STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TUSCOLA COUNTY MEDICAL CARE FACILITY,
Public Employer-Respondent in Case No. C12 J-191; Docket No. 12-001688-MERC

-and-

AFSCME COUNCIL 25, UNIT B, LOCAL 2641
Labor Organization-Respondent in Case No. CU12 J-046; Docket No. 12-001686-MERC

-and-

WANDA SMITH,
An Individual-Charging Party.
_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard, for the Public Employer

Kenneth J. Bailey, Counsel for the Labor Organization

Wanda Smith, appearing on her own behalf

DECISION AND ORDER

On April 3, 2013, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommended that the Commission dismiss the charges. The Decision and Recommended Order was served on the interested parties in accord with Section 16 of the Act.

Pursuant to Rule 176, R423.176 of the General Rules of the Employment Relations Commission, exceptions must be filed no later than twenty days of service of the ALJ's Decision and Recommended Order, and "[a]t the same time, copies of the exceptions . . . shall be served on each party . . . . An exception that fails to comply with this rule may be disregarded." (*emphasis added*).

In this case, exceptions to the ALJ's Decision and Recommended Order were due by the close of business on May 28, 2013. That same day, Charging Party filed exceptions but failed to submit a statement attesting that the exceptions were timely served upon Respondents.

On May 29, 2013, we notified Charging Party that unless a statement of service was filed within 20 days, her exceptions would be disregarded. To date, Charging Party has not provided the required statement of service. Accordingly, the exceptions will not be considered.

ORDER

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

_____
Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TUSCOLA COUNTY MEDICAL CARE FACILITY,
Respondent-Public Employer in Case No. C12 J-191; Docket No. 12-001688-MERC

-and-

AFSCME COUNCIL 25, UNIT B, LOCAL 2641,
Respondent-Labor Organization in Case No. CU12 J-046; Docket No. 12-001686-MERC,

-and-

WANDA SMITH,
An Individual Charging Party.
_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard, for the Public Employer

Kenneth J. Bailey, for the Labor Organization

Wanda Smith, appearing on her own behalf

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

This case arises from unfair labor practice charges filed on October 3, 2012, by Wanda Smith against her employer, Tuscola County Medical Care Facility, and her Union, AFSCME Council 25, Unit B, Local 2641. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charges were assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The charge in C12 J-191; Docket No. 12-001688-MERC alleges that the Tuscola County Medical Care Facility violated the employee handbook, engaged in harassment and refused to provide Smith with exculpatory information. The charge in Case No. CU12 J-046; Docket No. 12-001686-MERC asserts that the Union breached its duty of fair representation by engaging in

harassment, failing or refusing to communicate with Smith and failing to provide her with representation.

In an order issued on October 16, 2012, I directed Charging Party to show cause why the charges should not be dismissed for failure to state a claim upon which relief can be granted under the Act as to either Respondent. On December 11, 2012, Charging Party filed a response to the order to show cause in the form of seven "packets" of handwritten allegations and documents purportedly relating to her claims against Respondents. Within these packets, Smith requests that as remedy for the unfair labor practices committed by Respondents, the Commission order the Tuscola County Medical Care Facility to remove the discipline from her file and to terminate the employment of the director of nursing and the facility administrator. In addition, Smith seeks an order requiring the resignation or termination of Local 2641 president Kim Johnson.

Based on Charging Party's response to the order to show cause, I issued a supplemental order on December 18, 2012, in which I indicated that I would be recommending dismissal of the charge against the Employer in Case No. C12 J-191; Docket No. 12-001688-MERC on the ground that Smith had alleged no facts from which it could be concluded that the Tuscola County Medical Care Facility violated PERA. With respect to the charge against AFSCME Council 25, Unit B, Local 2641 in Case No. CU 12 J-046; 12-001686-MERC, I directed the Union to file a position statement addressing the allegations set forth by Charging Party in her charge and response to the order to show cause.

AFSCME filed its position statement on January 28, 2013. In the position statement, the Union made the following assertions of fact: Charging Party was issued a three day suspension on April 10, 2012 for allegedly engaging in harassment of co-workers by phone and text message and for creating a hostile work environment following the revelation that Smith had been engaged in an extra-marital affair with a co-worker. The Union filed a grievance challenging the suspension and advanced that grievance to the third step of the contractual grievance procedure. It then submitted the grievance and related information to the AFSCME Council 25 arbitration department, which decided not to proceed to arbitration based upon its conclusion that the grievance lacked merit. Charging Party's appeal of that decision was rejected by AFSCME because Smith had failed to provide her cell phone records which would have indicated the number and frequency of phone calls and text messages to co-workers, and based upon the Union's determination that the written statements provided by Smith in support of the appeal were not probative. At Charging Party's request, the Union then made a PERA request for additional information from the Tuscola County Medical Care Facility. Upon receipt of the requested information, the Union forwarded the documents to its arbitration department for use in conducting a review of Smith's second internal union appeal. That appeal, which once again was not accompanied by any of Smith's cell phone records, was rejected by AFSCME's arbitration department. Charging Party's third appeal is currently pending before the arbitration department.

In a second supplemental order issued on February 8, 2013, I concluded that the facts asserted by AFSCME in its position statement, if true, would warrant dismissal of the charge against the Union in Case No. CU12 J-046; 12-001686-MERC. I directed Charging Party to

either withdraw the charge or to show cause why the charge should not be dismissed for failure to state a claim under PERA. Charging Party was cautioned that in order to avoid dismissal of the charge without a hearing, she must assert facts which establish that this dispute involves more than simply a member's dissatisfaction with her Union's decision regarding the merits of a grievance. I further directed Smith to specifically identify which, if any, of the factual assertions set forth by the Union in its position statement she disagreed with and to set forth with specificity her explanation of what had actually occurred. Finally, I directed Charging Party to state the facts upon which she intends to rely to establish a breach of contract by the Employer. Charging Party filed a reply to the second supplemental order on March 7, 2013.

