STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1583,
Labor Organization - Respondent,

-and-

Case No. CU09 H-026
Docket No. 09-000020-MERC

CHARTE DUNN,
An Individual Charging Party.
_____/

APPEARANCES:

Shawntane Williams, AFSCME Council 25, for Respondent

Charte Dunn, *In Propria Persona*

DECISION AND ORDER

On November 2, 2012, Administrative Law Judge Julia C. Stern issued a 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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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1583,
Labor Organization-Respondent,

Case No. CU09 H-026

-and-

CHARTE DUNN,
An Individual-Charging Party.
_____/

APPEARANCES:

Aina M. Watkins, Sarah M. George, and Shawntane Williams, Staff Counsel, Michigan AFSCME Council 25, for Respondent

Charte Dunn, 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 Detroit, Michigan on six days beginning on October 15, 2010 and concluding on July 8, 2011, by 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 October 7, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The unfair labor practice charge in this case was filed on August 12, 2009 by Charte Dunn against her collective bargaining representative, Michigan AFSCME Council 25 and its affiliated Local 1583. Dunn was employed by the University of Michigan (the Employer) as a nurse's aid in the pediatric intensive care unit (PICU) of the Employer's CS Mott Children's Hospital when she was terminated for purported unsatisfactory attendance on February 12, 2009. Dunn was part of a bargaining unit of over 3,000 employees of the Employer represented by the Respondent Union. The charge alleges that the Union, Council 25 and Local 1583, violated its duty of fair representation toward her by its handling of, and eventual refusal to arbitrate, a grievance filed over her termination. Specifically, Dunn alleges that the Union did not represent her in good faith because of her history as a vocal opponent of Local 1583 incumbent president

Gloria Peterson and because, at the time of Dunn's discharge, she was participating in a campaign to decertify the Union and replace it with an independent association.

In 2007 and 2008, Dunn received a series of written warnings and disciplinary layoffs for absenteeism. Under the system of progressive discipline contained in the collective bargaining agreement, Dunn's termination was based, in part, upon this earlier discipline. The Union grieved all of these disciplinary actions, but did not take any of the grievances to arbitration. Dunn alleges that the Union's handling of these grievances, and its decisions to not arbitrate them, was influenced by the fact that she was a longtime opponent of Peterson and running against her for local president in an election held in May 2008. Although all of the Union's actions with respect to these grievances occurred outside the six month statute of limitations contained in §16 of PERA, Dunn was permitted to present evidence regarding the Union's handling of these grievances because her termination was based on the previous discipline and in order to show an alleged pattern of hostility toward her by the Union's leadership.

Findings of Fact:

Background

Dunn was hired by the Employer, and began working in the PICU, in 1998. After about 2000, the manager of the PICU in which Dunn worked was Clinical Nurse Manager Julie Juno. Dunn was also supervised by Cindy Montag, the clinical nurse supervisor. Sometime before 2003, Dunn filed a sexual harassment complaint with the Employer against another employee in the PICU which included a claim that Juno had failed to take action to prevent the harassment and that this failure was in part racially motivated. As a result of this complaint, Juno was sent to supervisory training. In 2003, Dunn became a Local 1583 district steward. According to Dunn, Juno began harassing her in petty ways almost immediately after Dunn became a steward and began leaving the PICU to attend to steward duties during her shift. In 2005, Dunn also became a member of Local 1583's bargaining committee. Dunn asserts that between about 2003 and her discharge in 2009, she was the victim of repeated discrimination and recriminatory conduct by Juno, Montag, and the charge nurses under them who supervised her in the PICU that had its origins in their hostility toward Dunn's union activities and Juno's resentment toward her because of the sexual harassment complaint.[1]

In addition to being a district steward and member of the negotiating committee, Dunn was a friend and active supporter of then-Local 1583 President Michael Edwards when he was defeated for reelection to that position by Gloria Peterson in 2005. Dunn remained a district steward from 2003 until March 2007, when she was removed by Local 1583's executive board for failing to resign from her steward position during a six week period in 2006 during which Dunn held a supervisory position. The executive board concluded that Dunn had acted in "collusion with management to the detriment of the welfare of the union" by continuing to serve as steward while also serving as a supervisor. Sometime around the time of her removal as steward, Dunn made it known that she planned to run against Peterson for Local 1583 president in the internal union election to be held the following year.

[1] Dunn also filed a charge against the Employer, Case No. C09 H-216, but this charge was dismissed as untimely on July 16, 2010.

Discipline for Attendance under the Collective Bargaining Agreement

Article 38 of the collective bargaining agreement between the Union and the Employer requires that discipline be based on just cause and states that discipline should be both corrective and progressive. It states:

> The application of the discipline procedure will generally be a documented oral warning, written warning, disciplinary layoff(s) or written warning in lieu of disciplinary layoff (paper dlo- for absenteeism only), and discharge.[2] A paper dlo will clearly be identified as such, and used as disciplinary action for unexcused absenteeism. In any individual situation, the extent of disciplinary action taken will depend on the facts, including mitigating and aggravating circumstances, available at the time the decision is made. For serious offenses, the steps of progressive discipline may vary. . . In taking disciplinary action, the University shall not take into account any prior incidents which occurred more than two (2) years previously.

Under the contract, unit employees accrue paid time off (PTO) which covers absences for vacations, family care responsibilities, illnesses and personal business. Article 25 of the contract gives the Employer the sole discretion to determine whether to allow employees to use their accrued PTO for absences not scheduled in advance. In order to be paid for unscheduled absences, employees are required to call in at least thirty minutes prior to the start of their shift, except when the failure to notify is due to circumstances beyond the employees' control. If an employee has no accrued PTO, unscheduled absences are generally deemed unexcused. However, the Employer has the discretion to excuse them based on the circumstances.

Although this is not set out in the contract, the record indicates that unit employees are not disciplined unless they have at least six "occurrences" – either full day or partial day unexcused absences/tardiness – within a six month period.

Grievance Processing Under the Collective Bargaining Agreement

Local 1583 district stewards have assigned areas and generally represent employees at disciplinary and first-step grievance meetings. Chief stewards fill in for district stewards when they are absent. Chief stewards also have the authority to file written grievances and the responsibility for processing these grievances after they are filed. The duties of the chief stewards include investigating and gathering information for grievances and attending second step grievance meetings (the final step before arbitration) with representatives from the Employer's Human Resources (HR) Department. The grievant and the chief steward who filed the written grievance attend the second step meeting. Depending on the grievance, Local 1583's grievance chair and/or the Council 25 staff representative assigned to assist the Local may also participate in the second step meeting.

[2] In a "paper dlo," the disciplinary notice is put into the employee's file but the employee does not have unpaid time off.

If the grievance is not resolved at the second step, the Employer issues a written answer. After the Employer denies a grievance at the second step, the chief stewards, acting as the Local's arbitration committee, review the grievance and decide whether it should be forwarded to Council 25 for arbitration. Grievances involving significant loss of money or discipline above a certain level are automatically forwarded. The arbitration committee also sends the Employer a demand to arbitrate the grievance, thereby ensuring compliance with the time limits in the contract even if the grievance is not ultimately arbitrated.

Council 25 has its own arbitration review panel that makes the final decision as to whether the grievance will actually be arbitrated, and Council 25 staff handles the arbitration if it occurs. The Local, however, is responsible for investigating and gathering the information necessary to support the grievance and for providing Council 25 with this information. In Local 1583, the chief stewards and the Local 1583 grievance chair put together the Local's submission to the Council 25 arbitration review panel and make sure that it has all the information they believe is necessary to support the grievance. The Council 25 staff representative assigned to assist Local 1583 also reviews all arbitration submissions from the Local for completeness and prepares a summary and recommendation for the Council 25 arbitration review panel. If the staff representative notices a document missing from the file, he or she obtains it from the Local before forwarding the grievance.

When a grievance submission from a local union arrives at Council 25's arbitration department, it is reviewed by a rotating group of Council staff representatives and staff counsel. This group makes a recommendation to the arbitration review panel as to whether the grievance should be arbitrated. If the group believes that there may be evidence supporting the grievance which is not in the file, a letter to that effect is sent to the Local 1583 grievance chair over the signature of the arbitration review panel, and the Local is given the opportunity to supply the missing evidence.

If Council 25's arbitration review panel refuses to arbitrate a grievance, the Local has the right to appeal this decision. The grievant also has the right to appeal. A grievant may request a "live appeal" at which the grievant brings his or her documentation and meets face-to-face with members of the arbitration panel.

