STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SEIU LOCAL 517M,
Labor Organization-Respondent,

Case No. CU10 D-015

-and-

ANTHONY AZZOUZ,
An Individual-Charging Party.
_____/

APPEARANCES:

Fraser, Trebilcock, Davis & Dunlap, P.C., by Brandon W. Zuk, for Respondent

Bator Gwinn, P.C., by Gregory J. Bator, for Charging Party

DECISION AND ORDER

On November 4, 2011, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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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

In the Matter of:

SEIU LOCAL 517M,
Labor Organization-Respondent,

Case No. CU10 D-15

-and-

ANTHONY AZZOUZ,
An Individual-Charging Party.
_____/

APPEARANCES:

Fraser, Trebilcock, Davis & Dunlap, P.C., by Brandon W. Zuk, for Respondent

Bator Gwinn, P.C., by Gregory J. Bator, for Charging Party

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 September 29, 2010 and January 27, 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 post-hearing briefs filed by the parties on or before March 24, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Anthony Azzouz, an individual, filed this charge on April 15, 2010 against his collective bargaining representative, SEIU Local 517M. The charge alleges that Respondent breached its duty of fair representation toward him by its handling of a grievance it filed over his discharge by the City of Detroit (the Employer) in November 2006.

Findings of Fact:

Azzouz was employed by the Employer as a civilian forensic technician in its police department and was a member of a bargaining unit represented by the Respondent. On June 5, 2005, Azzouz was arrested at the scene of an accident for driving under the influence of alcohol. Azzouz had two prior operating under the influence (OUI) convictions while employed by the police department, in 1997 and 2002, and in June 2005 was driving on a restricted license that allowed him to drive while on the job.

None of the three incidents occurred while Azzouz was working. Upon his third arrest, Azzouz's driver's license was suspended until September 2006.

In June 2005, Azzouz's job assignment was to dust for fingerprints at crime scenes, a job that required him to drive an Employer vehicle. After Azzouz notified his supervisors of his June 5, 2005 arrest and the fact that his driver's license had been suspended, Azzouz was given a new assignment in the fingerprint laboratory. Although this was also a forensic technician assignment, it did not require him to drive on a daily basis. In both assignments, Azzouz was subject to being called as a witness for the prosecution in a criminal case, although this happened infrequently.

On January 31, 2006, Azzouz pled guilty to the June 2005 OUI. Because it was his third offense, it was a felony conviction. Upon his conviction, Azzouz's driver's license was revoked subject to review in February 2007. In March 2006, Azzouz was sentenced to ninety days in jail and assigned to a work release program, during which he worked for the Employer during the day and returned to jail at night and on weekends. He was released in May 2006, after serving seventy-two days, and put on two years probation.

According to documents from Azzouz's personnel file, in or around June 2006, Azzouz casually mentioned to one of his superiors, Sergeant Paul Kalesa, that his recent OUI conviction had been a felony. Kalesa reported this information to his immediate supervisor and was assigned to conduct an investigation into the events surrounding Azzouz's conviction.

Article 2(A) of the collective bargaining agreement between Respondent and the Employer states, in part:

> The Union recognizes the exclusive right of the City to establish and enforce reasonable work rules, and to determine the penalties for violation of such rules, provided they do not conflict with the express terms of this Agreement and the applicable labor laws.

The police department's "Rules, Regulations, and Disciplinary Practices Handbook for Civilian Employees" sets out disciplinary rules for civilian employees and the recommended penalties for violations of each of these rules. Violations are grouped into three categories, minor, major I, and major II. The recommended penalty for a major II offense is discharge. Rule 45 reads as follows:

> Unlawful Conduct – Major II Offense
>
> An employee shall not commit an act or omission which is of such a nature that disclosure would reasonably be expected to adversely affect the morale or efficiency of the department, or to destroy public respect for department employees and confidence in the operation of the department and which is in violation of a:
>
> a. Federal statute, United States Constitution;
> b. Michigan state statute, Michigan Constitution; or
> c. City ordinance or city charter.

The police department considers felony convictions to be "acts of such nature" and, therefore, violations of Rule 45. Reginald Jenkins, a labor relations manager in the Employer's human resources

department, testified that the police department' has consistently taken the position that it should not employ individuals who have felony convictions. He also testified that during his twelve years of employment as a labor relations manager, he was not aware of any instance where an arbitrator had overturned the police department's decision to discharge an employee because he had a felony conviction.

