STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UAW LOCAL 2290,
Labor Organization-Respondent,

Case No. CU12 H-034
-and- Docket No. 12-001375-MERC

THOMAS LOCKHART,
An Individual-Charging Party.
_____/

APPEARANCES:

Ava Barbour, Associate General Counsel, International Union, for Respondent

Joni M. Fixel, on behalf of Charging party

DECISION AND ORDER

On September 3, 2013, after a full evidentiary hearing, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent UAW Local 2290 did not violate its duty of fair representation by failing to file a grievance concerning the employer's refusal to provide an accommodation for Charging Party's disability. The ALJ further found that Charging Party failed to establish that the employer breached the collective bargaining agreement and, thus, had not proven a violation of § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ recommended dismissal of the unfair labor practice charge in its entirety. The Decision and Recommended Order of the ALJ was served on the parties in accordance with § 16 of PERA. Charging Party filed a request for an extension of time in which to file exceptions. The request was granted and Charging Party filed an Appeal of Summary Disposition and Exceptions to the ALJ's Decision and Recommended Order on October 28, 2013.[1] Respondent filed a Brief in Support of the ALJ's Decision and Recommended Order on November 8, 2013.

In his exceptions, Charging Party argues that the ALJ erred in finding that the Respondent did not breach its duty of fair representation by failing to file a grievance. He argues that at the point where the employer gave him a choice between early retirement or loss of benefits, Respondent should have filed a grievance because that choice was tantamount to a constructive discharge. It was then, he claims, that the collective bargaining agreement was breached by the employer and by finding no such breach, the ALJ erred.

[1] This matter was not decided on summary disposition.

Charging Party also requests that the Commission "remand this case for a full evidentiary hearing." The ALJ held a full evidentiary hearing and did not decide this matter on summary disposition. Accordingly, Charging Party's request for a remand is denied.

In its Brief in Support of Decision and Recommended Order of Administrative Law Judge, Respondent urges the Commission to adopt the ALJ's Decision and Recommended Order in its entirety.

We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

Charging Party worked for the Kalamazoo County Circuit Court Family Division as an Intake Investigator for 19 years. His job required him to write reports, which were sometimes lengthy and detailed. In the early Fall of 2011, Charging Party began experiencing problems reading and comprehension. Those problems made it difficult for him to perform the report writing aspect of his job. He asked about being transferred to another job, one that did not require as many reports or such lengthy reports.

On October 7, 2011, Charging Party gave Kathy Flack, Administrator for the Court's Family Division, a letter from Dr. Michael Lyons, a psychologist, who stated that Charging Party had cognitive deficits, especially in language based skills. The letter stated that Charging Party was undergoing therapy for depression and anxiety due to concerns over his work performance and that due to his cognitive problems, he needed to be "placed in a less stressful setting, one in which report writing is not such a critical part of his job." The letter did not contain a specific diagnosis.

Charging Party asked Joseph Thomas, chair of the Family Court Unit of UAW Local 2290 and Betsy Bennett, the UAW International Service Representative assigned to assist Local 2290 with operations, negotiations and grievances, to assist him. Charging Party testified that he repeatedly asked Thomas if Respondent would file a grievance and was told that Thomas and Bennett were trying to work something out with the employer.

Sometime in early November 2011, Charging Party and Thomas met with Flack, Sue Darling, Court Administrator, and County Human Resources Director Jo Woods. Charging Party informed them that he was having trouble performing his job and was stressed out. They suggested that he take a leave of absence. Thomas testified that they did not direct Charging Party to take a leave or tell him that it was mandatory. Rather, Charging Party agreed to take Family and Medical Leave Act (FMLA) time until January 27, 2012.[2] Thomas testified that Charging Party did not ask him to file a grievance at any time prior to taking the FMLA leave.

Charging Party spoke with Thomas several times while on leave and provided Thomas a list of court or county jobs that he believed he could do, including one at the juvenile court. Thomas informed Charging Party that the juvenile court position was covered by another union

[2] Charging Party had accumulated sufficient paid leave time so would continue to receive his salary during the FMLA leave.

and paid $20,000 less per year than he was currently earning. Charging Party claims he then asked Thomas to file a grievance but Thomas said he could not because Charging Party was on leave. Thomas denied that he was asked to file a grievance.

After Charging Party went on FMLA leave, Bennett spoke with Thomas and they agreed that at that point the employer had not violated the collective bargaining agreement and there was nothing to grieve.[3] They spoke with Woods, who told them she was trying to find a way to lessen Charging Party's workload until September 2012, when he would be eligible for full retirement.