Local 1583's president is not normally involved in handling grievances unless there is an overflow of cases. It is the responsibility of the grievance chair to appeal a decision of Council 25's arbitration review panel denying arbitration of a grievance submitted by the Local. However, Local 1583's president has, on occasion, appeared with a grievant at his or her live appeal. In addition, if the appeal is denied and the Local still believes that the grievance should be arbitrated, Local 1583's president may make a personal appeal to Council 25. The record indicated that former Local 1583 president Michael Edwards sometimes brought Local 1583 grievances to Council 25's executive board after Council 25's arbitration review panel had refused to arbitrate them. Current Local 1583 President Gloria Peterson testified that she also has personally asked Council 25 to take certain grievances to arbitration.

Pre-2007 Discipline in Dunn's Personnel File

After Dunn was terminated, the Union requested from the Employer a copy of all disciplinary actions in her personnel file. According to the documents the Employer provided, Dunn's history of formal discipline for unsatisfactory attendance began on July 2, 2002, when she received a memo regarding her attendance for accumulating eight unexcused and unpaid full day absences and 17 unexcused partial day absences within the previous six months. The memo referenced a previous oral warning for poor attendance in January 2002. Dunn testified that Juno retracted the July 2002 discipline during the investigation surrounding Dunn's sexual harassment complaint, and that Dunn was not aware that it was still in her file. According to Dunn's personnel file, on August 9, 2004, Dunn was given another memo for accumulating 119 hours of unpaid time off and 76 additional hours of unexcused time off between January and July 2004. The memo stated that it served as a written disciplinary action due to her unsatisfactory attendance. Dunn testified that she did not remember receiving the August 9, 2004 memo and was not aware that it was in her file. She also testified that she believed that if she had accumulated that many unexcused absences within such a short period she would have been fired immediately.

On July 17, 2006, Montag and Juno called Dunn to a meeting with district steward Mary Heatherly. At this meeting, Montag and Juno handed Dunn a written warning citing her for "excessive use of unpaid time off." Heatherly told them a written warning was not appropriate because Dunn had not previously received a "documented oral warning" as provided in Article 38 of the contract. Juno said that she thought Dunn had been given a previous oral warning, but Heatherly said that if Dunn had been given discipline, Heatherly would have grieved it. Montag and Juno left the meeting to discuss the issue. When they returned, they said that they would reconvene the meeting on another date. Juno and Montag took back the written warning they had handed to Dunn. A second meeting was not held, and, according to Dunn and Heatherly, neither of them received any written documentation of the July 17 meeting. When Juno failed to schedule another meeting and Dunn did not receive a disciplinary memo, both Dunn and Heatherly believed that Montag and Juno had changed their minds about disciplining her.

When Dunn was terminated in February 2009, however, a memo from Montag to Dunn dated July 18, 2006 was in Dunn's personnel file. The memo stated that Dunn had accumulated 29 hours of unpaid time off on seven different occasions in one month, June 2006, and that her overall attendance record since January 2006 had been unsatisfactory. The memo also stated that it served as the written documentation of a verbal discussion Montag had with Dunn and Heatherly the previous day, July 17, 2006. Dunn testified that she did not see the July 18, 2006 memo until the meeting immediately preceding her discharge in February 2009. She also testified that the Employer did not produce this memo when it provided copies of her disciplinary record to the Equal Employment Opportunity Commission in 2008 after Dunn filed a charge of racial discrimination with that agency.

Dunn's 2007 Discipline for Attendance and Grievances

May 2, 2007 Written Warning

On or about May 2, 2007, Montag called Dunn and her steward Heatherly to a meeting at which a representative from the Employer's HR was also present. Montag handed Dunn and Heatherly a memo entitled "1st Written Corrective Action." This memo began as follows:

> Since your employment in the PICU as a Nurse Aide II, you have received feedback regarding your excessive unscheduled absences (sometimes resulting in the use of unexcused no pay) and lack of following procedures. We discussed your excessive unscheduled absences with you on July 17, 2006 which was determined to be a verbal warning. Our attempt to facilitate change by seeing a decrease in unscheduled absences has been unsuccessful. Therefore, it is necessary to provide you with a first written corrective action plan. Below is an outline of areas of improvement, along with specific expectations for future behavior.

The rest of the memo was divided into two sections, one of which was entitled "excessive unscheduled absences" and the other "following procedures." The first section stated that Dunn had incurred nineteen full day unscheduled/unexcused absences and seven partial day unscheduled/unexcused absences since her July 17, 2006 verbal warning. The memo did not list the dates of these absences/occurrences. The second section cited Dunn for failing to call in her absence to a charge nurse on March 19, 2007 and for failing to call in at least 30 minutes before her shift on that day. It also stated that other staff had complained that Dunn did not always carry out their requests, that they said they could sometimes not find her in the unit, and that they had overheard her telling other employees that she would not do certain tasks. The memo also reminded Dunn that she was required to check in every morning with the charge nurse in her unit to receive her assignments, and told her that Montag wanted to meet with her weekly over the next four weeks to discuss her progress on these issues.

Heatherly and Dunn told Montag that this disciplinary action was improper because Dunn had not previously received a documented oral warning for either excessive absenteeism or for failing to follow procedures. Heatherly pointed out that there had not been any actual discussion of Dunn's unexcused absences at the meeting on July 17, 2006, and told Montag that this was the purpose of a verbal warning. She also said that since Dunn had not received a memo stating that the July 17 meeting was a verbal warning, she had had no opportunity to grieve it. During the May 2 meeting there was discussion at this meeting of the "failure to follow procedures" section of the memo. Dunn said that it was a waste of resources to require her to check in with the charge nurse every morning, since she knew what work she needed to do. She denied most of the other things that she was accused of in the memo. Dunn herself accused her supervisors of "nitpicking her work" because she had been a vocal union representative, and also said that she believed this discipline might be racially motivated. Heatherly told Montag that it did not make sense to require Dunn to meet with Montag every week. Heatherly also told Montag that Heatherly needed to consult with Local 1583 Chief Steward Sheila Jemison about Montag's claim that Dunn had received a documented oral warning.

In May 2007, employees in the PICU did not punch a time clock. The times they arrived and left work, and the reasons for their absences, were recorded by a supervisor on a daily charge sheet which the employees could see. This information was then entered into ANSOS, the Employer's electronic time system, to which employees did not have access. Dunn had noted that Juno, Montag, or the charge nurses under them sometimes recorded her on the daily charge sheets as arriving at work later than she had. After the May 2 meeting, Dunn began regularly sending emails to herself at her personal email address from the PICU when she arrived at work in order to document the time she arrived. Chief Steward Glenn Ford suggested that Dunn also swipe her Employer identification card on one of the card readers in the PICU, but Dunn did not adopt his suggestion.

On May 7, Montag sent Dunn an email stating that she wanted to reiterate that Dunn was expected to check in with the charge nurse at the beginning of the shift each day and telling Dunn again that she wanted to meet weekly with her to discuss her progress in the areas covered by the memo. Montag scheduled a meeting with Dunn for May 9. Dunn came to the meeting with Chief Steward Jemison, who told Montag that this meeting should be considered a first-step grievance meeting prior to the Union's filing of a written grievance over the May 2, 2007 "Written corrective action." The meeting ended when Montag called a representative from HR to come to the meeting and Jemison said that if this representative was to be present she wanted the Union's grievance chair there as well. When Jemison tried to schedule another first-step meeting, Montag refused to meet.

Grievance over May 2 Written Warning

On May 23, Local 1583 grievance chair Gregory Zelanka asked Montag to schedule another first-step meeting on Dunn's discipline, but Montag again refused. Jemison then filed a grievance on that date asserting that the May 2 written warning should be removed from Dunn's file for "issuing discipline and not getting her union representation according to the contract and holding her to a different set of standards and guidelines." The grievance also requested that the discipline be removed from Dunn's file for "not following the grievance procedure on the verbal and written warning."

A second step hearing with the Employer was held on the May 23 grievance on July 31, 2007. As noted above, the May 2 written warning did not list the dates on which Dunn had been absent. Dunn testified that she did not believe that the dates of her alleged absences were discussed during that July 31 second step meeting, but that the Union did assert that Dunn's supervisors had been incorrectly recording the times at which she arrived.

