STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 517M,
Labor Organization-Respondent,

Case No. CU10 C-008

-and-

LUANNE SWIFTNEY,
An Individual-Charging Party.
_____/

APPEARANCES:

Howard F. Gordon, Staff Counsel, SEIU Local 517M, for Respondent

Luanne Swiftney, *In Propria Persona*

DECISION AND ORDER

On June 15, 2011, Administrative Law Judge Julia 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

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 517M,
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APPEARANCES:

Howard F. Gordon, staff counsel, SEIU Local 517M, appearing for Respondent

Luanne Swiftney, appearing for herself

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

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 at Lansing, Michigan on October 10, 2010, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Charging Party on November 10, 2010, I make the following findings of fact, conclusions of law, and recommended order.[1]

The Unfair Labor Practice Charge:

Luanne Swiftney filed this charge against her collective bargaining agent, the Service Employees International Union (SEIU) Local 517M, on March 8, 2010. The charge was amended on April 12, 2010. Swiftney alleges that Respondent violated its duty of fair representation under Section 10(3) of PERA by failing or refusing to assist her in retaining or regaining her job after she was terminated by the Grand Haven Public Schools (the Employer) on or about December 22, 2009. Swiftney alleges that Respondent's actions, including its decision not to take her grievance to arbitration, were arbitrary. She also maintains that Respondent did not represent her in good faith because, shortly before her termination, she complained to the

[1] Since Respondent's post-hearing brief was filed after the due date, and Swiftney objected to its consideration, Respondent's brief is not part of the record in this case.

Employer about the conduct of another employee who was a friend of Charging Party's local president.

Findings of Fact:

Swiftney was hired by the Employer as a school custodian in about 1986 and was part of a bargaining unit represented by the Respondent. At the time of her termination, Swiftney was assigned to clean an elementary school between the hours of 4:00 and 11:00 pm. Swiftney had a work partner, but worked without direct supervision.

The Employer has had surveillance cameras installed in its school buildings for purposes of security for several years. When the Employer first proposed installing the cameras, it promised Respondent that it would not look at the footage from the cameras to monitor employees unless, as Respondent local president Raymond Clover testified, it had "a reason to look or somebody gives [it] a reason to look." Respondent was satisfied with this response, and Clover told his members that the cameras could be used to monitor their work in case of complaints.

At the school where Swiftney was assigned, cameras monitored the exits and entrances to the school. There was also a camera in a hallway outside the staff break room. Persons entering and exiting the break room through the door from that hallway were captured by that camera. The break room also had a second door that was not monitored by a camera. This door led to the school's gym and kitchen areas.

On April 30, 2008, Swiftney was issued a written warning, a two day suspension, and had her pay docked by eleven hours for the improper use of sick and break time and for leaving work early without notification. The discipline was based, in large part, on footage from the surveillance camera outside the break room. From the camera, the Employer could see the exact hour and minute when Swiftney entered the break room through the monitored door and exited it again through that door. In 2008, the Employer looked at the footage from the camera over a ten day period and concluded that Swiftney had spent more than her allotted break time in the break room on five of the ten days. The excess time she allegedly spent in the break room ranged from thirty-seven minutes on one day to two hours and forty-five minutes on another. When confronted with this evidence, Swiftney did not deny that she had been in the break room during these periods. Instead, she told the Employer that she was taking strong pain medication for a chronic back injury, had hurried to complete her work before the medication wore off, and then sat for the rest of her shift in the break room. No grievance was filed challenging this warning/suspension.

After Swiftney was disciplined in 2008, she asked her supervisor, Operations Director Ted Rescorla, to confirm that the areas of the school to which she was assigned had been cleaned properly. Swiftney testified without contradiction that no one, including Rescorla, had brought complaints about the quality of her work to her attention prior to her termination.

On August 25, 2009, Swiftney complained to Rescorla that the custodian assigned to the day shift at her school was making crude remarks and gestures of a sexual nature. The next day,

Swiftney went to her building principal with the same complaint and asked him to speak to the other custodian. Swiftney did not file a formal complaint, did not mention the issue again, and did not hear anything more about the matter. Clover, however, testified that the other custodian told him that Swiftney had complained about him. Swiftney testified that this custodian and Clover were friends and socialized outside of work. According to Clover, he and this custodian were not personal friends, although Clover admitted that he had been twice to the custodian's home.