On August 25, 2006, Sergeant Kalesa issued his report into the circumstances surrounding Azzouz's felony conviction. The report detailed Azzouz's history of OUI convictions and his participation in alcohol rehabilitation programs. Kalesa noted that the police department had invested considerable resources in training Azzouz in the fingerprint laboratory. He also noted that, in the opinion of his counselors and supervisors, Azzouz was making good progress in his rehabilitation and was a good worker. However, Kalesa noted that while Azzouz's current assignment did not require him to drive on a daily basis, it did normally require some driving. Moreover, according to Kalesa, it was a general requirement for a forensic technician to have a valid state operator's license to operate a department vehicle.1 Kalesa also stated that Azzouz's felony conviction might affect his credibility when called to testify in court. In light of these factors, Kalesa recommended that Azzouz be dismissed, but that the dismissal be held in abeyance pending Azzouz's satisfactory compliance with certain conditions. These included that Azzouz be required to petition for a restricted driver's license that would permit him to drive while at work. According to the documents from Azzouz's personnel file, Kalesa's supervisor agreed with the recommendation, but his superior, a third deputy chief, did not. She concluded that monitoring Azzouz's compliance with the conditions recommended by Kalesa would be unduly burdensome. She also concluded that having a forensic technician with a felony conviction would reflect poorly on his credibility and that of the police department. The third deputy chief recommended that Azzouz be terminated. On September 27, 2006, the Employer issued Azzouz a suspension with a recommendation for discharge for having a felony conviction. On November 30, 2006, Azzouz was discharged.

Respondent filed a grievance over Azzouz's termination. Howard Gordon, Respondent's Region 3 coordinator, was assigned to handle the grievance for Respondent. Gordon testified he, like Jenkins, was not aware of any case where an arbitrator had reinstated an employee discharged after having been convicted of a felony. According to Gordon, there also was a question whether an arbitrator had the authority under Article 2(A) of the collective bargaining agreement to set aside the penalty imposed by the Employer for violation of the work rule.

In meetings held to discuss Azzouz's grievance, Gordon argued that discharge was too harsh a penalty in light of the circumstances and that Azzouz should have been suspended and allowed to come back to work after completing rehabilitation. In June 2007, Respondent and the Employer held a fourth step meeting on Azzouz's grievance. The Employer denied the grievance in writing at the fourth step, the step before arbitration, on November 9, 2007.

On November 29, 2007, Gordon left Azzouz a telephone message stating that he (Gordon) had found a provision in the contract that he believed "would be exceedingly helpful for the success of your case." Gordon was referring to Section 7(F) of the collective bargaining agreement, Section 7(F) states, in part, "In imposing any discipline on a current charge, management will not take into account any

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1 Azzouz disputed this point at the hearing. As he notes, the job description for the position of forensic technician does not list having a driver's license as a job qualification.

prior infractions which occurred more than (14) months previously." Azzouz and Gordon later discussed this section and the fact that all Azzouz's OUIs had occurred more than fourteen months before his discharge. Gordon told Azzouz that he felt positive about the grievance's chances of succeeding in arbitration. According to Gordon, however, he later decided that Section 7(F) was not helpful in Azzouz's case because his "current charge" was probably his January 2006 felony conviction.

Under Section 5(E) of the contract, Respondent is obligated to appeal a grievance to arbitration within sixty working days of the date of the Employer's fourth step decision. Sometime before the middle of December 2007, Respondent appealed Azzouz's grievance to arbitration. According to Gordon, when he filed for arbitration he did not actually believe that Respondent would succeed before an arbitrator. Rather, according to Gordon, the arbitration demand was a settlement tactic; he hoped that the pressure of an impending arbitration would cause the Employer to agree to some settlement. Gordon testified that, in addition to the other problems with Azzouz's case, Gordon believed that an arbitrator would not have the authority to reinstate Azzouz as long as he could not drive because, when Gordon initially filed the grievance, Azzouz also told him that his job as a forensic technician required him to drive.