On August 29, 2007, the Employer issued a written second step answer to the May 23 grievance. The answer did not address the argument made by Heatherly on May 2 that the written warning was improper because Dunn had not previously received a documented oral warning or the claim made by the Union at the second step meeting that her supervisors were recording her time incorrectly. The answer simply said that the May 2 discipline was valid, but that separate disciplinary memos should have been issued for excessive absences and failure to follow procedures. The answer said that two amended written warnings would be issued, one for

unexcused absences and one for lack of following procedures.

Two separate "amended" written warnings were eventually issued, dated August 22, 2007, and placed in Dunn's personnel file. The amended written warning for attendance listed seventeen occurrences of unexcused unpaid absences occurring between July 24, 2006 and February 6, 2007, five of which were partial day absences and fifteen of which were full day absences. Unlike the original May 2 memo, the August 22 document listed the specific dates on which Dunn had allegedly been absent. According to the documents in Dunn's personnel file, the Employer amended this written warning again on March 20, 2008. In this second amended written warning, the number of unexcused absences was reduced to six occurrences - two full day and four partial day - between July 24, 2006 and March 19, 2007.

On August 31, 2007, Dunn received a letter from the Local 1583 arbitration committee stating that her May 23 grievance over her May 2 written warning had been "granted or granted in part," and that it hoped that she was pleased with the outcome. At the hearing, the Union introduced a letter from Council 25's arbitration review panel to Dunn dated July 23, 2008 stating that "the above referenced" grievance over Dunn's "written reprimand" had been conditionally accepted for arbitration and would move forward in the scheduling process. The reference number on that letter, however, did not match the reference number on the May 23 grievance or any other grievance made part of this record. The Union could not explain this and had no information about what had happened to the grievance referenced in that letter after July 2008. Dunn denied receiving this letter. I conclude that whatever the origins of this letter, the Union never agreed to arbitrate Dunn's May 23 grievance. [3]

However, as discussed below, on August 29, 2007, Chief Steward Glenn Ford filed a second grievance on Dunn's behalf over both the May 2 written warning, as amended on August 22, and Dunn's subsequent disciplinary layoff.

August 9, 2007 One Day Paper Disciplinary Layoff for Attendance

On August 9, 2007, Dunn received one-day paper disciplinary layoff for fourteen alleged unexcused absences, all involving partial days, between May 15 and July 3, 2007. This time, the disciplinary memo included the specific dates on which Dunn had allegedly been tardy. On November 19, 2007, after the second step grievance meeting over this discipline, the Employer revised the memo to reduce the amount of time Dunn had been tardy on three dates listed in the memo. However, the revised memo continued to list Dunn as tardy on all fourteen dates listed in the original discipline, and the discipline remained in her file. On March 20, 2008, the Employer revised the August 9, 2007 disciplinary layoff again. However, it did not remove any of the occurrences and, in fact, added an additional date of July 17, 2007. The March 20, 2008 revised one day paper disciplinary layoff was in Dunn's personnel file when she was terminated.

At the meeting at which Dunn was given the August 9 memo, Heatherly argued, as she had in May, that the level of discipline was improper because Dunn had never received a

[3] According to allegations in a second charge filed by Dunn in 2012 (Case No. CU12 B-011), sometime after the close of the hearing on the instant charge the Union sent Dunn a follow-up letter stating that it would not arbitrate the grievance referenced in the July 28 letter and closing its file.

documented oral warning. Dunn also asserted that she was not tardy on all of the occasions listed in the discipline, and accused Montag and Juno of deliberately falsifying her time records.

On August 26, 2007, the Employer installed a time clock in the PICU for AFSCME-represented employees. Daily charge sheets recording employees' time continued to be prepared from the time cards. The time clock initially did not work properly, and Montag often had to make handwritten additions or corrections to employees' time cards. Dunn testified that Montag used this as an excuse to "correct" Dunn's time by modifying her time card to indicate that Dunn was not at work when she was actually there.

Grievances Over the August 9, 2007 One-Day Paper Disciplinary Layoff

On August 24, the Union, through Chief Steward Jim Yunkman, filed a grievance over Dunn's August 9 one-day paper disciplinary layoff. The grievance alleged "disparity of treatment." A second step meeting was held on this grievance on September 25, 2007. According to the Employer's second step answer, the Union argued at this meeting that the Employer had issued the disciplinary layoff without following the progressive discipline system because Dunn had never received a documented oral warning. It also argued that the one-day paper disciplinary layoff listed Dunn as tardy on dates that she was not.

On August 29, the Union, through Chief Steward Glenn Ford, filed a second grievance challenging both Dunn's May 2 disciplinary warning for excessive absenteeism, as amended on August 22, and her August 9 one-day paper disciplinary layoff. This grievance also asserted that the Employer had failed to properly follow the steps of progressive discipline before issuing these disciplinary actions. A second step hearing was held on the August 29 grievance on October 9, 2007. In one or both of these grievance hearings, according to Dunn, the Employer took the position that a verbal warning did not have to be documented, i.e., that the Employer did not have to give the employee a written document stating that he or she had received the verbal warning.

Sometime around this time, Dunn gave Chief Steward Sheila Jemison copies of emails she had been sending herself when she arrived at work to show Jemison that her supervisors had been improperly recording her times of arrival. At the unfair labor practice hearing, Dunn introduced emails for four dates listed as occurrences in her August 9 one day disciplinary layoff notice, along with an email for one date, August 20, listed as an occurrence in her notice of two-day disciplinary layoff issued on January 22, 2008. The documents Dunn introduced at the hearing consisted of: (1) the daily charge sheet from June 6, 2007, which indicated that Dunn arrived at work at 7:40 am; (2) Dunn's own email from the unit at 7:32 am on that date; (3) an email from Montag stating that Dunn arrived at 7:50 am on June 22, 2007; (4) Dunn's own email from the PICU on that date sent at 7:35 am; (5) the daily chart sheet from August 20, 2007, on which Juno had written that Dunn arrived at 7:37 am; (6) Dunn's own email from the PICU on that date on 7:28 am; and (7) emails from May 31 and July 3, 2007 indicating that Dunn arrived at work on time on those dates. Dunn testified that she did not bring all the emails to the unfair labor practice hearing because "there were so many." However, Dunn never explained for how many dates she had proof that her time had been improperly recorded and she never indicated on the record how many emails she gave Jemison.

Sometime in late August, Dunn met with the Council 25 staff representatives assigned to Local 1583, Robert Donald and Cheryl McCreary, to discuss her grievance. Dunn gave them copies of the same documents she had given Jemison. Donald and McCreary asked her how these emails proved that she was in the PICU at the time, and Dunn explained how the emails could be traced to the computer in the PICU.

On August 29, 2007, Ford made a request to the Employer for Dunn's attendance records from January 1, 2005 to August 29, 2007, her disciplinary records for the same period, and a copy of the new time clock policy for the PICU. A dispute then arose between Ford and the Employer over how much the Union should have to pay to obtain these records; Ford asserted that retrieving these records should take only minimal staff time, and that the Union should not have to pay what the Employer demanded. Eventually, Ford helped Dunn set up an appointment to look at her personnel file. According to Dunn, however, she could not complete her examination of her file because the Employer sent another employee from the PICU into the room with Dunn, the employee insisted on standing right over her, and Dunn did not want the other employee to look at the documents in her file. Although this was unclear from the record, it appears that Ford never obtained the attendance records he had requested.

On November 28, 2007, the Employer issued second step answers to the August 24 and August 29 grievances. In both answers, the Employer asserted that Dunn had been issued a documented verbal warning on July 17, 2006 and that the written warning on May 2, 2007 and the one-day paper disciplinary layoff on August 9, 2007 were both appropriate. The answers addressed the argument that Dunn had not received a documented oral warning as follows:

> Our investigation revealed that you were issued a verbal warning conducted on July 17, 2006. Notes from this verbal warning discussion are documented and substantiated by the department. It is determined that this meeting served the purpose of conveying to you verbally that your excused unpaid absences were excessive and needed to be corrected. The department had initially approached the July 17, 2006 meeting with a written warning, which you challenged. Due to your concern as to the level of discipline, the department documented this as a verbal warning instead of pursuing it at the written warning stage of discipline. Your unexcused no pay absences continued after this date, and you were issued a written warning on May 2, 2007. The written warning was amended on August 22, 2007 as a response to a grievance. However, the written warning stands as given on May 2, 2007 and acts as progressive discipline. You were then issued a 1 day paper DLO for excessive unexcused unpaid time off on August 9, 2007. Therefore, all steps of discipline are deemed appropriate and remain as recorded in your personnel file.