On December 15, 2009, Rescorla came to Clover and told him that there was an issue with Swiftney's misuse of break time and that the Employer intended to terminate her. Rescorla told Clover that he had looked at footage from the surveillance camera on seven random days and that, according to the camera outside the break room, Swiftney had spent an excessive amount of time in the break room on all of these days. Clover testified that Rescorla also told him that Swiftney's building principal had mentioned that Swiftney and her work partner were often in the break room when he came to the building in the evening, although Clover was not sure whether Rescorla told him this on December 15 or after Swiftney was terminated. Rescorla brought up Swiftney's 2008 discipline and told Clover that he had other discussions with her about her taking excessive breaks. Clover did not believe that Rescorla had acted improperly by looking at footage from the camera, but tried to persuade him to give Swiftney another suspension. Rescorla agreed, but later that day told Clover that he had changed his mind.

Swiftney received an email directing her to come to a meeting with the Employer on the morning of December 17, 2009. When she arrived, Clover and Swiftney's union steward, Dianne VanTol, were both there, along with Rescorla and the Employer's assistant superintendent for human services, John Thatcher. Before the meeting started, Swiftney gave Rescorla a card indicating that she was scheduled to have back surgery on January 18. Thatcher and Rescorla handed Swiftney a letter signed by Rescorla. The letter stated:

> Recent complaints about your use of break time and the cleaning of your area have come to my attention. I had investigated the complaints and found that you have disregarded the 15-minute break time rule on several days while you are at work, which leads to the improper cleaning of your assigned area. The following dates and time have been recorded regarding the misuse of your break time…

The letter then listed times Swiftney had been observed on camera entering and exiting the break room through the door monitored by a camera on seven dates within a three week period from late November to early December. For some of these dates, the letter also included times Swiftney had exited and then reentered the building during the course of her shift. On all the dates listed, the cumulative time Swiftney appeared to have spent in the break room or outside the building substantially exceeded her allotted break time. The letter stated that Swiftney's misuse of break time was unacceptable and referenced her previous discipline for this issue.

Clover did not say anything during this meeting. Swiftney began the meeting by asking Rescorla and Thatcher who had made complaints about her. She said that no one had come to her with any complaints about her work. Thatcher and Rescorla said that they did not know who had

complained, but that the building principal had brought the complaints to Thatcher's attention and that was why Rescorla had looked at the surveillance camera. VanTol stated that Swiftney ought to be allowed to confront her accusers. Thatcher replied that complaints about her cleaning were not the issue, that the important thing was Swiftney's misuse of time. There was some discussion between Swiftney and Thatcher and Rescorla about Swiftney's back problems. Clover and Swiftney, who were the only persons present at the meeting to testify at the hearing, had different recollections of this conversation. According to Swiftney, she admitted that she sometimes went into the break room and sat for short periods with an ice pack on her back. However, Swiftney also testified that she said that she did not think that she had spent as much time in the break room as the camera seemed to show, and that she also pointed out that cleaning the break room was part of her job. Clover's impression was that Swiftney admitted to being in the break room during the times noted in the letter. As Clover recalled it, Swiftney said that because of her medical problems she could not remain at her duties all the time and had to go in the break room and rest. Clover also testified that Thatcher asked Swiftney why she hadn't requested time off if she had medical problems, and that Swiftney did not have a response to this. After this discussion, Thatcher told Swiftney that since she was a long time employee, he would give her the choice to resign rather than being terminated and the Employer would not contest her claim to unemployment benefits. Thatcher told Swiftney that he would give her a day or so to think over whether she wanted to resign.

After the meeting with the Employer ended, Clover, VanTol and Swiftney went into a small conference room. According to Clover, he told Swiftney that it was hard to dispute what was on film. He said that, without something to explain the times on the camera, Respondent did not have anything to go on for a grievance. Clover testified that he also asked Swiftney "if she had some way that they could dispute it." According to Swiftney, Clover told her that as far as a grievance went, they did not have a leg to stand on because of the surveillance tapes. She denied that Clover asked her anything. Clover said that it was Swiftney's choice to resign or not, but that if she did resign Respondent could not file a grievance. Swiftney told Clover that she would call him with her decision. Swiftney did not say anything else during this brief meeting.

The next day, December 18, Thatcher called Swiftney and asked her whether she had decided to resign. Swiftney said that she would give Thatcher the answer when she came to his office later that afternoon to pick up copies of documents from her personnel file. After picking up the documents, Swiftney told Thatcher that she was not quitting. When Thatcher turned to leave, Swiftney said that since she was not quitting, she had better go to work. Thatcher then said loudly that she was terminated and should leave.

On or about December 21, VanTol filed a grievance alleging that Swiftney was terminated without just cause. Swiftney wanted VanTol to cite a section of the contract prohibiting the Employer from giving an employee a notice of discharge or of discipline resulting in loss of pay unless a steward is present; she felt that Thatcher violated this provision when he told her on December 18 that she was terminated. VanTol said that this was unnecessary. On December 22, 2009, Thatcher sent Swiftney a letter stating that she was discharged for inappropriate use of break time.

