

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 324,
Labor Organization-Respondent,

Case No. CU10 E-019

-and-

CYNTHIA A. BIMBERG,
An Individual-Charging Party.

APPEARANCES:

William Howard and Dan Ringo, for Respondent

Cynthia A. Bimberg, *In Propria Persona*

DECISION AND ORDER

On June 21, 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

Nino E. Green, Commission Member

Christine A. Derdarian, Commission Member

Dated: _____

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

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CYNTHIA A. BIMBERG,
An Individual-Charging Party.

APPEARANCES:

William Howard and Dan Ringo, for Respondent

Cynthia A. Bimberg, representing 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 Detroit, Michigan on January 12, 2011, 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 January 17, 2011, I make the following findings of fact and conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Cynthia A. Bimberg filed this charge against her former collective bargaining agent, the International Union of Operating Engineers, Local 324, on May 4, 2010. The charge was amended on July 1, 2010. Bimberg worked for the Elkton-Pigeon-Bay Port-Laker School District (the Employer) until she resigned on December 18, 2009 after being informed that she was about to be terminated for failing to return from a leave of absence that day. Bimberg alleges that Respondent violated its duty of fair representation toward her under Section 10(3) of PERA. Bimberg claims, first, that Respondent arbitrarily or in bad faith refused to support her position that her leave did not expire until January 4, 2010. Second, she asserts that Respondent arbitrarily failed to help her obtain

an extension of her leave. Third, she maintains that William Howard, Respondent's business agent, induced her to resign by telling her, falsely, that she would lose her pension if she was terminated. Finally, she asserts that Respondent unreasonably and wrongfully refused to file a grievance on her behalf after she attempted to rescind her resignation.

Findings of Fact:

Bimberg was hired by the Employer as a bus driver in 1996 and was a member of a bargaining unit represented by the Respondent. In June 2008, Bimberg's husband was diagnosed with cancer. Sometime that fall, Bimberg asked for an extended leave of absence because her husband was going to undergo experimental treatment at a hospital in Texas and she needed to accompany him. In addition to providing paid sick time, the collective bargaining agreement between Respondent and the Employer in effect in December 2008 gave unit members the right to a leave of absence without pay for a *personal* illness "for such time as necessary for complete recovery from such illness." The contract also provided for unpaid child care leave for up to one year, and for unpaid leaves of absence for other nonspecific "bonafide" reasons not to exceed ten days. The agreement did not specifically provide for unpaid leaves to care for ill family members. Bimberg was not eligible for unpaid leave to care for her husband under the Family Medical Leave Act (FMLA) because she did not work enough hours annually to be covered by the FMLA.¹ As discussed below, although Bimberg did not have a legal or contractual right to an extended leave of absence to care for her husband, the Employer agreed to allow Bimberg to take a leave.

Bimberg testified on her own behalf at the hearing and did not call any witnesses. Respondent's only witness was Business Representative William Howard. Howard did not become involved in Bimberg's case until sometime in September or October 2009 and had no personal knowledge of events taking place before that time. However, Howard testified without objection from Bimberg as to what Respondent stewards Carol Suttkus and Dawn Urick told him about her leave agreement. Respondent also produced copies of two letters of agreement and a memo purporting to memorialize agreements between Suttkus and the Employer regarding Bimberg's leave. Although Bimberg testified that she never saw any of these documents, they were admitted on Howard's testimony that copies of these documents were in Respondent's files.

According to Respondent, on November 12, 2008, Smith and Suttkus signed the following letter of agreement (LOA):

It is hereby agreed by and between the Elkton-Pigeon-Bay Port-Lake Schools Board of Education and the International Union of Operating Engineers Local 547 as follows:

¹ The Family Medical Leave Act (FMLA), 29 USC 2601 et seq, requires covered employers to provide up to twelve weeks of leave per year to eligible employees to care for covered family members with serious medical conditions. The leave need not be paid, but the employer is required to continue the employee's medical coverage. Employees who work less than 1,250 hours per year, however, are not eligible for FMLA leave.

