STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS (UAW),
LOCAL 771,
Labor Organization-Respondent,

Case No. CU08 G-035

-and-

KEVIN (JOHN) MALOY,
An Individual Charging Party.
_____/

APPEARANCES:

William J. Karges, Associate General Counsel, International UAW, for Respondent

Law & Mediation Center, P.L.L.C. by Earline R. Baggett-Hayes for Charging Party

DECISION AND ORDER

On June 30, 2010, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Remand[1] in the above matter finding that the unfair labor practice charge filed by Charging Party, Kevin (John) Maloy, against Respondent, International Union, United Auto Workers, Local 771 (Union) should be dismissed. The ALJ concluded that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Charging Party had alleged that Respondent Union breached its duty of fair representation by not adequately challenging his employment discharge and by withdrawing his grievance short of arbitration. Following an evidentiary hearing held pursuant to the Commission's Order on Remand, the ALJ concluded that Charging Party failed to establish that the Union had acted arbitrarily or discriminatorily in deciding not to arbitrate his grievance. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. After receiving an extension, Charging Party filed exceptions to the ALJ's conclusions on August 23, 2010, to which the Union did not respond. In his exceptions, Charging Party contends that the ALJ erred in recommending dismissal of his charge. He alleges that the Union breached its duty by not "zealously" challenging his discharge as a violation of the "five strikes" requirement under collective bargaining agreement. He also asserts that the Union "acted arbitrarily and with hostility" in deciding to withdraw his grievance in light of other members' grievances proceeding through arbitration. After careful review of these exceptions, we find them to be without merit.

[1] On November 16, 2009, this Commission remanded this matter to the ALJ to conduct an evidentiary hearing on Maloy's charge filed against the Respondent on July 18, 2008.

Factual Summary:

We accept the ALJ's factual findings and will not repeat them here, except where necessary. In December, 2007, Charging Party was discharged as an employee with Suburban Mobility Authority for Regional Transportation (SMART or Employer) for work performance violations. He alleged the dismissal was contrary to the progressive discipline protocol under the collective bargaining agreement that requires a minimum of "five strikes" to sustain a discharge action. Charging Party asserted that his record contained only three prior reprimands (all from 2005) at the time of his final performance citation and discharge in 2007.

Respondent Union filed and processed a grievance challenging the termination on several grounds including a violation of the progressive discipline system, and as being "excessive" in light of Charging Party's two-year discipline free period between August, 2005 and December, 2007. The Union also attempted to resolve the discharge dispute through mediation and by offering a last chance agreement; however, the Employer rejected these efforts. Subsequently, Respondent chose to withdraw the grievance short of arbitration based on various factors including Charging Party's discipline history, minimum likelihood of success and the expense associated with processing the matter through arbitration.

Charging Party objected and filed an unfair labor practice charge alleging a breach of the duty of fair representation from the Union's "arbitrary, hostile and discriminatory conduct" in handling his discharge grievance. He also alleged that Respondent failed to adequately enforce the collective bargaining agreement. In his pleadings, arguments made at the evidentiary hearing and in his exceptions, Charging Party asserts that the Union acted "arbitrarily", "discriminatorily" with "hostility" in processing his discharge grievance, but otherwise provides little factual support for this contention.

Discussion and Conclusions of Law:

Charging Party alleges that the Union breached its duty of fair representation by not fully challenging his discharge as a violation of the "five strikes" provision of the collective bargaining agreement. He asserts that Union's failure to arbitrate his discharge grievance is tantamount to its acquiesce in the Employer's misconduct at his expense. However, it is well settled that a union's duty is to the membership overall and 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 mere 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. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131, 134. 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 agree with the ALJ that Charging Party provides no basis to support that the Union breached its duty of fair representation in its handling of his discharge grievance. At best, the record reflects Charging Party's discontent with the Union's efforts. To prevail on a breach of duty of fair representation complaint, the allegations must contain more than conclusory statements of