The answer to the August 24 grievance also stated that the August 9 memo had been reviewed for accuracy and that specific amounts of time of unexcused no pay had been adjusted, but the discipline was appropriate.

Local 1583 forwarded both the August 24 grievance and the August 29 grievance to

Council 25. On April 2, 2008, Council 25 sent letters to Local 1583 on both grievances stating that the files contained no evidence addressing the arguments in the Employer's response or demonstrating that the discipline was not for just cause or was not progressive, and asking the Local to forward such evidence if it existed. Yunkman testified that the Local, meaning the stewards and the grievance chair, received several such letters from Council 25 requesting more information from the Local around this time, and that Dunn's grievance was not the only one about which Council 25 wanted more information. However, Yunkman also testified that in Dunn's case the Local had submitted a file of documents gathered by Dunn, and that he believed that the file was complete.

On April 21, 2008, the Council 25 arbitration panel rejected both grievances for arbitration. The letter(s) from Council 25 to Dunn explaining the basis for the rejection were not made part of the record. There is no evidence in the record that either Local 1583 or Dunn appealed the arbitration panel's decision.

Dunn's Other Discipline and Grievances in 2007

August 30, 2007 One-Day Disciplinary Layoff for Failure to Follow Procedures

On August 30, 2007, Dunn received a one-day disciplinary layoff for failure to follow procedures based on 13 incidents where Dunn allegedly refused to check in with the charge nurse at the beginning of her shift, or before or after lunch, between May 23 and August 23. The memo also stated that Dunn had been given specific lunch and break times, and that she was consistently not taking her lunch break at the scheduled time, citing six specific examples from June through August. At the meeting at which Dunn was given the disciplinary memo, Juno reminded Dunn and her steward Heatherly that Dunn had set break times, and told them that Dunn should notify the charge nurse if she was too busy to go on break at that time. Heatherly told Juno that if Dunn could not go on break because she was assisting with a patient or a new admission, she could not leave to go tell the charge nurse that she was too busy to go on break. Dunn also said that some charge nurses refused to acknowledge that she had checked in, i.e., Dunn would check in with a nurse, and the nurse would later tell Juno or Montag that she had not.

After the August 30 meeting, Dunn obtained written statements from four of her co-workers in the PICU stating that Dunn always told them that she was leaving the floor for breaks and lunches after she had notified the charge nurse and gave them to Heatherly for the file. Heatherly said that she would try and find out which charge nurse or nurses had claimed that Dunn was not checking in. According to Dunn, a grievance was filed over the August 30 one-day disciplinary layoff for failure to follow procedures. However, the record contains no evidence about what happened to this grievance.

Grievances Filed on Dunn's Behalf in Early October 2007

On or about October 4, 2007, Dunn had a grievance meeting scheduled with Montag and Chief Steward Yunkman at the beginning of her shift. Montag did not tell the charge nurse that Dunn was meeting with her, and the charge nurse paged Montag to tell her that Dunn had clocked in late and had not checked in with her that morning. Yunkman filed a grievance

asserting that Montag's failure to inform the charge nurse about the meeting constituted harassment. A second step hearing on the grievance was held on December 18, 2007. In its second step answer, the Employer said that it was Dunn's responsibility, not Montag's, to notify the charge nurse of her whereabouts.

On October 8, Ford filed a grievance asserting that Dunn was unable to find the charge nurse when attempting to check in and out for lunch as instructed, and that the Employer should insure that a charge nurse was available. A second step grievance hearing was held on December 18, 2007. In its grievance answer, issued on February 8, 2008, the Employer said that the charge nurse had a pager and telephone with her at all times, and that if Dunn could not find the charge nurse Dunn should check in and out by one of these methods. There is nothing in the record about what happened to these grievances after the Employer's answer.

October 22, 2007 One-day and Two-day Disciplinary Layoffs for Non-Attendance Misconduct and Grievances

In August or September 2007, Dunn began experiencing increasingly frequent migraine headaches. She applied for intermittent FMLA leave, provided medical documentation, and her request for leave was approved. On September 27, 2007, Dunn called in to report that she would be using a day of FMLA leave. Montag sent her an email instructing her, when she returned, to fill out a request for unscheduled paid time off for this date and also to fill out a return to work form indicating the cause of her absence. Dunn did not want to use her PTO time for FMLA leave. On the advice of AFSCME Staff Representative Robert Donald, who told her that if she filled out the form requesting paid time off the Union could not grieve the issue, Dunn refused to fill out the form requesting PTO. Dunn also refused to fill out the return to work form, maintaining that she should not have to fill out this form when she had approved intermittent FMLA leave.

Dunn was off work continuously from October 10 to October 22, 2007. On October 26, the Employer told Dunn that because the documentation supporting her FMLA leave stated that she would occasionally need to be off one to two days, she needed to provide additional medical documentation to support an absence of this length as well as fill out the return to work form. Dunn was also instructed to fill out a form to use PTO for the six work days she was absent, but she refused.

On October 22, 2007, Dunn received a one-day disciplinary layoff for "falsification of records" for an incident that occurred on September 25, 2007. The "record" was a print-out of a page that Dunn sent to Montag on that date telling her that Heatherly had arrived for a pre-arranged grievance meeting involving the three women. When Montag was later shown this print-out, she said that she had not received the page. According to the disciplinary notice, Montag later determined from the paging company that the page had not been sent to her. The discipline accused Dunn of initiating a page, printing it, and then not sending it in order to make Montag appear to be unresponsive to the concerns of the Union.

On this same date, October 22, Montag gave Dunn a two day disciplinary layoff for failing to follow procedures. The disciplinary notice cited Dunn for failing to check in with the

charge nurse at the beginning of her shift on two dates and refusing to fill out the return to work forms and requests for paid time off for her FMLA absences. After Dunn received the two day disciplinary layoff, she began filling out forms requesting paid time off on dates she took FMLA leave, but noted on the form that she was signing them "under duress."

On October 22, the Union, through Chief Steward Yunkman, filed grievances over both the one day and two day disciplinary layoffs. Second step hearings were held on both grievances on November 6, 2007. With respect to the grievance over the "falsification of records" discipline, Dunn told the Employer that it was routine for her to print out the screen shot when she paged her supervisor about a meeting and to give a copy of the screen shot to her steward. Union representatives assured the Employer that they had copies of previous print outs. According to Dunn, the Employer told the Union representatives in that meeting that if the Union gave it copies of these previous print outs, the Employer would take away the discipline. According to Dunn, however, a Union representative refused to give the Employer copies of these printouts because the Union "wanted to keep the documents for arbitration." The discipline was not rescinded. With respect to the grievance filed over the two day disciplinary layoff, the Union argued that Dunn should not have had to provide additional medical documentation for her absences in October because she had already been approved for intermittent leave under the FMLA. It also argued that she should not have to use PTO for her FMLA leave.

About a week after the October 22 grievance was filed, Dunn confronted Council 25 Staff Representative Donald about why Council 25 had refused to arbitrate another grievance she had filed over Montag's falsification of her time records. Dunn said that her stewards were constantly gathering information about this issue. Donald replied, according to Dunn, "You are never going to arbitration no matter how much evidence you got."

On November 28, 2007, the Employer issued second step answers to the two grievances filed on Dunn's behalf on October 22. In its November 28 answer to the "falsification of records" grievance filed on October 22, the Employer stated that the discipline was proper because the facts indicated that Dunn printed out a computer screen with text and claimed that she paged her supervisor, while the paging records showed that the page was not sent. In its answer to the grievance filed on October 22 over Dunn's two-day disciplinary layoff for failing to follow procedures, the Employer stated that under the collective bargaining agreement Dunn was required to fill out the appropriate form when returning from an absence due to personal illness, even if that illness was covered by the FMLA. The answer also stated that it was the Employer's standard practice to require employees to use PTO when absent on FMLA leave for a personal illness or injury, although employees were permitted to take either paid time off or time off without pay for an illness or injury of a family member.

Local 1583 forwarded both Dunn's October 22 grievances to Council 25. Around this time, according to Ford, he and Jemison were preparing the packets to send to Council 25 when Robert Donald came in to the chief stewards' office. Ford asked Donald to review the packet to see if he had any suggestions for additional information. Ford testified that after Donald had looked at the package, he told Ford and Jemison, "This is all b--s--. I can tell you this ain't going to arbitration." When Ford asked what he needed to fix it, Donald repeated that "it was b--s--."