On December 13, 2011, Flack sent Charging Party a letter stating that the employer needed additional information from Dr. Lyons - a specific diagnosis - and without a diagnosis, the employer could not respond to the accommodation request. On December 22, 2012, Dr. Lyons sent another letter, which repeated his earlier letter, but added diagnoses.

On or about December 23, 2011, Bennett spoke to Charging Party, who told her about Dr. Lyons' letter and his FMLA leave. He asked Bennett "if it was grievable" and Bennett replied that there was no contractual violation on which to base a grievance. She asked him to put in writing the reasonable accommodation he was seeking and to state what other jobs he thought he could perform. Charging Party faxed a list of jobs and sent Bennett an e-mail asking if "his situation was a grievable matter." He asked Bennett for a written reply to his e-mail. Charging Party testified that he never received a response. Respondent produced an e-mail dated January 3, 2012, from Bennett to Charging Party, in which Bennett apologized for not responding to his e-mail due to having been on vacation. Bennett testified that she also spoke to Charging Party and reiterated that the employer had not done anything to violate the contract.

On January 12, 2012, Flack sent Charging Party a letter stating that after consulting with Woods and the county's labor counsel, the employer had concluded that there was no reasonable accommodation available for him. The letter requested a statement from Charging Party's physician that he could return to work without restrictions when his leave expired on January 27, 2012. Charging Party sent Bennett an e-mail stating that he would return to work on January 30, 2012.

Charging Party submitted a letter from his family physician stating that he could return to work without restrictions. The employer responded that he must submit a letter from a psychologist. Dr. Lyons told Charging Party that he would not provide such a letter because it would contradict what Lyons had previously stated. Charging Party did not return to work. He asked Thomas if he now had a basis for a grievance. Thomas told him that if he tried to return to work and the employer refused to allow it, Respondent would file a grievance. However, Thomas added, the employer now had documentation – the letters from Dr. Lyons - that Charging Party could not perform the essential duties of his job. Thomas testified that he reminded Charging Party that report writing was an essential part of all the jobs at the court.

[3] The collective bargaining agreement contained a standard non-discrimination clause that prohibited the employer from discriminating on the basis of disability. However, the clause did not include any specifics related to reasonable accommodations for disabilities.

On February 3, 2012, Dr. Lyons sent the employer a third letter, which recommended that Charging Party "be assigned to a position in which he is using his skills with adolescents but does not have to write complicated reports and assessments. Currently, he does not have the cognitive capabilities to perform his old job." Flack arranged for Charging Party to have an independent neurological evaluation by Dr. David Russell, a psychologist. On February 7, 2012, Dr. Russell sent Flack a letter stating that the report from Charging Party's family physician was consistent with Charging Party's history and complaints, and recommending that Charging Party return to work, "with accommodations to see if he can function at a satisfactory level, consistent with the requirements of the job." Dr. Russell recommended a trial period of two weeks, but did not suggest any specific accommodation.

On February 15, 2012, Charging Party, his wife, Thomas and Bennett met with Woods and Jean Richards, Benefits Manager for the county. The employer presented a written summary of Charging Party's options. According to Thomas' notes and testimony, Woods said that the County's labor attorney advised that a reduced caseload was not a reasonable accommodation because in order to grant one, the intake investigator job would have to be restructured. The employer noted that Charging Party had only two and one-half weeks of leave time remaining and if he could not return to work without restrictions, he would become a deferred retiree. A deferred retiree is an employee who has run out of all paid leave time and cannot return to work, but who is retired rather than terminated. Thomas testified that "[w]hat makes a deferred retiree different than a full retiree is deferred retirees will never be eligible for medical insurance through the county." … "[y]ou still get your pension, but you don't get any medical insurance or coverage with the county."

Also discussed at the meeting were the pros and cons of Charging Party applying for short or long term disability. Another alternative was to retire early, with a reduced retirement benefit, but with individual retiree health care coverage. After the meeting, Charging Party talked to Thomas and Bennett and asked about filing a grievance. Thomas testified that he told Charging Party "we can do it if you want to," but Charging Party replied that he was "done fighting" and "ready to move on" to the next chapter in his life. Charging Party admitted that he said something to that effect, but insisted he said it out of exasperation at Respondent's lack of support.