improper representation by a union. *Martin v Shiawassee Co Bd of Comm'rs*, 109 Mich App 32, 35 (1981). Charging Party contends that more should have been done to challenge the alleged discrepancy regarding the number of performance citations on his record at the time of his discharge. He also asserts that the Union failed to adequately represent him by not processing the grievance through arbitration. However, even if Charging Party's contentions were true, we concur with the ALJ that the record before us does not reasonably support a finding that the Union's decisions were arbitrary, biased, discriminatory, or made in bad faith. Conversely, Respondent Union filed and processed the grievance through step 4 and even attempted to settle the discharge dispute with the Employer using other pre-arbitration methods. After reviewing several factors related to proceeding to arbitration, Respondent chose to withdraw the grievance for reasons it believed were meritorious. As such, this Commission will not evaluate whether the Union reached the right conclusion in deciding not to arbitrate Charging Party's grievance. *City of Flint,* 1996 MERC Lab Op 1, 11.

We further reject Charging Party's contention that the Union acted "discriminatorily" and "with hostility" by not arbitrating his grievance when other members' grievances had been successfully arbitrated. As the ALJ correctly indicates, a union may appropriately weigh relevant factors, on a "case by case" basis, to determine the appropriate course of action, so long as its decision is within an acceptable range of reasonableness as to not be irrational. *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35. The mere fact that some grievances are submitted to arbitration will not, by itself, support a claim of breach against a union for not pursuing arbitration on other grievances.

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 dismissed.

ORDER

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

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:

UNITED AUTOMOBILE WORKERS, LOCAL 771,
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-and-

KEVIN (JOHN) MALOY,
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APPEARANCES:

William J. Karges, Associate General Counsel, United Automobile Workers, for Respondent

Earlene R. Baggett-Hayes, for Charging Party

DECISION AND RECOMMENDED ORDER I. OF ADMINISTRATIVE LAW JUDGE ON REMAND

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 on remand at Detroit, Michigan on February 10, 2010, by Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before April 6, 2010, I make the following findings of fact, conclusions of law, and recommended order.[2]

The Unfair Labor Practice Charge and Its History:

On July 18, 2008, Kevin Maloy filed this charge against his collective bargaining representative, United Automobile Workers, Local 771 (the Union), alleging that it violated its duty of fair representation under Section 10(3) of PERA by withdrawing a grievance it filed over his December 7, 2007 termination by the Suburban Mobility Authority for Regional Transportation (the Employer). On this same date, Maloy also filed a charge against the Employer, Case No. C08 G-148, alleging that it wrongfully terminated him.

[2] Respondent argued that Maloy's brief should not be considered because it was filed late. The parties agreed to extend the deadline for filing briefs until April 2, 2010, and Respondent filed its brief on that date. Maloy filed his brief on April 6. However, his attorney stated that she had believed April 2, Good Friday, to be a state holiday. I conclude that under these circumstances Maloy's brief should be considered part of the record.

On July 25, 2008, I ordered Maloy to show cause why his charge against the Union should not be dismissed for failure to state a claim upon which relief could be granted under PERA. I also ordered Maloy to show cause why his charge against the Employer should not be dismissed because it failed to state a claim and because it was untimely filed under Section 16(a) of PERA. Maloy filed a timely response to the order to show cause on August 12, 2008. On August 18, 2008, I issued a decision and recommended order on summary disposition recommending that the Commission dismiss both charges on the grounds that they failed to state claims against the Respondents under PERA. Maloy filed exceptions to my decision and recommended order with the Commission. On November 16, 2009, the Commission issued a decision and order adopting my recommendation that the charge against the Employer be dismissed. However, the Commission concluded that Maloy's charge did state a claim against the Union because it alleged that the Union acted with hostility in deciding to withdraw his grievance. The Commission also noted that Maloy asserted that his discharge violated the collective bargaining agreement because the Employer terminated him with less than the five performance violations required under the collective bargaining agreement. The Commission remanded the case to me to conduct an evidentiary hearing on Maloy's claim against the Union. As noted above, the hearing was held on February 10, 2010.

Findings of Fact:

Maloy began working for the Employer sometime in the mid 1980s. In 2007, he was employed as an assistant bus mechanic at the Employer's Macomb terminal on the midnight shift and was a member of a bargaining unit represented by the Union. On December 7, 2007, Maloy was discharged for substandard work after the two left rear tires on a bus on which Maloy had worked came off while the bus was in service. At the time he was discharged, Maloy had four previous disciplines for substandard work in his personnel file.

