STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer- Respondent in Case No. C11 K-196,

-and-

AFSCME COUNCIL 25 AND ITS AFFLIATED LOCAL 542,
Labor Organization- Respondent in Case No. CU11 K-031,

-and-

NICOLE WRIGHT,
An Individual-Charging Party.
_____/

APPEARANCES:

Aina Watkins, Staff Attorney, AFSCME Council 25, for Respondent- Labor Organization

Nicole Wright, *In Propria Persona*

DECISION AND ORDER

On February 16, 2012, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents 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 complaints.

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
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent in Case No. C11 K-196,

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 542,
Labor Organization-Respondent in Case No. CU11 K-031,

-and-

NICOLE WRIGHT,
An Individual-Charging Party.
_____/

Appearances:

Aina Watkins, Staff Attorney, AFSCME Council 25, for the Labor Organization-Respondent

Nicole Wright, appearing for herself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On November 15, 2011, Nicole Wright filed the above charges with the Michigan Employment Relations Commission (the Commission) against her employer, the City of Detroit (the Employer), and her collective bargaining representative, AFSCME Council 25 and its affiliated Local 542 (the Union), pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charges were assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System.

On January 5, 2012, pursuant to Rule 151(2)(c) and Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165 and R 423.151(2)(c) I issued an order directing Wright to show cause in writing why both charges should not be dismissed because the facts as alleged in her charges did not state a claim upon which relief could be granted under PERA against either Respondent. The order informed Wright that I would review her timely response to my order to determine whether a proper claim had been made against either Respondent and, if I determined that it had, a hearing would be scheduled. Wright was cautioned that if her charges and response did not state a valid claim or if she did not respond to the order, I would issue a decision recommending to the

Commission that the charge be dismissed without a hearing. Wright did not respond to my order. Based upon the facts alleged in the charges and set forth below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Facts:

Wright's charge against the Employer alleges that it violated PERA by refusing to comply with an arbitrator's award reinstating her and ordering the Employer to make her whole for her loss of wages and benefits. Her charge against the Union alleges that Local 542 "failed to represent her fully and properly" and that Council 25 "failed to the fullest extent and to inform me of all options."

Wright was employed by the Employer as a recreation record technician and was a member of a bargaining unit represented by the Union. On June 19 or 20, 2009, the Employer suspended Wright for allegedly falsifying her time records. On June 22, 2009 (according to the charge), or July 20, 2009 (according to a letter from the Employer attached to the charge), Wright was terminated for this offense. On June 26, 2009, the Employer issued Wright a notice of layoff. The notice stated that Wright would be laid off for lack of funding effective July 13, 2009. It is not clear from the charge whether either Wright or the Union received this notice at the time it was issued.

On July 9, 2009, the Union filed a grievance over Wright's termination. The grievance was heard by an arbitrator in November, 2010. There is no indication in the arbitrator's award that the Employer brought the June 26, 2009 layoff notice to the attention of the arbitrator during the hearing. On December 14, 2010, the arbitrator issued an award finding that the Employer lacked just cause to discipline Wright, and granted the grievance. The arbitrator ordered the Employer to expunge from Wright's employment records all record of the suspension and termination. His award also stated, "Grievant's wages, seniority, and other employment benefits under the collective bargaining agreement shall continue uninterrupted from June 20, 2009, and the Employer shall make Grievant whole."

Wright was notified of the award on January 14, 2011, but did not receive any notification from the Employer that she was to report to work or any information about back pay. Wright contacted Union representatives several times to ask what was happening. In March 2011, Wright's union steward called her and told her to pick up a check from the Employer for approximately $1800. Wright was confused, and called the Union president. On March 4, 2011, a Union representative informed Wright that the Employer claimed that she had been laid off. At some point, Wright and/or the Union received a copy of an internal Employer memo referencing the granting of Wright's grievance. The memo, from Respondent's human resources department, stated that Wright had been properly notified that "her position had been reached for layoff" effective July 13, 2009. A copy of the June 26, 2009 layoff notice was attached to the memo. The memo also stated that, per the arbitration award, Wright's notices of suspension and discharge should be rescinded. It stated, in addition, that Wright should be paid for 120 hours, representing the time she would have worked between the date of her suspension, June 20, 2009, and the effective date of her layoff, July 13, 2009, plus reimbursement for a COBRA payment made by Wright in July 2009. The memo stated that Wright would remain on the special preferred eligibility roster for her original classification and would also be placed on the eligibility roster for another classification she had formerly held.

