employer, dated September 28, 2007, demanding arbitration of this grievance.

6. A form, dated April 24, 2008, submitted to Council 25 by Local 207 requesting arbitration of Grievance No. 0053-07, filed on behalf of Gray on February 23, 2007, and a letter from Council 25 to the Employer, dated April 24, 2008, demanding arbitration of this grievance.

7. A letter from Council 25 to the Employer dated November 13, 2008, demanding arbitration of Grievance No. 0076-07 filed on behalf of Gray. [4]

8. A letter from Council 25 to the Employer dated May 14, 2009, demanding arbitration of Grievance No. 0190-07, filed on behalf of Gray on July 31, 2007.

9. A letter from Council 25 to the Employer dated September 16, 2008, demanding arbitration of Grievance No. 0052-08, filed on behalf of Gray on February 2, 2008.

10. A form submitted by Council 25 to the Employer, dated March 16, 2009, appealing policy Grievance No. 0304-08 to the pre-arbitration panel, step four of the grievance procedure as set out in the current contract between the Employer and the Union. The subject of this grievance is the subcontracting of vehicle repairs.

Some of the dates given by Riehl in his February 16 letter as the date of the arbitration demand were inaccurate, according to the above records. Also, Riehl stated in his letter that a grievance over the subcontracting of vehicle repair work had been submitted to arbitration on August 25, 2008, but the Union provided no documentation for this grievance. However, as the above documents indicate, Council 25 representatives, not Riehl, send arbitration demands to the Employer.

Discussion and Conclusions of Law:

The elements of a union's duty of fair representation under PERA include: (1) serving the interests of all members without hostility or discrimination; (2) exercising its discretion with complete good faith and honesty; and (3) avoiding arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651 (1984); *Government Administrators Ass'n,* 22 MPER _____ (Case No. CU06 J-046, issued July 1, 2009). Although it is well established that a union has considerable discretion to decide how or whether to proceed with a grievance, it must exercise its discretion in full good faith and honesty. *City of Lansing,* 21 MPER 8 (2008). In *Goolsby*, at 659, the Court explained a union's duty to avoid arbitrary conduct as follows:

> In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected. We think the latter includes, but is not limited to, the following circumstances: (1) the failure to exercise

[4] Although the charge gives the grievance number as 0086-07, Grievance No. 0076-07 appears to be the grievance filed on Gray's behalf on March 14, 2007 and referenced in paragraph 5(f) above.

discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members.

The Commission has held that a union's failure to communicate, or its delay in communicating, with its members is not a breach of its duty of fair representation unless that delay or failure results in some actual harm to the members. *Detroit Police Officers Assoc,* 1999 MERC Lab Op 227, 230. While this may be evidence of poor judgment, or ordinary negligence, on the union's part, it is not sufficient to support a claim of unfair representation. *Whitten v. Anchor Motor Freight, Inc,* 521 F.2d 1335, 1341 (CA 6, 1975). See also *Detroit Fed of Teachers,* 21 MPER 5 (2008) (no exceptions); *Wayne Co Cmty College,* 19 MPER 25 (2006) (no exceptions); *Wayne Co Sheriff Dept,* 1998 MERC Lab Op 101 (no exceptions). Charging Parties allege that the Union either failed to respond or responded inadequately to their requests for information about grievances and the distribution of monies from the February 2009 arbitration award. However, they do not assert that they suffered any actual harm from the Union's alleged failure to provide them with this information.

Charging Parties also allege that the Union breached its duty of fair representation by arbitrarily failing to move their grievances to the next step of the grievance procedure, thereby relinquishing its rights and the rights of the Charging Parties. While a union has broad discretion to determine whether to move a grievance to the next step of the grievance procedure, it violates its duty of fair representation if, without explanation, it fails to exercise that discretion and its inaction harms its members. In *Goolsby,* a union filed and processed a grievance through the third step of the grievance procedure. According to the testimony of its own representatives, it believed that the grievance had merit and intended to pursue it. However, it failed to move a grievance to the fourth step of the grievance procedure by filing a notice within the 15 day time period required by the contract. As a result, the grievance stopped at the third step. The union could not explain why the notice was not filed. The Court found that the union had violated its duty of fair representation by its arbitrary conduct in that case. It concluded that the union's unexplained failure to file the notice constituted "inept conduct undertaken with little care or indifference to the interests of those affected," a failure to exercise discretion when it could reasonably expect this failure to have an adverse effect on its members, and/or gross negligence.

In this case, however, 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 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 Schs*, 22 MPER14 (2009) (no exceptions*); Service Employees International Union, Local 502*, 2002 MERC Lab Op 185 (no exceptions).

I conclude, for reasons set forth above, that Charging Parties have raised no issue of material fact and that the charge should be dismissed as a matter of law. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: August 4, 2009