The Collective Bargaining Agreement and Work Rules

Article 6 of the collective bargaining agreement between the Union and the Employer contains various provisions relating to discipline. Article 6, Section 2 states:

> Disciplinary action charges on the personnel record of an employee covering tardiness and/or absenteeism shall expire after a period of one year and covering all other infractions after a period of two years from date of offense in the event that no subsequent similar disciplinary action has been charged to such record. . . These periods shall be calendar days but shall exclude sickness and accident or workers' compensation leaves, and shall exclude disability leave, disciplinary suspensions and/or other time off without pay for 30 calendar days or more.

Article 6, Section 2 of the 2007-2010 collective bargaining agreement includes an additional sentence, "For all discipline issued subsequent to the union ratification of the 2007-2010 labor agreement, [the period during which disciplinary actions other than those for tardiness or absenteeism remains on the record] shall be shortened to one year." Maloy was terminated before this contract was ratified in February 2008, although his grievance was still

pending when the contract took effect. The Employer and Union agreed that the shorter period did not apply to Maloy's disciplinary citations because they were all issued prior to the union's ratification of the new contract.

Article 6 does not contain a list of disciplinary offenses or penalties. However, an Employer document, "Work Rules, Polices and Procedures for Maintenance Employees" includes an absence and tardiness policy which provides for progressive discipline for unexcused absences. It also contains a list of the offenses for which an employee is subject to immediate discharge. Substandard work or performance is not specifically mentioned as a disciplinary offense anywhere in the work rules or contract.

Although the work rules provide only for progressive discipline for unexcused absences and the collective bargaining agreement is silent on the issue, the Employer routinely utilizes progressive discipline for other offenses. The usual penalties are: first offense, written warning; second offense, one day working suspension at 90% of pay; third offense, three day working suspension at 80% of pay; fourth offense, five days off with no pay; fifth offense, discharge. The record established, however, that the Employer decides on a case-by case basis what discipline to assess for second or subsequent offenses. The Employer often repeats a step if it decides that the employee's misconduct does not warrant more severe discipline or if the employee is a long-term employee. For example, sometimes the Employer gives employees two successive written warnings in lieu of a suspension, or issues a second five day suspension instead of terminating them for a fifth offense. However, the Employer also sometimes skips a step or steps if it concludes that the employee's misconduct warrants it. For example, as discussed below, a drive shaft fell out of a bus after Maloy and a fellow mechanic, RM, worked on it in July 2005. RM, who had replaced the drive shaft, was terminated for this incident even though he had only one other discipline for substandard work in his personnel file at this time.

Although Article 6 does not require the Employer to follow a strict disciplinary progression, it permits the Union to file a grievance if it concludes that the employee has been treated unjustly. The grievance procedure in the collective bargaining agreement provides for mandatory binding arbitration as the fifth step. The 2007-2010 collective bargaining agreement, which went into effect in February 2008, also provides that after the fourth step answer, the parties may mutually agree to refer a grievance to mediation prior to arbitration. As of the date of the hearing in February 2010, however, the Union and the Employer had not yet mediated a grievance.

Maloy's Disciplinary History

On December 9, 2003, Maloy received a written warning for substandard work for allegedly failing to change a filter on a bus. According to the disciplinary report, Maloy left the filter inside the bus when he put it back in service. Maloy could not remember whether he filed a grievance over this warning.

On June 13, 2005, Maloy was disciplined again for substandard work after a drive shaft fell out of a bus on which he had worked. As noted above, RM, the mechanic who had replaced the drive shaft, was terminated because of this incident. Maloy told the Employer that he had not

worked on the drive shaft. However, when he was asked if he had "done anything" to the drive shaft, he said that he did not know. Maloy was given a one-day working suspension. Maloy testified that he filed a grievance over this discipline. He testified that Andrew Williams, the Union's grievance chairperson, told Maloy that he should not have said that he didn't remember, and that the Union eventually withdrew the grievance.