Council 25's arbitration review panel rejected the grievance over the one day layoff on or about May 9, 2008. The letter explaining the reasons for the rejection was not made part of the record. On July 16, 2008, that panel sent Dunn and the Local a letter rejecting the grievance over the two day layoff. This letter stated:

> The Employer issued a 2-day suspension for refusing to complete necessary documentation per the collective bargaining agreement. The documentation is relative to absences due to personal illness. The file shows the Local argues the Employer cannot mandate use of paid time off when utilizing FMLA absence. The Local also argues the Grievant was not obligated to provide the medical documentation in question. The argument by the Local appears to be disparate treatment.
>
> The burden of proof in cases where the Grievant alleges disparate treatment rests with the Union. The file provides only one witness statement which will not rise to the level of proof to substantiate disparate treatment. Arbitrators have generally ruled that employers have a right to documentation to substantiate the need for FMLA time. As it relates to being mandated to utilize paid time off, absent specific contract language to the contrary, the law allows it. Therefore, without substantial proof to show disparate treatment, this file as it exists is rejected for arbitration.

Dunn testified that many other grievances were filed on her behalf in 2007, but the record does not indicate what these grievances were or what happened to them.

2008 Local 1583 Election

As noted above, sometime after March 2007, Dunn began telling other employees that she was going to run as a candidate for Local 1583 president in the election to be conducted in May 2008. The election was held on May 20, 2008. Dunn came in third among six candidates, with incumbent Local 1583 President Gloria Peterson garnering about half the votes. In that election, Yunkman was defeated for a position as chief steward, and Angela Dameron replaced Gregory Zelanka as the grievance chair.

In June 2008, seven unit members, including Dunn, Ford, Yunkman, Gregory Zelanka, and Fred Zelanka, who had been a candidate for vice-president, filed protests against the conduct of the election with the AFSCME International Union. These protests included the following; (1) Peterson had appointed the election committee, which under the AFSCME Constitution should have been elected; (2) the notice of election was not mailed to each member; (3) after the polls had closed, but before the count, the election committee took the ballot boxes out of the sight of the observers; (4) while observers were allowed to watch the count, the members of the committee who counted the ballots did not count aloud, and therefore the observers could not keep their own tallies; (5) the observers were not allowed to examine the ballot boxes before the polling began; (6) the observers were not allowed to examine the ballots declared spoiled.

The challenges were assigned to a member of the AFSCME International Judicial Panel. After a hearing, a written decision was issued on August 19, 2008. The panel member assigned

to the case found that Peterson's appointment of the election committee was a violation of the AFSCME Constitution, but that it did not affect the election. The panel member concluded that the other alleged misconduct had either not occurred or that it had occurred but did not violate the AFSCME Constitution.

Dunn's 2008 Discipline and Grievances

January 21, 2008 Two-Day Paper Disciplinary Layoff for Attendance

On January 21, 2008, Dunn received a two day paper disciplinary layoff for excessive unexcused absences on thirteen full and ten partial days between August 20, 2007 and January 7, 2008. The disciplinary notice stated that Dunn had "attempted to cover your absences with FMLA, but have failed to provide adequate documentation." On March 20, 2008, the Employer issued a revised disciplinary notice. The revised notice listed two full day and nine partial day occurrences between August 20, 2007 and January 21, 2008. This was the disciplinary notice that was in Dunn's personnel file at the time she was terminated.

Grievance Over the Two Day Paper Disciplinary Layoff for Attendance

On January 14, 2008, Chief Steward Jemison filed a grievance asserting that Dunn was being harassed through her supervisors' refusal to approve her requests for FMLA leave. Jemison also filed a grievance over Dunn's January 21 two day paper disciplinary layoff on January 23, 2008. On the advice of Council 25 Staff Representatives Donald and Sharon Donahue, Dunn also filed a complaint with the U.S. Department of Labor over the Employer's refusal to recognize her FMLA leave.

In February 2008, the Employer sent Dunn for a medical evaluation by one of its doctors. A second step meeting was held on both the January 14 and January 23 grievances on March 18, 2008. According to the Employer's second step answers, the Union argued at this meeting that because her supervisors improperly refused to accept the medical documentation for her intermittent FMLA leave, Dunn's absences between October and December should have been excused and she should not have received the two day paper disciplinary layoff. In its April 18, 2008, grievance answer, the Employer stated that because Dunn had not submitted adequate medical documentation to substantiate the number of absences she had between October and December, these absences were all deemed unexcused. However, based on the February 2008 medical evaluation, the Employer agreed to count some of these absences as FMLA leave and to pay Dunn for them. The March 20, 2008 revised disciplinary notice evidently reflected this action, leaving Dunn with eleven unexcused "occurrences" between the issuance of her one day paper disciplinary layoff and her two day paper disciplinary layoff. The Employer did not rescind the two day paper disciplinary layoff, and it remained in her file. The grievance answer also noted that a count of Dunn's hours worked in 2007 showed that she did not work enough hours in that calendar year to be eligible for FMLA after January 2008.

On April 21, 2008, the Local 1583 arbitration committee sent Dunn a letter, with the Employer's April 18, 2008 letter attached, stating that her grievance had been "granted or granted in part" and that it hoped she was pleased with the outcome. The record contains no

evidence regarding what happened to this grievance after that date.

March 21, 2008 Grievance Over "Shorting of Pay"

On March 21, 2008, Jemison filed a grievance asserting that Dunn was being improperly recorded as absent when she was at work, and that her pay was being shorted. The grievance requested an audit of all Dunn's pay records dating back to her discipline in May 2007. A second step hearing was held on this grievance on March 18, 2008. According to the Employer's answer, issued on April 18, 2008, Dunn contended that she had not been paid for time she spent attending grievance meetings or for the time in February 2008 when she went to the physician for a medical evaluation at the Employer's direction. The Employer's answer stated, "Our investigation revealed that you have been paid for all time worked as appropriate. You are to be paid for grievances scheduled during your regular work time on a scheduled work day. However, please note that while you are guaranteed no loss in pay due to a grievance, the unit is not obligated to pay you for attending a grievance on a day that is not your scheduled work day or during your scheduled work hours."

Dunn testified that the Employer acknowledged in the grievance answer that Dunn should have been paid for time spent attending grievance meetings, and that it subsequently reimbursed her for time that had been docked. However, according to Dunn, the answer did not address her claim that the time she spent attending grievance meetings had been recorded as unexcused. On April 21, 2008, the Local 1583 arbitration review committee told Dunn that it had reviewed the information from the PICU and had determined that the March 21 grievance lacked merit, and was, therefore, not forwarding it to Council 25 for arbitration.

2009 Decertification Campaign and Union Disciplinary Charges

After the decision upholding the 2008 Local 1583 election, Dunn and Fred Zelanka contacted the Employment Relations Commission and obtained information on how to decertify the Union. They were told that a petition for decertification election would have to be filed in the window period before the collective bargaining agreement expired in May 2009. Beginning in early January 2009, a group of about eight unit members, including Dunn, Ford and Yunkman, began circulating petitions among employees collecting signatures for an election to decertify the Union and replace it with an independent association.

When the decertification efforts became known, a counter campaign was organized against the decertification. At least one Council 25 staff member, Reno Thompson, was assigned to this counter campaign, and Thompson spent some days sitting in a cafeteria or break room on the Employer's premises with Local 1583 officers and talking to unit members about the decertification efforts. Flyers were prepared by Council 25 urging the employees to stay with AFSCME. One flyer accusing Ford using the decertification as a power grab listed Dunn and Fred Zelanka as part of Ford's "team."

On February 11, 2009, Dunn was notified that she was being charged with misconduct under Article X of the AFSCME Constitution for "activity which assists or is intended to assist a competing organization within the jurisdiction of the union" by circulating the petition. Seven

other individuals, including Ford, Yunkman and Frederick Zelanka, were also charged. Dunn was tried before a panel of Local 1583 executive board members on March 28, 2009. Only one of the witnesses who had signed affidavits stating that they saw Dunn circulating a petition appeared to testify, and the executive board determined that what he had seen and heard was not enough to establish that Dunn had been circulating a petition. The charges against Dunn, therefore, were dismissed, as were the charges against three others. Ford, Yunkman, Zelanka and one other member, however, were fined, removed from office and/or barred from holding an elected position in the union for three or four years, and suspended from membership for two years.