It was unclear from Gordon's testimony whether he communicated his reservations about the case to Azzouz. Gordon testified initially that he normally keeps his speculations about a case to himself and does not express them to a member until the "matter is set." Later in the hearing, however, he testified that he told Azzouz that his case was "problematic" because he had a felony conviction, but that even if that problem could be overcome, the Union would lose anyway because Azzouz did not have a driver's license.

On December 13, 2007, Respondent and the Employer notified Ruth Kahn that they had selected her to arbitrate the dispute. On December 20, 2007, Arbitrator Kahn sent Gordon and the Employer a letter proposing hearing dates in April 2008. According to Gordon, he decided that the arbitration hearing should be held in abeyance at least until Azzouz regained his driving privileges and could be returned to work. Gordon and Azzouz discussed postponing the arbitration until after Azzouz regained his license. Azzouz agreed, but expressed concern that the time limit on the grievance might run out. Gordon assured Azzouz that this would not occur.

Gordon did not respond to Kahn's December 20 letter. On January 18, 2008, Kahn wrote to Gordon and the Employer that since Gordon had not responded to her letter or telephone calls, she was holding the matter in abeyance. Insofar as the record indicates, neither Respondent nor the Employer had any further communication with Kahn or with each other about the grievance until the fall of 2009.

In the summer of 2008, Azzouz obtained a restricted driver's license which required him to have an interlock device on his vehicle. Azzouz had to blow into a breathalyzer before the car would start. Gordon, however, told Azzouz that he wanted to wait until Azzouz had a full driver's license to arbitrate his case to give them the best chance of winning. Gordon told Azzouz that the Employer would never agree to have an interlock device placed on one of its vehicles, and Azzouz agreed.

In August 2009, Azzouz regained full driving privileges. Azzouz drove to Gordon's office and showed him his driver's license. According to Azzouz, Gordon told him, "I know what we have to do," which Azzouz took as an indication that they would proceed to arbitration. During their meeting,

Gordon gave Azzouz a copy of the Employer's November 9, 2007 final grievance answer, the December 12, 2007 letter appointing Kahn to arbitrate his case, and Article 7(F) of the contract.

After this meeting, Azzouz called Gordon several times to ask about the arbitration date, On October 1, Gordon called Azzouz and left a message stating that Respondent President Yolanda Langston would be meeting with the Employer the next day to get an answer as to whether the City would go forward with a hearing date. Azzouz continued to call Gordon, who told him that Langston was still working on a hearing date. At some point Azzouz asked Gordon to produce evidence that Respondent had asked the Employer to set up a date for the arbitration. Sometime in October, Gordon told Azzouz that he would contact Azzouz's former supervisor, Sergeant Robbins, and try and get Azzouz reinstated "through the back door." Gordon then called Robbins to ask whether the Employer might agree to reinstate Azzouz since he had rehabilitated himself. Robbins told Gordon that he had a good opinion of Azzouz, and that Azzouz had been a hard worker. Robbins said, however, that he did not have authority to reinstate Azzouz. Gordon next called Robbins' supervisor, a Lieutenant Mohammad, who also told Gordon that he had no authority. Mohammad recommended that Gordon call a Deputy Chief Tolbert. Gordon phoned and left messages for Tolbert, but Tolbert did not return his calls.

Langston had not had any prior involvement with Azzouz's grievance until Gordon asked her in the fall of 2009 to contact the Employer to set up an arbitration date. Langston met with Azzouz and she explained to him that she would contact the Employer to see if his grievance was being held in abeyance. Langston then telephoned the Employer's labor relations office. She was told that the Employer needed to retrieve Azzouz's file from storage. On October 16, 2009, Langston wrote the labor relations office stating that Respondent wanted the matter reinstated. Langston's letter stated, "This communication should be considered as a notice of intent to arbitrate," and asked the Employer to provide a list of arbitrators.

On October 28, the Employer replied as follows:

> This is to acknowledge receipt of your recent letter requesting the reinstatement of the above-captioned grievance and list for the mutual selection of an arbitrator. Please be advised that such case already has a mutually agreed upon arbitrator, Ruth Kahn. As discussed with you recently, the City was reviewing its records to determine whether this case was still active.
>
> Arbitrator Kahn held this matter in abeyance on January 16, 2008 pending a response from the Union on its status which was not forthcoming. The City reserves the right to challenge the arbitrability of this grievance due to the lack of prosecution by the Union. Please advise our office of the extenuating circumstances for the delay in pursuing this grievance before the City agrees it should be reactivated and scheduled for arbitration.