On July 25, 2005, Maloy received a third citation for substandard work and was given a three day working suspension. Two other mechanics had done repairs to a bus, but had forgotten to initial the maintenance log. Maloy was cited for writing their initials on the log, in violation of a policy prohibiting employees from signing off on each other's work. Maloy admitted doing this, but claimed that it was a common practice. There was no indication in the record that Maloy filed a grievance over this suspension.

In August 2005, Maloy received a fourth citation for substandard work and was given a five day unpaid suspension for failure to record information on his daily report, or "blue card." The work rules explicitly require mechanics to keep track of the time they spend on each task during the work day on their blue card. They must also record the bus' number and the work order number, and write down the code for the task they perform. If the clerk receives a blue card with missing information, it is simply sent back to the employee to complete. In fact, if the employee is not available, the Union steward sometimes completes the card for him and sends it back with a notation that it was completed by the Union. On August 11, Maloy wrote on his blue card that he had spent 6.5 hours changing filters, 1.5 hours cleaning his area, and .5 hours on break. The card, on its face, was complete. However, according to a statement by his supervisor made part of the disciplinary citation, Maloy did not record the repair job he also did that day. The supervisor also asserted that different supervisors had spoken to Maloy on multiple prior occasions about making sure his blue card accurately reflected all the tasks he performed during the day. Maloy filed a grievance or grievances over this discipline. Maloy asserted he should not be disciplined for merely forgetting to write down the other tasks he had performed, and that it was common for mechanics to forget to write things down. Maloy's grievance or grievances were withdrawn by the Union.

If Maloy had not received a citation for substandard work in 2005, his December 9, 2003 disciplinary citation would have been removed from his file in December 2005 per Article 6, Section 2 of the contract. However, each of the three disciplinary citations he received for substandard work in the summer of 2005 reset the two year period. After August 11, 2005, all of Maloy's citations were to remain in his personnel file until August 2007. However, Maloy was on sick and accident leave from April 3, 2006 to October 16, 2006, and again from February 26, 2007 to July 12, 2007. The Employer maintained, and the Union eventually agreed, that under Article 6, Section 2, these leaves extended the period during which Maloy's citations were to remain in his personnel file to sometime in July 2008.

The Union's Alleged Hostility

In the months preceding Maloy's December 2007 termination, the Union and the Employer were negotiating the new contract which became their 2007-2010 collective bargaining agreement. The Employer's proposals included reducing medical benefits. Maloy

was one of a group of employees who spoke out against accepting this proposal during discussions among employees in the shop. At least one Union representative was present when Maloy made negative statements about the proposal. It was not clear from the record what the Union's table position was with respect to this proposal when these shop floor discussions were taking place. Later, however, Maloy heard from other employees that either the Employer or the Employer and the Union were keeping a "blacklist" of employees who had expressed opposition to the proposal. Maloy did not hear this directly from any Union or Employer representative, and the comments he heard from other employees were the only evidence Maloy had that such a list existed. William Costie, Local 771's president, and John Young, the Employer's director of labor relations, denied on the record that there was any such list. The 2007-2010 collective bargaining agreement went into effect in February 2008. It is unclear from the record whether the agreement included the reduced medical benefits the Employer had proposed.

During roughly this same period, some members of the bargaining unit were advocating that Andrew Williams be replaced as grievance chairperson at the next election of union officers. According to Maloy, he agreed that Williams should be replaced. The record did not indicate whether Williams or other Union representatives knew of Maloy's position on this issue.

Maloy's Termination and Grievance

On November 27, 2007, Maloy was assigned to work on the rear brakes of a bus. Maloy worked on the left side of the bus, while another mechanic worked on the right side. The job required Maloy to remove the two left rear tires of the bus and then put them back on using a tire gun. Each tire weighs between four hundred and six hundred pounds. On December 2, several days after Maloy had replaced the tires, the left rear wheels of the bus fell off while the bus was in service. No one was injured, but the bus' rims were damaged and the tires caused some minor damage to private property. Maloy asserted that he was not responsible for the accident because the tire gun he was given by the Employer to tighten the lug nuts was defective, although he did not know it at the time. After the accident with the bus, the Employer tested and then replaced the tire gun Maloy had used. The Employer's policy, however, required mechanics to use a torque wrench on the lug nuts after using the tire gun.[3] Maloy admitted that he knew that he was supposed to use the torque wrench, but stated that he forgot to do so. Maloy testified at the hearing that it was common for mechanics not to use the torque wrench and that while the torque wrench might have alerted him to the fact that the tire gun was defective, even torque wrenches are sometimes defective.