On February 21, 2012, Charging Party, Thomas and Bennett met again with Woods, Flack and Darling. Flack said that the transcriber complained that she could not understand his dictated reports and his supervisor complained about the accuracy of his reports. Woods said that his reports were being rewritten, the employer could not be expected to have another employee write his reports, and all other open positions required report writing. After the meeting, Charging Party met with Thomas and Bennett, who informed him that if a grievance were filed, Respondent might or might not win, and if it did not, and Charging Party did not retire before he ran out of leave, he would become a deferred retiree.

Sometime between February 24 and March 1, 2012, Charging Party called Thomas and asked if Thomas would accompany him to the Human Resources Office to sign his retirement paperwork. Thomas testified that Charging Party "… said he was done, he was tired" and "he was going to retire …. and just move on." … "He thanked me for all my hard work that I had

done with this, and that was it." After Charging Party signed the retirement paperwork, he submitted an application for disability benefits, which was denied on or about April 12, 2012.

Discussion and Conclusions of Law:

The union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651 (1984); *Eaton Rapids Educ Ass'n*, 2001 MERC Lab Op 131. See also *Vaca v Sipes*, 386 US 171, 177 (1967). Bad faith, under this standard, indicates an intentional act or omission undertaken by the union dishonestly or fraudulently. *Goolsby* at 679. A union acts in bad faith when it "acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct," while discriminatory conduct has been defined as discrimination which is "intentional, severe and unrelated to legitimate union objectives." *Merritt v International Ass'n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass'n-Int'l*, 156 F3d 120, 126 (CA 2, 1998); *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v Lockridge*, 403 US 274, 301 (1971); *Vaca v Sipes.* "Arbitrary" conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682. A union has considerable discretion to decide how or whether to proceed with a grievance, and is permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. The fact that an individual member is dissatisfied with the union's efforts on his or her behalf is insufficient to demonstrate a breach of the duty of fair representation. *Eaton Rapids Educ Ass'n*, 2001 MERC Lab Op 131.

The ALJ found no evidence that Respondent acted in bad faith, arbitrarily, dishonestly or with discriminatory intent in its handling of Charging Party's requests that it file a grievance. We agree. The ALJ credited the testimony of Thomas and Bennett that Respondent never explicitly told Charging Party that it would never file a grievance. The ALJ also noted that Bennett and Thomas consistently informed Charging Party that the employer had not violated the contract and that unless it did, there was no basis for filing a grievance. The ALJ stated that "[i]t is clear from this record that neither Thomas nor Bennett ever believed that there was a basis for a viable grievance." Our review of the record reveals that the ALJ is correct. Respondent exercised considerable discretion in deciding whether to proceed with a grievance and evaluated Charging Party's requests based on its assessment of the individual merit of the requested grievance.

To demonstrate a violation of the duty of fair representation for failure to file a grievance, a charging party must prove both that the union violated its duty of fair representation and that the employer violated the collective bargaining agreement. *Goolsby*; *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480 (1993). We agree with the ALJ that Charging Party did not establish that the employer violated the collective bargaining agreement by failing to provide him with an accommodation for his disability.

The ALJ noted that Charging Party was neither disciplined nor discharged, but that he submitted documentation that he could no longer perform the essential duties of his job. The only issue, she found, was reasonable accommodation, and on that issue Charging Party:

> "did not establish that there were any reasonable accommodations that the Employer could have made that would have enabled him to perform the essential functions of any job at the Court or County for which he was otherwise qualified. Second, and more significant, the collective bargaining agreement contained a non-discrimination clause that included a prohibition on discrimination based on disability. However, … the agreement did not contain any provision pertaining to accommodations for disabilities."

We concur.

For all of the above reasons, we agree with the ALJ that Respondent did not violate the duty of fair representation. We have carefully examined all other issues raised by Charging Party in his exceptions and find they would not change the result. We, therefore, affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charge.

Accordingly, we issue the following Order:

ORDER

The unfair labor practice charge is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 14, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UAW LOCAL 2290,
Labor Organization-Respondent,

Case No. CU12 H-034
Docket No. 12-001375-MERC

-and-

THOMAS LOCKHART,
An Individual-Charging Party.
_____/

APPEARANCES:

Ava Barbour, Associate General Counsel, International Union, UAW, for Respondent

Thomas Lockhart, appearing for himself

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 in Lansing, Michigan on December 14, 2012, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by Respondent on February 14, 2013, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On August 10, 2012, Thomas Lockhart filed this charge against his collective bargaining agent, UAW Local 2290. Until March 1, 2012, when he took an early retirement, Lockhart was employed by the Kalamazoo County Circuit Court (the Employer) as an intake investigator. In 2011, Lockhart developed a medical condition which affected his ability to do his existing job. Lockhart sought an accommodation, or another job with the Employer or its funding unit Kalamazoo County, that would allow him to continue to work. The Employer refused to provide such an accommodation. Lockhart alleges that Respondent discriminated against him and failed to represent him in good faith in his dispute with the Employer, including refusing to file a grievance over the Employer's refusal to accommodate his disability.

