STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION,
Labor Organization-Respondent,

Case No. CU10 B-005

-and-

ELSIE JANE PATCH,
An Individual Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Feldstein Co., L.P.A, by Krista D. Abbott

Elsie Jane Patch, *In Propria Persona*

DECISION AND ORDER

On October 22, 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. 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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APPEARANCES:

Kalniz, Iorio & Feldstein Co, L.P.A, by Krista D. Abbott

Elsie Jane Patch, appearing for herself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On February 11, 2010, Elsie Jane Patch filed theabove charge with the Michigan Employment Relations Commission (the Commission) against her collective bargaining representative, the Michigan Education Association, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16, the charges were assigned to Julia C. Stern, Administrative Law Judge for the State Office of Administrative Hearings and Rules. Based on the facts as set out in Patch's charge and a supplemental statement submitted by her on September 20, 2010, I make the following conclusions of law and recommend that the Commission issue an order dismissing the charge.

The Unfair Labor Practice Charge, Order to Show Cause, and Motion:

Patch was employed by the Oakridge Public Schools (the Employer) as a bus driver until her termination on May 30, 2009. Patch was a member of a bargaining unit represented by Respondent. Patch alleges that Respondent breached its duty of fair representation by failing to file a grievance over her termination. In her original charge, Patch asserted that after her termination she called Respondent's office repeatedly to find out what Respondent could do to get her job back or what her other options were. She asserted that over a period of several months she spoke to five different union representatives, but that none of them called her back.

On February 25, 2010, I issued an order directing Patch to show cause why her charge should not be dismissed without a hearing because it failed to state a claim under PERA. The order explained that the charge, as filed, did not allege facts to support a claim that Respondent breached its duty of fair representation by acting arbitrarily or in bad faith. The order directed Patch to provide certain additional facts to support her charge and cautioned her that if she did not respond I would recommend to the Commission that her charge be dismissed. Patch did not respond to my order. On March 31, 2010, I sent Patch a letter explaining again why her charge, as filed, did not state a claim and asking her again to provide facts to support her charge. Patch did not respond to this letter.

On August 25, 2010, Respondent filed a motion for summary disposition or, in the alternative, for a more definite statement. On September 20, 2010, Patch filed a statement supplementing and correcting the statement of facts contained in her charge.

Facts:

The pertinent facts, as alleged by Patch in her charge and supplemental statement of facts, are as follows. As noted above, Patch was employed by the Employer as a bus driver. In 2008, she developed complications after a surgery. Effective May 11, 2008, the Employer granted Patch an unpaid leave of absence for medical reasons. Article XIII (D) of the collective bargaining agreement between Respondent and the Employer stated that an employee could be granted up to one year of unpaid leave for personal disability. Sometime during her leave, Respondent's steward advised Patch not to return to work until she was sure that she was able to do her job.

On May 10, 2009, Patch gave the Employer a slip from her doctor indicating that she would be able to return to work on September 8, 2009. According to Patch, she was prepared to return to work in May 2009. However, she knew that drivers were already assigned to all the bus routes. She assumed that if she returned to work so close to the end of the 2008-2009 school year she would simply be assigned to ride with another driver. According to Patch, she asked her doctor to write that she could not return to work until the fall of 2009 in order to save the Employer the cost of paying her salary.

On May 30, 2009, however, the Employer sent Patch a letter which stated that it was terminating her employment because she was unable to return to work within the one year period of leave allowed by the contract. Patch discussed her termination with a union representative, Bob, and explained the reason why her medical slip stated that she could not return to work until September. [1] Bob did not file a grievance over Patch's termination. Instead, in June 2009, Bob wrote a letter to the Employer's superintendent asking him to reconsider the termination. After the superintendent refused, Patch and Bob had a conversation in which Patch told Bob that she wanted her job back, or to be able to keep her health insurance, or at least to have it removed from her record that she was fired. According to Patch, Bob did not have any suggestions for her at that time.

[1] Patch did not know, or could not recall, the surnames of any of the Respondent representatives with which she discussed her case.