On December 7, 2007, Maloy was terminated. His termination notice stated that wheels had fallen off a bus because Maloy failed to properly tighten the lug nuts, and that Maloy's negligence had endangered the public's safety and damaged the rims of the bus and some private property. The notice stated that as it was Maloy's fifth violation for substandard work performance, his employment was terminated immediately.

[3] Rick Carney, the Union's grievance chairperson, confirmed the existence of the policy, although he testified that no one regularly checked on mechanics to see if they were using the torque wrench. He also testified that the policy applied only to the Employer's employees, and that a "tire man" who worked for Firestone in the shop never used the torque wrench.

On December 13, 2007, Maloy filed a grievance over his termination. Maloy testified that he spoke with William Costie, then Local 771 vice-president, who told him not to worry and that he would be back to work in a few days. Maloy testified that between December 2007 and May 2008 he called Costie at the union hall several times to check on the status of the grievance. Each time he was able to speak to Costie, but Costie simply told him to "hang in there," that Costie was working on it. Costie first testified that he handles grievances at the fourth step of the grievance procedure and above, that the grievance was investigated and handled at the lower steps by the Union's bargaining committee, and that he never spoke to Maloy about his grievance before it reached the fourth step. Later during the hearing, however, Costie testified that he spoke to Maloy five or six times before May 2008. Costie also testified that he would never tell a terminated employee that he would be back to work in a few days. I find, for reasons discussed below, that whether Costie told Maloy that he would soon be back to work to be immaterial to the decision in this case.

At some point after Maloy's grievance was filed, Young, then employed as labor relations specialist, reviewed Maloy's previous disciplinary citations and the dates of Maloy's leaves of absence to determine whether any of these citations had expired. He concluded that Maloy would have had to have worked until July 4, 2008 for the previous citations to clear. Young concluded, therefore, that the Employer had not violated Article 6, Section 2 by relying on Maloy's previous citations to support its decision to terminate him.

On December 19, 2007, the Employer denied the grievance at the third step of the grievance procedure. The grievance answer stated that Maloy's failure to "torque the wheel," coupled with his previous history, justified his termination. On December 26, the Union moved the grievance to the fourth step.

The Union and the Employer held a step four meeting on January 30, 2008 to discuss Maloy's and other grievances. Costie represented the Union at this meeting. Costie testified that the main problems with Maloy's case from the Union's perspective were that the tires had come off the wheel, which was a serious event, and that Maloy had admitted that he had not used a torque wrench. Costie testified that, prior to this meeting, the Union's bargaining committee confirmed to him that mechanics were supposed to use a torque wrench. He stated that in light of this fact he did not think that it mattered much whether the tire gun had been defective. According to the grievance answer, however, the Union argued at this meeting that a defective tire gun may have been responsible for the bus accident. The Union asked the Employer to consider Maloy's long work history and return Maloy to work without back pay on a last chance agreement. Costie testified that he also asked why Maloy was being terminated when his last citation for substandard work was over two years old, and that the Employer explained how it had calculated the effect of Maloy's leaves of absences.

The Employer denied Maloy's grievance in writing in a memo dated February 20, 2008. The answer stated that Maloy admitted that he had not used a "torque gun" [sic], that Maloy's negligence damaged private property and put the public's safety in jeopardy, and that Maloy had been warned several times before about substandard performance.

On February 26, 2008, Costie made a written request that Maloy's grievance go to mediation. As discussed above, the 2007-2010 collective bargaining agreement, which had just been ratified, added mediation as a step in the grievance procedure if the Employer and Union mutually agreed to it. On March 6, Young sent Costie a memo stating that the Employer would not agree to a compromise settlement on Maloy's grievance and, therefore, would not agree to mediate it.