When Gordon saw this letter, he instructed Langston to talk to the Employer again and schedule a hearing date. Langton then called the labor relations office to ask if it was going to agree to schedule a date, and was told that she would "receive a letter." On November 23, Azzouz wrote Gordon asking for information about the status of his hearing, including any letters Respondent might have written to the Employer after December 13, 2007. Azzouz did not get a response, and wrote again on December 14, 2009. He again did not get a response.

On December 21, the Employer wrote to Langston stating that it had administratively closed Azzouz's grievance file. The letter stated that the Union had not responded to the arbitration dates offered by Kahn in 2006 [sic] and therefore had failed to timely pursue the arbitration. The letter also stated that the Union had offered no reasons which would warrant reactivation of the grievance. Gordon testified that he concluded from this letter that there was no point in making further efforts to get a settlement of the grievance. He also testified that he felt that there was no point in pressing the Employer to arbitrate since there was no chance that Respondent would prevail on the grievance after four years. According to Gordon, after he read the December 21 letter, he instructed Langston to contact Azzouz and tell him that Respondent was not proceeding with the arbitration.

Langston testified that she left a phone message for Azzouz stating that "the City had closed the case and they were not pursuing arbitration," and asked him to call if he had any questions. Azzouz denied receiving this message. He also testified that he did not find out that Respondent was not going to arbitrate his grievance until he received Respondent's answer to the unfair labor practice charge. On December 21, 2009, Azzouz wrote to the police department asking to be reinstated; his letter was put in his personnel file with a note that discharged employees were not eligible for reinstatement. In his letter, Azzouz stated that Respondent was trying to set up an arbitration hearing on his case.

Discussion and Conclusions of Law:

To prevail on a claim of unfair representation under PERA, a charging party must establish not only a breach of a union's duty of fair representation, but also a breach of the collective bargaining agreement. *Knoke v East Jackson Public School Dist,* 201 Mich App 480, 488 (1993); *Goolsby v City of Detroit,* 211 Mich App 214, 223 (1995). Respondent first argues that Azzouz did not establish that his discharge breached the collective bargaining agreement between Respondent and the Employer. As discussed above, the collective bargaining agreement gives the Employer the right to promulgate and enforce reasonable work rules. Rule 45 of the police department's rules and regulations gives the Employer the discretion to discharge civilian employees for committing violations of law which "destroy public respect for the department employees and confidence in the operation of the department." According to the testimony of Gordon and Jenkins, the police department has consistently taken the position that all acts which result in felony convictions violate Rule 45. This is why, when Azzouz's superiors realized that his June 2005 OIL had resulted in a felony conviction, they ordered an investigation for purposes of determining whether discharge should be imposed as the penalty for his violation of the rule. Azzouz argues that the Employer violated Article 7(F) of the contract by disciplining him for a "prior infraction" that occurred more than fourteen months before his discharge. However, assuming arguendo that Article 7(F) applies to major II offenses, the record indicates that the Employer did not learn that Azzouz had a felony conviction until about June 2006. I agree with Respondent that Azzouz did not establish that his discharge violated the collective bargaining agreement.

I also agree with Respondent that it did not violate its legal duty of fair representation under Section 10(3) (a) (i) of PERA. A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 679(1984); *Eaton Rapids Ed Ass'n,* 2001 MERC Lab Op 131,134. See *Vaca v Sipes,* 386 US 171, 177 (1967). Within these boundaries, a union has considerable

discretion to decide how or whether to proceed with a grievance and is permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe*, supra. To this end, a union is not required to follow the wishes of the individual grievant, but may investigate and proceed with the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. A union satisfies the duty of fair representation as long as its decision not to proceed with a grievance is within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991).