Findings of Fact:

In the fall of 2011, Lockhart was an intake investigator in the Employer's Family Division. He had held this position for nineteen years. He was a member of a bargaining unit represented by Respondent which included both employees of the Court and employees of the Employer's funding unit, Kalamazoo County (the County). Lockhart had a number of dealings with Respondent over the years, including a grievance filed on his behalf which resulted in the reduction in discipline issued to him. However, Lockhart testified that on at least two occasions prior to the fall of 2011, Joseph Thomas, the unit chairperson for the Family Division unit of Local 2290, and Betsy Bennett, the International UAW servicing representative assigned to assist Local 2290, refused to file a grievance when he asked them to do so. Lockhart testified that when he asked Thomas why he had filed a similar grievance on behalf of another employee, Thomas said that it was because the other employee was white; Lockhart is African-American. Lockhart also testified that Bennett said that she would not file a grievance against Lockhart's supervisor because she was a white woman. Both Thomas and Bennett denied making these statements or anything of a similar nature; Bennett additionally testified that she is not normally involved with grievances before step four of the grievance procedure. Both Thomas and Bennett were experienced union representatives. It is unlikely that either, not to mention both, would have given Lockhart such blatantly racist explanations for their actions. I do not, therefore, credit Lockhart's testimony.

Lockhart's duties as an intake investigator required him to work with juveniles and to write assessments. These reports, which were dictated and transcribed by a typist, were sometimes detailed and lengthy. At some time prior to the fall of 2011, Lockhart began experiencing problems reading and comprehending written words, problems that made it difficult for him to perform the report writing aspect of his job. Sometime in September or October 2011, Lockhart brought his problem to the attention of Kathy Flack, the administrator for the Court's Family Division. Lockhart and Flack had several discussions about his problem. Although the record is not clear, it appears that Lockhart asked to be transferred to one of several other positions with the Court. These were positions that also worked with juveniles, but which Lockhart believed he could handle because they involved fewer or shorter reports. They also apparently paid the same or about the same as Lockhart's position, a factor which was important to him. During these discussions, Flack told Lockhart that she thought that the Employer could make some accommodation for his condition. However, she did not explicitly agree to place Lockhart in a different job.

On October 7, 2011, Lockhart brought Flack a letter from Dr. Michael Lyons, a psychologist. The letter stated that Lockhart had been given neuropsychological testing and that he demonstrated cognitive deficits, especially in areas requiring language based skills, probably originating from a medical condition or event. The letter stated that Lyons was providing Lockhart with therapy because Lockhart was depressed and anxious because of his concerns due to work performance. The letter also stated that due to Lockhart's cognitive problems, he needed to be "placed in a less stressful setting, one in which report writing is not such a critical part of his job."

According to Lockhart, he approached Joseph Thomas, the elected unit chair of the Family Court unit of UAW Local 2290, for help in his dispute with the Employer sometime in September or early October 2011. According to Lockhart, Betsy Bennett, the UAW International servicing representative assigned to assist Local 2290, also became involved at this time. Lockhart testified that he repeatedly asked Thomas if Respondent would file a grievance, but that both Bennett and Thomas told him that they were trying to work something out with the Employer. He also testified that in September and October 2011, he repeatedly visited Bennett's office to find out what was happening, but that Bennett would not speak with or contact him.

Thomas testified, however, that Lockhart did not inform him of his problem or seek his advice until October 27, 2011, after Lockhart had given Flack the letter from Lyons. Thomas testified that on that date Lockhart left him a written note. Thomas produced a copy of the dated note in Lockhart's handwriting. The note said that Lockhart had met with the Employer and discussed "options available to me surrounding work, retirement, etc." The note also said that Lockhart would like to bring Thomas in on the discussions, and also to include Bennett. According to Thomas, Lockhart then told Thomas about his previous conversations with Flack and gave Thomas a copy of the letter from Lyons. A few days after that, Lockhart and Thomas had a meeting with Flack, who told them that she needed to consult with Sue Darling, the court administrator, before taking any further action. Sometime in early November 2011, Lockhart and Thomas met with Flack, Darling, and County human resources director Jo Woods. Lockhart reiterated that he was having trouble performing his job and that he was "stressed out." The Employer representatives suggested that Lockhart go on leave so that he could take a break and get "refreshed." According to Thomas, they did not tell Lockhart that he had to take a leave of absence. Lockhart, who had sufficient accumulated leave time to continue to receive his salary for this period, agreed to take a leave of absence under the Family Medical Leave Act (FMLA) until January 27, 2012. According to Thomas, Lockhart did not ask him to file a grievance at any time prior to taking this leave of absence. Lockhart affirmed that he agreed to take FMLA leave after the Employer suggested it. I credit Thomas' testimony as set out in this paragraph.