In early April 2008, Costie talked to Maloy and told him he needed more information. Maloy told Costie about RM and how Maloy had been disciplined for the drive shaft incident even though he was not responsible. Either Costie or Maloy then called RM, who gave Costie a written statement stating that he, RM, was responsible for the drive shaft accident. Maloy also told Costie that he had filed a grievance over this discipline. On April 11, Costie wrote to the Employer as follows:

> Mr. Kevin Malloy [sic], this grievance won't go away, there is some mix up in a previous grievance. So I have to asked [sic] formally to reconsider Mr. Malloy, he is a long time employee, and there was a period of over two years between write ups. I would like to settle this one. If not I am asking for any names of arbitrators you are willing to use.

On April 14, Costie called Young and told him about RM's statement, and that Maloy claimed that this violation had been grieved. On April 15, Young sent Costie a memo stating that the Employer's records showed only two grievances filed over Maloy's previous citations for substandard work. Both of these grievances, according to the Employer's records, were filed over Maloy's August 11, 2005 suspension for failing to properly fill out his blue card. Young noted that the Union did not demand arbitration for either of these grievances or for any other grievance involving Maloy's discipline. Young stated again that the Employer was not interested in a compromise settlement, and told Costie to advise him if he wanted to move Maloy's grievance to arbitration.

On May 27, 2008, Costie sent Maloy a letter stating that his grievance was being withdrawn. The letter did not provide an explanation for this decision. Maloy appealed this decision through the Union's internal procedures. As part of this appeal, the Union held a meeting of the bargaining unit to vote on whether Maloy had grounds for appeal. The unit voted in favor of Maloy's appeal. In accord with UAW procedures, Maloy's appeal then went to the Local Union's executive board. It was not clear from the record what ultimately happened to Maloy's internal union appeal, but Maloy's grievance was not arbitrated.

Maloy testified that he knew of at least two cases where the Union arbitrated grievances involving employee terminations. According to Maloy, in one of these cases the employee was fired after making a threatening statement about President Obama and in the other the employee was terminated for fighting. The Union's current grievance chairperson, Rick Carney, testified that the Union was arbitrating fewer grievances than it had in the past because of the cost of arbitration.

Discussion and Conclusions of Law:

A union representing public employees in Michigan owes its members a duty of fair representation under Section 10(3) (a) (i) of PERA. The union's 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). Because the union has a duty to represent the bargaining unit as a whole, it has considerable discretion in deciding how to handle a grievance, including the discretion to decide which grievances should be arbitrated and which settled or withdrawn. An individual member does not have a right to demand that a grievance be taken to arbitration. Rather, the union has the latitude to investigate claimed grievances and assess their individual merit. The union is permitted, in deciding whether to proceed with a grievance, to weigh the burden upon the contractual grievance machinery, the amount at stake, the likelihood of success, the cost, and the desirability of winning the award. *Lowe* v *Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973). A union's actions are not "arbitrary" unless they "reflect reckless disregard for the rights of the individual employee." *Goolsby*, at 679. A union satisfies its duty of fair representation as long as it exercises its discretion in good faith and without discrimination and its decision is within the "range of reasonableness." *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991).

When a member's claim of unfair representation is based on the allegation that the union violated its duty of fair representation by refusing to arbitrate a grievance, the member must also establish that the employer breached the collective bargaining agreement. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 181 (1992); *Knoke v East Jackson Public School Dist*, 201 Mich App 480, 488 (1993).

Maloy asserts that the Union deliberately mishandled his grievance and withdrew it short of arbitration because of its hostility toward him. I conclude that Maloy did not establish that the Union bore personal animosity or was hostile toward him. At the time of Maloy's termination, the Union and the Employer were negotiating a new collective bargaining agreement and the Employer had proposed that the agreement include reduced medical benefits. The Union was aware that Maloy was among a group of members who expressed opposition to this proposal. Maloy was also among a group of members opposed to the reelection of the current grievance chairperson, although it was not clear whether the Union was aware of this fact. However, there was no credible evidence that Union representatives were hostile to Maloy because he had taken these positions.[4] Maloy heard from other employees that the Employer and/or the Union were keeping a "blacklist" of employees who opposed the Employer's contract proposals. However, both Costie, the Union president, and Young, the Employer's labor relations director, denied that this list existed, and Maloy had no evidence other than rumor that there was such a list.