After receiving a copy of the February 24 memo, the Union contacted the Employer to complain that it had failed to comply with the arbitrator's award. There is no indication in the charge that the Union disputed the legitimacy of the June 26, 2009 layoff notice, i.e., whether it was actually issued or whether Wright would have been laid off if she had not been discharged or suspended pending discharge at the time it was issued. On March 25, the Union wrote a letter to the arbitrator requesting a clarification of the award. It attached several documents to its letter, including the June 26, 2009 layoff notice.

On May 26, the Union and the Employer held a telephone conference with the arbitrator. The arbitrator confirmed that his intention was to make Wright whole from the date of her discharge, but stated that he had no jurisdiction to order the Employer not to lay her off or rescind her layoff. After this conference, the Union informed Wright that there was nothing more that it could do for her.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations and to negotiate or bargain with their public employers through representatives of their own free choice. It also protects the rights of public employees to engage in lawful concerted activities for mutual aid or protection, e.g., complaining about working conditions with another employee. Section 10 of PERA prohibits an employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against employees because of their union activities or other concerted activities. However, the Commission's jurisdiction is limited to determining whether the employer engaged in conduct that violated PERA, and PERA does not prohibit all types of discrimination or unfair treatment. An individual does not state a cause or claim under PERA merely by asserting that his or her rights under a union contract were violated. *Utica Cmty Schs*, 2000 MERC Lab Op 268; *Detroit Bd of Ed*, 1995 MERC Lab Op 75. Absent an allegation that the employer interfered with, restrained, coerced, restrained or retaliated against the employee for engaging in union or other protected activities, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions. See, e.g., *City of Detroit (Fire Dep't*), 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

The failure of a charging party to respond to an order to show cause may warrant dismissal of the charge. *Detroit Federation of Teachers,* 21 MPER 3 (2008). In this case, Wright's charge against the Employer alleges that it refused to comply with the arbitrator's December 14, 2010 order that it make her whole for her discharge. While an employer may have a contractual obligation to comply with an arbitration award issued under the collective bargaining agreement, Wright's claim that the Employer refused to comply with the award does not allege a violation of PERA where the relief ordered was disputed and the parties voluntarily returned to the arbitrator for clarification. I conclude, therefore, that Wright's charge against the Employer does not state a claim upon which relief can be granted under PERA and should be dismissed for that reason.

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). Because a union's ultimate duty is toward its membership as a whole, a union has considerable discretion to decide how or whether to proceed with a grievance. *Lowe v Hotel Employees*, 389 Mich. 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1.

A union is guilty of bad faith when it "acts [or fails to act] 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, under the *Goolsby* standard, 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 decision to proceed or not proceed with a grievance is not considered arbitrary if it is within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill,* 499 US 65, 67 (1991). That is, if a union makes a good faith, reasoned decision that a grievance is not worth pursuing based on the likelihood of its success, the Commission and courts do not substitute their own judgments for that of the union. The fact that an individual member is dissatisfied with the union's efforts does not indicate that the union has breached its duty of fair representation. *Eaton Rapids EA, supra*.

Wright asserts that Council 25 "failed to the fullest extent and to inform me of my options," and that Local 542 "failed to represent me fully and properly." According to her charge, the Union decided, after the May 26, 2011 conference with the arbitrator, not to take any other action to obtain Wright's reinstatement or secure her more back pay. Wright has not made a claim that the Union's decision was arbitrary, discriminatory, or made in bad faith or asserted facts to support such a claim. Nor has Wright identified any other action or inaction by Council 25 or Local 542 which breached the Union's duty of fair representation toward her. I find that Wright's charge against the Union does not state a claim upon which relief can be granted under PERA and should be dismissed for that reason. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____