On January 4, 2010, Swiftney sent Clover a letter stating that she wanted her grievance processed through all the steps and to be informed in writing of the outcome at each step. A first or second step meeting was held on Swiftney's grievance on January 5. Swiftney attended this meeting along with Clover and VanTol. There was no testimony regarding what was said at this meeting, except that there was no discussion of the second door to the break room or whether Swiftney might have been using this door to leave and reenter the break room. Swiftney brought with her to that meeting a grievance she had written on a piece of paper citing the section of the contract requiring a steward to be present when an employee was given a notice of discipline or discharge. After that meeting ended, Swiftney handed her grievance to Rescorla. On January 7, the Employer provided a written answer which denied both the grievance filed by Respondent and the grievance filed by Swiftney. The Employer's answer to Respondent's grievance was simply that Swiftney had been afforded due process and that termination was appropriate because of her previous discipline for the same infraction.

After the second step, responsibility for Swiftney's grievance passed to Jim Kehoe, Respondent's region two coordinator. A third step meeting was scheduled for January 27. On or about January 26, Swiftney spoke to Kehoe for the first time. They also spoke again the next day. Swiftney told Kehoe that it was her understanding that there was a verbal agreement that the Employer would not use the cameras to watch employees unless there was a complaint about their work. Kehoe said he would check into this. They also went over the times listed in her termination letter together. Swiftney told Kehoe that she was not taking extended breaks and that she had not been in the break room for all the time suggested by the termination letter. She said that she regularly went through the break room and exited through the door not covered by the surveillance camera to check on and clean the areas through that door, including the gym, kitchen and bathrooms. Swiftney told Kehoe that although she was not responsible for cleaning these areas, she checked to make sure the doors to the outside had not been propped open and the doors on the refrigerators and freezers were shut, and that she also checked on the gym and bathrooms. She said that if she saw trash that had not been picked up or something else that needed to be cleaned, she took care of this before coming back to the break room through the rear door and exiting it again past the surveillance camera.

Swiftney decided not to attend the third step meeting on her grievance. At the third step meeting, Kehoe told Thatcher what Swiftney had said about leaving the break room by the other exit. Thatcher replied that Swiftney had not said anything about this at the meeting on December 17, but had said instead that she had problems with her back and legs and sometimes needed to rest. Thatcher also said that Swiftney did not have her cleaning cart with her when she was shown on camera entering and exiting the break room; Kehoe replied that Swiftney had told him that there were cleaning supplies in the rear of the building.

After this meeting, Kehoe asked for and obtained a copy of the disc from the surveillance cameras. This disc confirmed what Thatcher had said about the cleaning cart. He also asked VanTol and Clover whether Swiftney had admitted in the December 17 meeting that she was taking long breaks, and they told him that they believed she had. They also told Kehoe that Swiftney felt that this did not matter as long as her area was cleaned. Finally, Kehoe asked Swiftney if she had admitted at the December 17 meeting that she had been taking long breaks. According to Kehoe, Swiftney simply said that she had not been given time to think of answers

to the Employer's questions at the December 17 meeting and that it was not fair that she had not been given time to prepare.

In the Employer's third step answer, dated January 28, 2010, Thatcher noted that the areas behind the break room were areas assigned to the day custodian and not to Swiftney. He also said that when he asked Swiftney on December 17 about the time she was spending in the break room, she talked about her back problems, but did not tell him that she had left the break room by another door to go to work. Thatcher stated that, in any case, the camera also showed Swiftney carrying knitting and other personal effects into the break room. He also noted that Swiftney had not previously brought it to his attention that she had an issue with her back.

On February 12, Swiftney wrote a letter to Thatcher in which she asked him about the purpose of the school's surveillance cameras. In a reply dated February 19 and received by Swiftney the next day, Thatcher wrote:

> While the cameras are primarily for the safety and security of our properties, there is a verbal agreement with the union that we have the right to review the cameras' tapes for the purpose of monitoring the work of our employees and/or assisting with staff disciplinary issues. This only occurs when there are complaints about the quality of work.

On February 19, 2010, Swiftney participated in a telephone conference with Kehoe and Respondent's region two grievance committee. During this conference, Swiftney told the committee members what she had said to Kehoe about exiting the break room through the other door and working in the gym and kitchen area. The committee members asked Swiftney questions and she answered them. The committee discussed whether disciplining Swiftney for taking extended breaks was proper if Swiftney's area was adequately cleaned and whether the Employer's use of the surveillance cameras was proper.