Thomas and Lockhart spoke on the phone several times while Lockhart was on his FMLA leave. Lockhart also provided Thomas with a list of Court or County jobs that he believed he could do, including one at the juvenile court. Thomas told him that the job at the juvenile court was not in Respondent's bargaining unit, and also that since the job paid $20,000 less per year than an intake investigator, the County was not going to let him transfer to that position at his current salary. According to Lockhart, he asked Thomas during these discussions to file a grievance and Thomas said he could not because Lockhart was on FMLA leave. Thomas denied that Lockhart asked him to file a grievance at that time, but admitted that he felt that there was not much he could do for Lockhart at that point because Lockhart was on a leave of absence.

Bennett was not present at the meetings held with Employer representatives about Lockhart's situation in the fall of 2011. However, sometime after Lockhart left work on his FMLA leave, she spoke with Thomas about Lockhart's situation. They agreed that at that point the Employer had not done anything to violate the collective bargaining agreement and that there was nothing to grieve. As Bennett explained at the hearing, the collective bargaining agreement contained a standard non-discrimination clause that prohibited the Employer from discriminating on the basis of disability, among other things. However, it did not include any specific provisions

related to reasonable accommodations for disability. In addition, since Lockhart was on a voluntary leave of absence and had not been denied the right to return to work, it was not clear that there was anything to grieve.

Sometime prior to December 23, 2011, Bennett also spoke directly to Lockhart. Lockhart told her about his diagnosis and letter from his doctor, and said that he was out on medical. Lockhart then asked Bennett "if it was grievable," and Bennett told him that there was no contractual violation for a grievance to be filed. Bennett also told Lockhart that if he was looking for an accommodation it had to be reasonable, and asked Lockhart to fax her information about what he thought would be reasonable, including other jobs that he felt he could do.

Under the retirement plan available to members of Respondent's bargaining unit, employees hired before 2009 could retire with full benefits at age 60 with at least eight years of service, or at age 55 with 25 years of service. In December 2011, Lockhart was 56 years old. He would not attain 25 years of service until September 2012. However, in December 2011 Lockhart was eligible for early retirement, at a reduced benefit. Lockhart was also eligible for individual retiree health insurance as an early retiree, although his premium share would go down if he continued to work another year. Under the collective bargaining agreement, retirees could elect dependent coverage but were required to pay the full cost, whether they retired early or at the age of normal retirement. Members of the unit who were vested in the pension plan, but who left their employment before they were eligible to receive immediate retirement benefits, were considered "deferred retirees." Deferred retirees received no retiree health benefits when they began drawing retirement benefits.

On December 8, Lockhart sent Bennett a fax listing other jobs with the Court or County which Lockhart believed he could do. In mid-December 2011, Thomas and Bennett discussed Lockhart's situation with Woods after the end of a contract negotiating session. Woods told them that she was trying to work out a way to lessen Lockhart's workload until September 2012 when he would become eligible for full retirement. She said she had yet to receive approval for this, however. There was no suggestion from Woods, according to Thomas and Bennett, that the Employer would agree to give Lockhart a different job. According to Bennett, she relayed Woods' statement to Lockhart and told him that she was confident that Woods was going to find a way to accommodate him. However, according to Thomas, when he told Lockhart that Woods seemed willing to give Lockhart a reduced caseload until he could retire, Lockhart said that he did not want to return to the same job because it had made him too stressed out.

On or about December 13, Flack sent Lockhart a letter stating that Employer had not yet received information about his specific diagnosis and that this prevented the Employer from responding at that time to Lockhart's request for an accommodation.