Discussion and Conclusions of Law:

Accepting all of the allegations set forth by Charging Party as true, dismissal of both of the charges on summary disposition is warranted. With respect to public employers, PERA does not prohibit all types of discrimination or unfair treatment, nor does the Act provide an independent cause of action for an employer's breach of the collective bargaining agreement. Rather, the Commission's jurisdiction with respect to claims brought by individual charging parties against public employers is limited to determining whether the employer interfered with, restrained, and/or coerced an employee with respect to his or her right to engage in union or other protected concerted activities. In the instant case, the charge against the Tuscola County Medical Care Facility does not provide a factual basis which would support a finding that Smith engaged in union activities for which she was subjected to discrimination or retaliation in violation of the Act. Therefore, the charge against the Employer in Case No. C12 J-191; Docket No. 12-001688-MERC must be dismissed for failure to state a claim under PERA.

Similarly, there is no factually supported allegation against AFSCME Council 25, Unit B, Local 2641 in Case No. CU12 J-046; Docket No. 12-001686-MERC which, if proven, would establish that the Union acted arbitrarily, discriminatorily or in bad faith with respect to Smith. A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). The union's actions will be held to be lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit, Fire Dep't*, 1997 MERC Lab Op 31, 34-35. To pursue such a claim, Charging Party must allege and be prepared to prove not only a breach of the duty of fair representation by the Union, but also a breach of the collective bargaining agreement by the Employer. *Knoke v E Jackson Pub Sch Dist*, 201 Mich App 480, 485 (1993); *Martin v E Lansing Sch. Dist*, 193 Mich App 166, 181 (1992).

The Commission has steadfastly refused to interject itself in judgments over agreements made by employers and collective bargaining representatives, despite frequent challenge by employees. *City of Flint*, 1996 MERC Lab Op 1, 11. The fact that an individual member is dissatisfied with the union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Assoc*, 2001 MERC Lab Op 131. Because the union's ultimate duty is toward the membership as a whole, the union is not required to follow

the dictates of the individual employee, but rather it may investigate and take the action it determines to be best. A labor organization has the legal discretion to make judgments about the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218.

In the instant case, Charging Party has failed to adequately explain how the actions of the Union constitute a violation of PERA. There is no factually supported allegation which would establish that the Union acted arbitrarily, discriminatorily or in bad faith. Smith admits that she had an extra-marital affair with a co-worker which resulted in her being disciplined for allegedly making harassing phone calls and text messages to other employees of the facility. It is undisputed that the Union filed a grievance on Charging Party's behalf regarding her three day suspension and that it advanced that grievance to the third step of the contractual grievance procedure before deciding not to proceed to arbitration based upon its conclusion that the grievance lacked merit. Although Smith is apparently displeased that the grievance was processed by Union steward Jeff Funsch and AFSCME staff representative Tom Greyerbiehl, rather than by Local 2641 president Kim Johnson, she offers no explanation as to how she was detrimentally affected by the fact that Johnson was not involved. There is also no dispute that AFSCME made a PERA request to the Employer for additional information pertaining to Charging Party's case and that it forwarded that information to the Union's arbitration department. The Union has twice given Charging Party the opportunity to appeal its decision not to seek arbitration of the grievance. A third appeal remained pending at the time Charging Party filed her response to the second order to show cause. The Union rejected the prior appeals, in part, because Charging Party failed to provide its arbitration department with copies of her cell phone records which would have indicated the number and frequency of phone calls and text messages to co-workers, a fact which Smith admits in her response to the second order to show cause.[1]

Charging Party repeatedly contends that her suspension was in violation of the second step of the Employer's harassment policy which, according to Smith, requires the facility to conduct an investigation and interview witnesses regarding allegations of harassment. However, the Union, in its position statement, asserts without contradiction that the harassment policy is not part of the collective bargaining agreement and, in any event, a grievance was ultimately filed on Smith's behalf challenging the suspension on the ground that "no proof [was] provided" to support the harassment allegations. In rejecting Smith's second internal union appeal, AFSCME concluded that the Employer had properly followed the rules and regulations set forth in the collective bargaining agreement, including contract language pertaining to progressive discipline. There is no suggestion that the Union's decision-making was motivated by racial or other individual prejudice or personal dislike, or that the Union treated Smith differently than

[1] Charging Party asserts that she was unable to provide cell phone records to the Union because she did not know when the allegedly harassing phone calls and text messages were made. However, she presumably is aware of the period during which she was engaged in the affair with her co-worker, as well as the date upon which she was suspended by the Employer. Moreover, Smith admits that she turned over to the Union records pertaining to her home telephone, but does not explain why she was unable to provide even a single document pertaining to calls and text messages made from her cell phone during any period preceding her suspension.

other bargaining unit members. The facts alleged show only that the Union determined that Smith's grievance was without merit. As noted above, a union has the legal discretion to make judgments about the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. To this end, the Michigan Supreme Court has held, "When the general good conflicts with the needs or desires of an individual member, the discretion of the union to choose the former is paramount." *Lowe v Hotel Employees*, 389 Mich 123, 146 (1973). Based upon the allegations set forth by Smith, I recommend dismissal of the charge against the Union in Case No. CU12 G-031; Docket No. 12-001265-MERC for failure to state a claim under PERA.

Despite having been given ample opportunity to do so, Charging Party has failed to set forth any facts which, if proven, would establish that either Respondent violated PERA. Therefore, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charges filed by Wanda Smith against the Tuscola County Medical Care Facility and AFSCME Council 25, Unit B, Local 2641 are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 3, 2013