On February 22, Kehoe sent Swiftney a letter indicating that the committee had voted to deny her request to proceed to arbitration on the grounds that its review determined that the union would be unable to prevail based on a just cause standard for discipline. Thereafter, Swiftney had a conversation with Kehoe in which he told her that the main reason for the denial was that she had failed to provide an explanation for the times in question at the December 17 meeting.

Respondent asked the Employer for an extension of time to file its arbitration demand so that Swiftney could appeal, and this was granted. Swiftney then filed an internal union appeal of Respondent's decision not to proceed to arbitration. Her internal appeal was denied on March 24, 2010.

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 EA*, 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 as long as it acts in good faith and without discrimination. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729.

"Bad faith" indicates an intentional act or omission undertaken by the union dishonestly or fraudulently. *Goolsby* at 679. A union acts in "bad faith" when it "acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Merritt v International Ass'n of Machinists and Aerospace Workers,* 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass'n-Int'l*, 156 F3d 120, 126 (CA 2, 1998). "Arbitrary" conduct encompasses: (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682. For example, in *Goolsby,* a union's unexplained failure to take a grievance which it had previously concluded to have merit to the next step of the grievance procedure was held to constitute arbitrary conduct and to violate its duty of fair representation. However, a union's good faith decision not to proceed with a grievance is not arbitrary if its decision falls within a broad range of reasonableness. *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35, *citing Air Line Pilots Ass'n 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*

Swiftney was discharged for taking excessive breaks. Respondent's grievance committee assessed the merits of her grievance and decided not to take her grievance to arbitration because it was unlikely to succeed. The committee considered, and rejected, Swiftney's argument that the discharge was unjust because she had not received any complaints about her cleaning. It concluded that the misuse of time was by itself just cause for discharge and that the use of the surveillance cameras did not provide a defense. It also considered Swiftney's claim that she was, in fact, working during at least some of the time she appeared to be taking a break. This defense would not succeed unless an arbitrator accepted Swiftney's testimony, since there was no other evidence to either support or contradict her claim that she had been exiting and entering the break room through the unmonitored door. The committee concluded that this defense was not likely to be successful, in part, because the failure to raise the issue before the third step raised serious questions about Swiftney's credibility. There is no indication that the grievance committee's decision was colored by hostility toward Swiftney or other improper motive. I find that the decision of the grievance committee not to arbitrate Swiftney's grievance was not arbitrary or made in bad faith and that the committee did not breach Respondent's legal duty of fair representation.

Swiftney also complains that Respondent failed to properly represent her at the early stages of her dispute. Specifically, she argues that Clover was negligent in failing to speak on her behalf at the December 17 meeting and in failing to investigate her grievance. Swiftney asserts that she expected Clover to interview her as part of an investigation, and that this was why she did not tell him that she had been using the second door to the break room. Swiftney also maintains that Clover failed to actively represent her because he resented her complaining about his friend, the day custodian. As noted above, a union has broad discretion to decide how best to proceed with the representation of its member in a given case. It is not the role of the Commission or the courts to second guess a union representative's decisions about whether or not to speak at an investigatory interview or how to gather the facts surrounding a grievance. In this case, Clover elected not to speak at the December 17 meeting. However, Respondent representative VanTol was also present and played an appropriate role. After the meeting, VanTol filed a grievance challenging Swiftney's termination. According to Clover, he did not conduct an investigation into the circumstances of Swiftney's termination after December 17 because he thought he already knew the facts. That is, Clover understood Swiftney to have admitted at the December 17 meeting with the Employer that she was using work time to rest her back. Since Swiftney did not tell him or VanTol that she had been exiting and entering the break room through the other door to work in the back area, it did not occur to him that she might have a claim that she was working at least some of the time that she was accused of misusing.

Even if Clover and VanTol acted based on a misunderstanding of what Swiftney said at the December 17 investigatory interview, Swiftney bears some of the responsibility for failing to clear up this misunderstanding in a timely manner. I find that Clover and VanTol's representation of Swiftney was not so inept that it showed indifference to Swiftney's interests, that they were not guilty of gross negligence, and that they did not act impulsively or irrationally. I conclude that the evidence does not demonstrate that Clover and VanTol acted arbitrarily in handling Swiftney's termination dispute. I also find that the evidence is not sufficient to establish that Clover deliberately mishandled Swiftney's termination case because she had earlier complained about the day custodian with whom he was friendly. I conclude that Clover and VanTol's representation of Swiftney did not breach Respondent's duty of fair representation. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____