1. This Letter of Agreement is the full and complete resolution to the Cindy Bimberg request for an unpaid leave to attend to her spouse's emergency medical needs commencing January 5, 2009 and expiring on the last student day of the 2008-2009 school year.
2. The payment of any fringe benefit and the accrual of any rights of benefits [sic] shall cease with the exhaustion of paid sick time.
3. Seniority shall be retained, but will not accrue during the unpaid leave.
4. This constitutes the entire understanding of the parties. This Letter of Agreement shall not be precedent setting.

On December 18, 2008, Bimberg met with Smith, Suttkus and Urick to discuss Bimberg's leave of absence. Respondent introduced a copy of a document otherwise identical to the November 12 LOA that was apparently signed and dated by Suttkus, Smith and Bimberg on December 18, 2008. According to Howard, Bimberg was given a copy of this document after she signed it at the meeting. Bimberg adamantly denied signing the document produced by Respondent and asserted that she had never seen it. She admitted that the signature on this document looked like hers, but maintained that her signature must have been added to the document when the original was copied.

Bimberg testified that an agreement was reached at the December 18 meeting to grant her a leave of absence for one year. According to Bimberg, the leave was to start on the first school day after the Christmas break in the 2008-2009 school year and end on the first school day after the Christmas break the following year, which was January 4, 2010. Bimberg testified that "the original agreement" had her returning in December 2009, but that her return date was changed during the meeting to January 4, 2010. She testified that she, Smith and either Suttkus or Urick signed an agreement with these terms at the meeting on December 18 meeting. According to Bimberg, she also signed a separate document stating that she would not receive health or life insurance benefits during her leave. Bimberg, however, did not have a copy of the documents she signed. According to Bimberg, Smith did not give her or the stewards copies of the documents when they were signed. She testified that Suttkus later told her that she (Suttkus) had obtained copies, but Bimberg never received copies.

Bimberg's last scheduled day of work was Friday, December 19, 2008. However, since school was closed due to a snow emergency on that day, her last day actually worked was December 18. Throughout the remainder of the 2008-2009 school year, Bimberg cared for her husband and accompanied him on trips back and forth to Texas for treatment. Per her agreement with Smith, she telephoned her supervisor, Dawn Rosenthal, every few weeks to keep Rosenthal updated on her husband's status. According to Bimberg, in these conversations Rosenthal referred to Bimberg's return to work date as January 4. Bimberg also testified that Suttkus told her that she was on leave until January 4.

On May 5, 2009, Bimberg met with Smith and Rosenthal to discuss returning early from her leave of absence. Bimberg told them that she wanted to come back to work because she was afraid that she might need another leave of absence after January 2010. Bimberg testified that they told her

that she could not work for the remainder of the school year or during the summer because she was on a leave of absence. However, according to Bimberg, Smith assured her that she would get an extension of her leave in January if she needed it.

The third document introduced by Respondent at the hearing was a memo from Smith to Suttkus dated May 27, 2009. The memo read:

This Thursday morning, I met with you and Dawn Urick to discuss extending Cindy's medical leave. As you recall, we signed a letter of agreement on November 12, 2008 to grant her a leave of absence until the last student day of the 2008-2009 school year.

Although it is not clearly outlined in the current contract and, in fact, there is no option for unpaid leave, I agreed that the new contract that is nearly completed and we would extend a year's leave of absence in accord with the new language. [sic]² Since Cindy's last day of work was December 18, 2008, it was agreed that she had to return by December 18, 2009, the day before the upcoming Christmas break.

Hopefully Ken will respond positively to treatment and fully recover and Cindy will return to work on December 18, 2009. Thanks for helping to resolve these matters in an appropriate manner.

According to Howard, Suttkus mailed Bimberg a copy of this memo.

In August 2009, Bimberg met with Urick and Smith and told them that her husband was going to Texas for more treatment and would have to remain there for at least six months. She said that she might be able to come back to Michigan in January, but asked Smith if she was going to have "trouble with a leave of absence" if she could not. Bimberg testified that Smith replied that if she had to stay in Texas longer than January, to let the Employer know in December so that it "could work with her."

Howard testified that in September or October 2009, he was contacted by Suttkus and Urick who told him that Bimberg was disputing the date on which she was supposed to return from her leave of absence. They told him that there had been two separate leave agreements and that the second required her to return in December. They also said that Suttkus had sent Bimberg a copy of this agreement, but that Bimberg was insisting that her return date was January 4. Howard asked to see the second leave agreement. Suttkus and Urick told him that they had given their only copy to Bimberg. Howard then spoke to Smith, who gave him a copy of the May 27 memo and promised to send another copy to Bimberg. Later, however, Urick found a copy of the May 27 memo in her file. Howard also located copies of the two earlier LOAs in Respondent's files.