On December 23, Lockhart sent Bennett an email asking her if any progress had been made with Woods on making an accommodation for him. In the email, Lockhart told Bennett about the December 13 letter from Flack, and that his doctor had promised to send a letter with a more detailed diagnosis. Lockhart asked about his "overall status with the union, now that I am on medical leave from the job," asked if he was protected by the union, and if "his situation was a grievable matter." He asked Bennett for an email or written response to his email.

Lockhart testified that he did not get any response to his letter. Respondent produced an email from Bennett to Lockhart dated January 3, 2012, in which Bennett apologized to Lockhart for not responding to his email and noted that she had been on vacation. Bennett's email stated that she had confirmed that Woods had not spoken to Flack before Flack sent the December 13 letter, that Bennett was confident that Woods intended to make accommodations to get Lockhart back to work, and that Bennett would be talking to Woods again the next day. Bennett testified that around this time she also spoke to Lockhart and told him that the Employer had not done anything that was a contract violation at that point. I credit Bennett's testimony. I note that Bennett testified that she sometimes preferred talking over email, and that her conclusion that the Employer had not violated the contract was something that Bennett may not have wanted to put in writing.

On December 22, Lyons sent Flack another letter. This letter repeated the comments and recommendations contained in his October 7 letter, but included diagnoses and diagnoses codes.

On January 12, 2012, Flack sent Lockhart a letter stating that after consulting with Woods and the County's labor counsel, the Employer had concluded that, based on the information he and Lyons had submitted, there were no reasonable accommodations that could be made for him at that time. Flack's letter stated that the Employer needed a statement from Lockhart's physician that he could return to work without restrictions after his FMLA leave ended on January 27, 2012.

After receiving this letter, Lockhart sent an email to Bennett stating that he would be returning to work on January 30 and had a meeting with his doctor on January 19. He asked Bennett for a meeting to discuss what he should expect when he returned to work. Bennett told him that she was going to talk to Woods again, and was still confident that Woods intended to make accommodations to get him back to work.

Lockhart then gave the Employer a letter from his family doctor stating that he could return to work without restrictions. However, the Employer insisted that he obtain a letter from a psychologist. Lyons told Lockhart that he would not provide such a letter because it would contradict what Lyons had previously documented. Lockhart did not return to work on January 30. Sometime in January, Lockhart asked Thomas if he now had the basis for a grievance. Thomas told him that if Lockhart attempted to return to work and was told by the Employer that he could not, Respondent would file a grievance. However, Thomas also told Lockhart that the Employer now had documentation, in the form of Lyons' letters, that Lockhart did not have the capabilities to do his job. Thomas told Lockhart that the Employer needed something that said these things were no longer limitations. Thomas also told Lockhart that writing assessments was an essential part of all the jobs at the Court that involved working with juveniles, including Lockhart's job and Thomas' own job as a probation officer. According to Thomas, he tried to explain the situation to Lockhart by using the analogy to a UPS worker who had to lift boxes all day, and whose doctor said that he could not lift boxes. Lockhart did not deny having this conversation with Thomas, and I credit Thomas' testimony.

Sometime in late January or early February, Thomas and Lockhart had a meeting with Woods and Flack during which Lockhart said that he believed that he had been carrying a higher caseload than the other intake investigators. Lockhart said that he had been keeping a personal log of his case assignment, and that he probably had 10 to 15 more case assignments than the other investigators. There was also discussion about other jobs Lockhart might be able to do, and Woods said that she would investigate and see if there were any County jobs that he could do with his limitations.

On February 3, Lyons sent the Employer a third letter. This one recommended that Lockhart, "be assigned to a position in which he is using his skills with adolescents but does not have to write complicated reports and assessments. Currently, he does not have the cognitive capabilities to perform his old job." The letter also gave a slightly different diagnosis of Lockhart's condition than the previous letter, with a different diagnosis code.

In early February, Flack arranged for Lockhart to have a neurological evaluation by another psychologist, Dr. David Russell. On February 7, Russell sent Flack a letter stating only that the report from Lockhart's family physician was consistent with Lockhart's history and complaints, and recommending that Lockhart return to work, "with accommodations to see if he can function at a satisfactory level, consistent with the requirements of the job." Russell recommended a trial period of two weeks to see if Lockhart could function with accommodations, but did not suggest any specific accommodation.