Although Gordon may not have adequately conveyed this to Azzouz, I find that Respondent has established that the weaknesses in Azzouz's case made it unlikely that it would have prevailed had the case been arbitrated. Moreover, Azzouz did not regain full driving privileges for almost three years after his discharge, undercutting Respondent's argument that the Employer should have suspended him in 2006 while he completed his rehabilitation. A reasonable good faith tactical choice by a union is not a breach of the duty of fair representation. *Detroit Federation of Teachers*, 21 MPER 15 (2008)(no exceptions). Whether or not Gordon's decision to put off the arbitration until Azzouz regained his driver's license was the correct one, I find that neither this decision nor his decision not to proceed with the arbitration in 2009 was so outside the range of reasonableness to be arbitrary under the *Goolsby* standard.

However, a union must exercise its discretion in complete good faith and also avoid arbitrary conduct in its handling of the greivance. In addition to "impulsive, irrational or unreasoned conducted," arbitrary conduct by a union includes, "inept conduct undertaken with little care or with indifference to the interests of those affected," and "gross negligence which can reasonably be expected to have an adverse effect on any or all union members." *Goolsby*, at 679 As the Court held in *Goolsby*, a unexplained union's failure to comply with collectively bargained grievance procedure time limits, when this failure results in the waiver of the right to arbitrate, constitutes arbitrary conduct in the absence of a reasoned, good faith, non-discriminatory decision not to process the grievance.

Azzouz argues that Respondent was guilty of gross negligence in January 2008 when it failed to secure the Employer's and/or Arbitrator's Kahn's agreement to hold the grievance in abeyance indefinitely. He also asserts that Respondent's failure/refusal to arbitrate his grievance was an attempt to cover up this negligence, and thus was a direct result of its inept, grossly negligent, arbitrary conduct in 2008. According to Azzouz, Respondent abandoned his case when the Employer objected to Respondent's October 2009 request to reinstate the grievance in order to cover up Gordon's January 2008 negligence, then fabricated arguments for not arbitrating to disguise its negligence. There are several problems with this scenario. First, unlike the union's conduct in *Goolsby*, Respondent's failure to secure the Employer's agreement to the abeyance did not clearly waive its right to arbitrate. Unlike the union in *Goolsby*, Respondent did not fail to comply with a contractual deadline for moving the grievance forward, and the collective bargaining agreement does not explicitly give an arbitrator the authority to deny a grievance due to "lack of prosecution." Moreover, Respondent clearly never withdrew the grievance, and the last communication on the grievance before October 2009 was Arbitrator Kahn's letter to the parties stating that she was holding the grievance in abeyance. I find that Gordon's failure to secure the Employer's agreement to hold the grievance in abeyance indefinitely was not gross negligence or inept conduct manifesting indifference to Azzouz's interests and did not

constitute arbitrary conduct under the *Goolsby* definition. Secondly, as discussed above, Respondent had legitimate, not manufactured, reasons for not wanting to arbitrate the grievance in December 2009. I find that Respondent ceased its efforts on Azzouz's behalf in December 2009 because it believed that neither arbitration nor further attempts to settle the grievance would succeed in getting Azzouz back to work, not because Gordon had not obtained the Employer's agreement in 2008 to hold his grievance in abeyance indefinitely.

Azzouz complains that after August 2009, Respondent repeatedly failed to provide him with information he asked for about his case. He also testified that Respondent never told him that it was not going to arbitration on his case, and that he did not find this out until after he filed the charge. I credit Azzouz's testimony, including his testimony that he did not know Respondent had decided not to go forward with his case. I note that, according to Langston, she did not tell Azzouz that Respondent was not going to take any further action on his grievance. Rather, she merely left him a phone message stating that the Employer had closed his file and that "they" were not going to arbitration. The Commission, however, has held that a union's failure to communicate with a member about his or her grievance is not a breach of the duty of fair representation unless that failure results in some actual harm. *Detroit Police Officers Assoc*, 1999 MERC Lab Op 227, 230. See also *Wayne Co Sheriff Dept*, 1998 MERC Lab Op 101, 105 (no exceptions); *Detroit Assoc of Educational Office Employees*, 1997 MERC Lab Op 475,480 (no exceptions). I conclude that since Azzouz was not harmed by any failure of Respondent to keep him informed about the status of his case, Respondent's failure to adequately communicate with Azzouz did not violate its duty of fair representation. As discussed above, I also conclude Respondent's decision not to arbitrate Azzouz's grievance was not arbitrary or made in bad faith and did not violate its duty of fair representation. Accordingly, I recommend 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
Michigan Administrative Hearing System

Dated: _____