² In May 2009, the Employer and Respondent were negotiating a new collective bargaining agreement for the period 2009-2011 and had tentatively agreed to new contract language governing leaves of absence. The new language limited leaves of absence for personal illness to one year, with an additional year to be granted at the discretion of the superintendent.

Bimberg testified that around Thanksgiving 2009, she called Suttkus from Texas, told her that she could not return to work in January 2010 because of her husband's condition, and asked for help in getting an extension of her leave. According to Bimberg, sometime around the beginning of December, Suttkus told her in a telephone call that she and Urick could not find Respondent's copy of the leave of absence agreements that Bimberg had signed on December 18, 2008. Suttkus also told Bimberg that she did not know how to handle the matter and referred her to Howard.

On December 8 or 9, Bimberg telephoned Howard from Texas. Bimberg and Howard spoke at least twice on December 9, and again on December 10, December 11 and December 15. Howard told Bimberg that she was supposed to return to work on or before December 18, while Bimberg insisted that the date was January 4 and that she had no copy of any written leave agreement. They discussed Bimberg's husband's condition. Howard told Bimberg to write Smith and formally request an extension of her leave and made some suggestions about what she should say. Howard testified, however, that he had already had several conversations with Smith and that he told Bimberg that he did not think Smith would agree to extend her leave. At one point, Bimberg told Howard that her husband's daughter was coming to Texas so that Bimberg could come back to Michigan, but this plan fell through.

On December 9, Bimberg faxed Smith a written request for an extension of her leave with letters from her husband's physicians in Texas. Bimberg asked to extend her leave to the end of the school year, but said that "any extension would help." Over the next week, Bimberg repeatedly called Howard to ask if he had heard anything from Smith. Howard said that he had not. According to Howard, he said that she should consider this a "no" and be prepared to return to work on December 18. Bimberg also talked to both Rosenthal and Smith. The former told her that she had no authority to extend her leave. Smith merely told her that he would call her back, but did not do so.

On December 17, Howard told Bimberg that the Employer would not agree to the extension, and that she had to be back at work by the following day. Bimberg was very upset. She told Howard that it was impossible for her to return to work by the next day. Bimberg again insisted that she should not have to return until January 4. According to Howard, Bimberg asked him what was likely to happen if she didn't return. He said that the Employer would likely terminate her. Bimberg asked him what he meant, and he asked her what she didn't understand.

On December 18, according to Bimberg, she called Howard from Texas and asked him if she could avoid being terminated if she came back to work in January and agreed to a three-day suspension for missing a day of work. According to Bimberg, Howard asked her "what she did not understand about being terminated." Bimberg testified that she told Howard that she was scared of losing her pension, and asked him to find out if she would lose her pension if she was terminated. Bimberg was actually referring to the extra pension credits she had been purchasing from the Michigan Public School Employees Retirement System (MPERS) on an installment agreement since 2005. If Bimberg could obtain these credits, she would be eligible to begin receiving a pension immediately. ³ According to Bimberg, Howard said that he did not know the answer, but that the

³ In March 2010, Bimberg attempted to complete her purchase with a lump sum payment, but MPERS refused to accept her check on the grounds that the rules required her to complete her

best thing to do would be to resign. Bimberg also asked Howard if she could wait until Monday to decide, but Howard told her that Smith had said that she would have to fax in her resignation letter by the end of that day. Bimberg then faxed Smith a letter of resignation. Howard admitted advising Bimberg to resign, but denied having any conversation with her about her pension.

A few days later, Bimberg had a conversation with a member of Respondent's school board who told Bimberg that she thought Bimberg had had an "open leave of absence." On December 23, 2009, Bimberg sent Respondent's school board a letter asking to rescind her resignation. In the letter, Bimberg explained her husband's situation, and stated that she had originally been told that her leave of absence was from January 5, 2009 through January 4, 2010. She also stated that she had submitted her resignation because Howard told her that she would lose her pension if she did not resign.