On February 15, 2012, Lockhart, his wife, Thomas and Bennett attended a meeting with Woods and Jean Richards, an employee of the County human resources department. Thomas took notes at this meeting which were admitted into the record and also testified regarding what was discussed. Also admitted was a summary of Lockhart's options prepared by the Employer before the meeting and presented to Lockhart and Thomas at the meeting. According to Thomas' notes and testimony, Woods said that the County's labor attorney had said that giving Lockhart a reduced caseload was not a reasonable accommodation because the intake investigator job would have to be restructured. The Employer representatives also noted that Lockhart had only two and one-half weeks of remaining leave time. They stated that if he could not return to work without restrictions after he exhausted his leave, he would become a deferred retiree. As a deferred retiree, Lockhart not only would not be receiving any immediate source of income, he would forfeit his rights to future retiree health benefits because he would have a break in service. There was also discussion at this meeting of the benefits, drawbacks, and risks of Lockhart applying for short or long term disability, including that Lockhart's family could not be covered by his health benefits if he went on long-term disability and that if Lockhart was not approved for disability benefits he might have a break in service. The Employer also told Lockhart that he would not accrue pension service credits while on disability, and would have to return to work to accrue the additional service credits he needed for full retirement before age sixty. The final alternative the Employer gave Lockhart was to retire early, with a reduced retirement benefit. In that case, Lockhart would receive individual retiree health care coverage. His family would be covered by his health insurance until the end of the month, and then Lockhart would have to pay out of pocket for their benefits but could buy these benefits through the Employer. The Employer emphasized that Lockhart needed to make his decision before his accumulated leave time ran out in two weeks, because Lockhart needed to be on the payroll when he applied in order to eligible

for any type of disability benefit and needed to return to work or retire before he exhausted his leave time to ensure that he would not have a break in service.

After the February 15 meeting, Lockhart talked to Thomas and Bennett and asked them what he should do. Thomas went over the options presented by the Employer, but didn't make a recommendation. Lockhart also asked about filing a grievance. Thomas testified that he told Lockhart "we can do it if you want to," but that Lockhart replied that he was "done fighting" and ready to move on the next chapter in his life. Lockhart admitted that he said something to this effect, but maintained that he made this statement out of exasperation at Respondent's lack of support. Lockhart then told Thomas and Bennett that he would consider all his options.

On February 21, Lockhart, Thomas and Bennett met again with Woods, Flack and Darling. According to Thomas' notes, Woods said Lockhart's assignments as intake investigator required him to do written case reports. Flack said that the review of the case assignments indicated that two of the three other intake investigators had received the same number of case assignments as Lockhart, and that the other had received more. Lockhart disagreed, and said that according to a former intake investigator, Lockhart was receiving two to three times the number of assignments intake investigators were supposed to receive. Woods noted that Lockhart had not filed a grievance over the issue. The Employer representatives also said that the transcriber had complained that she sometimes could not understand Lockhart's dictated reports, and that Lockhart's supervisor also had complained about the accuracy of Lockhart's reports. There was also discussion of the requirements of other open positions, and the Employer maintained that they all required writing reports. The Employer representatives said Woods had contacted Dr. Russell and that while Dr. Russell had suggested another job, in-house detention, that Lockhart could possibly do, Russell did not really understand the work. Woods said that Lockhart's reports were already being rewritten, that the Employer could not have someone else writing Lockhart's reports, and that there was not an accommodation that could be made.

After the February 21 meeting, Lockhart, Thomas and Bennett had another discussion about filing a grievance. This time Bennett and Thomas pointed out Respondent might or might not win the grievance, and if it did not and Lockhart did not retire before he ran out of leave he would become a deferred retiree.

On February 24, Woods sent Lockhart a letter stating that she had reviewed all open positions in the County, but had found none for which he would qualify for or "do not require use of cognitive abilities." Woods reminded Lockhart that he had only enough available leave time to take him to March 1, 2012, at which time he must either have made the decision to retire or have qualified for disability leave.

Sometime between February 24 and March 1, Thomas accompanied Lockhart to sign papers applying for retirement effective March 1, 2012 that day. According to Thomas, Lockhart said that he was tired and looking to move on, but also that he was looking into suing the County. After Lockhart signed the retirement paperwork, he submitted an application for disability benefits. The application was denied on or about April 12, 2012.

After Lockhart retired, he filed charges against the Employer with the Michigan Civil Rights Commission and the Equal Employment Opportunity Commission (EEOC). These charges were dismissed, although the record did not indicate on what basis.

On June 13, 2012, Lockhart sent Bennett a letter stating that she had not responded to the questions he asked in his December 23, 2011 email as to whether he was protected by the union and whether his situation was a grievable matter. Lockhart asked Bennett again for a written response. Lockhart testified that he sent this letter on the advice of an EEOC representative. Bennett did not respond to the letter; according to her, she had responded to Lockhart's December 23 email. When Lockhart did not receive a response, he filed this unfair labor practice charge.