Dunn's 2009 Termination and Grievance

On February 9, 2009, Montag came up to Dunn at the end of her shift and told her that she was going to be fired. The following day, the Employer scheduled a disciplinary review conference. A disciplinary review conference is a meeting scheduled with an employee who is about to be terminated and his union representative to give the employee an opportunity to present his side of the story. Angela Dameron, Local 1583's grievance chair, came to represent Dunn at the conference, and a Council 25 staff representative, Dan Hunt, was also present. Dunn brought her own attorneys to this conference and told the Employer representatives that she did not want the Union to represent her because she was in the middle of a decertification and because the Union had failed to represent her properly in previous grievances. The Employer told Dunn that they would not recognize these attorneys as her representative. Dunn said that she was waiving her rights to be represented by the Union, but the Employer reiterated that it had no obligation to recognize the attorneys as Dunn's representative. It was agreed that Dunn's two attorneys could sit beside her during the meeting. Dameron also remained in the meeting but remained silent. According to Dameron, she did not speak during the conference because of Dunn's statement that she did not want to be represented by the Union.

At this conference, Dunn was given a copy of a termination letter that the Employer planned to give her. The letter stated that Dunn had received a verbal counseling regarding excessive unexcused absences on July 17, 2006, and that "This meeting was documented for our records and copy given to you and placed in your file dated July 18, 2006." The discharge letter went on to recite that Dunn had received a written warning on May 2, 2007, a one day paper disciplinary layoff on August 9, 2007, and a two day paper disciplinary layoff for excessive unexcused absences on January 21, 2008. The letter stated that since that date, the following incidents of unexcused absence had occurred:

Date	Time
April 17, 2008	1 hour
November 16, 2008	4 hours
January 13, 2009	.2 hours
January 22, 2009	8 hours
January 25, 2009	.1 hour
January 26, 2009	.1 hour
February 3, 2009	.1 hour

February 7, 2009 8 hours

Attached to the termination letter was a list, compiled by the Employer, of all Dunn's unexcused unpaid absences, full and partial day, from June 1, 2006 through February 7, 2009.

Dunn did most of the talking during the disciplinary review conference. She said that the discipline was inappropriate because "we had been waiting all this time for (the Employer) to present a verbal." Dunn also told the Employer that her supervisors were "forging her time." The HR representative asked Dunn if she had any type of proof that her time was not correct, and Dunn was permitted to leave the meeting and retrieve some documents from her car. When she returned, Dunn distributed copies of the emails to herself which were discussed above. Dunn and the Employer representatives then went through the list of all Dunn's unexcused absences since June 1, 2006, with Dunn pointing out the dates on which she believed that her time had been recorded inaccurately and other dates that she believed should have been considered FMLA leave. Dameron recalled that Dunn also provided explanations for the dates listed in her termination letter, but, according to Dunn, she told the Employer that she could not address those specific dates at that time.

The Employer told Dunn that she was not fired at that point, and that she was to come to work on her next scheduled day, February 12, and that the Employer would reconvene the meeting. When Dunn arrived at work on February 12, however, she was told that there was not going to be a meeting, and she was given a copy of a letter terminating her effective February 12. After Dunn received this letter, she and Dameron had a conversation in which Dameron promised to do all she could to make sure Dunn's termination grievance was arbitrated, and Dunn agreed to allow the Union to represent her again.

Dameron became Local 1583 grievance chair in July 2008, after the May 2008 Local 1583 election. Although Dameron had been a chief steward before she became grievance chair, she had not personally represented Dunn in any of Dunn's previous grievances. Dameron testified that after Montag gave Dunn her termination letter, Dameron and Dunn spent some time talking about her previous disciplines. This included a discussion of Dunn's claims that her supervisors had been singling her out and improperly recording her time. At the hearing, Dameron could not recall the specifics of what Dunn told her about her these previous disciplinary actions. However, Dameron stated that she believed that the Union could not attack the termination based on "something that happened three or four years ago." On February 19, Dameron filed a grievance over Dunn's discharge.

After Dameron filed the grievance, she began reviewing Local 1583's files on Dunn's previous grievances. Dameron testified that Local 1583 had copies of disciplinary actions issued to Dunn in its files, but that its files on Dunn had become very large. To make sure that the Local's files were complete, Dameron made a request to the Employer for copies of all disciplinary actions in Dunn's personnel file. The documents the Union received included the July 18, 2006 memo and the two memos from 2002 and 2004 as well as the written warnings and one and two day disciplinary layoffs Dunn had received in 2007 and 2008.

According to Dunn, sometime between February 12 and February 19, there was another

meeting with the Employer attended by Dunn, Dameron and Robert Donald, at which Dunn provided explanations for the dates listed in her termination letter. Dunn told the Employer: (1) the April 17 date should not be counted because it was more than six months prior to the discipline; (2) the November 16 date should not be counted because she showed up to work but was sent home by a supervisor because she was sick; (3) she was late on January 13 because there was a fire in the Employer's parking garage which caused her to be stuck in traffic in the garage; (4) on January 22, she had to take her son to the doctor; (5) January 25 was a day with bad weather when several other employees were late; (6) on January 26, she forgot to punch out but did not leave early as the Employer claimed; (7) February 3 was another bad weather day which caused her to be late; and (8) on February 7, she called in sick but had PTO time in her bank. After its representatives conferred regarding the February 7 date, the Employer decided that Dunn did, in fact, have PTO time on February 7, but told Dunn that the absence was unexcused because she had failed to call in 30 minutes before her shift.

Yunkman testified that on February 24, 2009, he sat down at a table in a break room at the hospital with Thompson and Local 1583 vice-president Dane Morgan. According to Yunkman, they talked about the decertification and about Dunn and the fact that she had been fired. Yunkman testified that Thompson said that Dunn "was fired before the ink dried on the paper." Yunkman did not explain what he thought this meant. Yunkman also testified that Thompson talked about things that had happened at Dunn's disciplinary review conference which he should not have known about, and should not have talked about if he did. Thompson denied having any conversation with Yunkman about Dunn. He testified that by February 24 his temporary assignment to counter the decertification drive had ended and that he did not learn that Dunn had been terminated until sometime in April 2009.

The second step hearing on Dunn's termination grievance was held on March 17, 2009, with both Dameron and Robert Donald in attendance for the Union. The parties went over the occurrences listed in the termination letter and Dunn gave the explanations that she had given earlier for the absences listed in the termination letter. The Union also raised the argument about the lack of a documented oral warning, but the Employer said that she had received one. Dameron asked that Dunn be given a last chance agreement, but the Employer refused.

According to the Employer's grievance answer, issued on April 7, 2009, Dunn argued at the second step meeting that the January 22 and November 16 absences should not be counted, and that absences of less than an hour should not be counted for purposes of discipline. The answer did not specifically reference any of the other occurrences listed in the termination letter. However, it stated that departmental guidelines for her position had consistently held that absences of less than an hour would be counted for purposes of discipline, even though such absences were not counted for nurses. The answer stated that even with the elimination of the January 22 and November 16 dates, her six unexcused absences since her previous discipline justified her termination.

On May 19, Dunn gave Dameron a "witness statement" that reiterated the arguments she had made at the meeting with the Employer about the dates listed in her termination letter. Dunn also stated that she had previously provided the Union with evidence that her supervisors were falsifying her time. She argued that she had not received a documented oral warning, and said

that that even if the July 18, 2006 memo counted as an oral warning, it could not be used because it was more than two years old. In addition to her own witness statement, Dunn also gave Dameron statements from several other employees in the PICU stating that while they had been docked time for unexcused absences of less than an hour, they had never been disciplined for these absences. She also gave Dameron a time card from one of these employees showing that this employee had been tardy twice within two weeks. Dameron testified that she did not interview these employees because the statements did not indicate how many other unexcused absences these other employees had and because, except for the time card, there was no indication of when these unexcused absences had occurred.

Sometime thereafter, Local 1583 forwarded Dunn's grievance to Council 25 for arbitration. On August 12, 2009, Dunn filed the instant unfair labor practice charge. On September 10, 2009 Council 25's arbitration review panel sent Dunn and the Local a letter stating that it had rejected the grievance for arbitration because, as stated in the Employer's answer, Dunn had been progressively disciplined for attendance issues and was still at the termination level with six unexcused absences since her previous discipline. Local 1583 appealed, arguing that Dunn's discipline was not proper because she had never received a documented verbal warning. On October 2, 2009, the panel again rejected Dunn's grievance, stating that while lack of a verbal warning might have been an appropriate argument at the written reprimand stage, it was not a relevant argument at the discharge stage of progressive discipline.