Bimberg did not get a response to her letter from the school board. Howard, however, received a phone call from Smith about the letter. A few days later, Bimberg called Howard and told him that a school board member had asked her why she resigned. Howard told Bimberg that he had seen her letter to the school board and angrily asked her why she had said that he had told her that she would lose her pension unless she resigned. According to Howard, Bimberg didn't respond directly, but asked him if she could file a grievance. Howard first asked her on what grounds; he then told her that she would have to contact Respondent's office and have someone else help her. Bimberg testified that when she asked about filing a grievance, Howard merely gave her the name and phone number of an attorney.

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). "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 includes (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. 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*.

purchase before she terminated her employment. As a result, Bimberg did not meet the age and service credit requirements to begin drawing a pension. She did not lose her future pension rights.

Bimberg alleges that Respondent violated its duty of fair representation by refusing to support her claim that her leave of absence did not expire until January 4, 2010. According to Bimberg, Respondent had no legitimate reason to take this position because it was contrary to the agreement entered into on December 18, 2008. At the hearing, Bimberg speculated that Urick and Suttkus were pressured by Smith to repudiate this agreement. However, she did not offer any evidence to support her theory. Respondent's explanation for refusing to support Bimberg's claim was that it had reached an agreement with the Employer in May 2009 that Bimberg's return to work date would be December 18, 2009. In support, Respondent produced a copy of the memo memorializing this agreement and earlier agreements indicating that Bimberg was given a six month leave of absence, from December 2008 to the end of the 2008-2009 school year. Although Bimberg asserts there was a written agreement reached on December 18, 2010 which granted her a leave of absence until January 4, 2010, she could not produce a copy of this agreement. She insists that the document which Respondent produced must have been fabricated, but did not call any of the other persons whose signature on this document as witnesses to support her claim that this was not the agreement she signed. I note that neither Bimberg's charge nor her letter to Respondent's school board explaining her resignation mention the existence of a written agreement explicitly granting her a leave of absence until January 4, 2010. I find that Bimberg has failed to show the existence of such an agreement. I also find that Respondent did not act arbitrarily or in bad faith when, based on its earlier agreement establishing Bimberg's return to work date, it refused to support Bimberg's position that she did not have to return to work until January 4, 2010.

Bimberg also alleges that Respondent violated its duty of fair representation by failing to help her obtain an extension of her leave in December 2009. Howard advised Bimberg to make a written request for an extension, but he did not offer to file a grievance on her behalf if her request was denied. There is no dispute that Bimberg's husband was in grave condition in December 2009 and that Bimberg needed to be by his side. The evidence indicates that had Bimberg herself been ill, she would have been entitled under the language of the collective bargaining agreement to at least another year of unpaid leave. However, she had no legal or explicit contractual right to an extended leave of absence to care for her husband. Although the Employer's insistence that Bimberg return to work one day before the Christmas break seems unreasonable, the Employer may have been concerned that if it agreed to let Bimberg disregard the terms of her leave agreement other employees would demand the same benefit. In any case, Howard's failure to offer to file a grievance was not arbitrary since Bimberg had no right under the contract to an extension of her leave.

Bimberg's third claim is that Howard induced her to resign by telling her, falsely, that if she was terminated she would lose her pension. Bimberg also claims that Howard violated Respondent's duty of fair representation by refusing to file a grievance on her behalf in January 2010. According to Bimberg's testimony at the hearing, she asked Howard if she would lose her pension if she was terminated. According to her testimony, he did not say that she would lose her pension, but said merely that he did not know and that it would be better to resign. According to Howard, Smith had told him that Bimberg had to submit her resignation by the end of the day or she would be discharged. As discussed above, the collective bargaining agreement did not give Bimberg the right to a leave of absence to care for her husband, no matter what his condition. I find that Howard did not violate Respondent's duty of fair representation by advising Bimberg to submit a letter of resignation rather than let herself be terminated under these circumstances. I also find that

since Bimberg had resigned, Howard's refusal to file a grievance demanding her reinstatement did not constitute arbitrary conduct.

Based on the findings of fact and law as set out above, I conclude that Bimberg did not establish that Respondent violated its duty of fair representation under Section 10(3) of PERA. I recommended, 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: _____