Discussion and Conclusions of Law:

A union representing public employees in Michigan owes these employees a duty of fair representation under §10(3)(a)(i), now §10(2)(a) of PERA. The union's legal duty is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651,679(1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967).

Bad faith, under this standard, indicates an intentional act or omission undertaken by the union dishonestly or fraudulently. *Goolsby* at 679. A union acts in bad faith when it "acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct," while discriminatory conduct has been defined as discrimination which is "intentional, severe and unrelated to legitimate union objectives." *Merritt v International Ass'n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass'n-Int'l*, 156 F3d 120, 126 (CA 2, 1998); *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v Lockridge*, 403 US 274, 301 (1971); and *Vaca v Sipes* at *177*. "Arbitrary" conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682. A union may violate its duty of fair representation if handles a a grievance in a manner which demonstrates reckless disregard for a member's interests. For example, a union's unexplained failure to meet a time deadline for processing a grievance was held to constitute a breach of its duty when this failure resulted in the dismissal of the grievance in *Goolsby*. However, as long as it acts in good faith, a union has considerable discretion to decide how or whether to proceed with a grievance, and is permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. The fact that an individual member is dissatisfied with the union's efforts on his or her behalf is insufficient to demonstrate a breach of the duty of fair representation. *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. Moreover, a union is not required to always make the right or best decision, as long as it acts in good faith and avoids being arbitrary. *Detroit Police Officers Ass'n*, 26 MPER 6 (2012).

As discussed above, I do not credit Lockhart's testimony that Thomas and Bennett gave race as a reason for refusing to file past grievances on Lockhart's behalf. Other than this discredited testimony, there is no evidence that Respondent acted in bad faith or out of a discriminatory motive in its handling of Lockhart's dispute with the Employer.

On October 7, 2011, Lockhart, perhaps under the misapprehension that the letter would automatically qualify him for a transfer to a different job, provided his Employer with a letter from his psychologist which appeared to state that Lockhart could no longer perform his job. This letter immediately put Lockhart's continued employment in jeopardy. However, the Employer's need to decide what type of accommodation, if any, to offer him was postponed by Lockhart's agreeing to take FMLA leave. Respondent never explicitly told Lockhart that it would never file a grievance. However, it was never clear, when Lockhart asked Bennett and Thomas about filing a grievance over his "situation," what the basis of the grievance would be. Bennett told Lockhart after he began his FMLA leave that there was nothing to grieve because there was no contract violation. In January 2012, Thomas told Lockhart that Respondent would file a grievance if Lockhart produced a doctor's letter indicating that he no longer had medical limitations and the Employer refused to let him return to work. However, Lockhart could not produce such a letter. In mid-February 2012, when Lockhart was almost out of leave time, Thomas and Bennett offered to file a grievance, although it was unclear what the basis for the grievance would be. It is clear from this record that neither Thomas nor Bennett ever believed that there was a basis for a viable grievance.

This is not a case where the facts establish that Respondent's failure or refusal to file a grievance, or its mishandling of that grievance, caused Lockhart to forfeit his rights under the collective bargaining agreement. In order to establish that a union breached its legal duty of fair representation in its handling of a grievance, a charging party must show not only that the union acted arbitrarily, discriminatorily or in bad faith, but also that the employer breached the collective bargaining agreement. *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 485 (1993); *Government Administrators Ass'n*, 24 MPER 54 (2012). Lockhart was not disciplined or discharged. Rather, he admitted that he could no longer perform the duties of the job he had held for nineteen years. The only issue was reasonable accommodation. I find, first, that Lockhart did not establish that there were any reasonable accommodations that the Employer could have made that would have enabled him to perform the essential functions of any job at the Court or County for which he was otherwise qualified. Second, and more significant, the collective bargaining agreement contained a non-discrimination clause that included a prohibition on discrimination based on disability. However, as Bennett explained at the hearing, the agreement did not contain any provision pertaining to accommodations for disabilities. I find that even if Lockhart had the right to one of the other jobs he had identified, or a reduced caseload, under either state or federal law, he did not establish that this right was enforceable through the mechanism of a grievance. In sum, I conclude that Lockhart did not establish that the Employer breached its obligations to him under the collective bargaining agreement by refusing to provide him with accommodations for his disability or that Respondent violated its duty of fair representation under PERA by refusing or failing to file a grievance over this refusal.

In accord with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 3, 2013