Between June and the early fall of 2009, Bob was reassigned to another of Respondent's offices. When Patch had not heard from Bob again by September, she called Respondent's office and talked to Christi, who identified herself as Bob's temporary replacement. Patch explained her situation to Christi, including why her medical slip had stated that she could not return to work until the next school year. Christi did not offer an opinion on the merits of Patch's case, and she and Patch did not discuss filing a grievance. After some time had elapsed and Christi had not called her back, Patch telephone Respondent's office again. This time she talked to Marty. Patch explained to Marty what she had earlier explained to Bob and Christi. Like Christi, Marty did not say anything to Patch about the merits of her case. When Patch did not receive a return call from Marty, she called the office again and asked to speak to a supervisor. Patch then received a phone call from Joe, who told her that he was not in the office, but would call her back after looking at her file. When Patch did not receive another call from Joe, she filed this charge.

Discussion and Conclusions of Law:

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 Ed Ass'n*, 2001 MERC Lab Op 131,134. See *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. *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*.

As discussed above, however, a union must avoid acting arbitrarily and exercise its discretion in complete good faith. "Arbitrary" conduct by a union includes "inept conduct undertaken with little care or with indifference to the interest of those affected." *Goolsby,* at 679 As the Court held in *Goolsby*¸ a union's failure to comply with collectively bargained grievance procedure time limits constitutes arbitrary conduct in the absence of a reasoned, good faith, non-discriminatory decision not to process the grievance. Accordingly, a union might be guilty of arbitrary conduct if it failed to file a grievance because, due to carelessness and confusion caused by personnel changes, it failed to assess the merits of a grievance and make a reasoned decision not to proceed with it.

When the alleged unfair representation involves the processing of a grievance, however, a charging party must establish both that the union breached its duty of fair representation and also that the collective bargaining agreement was breached. *Goolsby v City of Detroit*, 211 Mich App 214 (1995); *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993).

In this case, Article XIII(D) of the collective bargaining agreement, on its face, placed a one year limit on unpaid leaves of absence for medical reasons. Therefore, the Employer was seemingly acting within its contractual rights by terminating Patch when she submitted a doctor's slip stating that she could not return to work within a year. Patch's union representative, Bob, knew the facts surrounding her termination, including Patch's explanation for why her doctor's slip said she could not return until the fall in June 2009. Instead of filing a grievance, however, he wrote the Employer's superintendent a letter asking him to reconsider the termination. Bob never told Patch that he planned to file a grievance, and there is nothing in the facts suggesting that he intended to file one but carelessly neglected to do so before he was transferred. There are also no facts to suggest that his decision not to file the grievance was made in bad faith.

According to her charge, beginning in September 2009, Patch had a series of unsatisfactory conversations with Bob's replacements and another Respondent representative, Joe. Patch explained the facts of her case to a different representative each time she called Respondent's office, but was never told that she did or did not have a case or that Respondent would or would not take further action on her behalf. While frustrating to Patch, the conduct of Respondent's representatives in the fall of 2009 did not violate its duty of fair representation. The Commission and its administrative law judges have consistently held that a union's failure to communicate with a member about his or her grievance is not a breach of its duty of fair representation unless that failure results in some actual harm to the member. *Detroit Police Officers Ass'n*, 1999 MERC Lab Op 227, 230. See also *Wayne Co (Sheriff's Dep't*), 1998 MERC Lab Op 101, 105 (no exceptions); *Southeastern Michigan Transportation Authority*, 1988 MERC Lab Op 191, 196 (no exceptions); *AFSCME Local 1600*, 1981 MERC Lab Op 522, 527 (no exceptions). In this case, the facts indicate that the decision not to file a grievance over her termination was made by Bob in June 2009. The fact that Respondent representatives did not explain this decision when they spoke to Patch in the fall of 2009 did not cause Patch actual harm.

I find that Patch has not alleged facts indicating that Respondent acted arbitrarily or in bad faith in failing to file a grievance over her May 30, 2009 termination. I conclude that Patch's charge fails to state a claim upon which relief can be granted under PERA. 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: _____