STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25 AND LOCAL 1250,
Labor Organization-Respondent,

-and-

Case No. CU13 J-063
Docket No. 13-013932-MERC

MICHAEL T. LONCHAR,
An Individual-Charging Party.
_____/

APPEARANCES:

Kenneth J. Bailey, Staff Attorney, for Respondent

G. Patrick Thompson, for Charging Party

DECISION AND ORDER

On May 1, 2014, Administrative Law Judge David M. Peltz 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

_____/s/_____
Edward D. Callaghan, Commission Chair

_____/s/_____
Robert S. LaBrant, Commission Member

_____/s/_____
Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Kenneth J. Bailey, Staff Attorney, for the Respondent

G. Patrick Thompson, for the Charging Party

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed on November 5, 2013 by Michael T. Lonchar against the American Federation of State, County and Municipal Employees (AFSCME) Council 25 and its affiliated Local 1250. 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 case was 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 alleges that Respondent breached its duty of fair representation by refusing to pursue a grievance challenging Lonchar's termination from employment with the City of Warren for theft of tools owned by the employer. According to the charge, the Union made the decision not to pursue the grievance on June 24, 2013, without having conducted a proper investigation of the events giving rise to his discharge. Charging Party contends that the Union ignored the fact that the offense for which he was terminated was an established practice encouraged by management.

An evidentiary hearing was scheduled for March 17, 2014. On February 27, 2014, Respondent filed a motion for summary disposition asserting that the charge should be dismissed for failure to state a claim upon which relief can be granted under PERA. In its motion, which was supported by sworn affidavits from various AFSCME representatives, the Union set forth the following allegations: Charging Party was placed on leave for theft of City-owned tools on March 27, 2012, and was subsequently terminated after he twice refused to answer questions from

management about the incident. Local 1250 filed a grievance challenging the termination on May 23, 2012, advanced the matter through the grievance process and finally submitted the grievance to AFSCME's arbitration review panel. The panel rejected the grievance on August 3, 2012, but the Local appealed that decision and sought to have the matter stayed pending resolution of criminal charges arising from the alleged theft. On May 10, 2013, the Local notified the arbitration review panel that Lonchar had been convicted of embezzlement. Thereafter, the panel convened a live appeal of its decision not to pursue the grievance with Lonchar in attendance. On June 24, 2013, the panel notified Lonchar in writing that the appeal had been rejected for lack of merit. The letter stated:

> The file shows the grievant is accused of embezzlement of City property/funds. At issue is the fact the grievant was found guilty of embezzlement by jury trial. Further, the grievant admitted he had been told by Mr. Neighbors that if they borrowed tools for personal use they had to sign them out. At no time did the grievant then state he had tools and would sign out for them.
>
> Arbitrators consider theft a serious offense and the fact that the grievant was convicted cannot somehow be undone by an arbitrator.

Because the scheduled hearing date was rapidly approaching at the time the Union's motion for summary disposition was received, I issued an order notifying the parties that the motion would be addressed on the record at the start of the hearing and that Charging Party would be given an opportunity to respond to the motion and to dispute the allegations set forth therein on the record. However, I indicated in the order that if the factual allegations set forth by Respondent were true with respect to the Union's representation of Lonchar and its decision not to pursue the grievance to arbitration, a ruling in favor of the Union was warranted.

Subsequent to the issuance of that order, Charging Party retained G. Patrick Thompson as his representative and the hearing was adjourned to accommodate a conflict with Mr. Thompson's schedule. In an order issued on March 18, 2014, I indicated that rather than immediately set a new hearing date, I was instead directing Charging Party to file a written reply to the Union's motion to dismiss. Charging Party was specifically ordered to respond to the factual allegations and legal arguments set forth by the Union in its motion and cautioned that a timely response to the order must be filed to avoid dismissal of the charge without a hearing. Pursuant to that order, Lonchar's response was due by the close of business on March 18, 2013. To date, Charging Party has not filed a response to the order or sought to obtain an extension of time in which to file such a response.

Discussion and Conclusions of Law:

The failure to respond to an order on a motion to dismiss may, in itself, warrant dismissal of an unfair labor practice charge. *Detroit Federation of Teachers*, 21 MPER 3 (2008). In any event, I conclude that the charge, as written, fails to raise any issue cognizable under PERA.

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386

US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. To this end, the union is not required to follow the dictates of any individual employee, but rather it may investigate and handle the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. Poor judgment, or ordinary negligence, on the union's part, is not sufficient to support a claim of unfair representation. *Goolsby* at 672; *Whitten v Anchor Motor Freight, Inc*, 521 F 2nd 1335 (CA 6 1975). See also *Detroit Fed of Teachers*, 21 MPER 5 (2008) (no exceptions); *Wayne Co Cmty. College*, 19 MPER 25 (2006) (no exceptions); *Wayne Co. Sheriff Dept* 1998 MERC Lab Op 101 (no exceptions).

The Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. The Union's decision on how to proceed is not unlawful as long as it is 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. The mere fact that a member is dissatisfied with their union's efforts or ultimate decision is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Assoc*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855. To prevail on a claim of unfair representation, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993).

Here, Charging Party has failed to set forth any factually supported allegation which would establish a breach of the duty of fair representation by Respondent, nor has Charging Party described with specificity how the conduct of the City of Warren violated the collective bargaining agreement. Moreover, the facts set forth by the Union in its motion for summary disposition which, as noted, was unopposed and which was supported by sworn affidavits, contradict Charging Party's contention that the Union acted unlawfully in connection with its representation of Lonchar. It is undisputed that Local 1250 filed a grievance on Charging Party's behalf and advanced the matter through the grievance process before submitting the grievance to AFSCME's arbitration review panel. When the arbitration review panel rejected the grievance, the Local appealed that decision and sought a stay while criminal charges against Lonchar were pending. After Lonchar was convicted by a jury of embezzlement based upon the events giving rise to his termination, the Union granted Charging Party a live appeal before affirming its earlier decision not to advance the grievance further. The Union determined that Lonchar was unlikely to prevail at arbitration due to the criminal conviction and various statements made by Charging Party concerning the incident for which he was discharged.

Although Charging Party now takes exception to the representation he received from the Union, there is no factually supported allegation which, if true, would establish that AFSCME was hostile to Lonchar, that it treated him differently than other, similarly situated bargaining unit

members or that it in any manner acted arbitrarily, discriminatorily or in bad faith in connection with this matter. The record establishes that the Union made a determination that the grievance was without merit, a decision which was certainly not irrational given Lonchar's criminal conviction arising from the theft of City tools. 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).

Despite having been given a full and fair opportunity to do so, Charging Party has failed to set forth any factually supported allegation which, if true, would establish that the Union acted arbitrarily, discriminatorily or in bad faith in connection with this matter. Accordingly, I conclude that the charge must be dismissed for failure to state a claim upon which relief can be granted under PERA and recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____