[4] On December 7, 2007, Maloy was called to a meeting in the Employer's office and told he was terminated. Andrew Williams, the Union grievance chairperson, accompanied him to the meeting. As they were preparing to go into the meeting, Williams said to Maloy, "You better watch yourself, they are coming after you." Maloy interpreted Williams as warning him against both the Union and the Employer. However, in context, it is clear that Williams was merely warning Maloy that the Employer wanted to fire him because of the tire incident.

Maloy also asserts that the Union's failure to perform a good faith investigation of the facts underlying his discharge constituted arbitrary conduct. In his brief, Maloy argues that it was never established why on December 2, 2007 the tires came off a bus on which he had worked five days before, and that the Union should have investigated this issue. However, Maloy never asserted that there was any doubt that he was the last mechanic to work on the wheels before the accident. Maloy also argues that the Union negligently failed to investigate whether the tire gun he used was defective. Costie testified, however, that he concluded that whether the gun was defective was irrelevant in light of the fact that Maloy had not used a torque wrench on the lug nuts after replacing the tires with the tire gun. That is, Maloy admitted that he failed to follow the procedure set up by the Employer to make sure that the lug nuts were properly tightened in the event that the gun failed to do its job. I conclude that the Union did not fail to investigate the facts underlying Maloy's discharge and that its conduct in this respect was not arbitrary as that term is defined by the case law.

Maloy also argues that the Union arbitrarily or discriminatorily failed to argue to the Employer that the Employer applied its progressive discipline system inconsistently when it discharged him. There were four prior disciplinary citations in his Maloy's personnel file when he was terminated. Whether or not the penalties in these citations were appropriate, the Employer was entitled to rely on them since the Union had not pursued grievances over them when they were issued. Moreover, neither the collective bargaining agreement nor past practice prohibited the Employer from discharging an employee for substandard work before he accumulated five disciplinary citations for the same offense. To the contrary, the record established that the Employer decided what discipline to impose for an offense on a case by case basis, based on the seriousness of the misconduct and the employee's length of employment. Here, the Union argued to the Employer that because of Maloy's seniority, he should be offered a last chance agreement in lieu of discharge. It also asked the Employer to mediate the grievance. The Employer, however, refused to consider any settlement in Maloy's case.

In addition, Maloy argues that Costie fraudulently induced Maloy to wait to file this action by telling him, soon after the grievance was filed, that he would be back to work in a few days. However, when Costie allegedly made this statement, Maloy had no claim against the Union since it was actively pursing his grievance. Even if Costie's statement caused Maloy to refrain from filing a charge immediately after he was terminated, Maloy suffered no harm thereby.

Finally, Maloy argues that the Union's refusal to arbitrate his grievance was arbitrary. He also argues that since the Union has successfully arbitrated the termination of other employees, its refusal to take his grievance to arbitration was discriminatory. As discussed above, however, a union has the discretion to consider factors such as the cost of arbitrating the grievance and the likelihood that the arbitrator would rule in its favor; as long as its decision is within the range of reasonableness, it does not breach its duty of fair representation. Here, the Union could reasonably conclude that an arbitrator was not likely to find Maloy's termination to be a breach of the collective bargaining agreement. Maloy had four previous disciplinary citations for substandard work in his file when the incident with the tires occurred. Moreover, the contract did not prohibit the Employer from terminating an employee with fewer than five citations. Maloy

admittedly failed to follow an Employer rule requiring him to use a torque wrench after using a tire gun. As Costie explained, Maloy's failure to follow the rule had serious consequences in this case. An accident occurred which could have caused serious injury or damage to property. In addition, this was not Maloy's first discipline for substandard work; his work history contained several citations suggesting that he had a propensity to cut corners while doing his work. Based on these facts, the Union concluded that the likelihood of a successful outcome did not justify the cost of arbitration. I conclude that Maloy has not established that the Union's refusal to arbitrate was arbitrary or discriminatory. I conclude, for the reasons set forth above, that the Union did not violate its duty of fair representation toward Maloy. 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

Dated: _____