Dunn then was granted the opportunity to present her case before the panel in a live appeal. The live appeal was heard on October 28, 2009. On November 4, the arbitration panel sent Dunn and the Local a letter stating that Dunn had provided the following additional evidence: her time records for January 12 and January 15, 2008; time records for June 6, 2007 and emails relating to employer falsification of time; other disciplinary actions; and an FMLA letter from an Employer physician. The panel requested the following additional documents: status of each grievance filed over the 5/5/07 [sic] written warning, 8/9/07 one-day suspension, and 1/21/09 two-day suspension; all FMLA applications and the Employer's responses; and "ANSOS One-Staff Reasons Reports" for January 2007 through February 2009. During the live appeal, Dunn had shown the arbitration panel some reports from the ANSOS system given her by a clerical employee in the PICU. The ANSOS reports showed Juno or Montag going into the system and making changes to Dunn's time after it had been entered. The arbitration review panel placed Dunn's appeal on hold for 60 days.

On March 2, 2010, the Council 25 arbitration review panel sent Dunn and Local 1583 a letter stating that it had reviewed the additional evidence submitted after the live appeal, but the evidence "did not indicate that Dunn did not have attendance problems from her last discipline to her discharge." The panel said that the discharge seemed supported by the file and was the next step of discipline. Dunn filed a second appeal on March 9, 2010. In this appeal she argued; (1) that she had not received a verbal warning; (2) that she had not had a first step meeting on her grievance over her written warning; (3) that the alleged July 2006 verbal warning was more than two years before she was fired, so it couldn't be used to support her discharge; (4) that the time records she had provided the panel clearly showed that her supervisors were falsifying her time: (5) that she had good excuses for her tardiness on three of the six remaining dates listed on her

termination letter. Dunn also included complaints about the Union's handling of her non-attendance grievances; she asserted that Union staff representative Robert Donald had falsely told her that the grievance over her "falsification of records" would be arbitrated, and that she had been disciplined for refusing to fill out forms for the FMLA absences after Donald had told her not to fill them out. Dunn requested a second live appeal. On March 23, 2010, the arbitration review panel sent Dunn a letter stating that it had reviewed her March 9, 2010 appeal, but that it presented no new evidence. Dunn was informed that her file had been closed.

Discussion and Conclusions of Law:

The duty of fair representation, as set out in *Goolsby v Detroit,* 419 Mich 651, 679 (1984), requires that a union: (1) serve the interests of all members without hostility or discrimination toward any; (2) exercise any discretion in complete good faith and honesty and (3) avoid arbitrary conduct. A union has wide latitude in determining whether to pursue a grievance based on what it perceives, in good faith, is in the best interest of the entire membership, even though that decision may conflict with the wishes of an individual member. *Eaton Rapids Ed Ass ' n,* 2001 MERC Lab Op 131, 134. A union is not required to always make the right or best decision, so long as it acts in good faith and avoids being arbitrary. *Detroit Police Officers Ass'n,* 26 MPER 6 (2012); *City of Detroit*, 1997 MERC Lab Op 31.

The Courts have held that a union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive." See *Merritt v International Ass ' n of Machinists and Aerospace Worker*s, 613 F3d 609, 619 (CA 6, 2010). The *Goolsby* Court, at 679, described "arbitrary" conduct as "impulsive, irrational or unreasoned conduct, or inept conduct undertaken with little care or with indifference to the interests of those affected." In *Air Line Pilots Ass'n, Intern v O'Neill*, 499 US 65, 78, the US Supreme Court explained "arbitrary" conduct as conduct that can be fairly characterized as "so far outside a wide range of reasonableness" that it is "wholly irrational." In other words, a charging party does not establish a breach of his union's legal duty of fair representation merely by showing that his union could have done a better job of representing him. The charging party must demonstrate that the union acted out of an improper motive unrelated to the merits of his grievance, that its decisions were wholly irrational, or that its representation was so inept that it demonstrated indifference to his interests.

In this case, Dunn alleges that the Union acted in bad faith in handling her discharge grievance and that its motive for refusing to arbitrate the grievance was improper. That is, she asserts that it refused to arbitrate because she had been a vocal opponent of Local 1583 president Gloria Peterson since Peterson's first election in 2005 and because of her efforts, shortly before her discharge, to decertify the Union and replace it with an independent association.

Dunn was permitted to present evidence regarding the Union's handling of her earlier grievances to support her claim that the Union acted in bad faith with respect to her discharge grievances. The evidence presented by Dunn regarding the handling of her earlier grievances included the testimony of Glenn Ford, who was a chief steward in Local 1583 for thirteen years until he was removed from office in early 2009 for his participation in the decertification attempt. Ford described how a grievance was processed by the Local up to the point that it was forwarded to Council 25 to decide whether it should be arbitrated. He testified that the chief

stewards, meeting in a group as the Local's arbitration committee, reviewed all grievances after they were denied by the Employer at the second step. The arbitration committee then determined whether a grievance should be sent to Council 25. Ford also testified that within the Local it is the responsibility of the chief stewards and the grievance chair to gather the evidence necessary to support the grievance and to submit that evidence to Council 25. Although Ford did not recall the details of these grievances, as a chief steward in 2007 and 2008 Ford presumably participated in the Local's review of many of Dunn's grievances prior to their submission to Council 25 during that period. Ford testified that Council 25 Staff Representative Robert Donald made disparaging remarks to him about Dunn's grievances. Notably, however, Ford did not testify that Peterson or any other Local 1583 officer attempted to interfere with the arbitration committee's decisions or its handling of these grievances. In his testimony, Ford accused Peterson of failing to intercede with Council 25 after it refused to arbitrate Dunn's grievances. However, it was clear that while the Local 1583 president sometimes did intercede, it was not routine for him or her to do so. I find that while Dunn established that Peterson had a motive to interfere with the Union's handling of her grievances, she did not present any evidence that Peterson actually did so.

Dunn also had no direct evidence that Council 25's arbitration panel refused to arbitrate her 2007 and 2008 grievances because Dunn was Peterson's political opponent. What Dunn argues is that the evidence that the Union had in its possession so clearly demonstrated that her discipline was not for just cause that it should be inferred that the arbitration panel's refusal to arbitrate the grievances over this discipline was not based on their merits. Dunn argues that beginning with her first written warning on May 2, 2007, all the discipline issued to her for unexcused absences was at the wrong level, since she was never given the documented oral warning that the contract required for progressive discipline. According to Dunn, the Union should have taken her disciplinary actions to arbitration on this issue alone. She also asserts that she provided the Union with sufficient evidence that her supervisors were "stealing her time" to have her disciplines overturned. Dunn argues, in addition, that she provided the Union with sufficient evidence to establish that her supervisors were disciplining her for incidents of tardiness that, for other employees in the PICU, resulted only in their pay being docked.

The argument that Dunn did not receive a documented oral warning was addressed by the Employer in its November 28, 2007 second step answer to the grievances filed on August 24 and August 29 grievances over Dunn's August 9 one-day paper disciplinary layoff and the reissued written warning. Although the Union had argued that the meeting with Dunn, Heatherly and her supervisors on July 17, 2006, was not a verbal warning since there was no discussion of Dunn's absences, the Employer maintained in its answers that this meeting did constitute a verbal warning since it served the purpose of conveying to Dunn that her excused unpaid absences were excessive and needed to be corrected. In response to the Union's claim that the verbal warning wasn't "documented" because Dunn was not given a copy of a memo stating that she had been warned, the Employer maintained that the warning was documented because Dunn's supervisors had notes from the meeting.

Local 1583 forwarded both the August 24 and August 29, 2007 grievances to Council 25 for arbitration, and they were rejected by the Council 25 arbitration review panel on April 21, 2008. The letter(s) to Dunn from the arbitration review panel regarding these grievances were

not made part of the record. However, according to a letter sent by Council 25 to Local 1583 on April 2, 2008, Council 25 believed that the files that the Local provided it "contained no evidence addressing the arguments in the Employer's response or documenting that the discipline was not for just cause or was not progressive." It is evident from this letter that Council 25 accepted the Employer's arguments about the adequacy of the verbal warning. That this was the case is supported by the fact that the Union did not raise the issue of the appropriate level of discipline in the grievance it filed after Dunn received her next discipline for unexcused absences, the January 21, 2008 two-day paper disciplinary layoff. The July 16, 2006 meeting did warn Dunn that her supervisors believed she had an attendance problem and, therefore, the Employer's arguments did have some basis in the language of the contract. Moreover, by the time the grievances raising the issue came before the arbitration panel, Dunn had received three written disciplinary actions for absenteeism within an eight month period. With this type of disciplinary history, the arbitration panel could have rationally concluded that it was not likely to succeed in convincing an arbitrator that the Employer lacked just cause for the May 2007 written warning and August 2007 disciplinary layoff simply because Dunn was not given a memo documenting that she had been warned about her attendance in July 2006.

Dunn's more compelling argument, if it could be proved, was that her supervisors had been recording her time incorrectly. Dunn's claim that her supervisors were deliberately "stealing her time" would, of course, have been difficult to prove. However, if the Union could have affirmatively shown that Dunn had not been absent or tardy on enough occasions to justify her discipline, the supervisors' motivations would have been irrelevant. Dunn provided the Union with emails sent from the PICU to her personal email address when she arrived at work to document her time of arrival. However, Dunn never testified as to the number of dates for which she had proof that supervisors had improperly recorded her time. Dunn clearly had no such proof for any of the absences listed in her written warning, since the last of these absences occurred on March 19, 2007, and Dunn did not begin sending emails to herself until after May 2, 2007. At the unfair labor practice hearing, she produced evidence for only four of the fourteen dates on which, according to the August 9 one day disciplinary layoff, she was tardy within a six week period. Unless the Union had emails or other evidence that Dunn did not have a sufficient number of occurrences to justify the discipline she received on May 9 or August 9, and the record does not establish that it did, the Council 25 arbitration panel could rationally have concluded that the emails were irrelevant.

The record contains no explanation for why the Union did not arbitrate the grievance it filed over Dunn's January 21, 2008 two-day disciplinary layoff for attendance. However the main issue in that grievance appears to have been whether absences that should have been covered by Dunn's previously-granted intermittent FMLA leave were being marked as unexcused; the grievance resulted in the Employer excusing twelve of the 23 "occurrences," but refusing to rescind the discipline. All but one of the absences listed in the January 21, 2008 discipline occurred after August 26, 2007, when the Employer installed a time clock in the PICU, and the record does not indicate that Dunn claimed to be at work or at work on time on the dates she was listed in that discipline as being absent or tardy.

Dunn and the Union also argued, in the August 24, 2007 grievance and after, that Dunn was the victim of disparate treatment. Dunn maintained that while other employees in the PICU

only had their time docked when they were tardy if they had not PTO, Dunn's tardiness was considered an unexcused absence and she was disciplined. The evidence of this disparate treatment that Dunn introduced, and which she said she gave to the Union after she was terminated, consisted only of statements from other employees attesting that they had been tardy but not disciplined, and a time card indicating that one of these employees had been tardy twice within two weeks. However, employees in the Union's bargaining unit have to accumulate a certain number of unexcused absences before they can be disciplined. The evidence that Dunn introduced at the hearing would not have been sufficient to demonstrate to an arbitrator that her supervisors were treating her differently from other employees in the PICU.

In sum, as discussed above, the grievances filed over Dunn's 2007 and 2008 discipline for unexcused absences were not so clearly meritorious as Dunn argues they were. Moreover, there is no evidence that the Local handled these grievances in a manner that suggested that it wanted, or expected them to be unsuccessful. To the contrary, the Union filed a number of other grievances on Dunn's behalf in 2007 and 2008, only some of which were documented in the record, addressing Dunn's complaints that she was being unfairly targeted for discipline by her supervisors. Local 1583's stewards, including Heatherly, Ford, Yunkman and Jemison, and argued vigorously on Dunn's behalf at every level, and grievances over all her disciplinary actions, were filed and processed in a timely fashion. Ford also testified regarding his own efforts to ensure that the grievances the Local submitted to Council 25 on Dunn's behalf included all the evidence necessary to support them. Even if the Union may have on occasion given Dunn poor advice, e.g. advising her not to fill out the form requesting PTO for absences covered by the FMLA, or made possible errors of judgment, e.g., refusing to give the Employer documents pertaining to her "falsification of records" discipline that might have convinced the Employer to rescind it, nothing suggests that these were deliberate attempts by Local 1583 to sabotage her grievances. Despite Dunn's history of opposition to Local 1583's leadership, I conclude that there is insufficient evidence that either Local 1583's handling of the grievances it filed on Dunn's behalf in 2007 and 2008 or Council 25's decisions not to arbitrate these grievances was influenced by that history.

When Dunn was terminated in 2009, she had recently been involved in circulating a petition to decertify the Union. Council 25 took the challenge to its representation status in this large bargaining unit seriously enough to assign staff to counter it, and to distribute flyers attacking the instigators of the campaign, including Dunn, by name. On the day before Dunn's termination, the Local filed internal union charges against her under the AFSCME International Constitution. When Dunn was terminated, therefore, the Union, both Local 1583 and Council 25, had a strong motive for wishing her gone from the unit. The fact that the Union had motive, however, does not establish that its handling of her discharge grievance was influenced by this motive or that its decision not to arbitrate was made in bad faith.

Dunn's termination grievance was handled at the Local level by Dameron, the grievance chair. At the second step meeting on this grievance, Dameron reiterated the argument the Union had made in previous grievances about the lack of a documented oral warning. She also asked for a last chance agreement, which the Employer rejected. However, at the meetings with the Employer which preceded the second step, Dunn mostly acted as her own advocate. At the hearing and in her post-hearing brief, Dunn complained that Dameron did not speak out in her

disciplinary review conference or interview the witnesses whose statements Dunn gave her. However, Dameron testified that the reason she did not speak in Dunn's disciplinary review conference was that Dunn had said that she did not want the Union to represent her at that meeting, and that the reason she did not interview Dunn's witnesses is that the statements Dunn gave her did not indicate that the witnesses had accrued enough unexcused absences that they should have been disciplined. Moreover, as the record makes clear, Dunn was ready and willing to assume the task of explaining to the Employer in the meetings held to discuss her termination why the absences listed in her termination letter should not be considered unexcused and why her termination was not for just cause. There is no indication in the record that, at the time, Dunn either asked or expected Dameron to take a more active role in her defense. I conclude that the evidence does not support a finding that Dameron held back from arguing vigorously on Dunn's behalf, failed to do a proper investigation of Dunn's grievance, or took any other action that might be considered part of her responsibility as Dunn's representative because Dunn had been involved in the efforts to decertify the Union.

Because Dunn's grievance involved a termination, it was automatically forwarded to Council 25's arbitration review panel after the Employer denied the grievance at the second step. After Council 25 arbitration panel rejected the grievance, on September 10, 2009, the Local appealed with the argument that termination was inappropriate because there had been no documented oral warning. The panel had already rejected this argument when it refused to arbitrate Dunn's August 24 and August 29, 2007 grievances, and it rejected it again on October 2, 2009.

At Dunn's October 28, 2009 live appeal to the arbitration panel, Dunn evidently made arguments that she and the Local had made in previous grievances, because on November 4, 2009 the panel asked the Local for additional information, such as records from the Employer's computerized time system dating back to 2007, relevant to those arguments. At that time, the panel's file apparently did not include information about the series of grievances the Union had filed over the disciplinary actions leading up to Dunn's discharge, because the panel also requested this information from the Local.

The Union had already grieved Dunn's previous disciplines, and could not argue to an arbitrator in 2009 that the Employer had lacked just cause for these disciplinary actions. When it reaffirmed its intention not to arbitrate on March 2, 2010, the panel simply stated that the evidence did not show that Dunn did not have attendance problems between her last discipline and her discharge. Dunn had explanations for all the absences listed in her termination letter. However, these were all unscheduled absences, which the collective bargaining agreement gave the Employer the discretion to consider unexcused. Moreover, the Employer's personnel file contained documents which appeared to indicate that Dunn had attendance problems dating back to 2002. This evidence might have made it difficult to convince an arbitrator that termination was too severe a penalty for six unexcused absences incurred within five months. In short, Dunn is wrong when she argues that her termination grievance was so clearly meritorious that the Commission ought to conclude, from this fact alone, that Council 25's hostility toward her efforts to decertify the Union was the real reason that its arbitration panel refused to arbitrate the grievance.

I find that Dunn did not establish that Council 25 acted in bad faith and for reasons unrelated to the merits of her grievance when it refused to arbitrate her termination grievance. I also conclude, for reasons discussed above, that the Union, Local 1583 and Council 25, did not violate its duty of fair representation toward Dunn in its handling of the grievance filed over her February 12, 2009 termination. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____