STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN AFSCME COUNCIL #25,
Labor Organization-Respondent,

Case No. CU11 K-033
-and- Docket No. 11-000601–MERC

ARLAN JACKSON,
An Individual-Charging Party.
_____/

APPEARANCES:

Kenneth J. Bailey, Jr., Staff Attorney for the Respondent

Arlan Jackson, appearing on his own behalf

DECISION AND ORDER

On September 18, 2013, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent Michigan AFSCME Council #25 (Union) did not violate its duty of fair representation by failing to timely advance to arbitration a grievance over Charging Party's discharge. The ALJ found that Charging Party Arlan Jackson did not meet his burden of establishing both a violation of the duty of fair representation by the Union and a breach of the collective bargaining agreement by the employer. The ALJ concluded that Respondent had not violated § 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 was served on the interested parties in accordance with § 16 of PERA.

On October 14, 2013, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. The Union did not file a response. In his exceptions, Charging Party argues that the ALJ erred by failing to find that the Union refused to take his grievance to arbitration because it desired to cover up its intentionally untimely filing of a letter demanding arbitration. This alleged cover up, according to Charging Party, constitutes a violation of the duty of fair representation. Charging Party also takes exception to the credibility findings of the ALJ.

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

Factual Summary:

The facts are stated at length in the ALJ's Opinion and Recommended Order and will be repeated here only as needed. Charging Party was a bus driver for Mecosta Osceola School District and drove a passenger van for students with disabilities. He was terminated for falling asleep in the driver's seat of a running van with special needs students on board. Several of his coworkers, also bus drivers, observed him sleeping and one of them called the school district. Jackson admitted that he fell asleep, but asserted that the van doors were locked so students could not exit the vehicle and that he had only briefly slept. According to Assistant Superintendent Mark Klumpp, Charging Party became so agitated when confronted over the incident that the union steward had to physically intervene.

Several months earlier, Charging Party had received a two day disciplinary suspension for engaging in unprofessional conduct regarding two special needs students, who had become unruly while on his bus. He returned to the school building and dropped the children off at the curb, without ensuring that the children were in the custody of a school employee. The Assistant Superintendent called Charging Party and ordered him to return to the school and pick up the students, but Charging Party refused, stating that he did not care if the students were autistic; they "needed to learn to behave." He did not file a grievance over the suspension.

Klumpp testified that given Charging Party's prior suspension and his insistence during Klumpp's investigation that he did nothing wrong, the decision was made to discharge him. The Union filed a grievance over the discharge, which was denied. The denial was appealed to the School Board, which also denied it. The Union's local chapter chair and field staff representative both advised Charging Party that it was unlikely that his case would advance to arbitration because he admitted falling asleep, refused to acknowledge that the conduct was inappropriate, and had prior related discipline.

Meanwhile, the Union sent a letter to the school district stating that it intended to refer the matter to arbitration. This was often done, according to union witnesses, to preserve the time limits for filing a demand for arbitration while the union is reaching a decision on the merits of the grievance. The letter was not sent within 30 days, as required by the collective bargaining agreement. The Union's Arbitration Review Panel reviewed the grievance. The panel routinely selects from among the many grievances filed throughout the state which cases will be forwarded to arbitration. The panel sent Charging Party a letter stating that the Union would not be taking the case to arbitration because "[t]here appears to be no dispute about the facts" and Charging Party's actions "put into place a real risk of safety for the children in his care. This would be grounds for termination even without his prior disciplinary record."

Charging Party appealed to the panel to reverse its decision. He did not challenge the reasons for their decision but instead accused them of not timely filing a demand for arbitration. Several subsequent appeals to the Union were denied, with the final appeal resulting in the Union informing Charging Party that the employer had just cause for the discharge, and that the matter would not be moved to arbitration. Charging Party then filed this unfair labor practice charge.

Discussion and Conclusions of Law:

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. *Goolsby v Detroit*, 419 Mich 651 (1984). The union, thus, has considerable discretion in deciding whether to proceed with a grievance, and must be permitted to assess each grievance based on its individual merit. *Lowe v. Hotel Employees*, 389 Mich 123 (1973). The union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success at arbitration. *Lowe*. No union is required to follow the dictates of an individual grievant, but rather may investigate and present the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. 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. A union is not required to carry every grievance to the highest level and must be permitted to determine the individual merits of each case. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131. See also *Teamsters Local 214*, 23 MPER 38 (2010); *Detroit Pub Schs*, 22 MPER 14 (2009). The Commission has consistently refused to interject itself in grievance decisions by unions where tactical choices are made by the union. *City of Flint*, 1996 MERC Labor Op 1; *Detroit Fed of Teachers*, 21 MPER 15 (2008) (reasonable good faith tactical choice by a union is not a breach of the duty of fair representation.).

We agree with the ALJ that Charging Party failed to allege any hostility, discrimination, bad faith or arbitrary conduct by the Union. Charging Party asserts that his grievance was not rejected on the merits but instead because the Union was engaged in a cover up to hide the fact that it had missed the filing deadline for submitting a demand for arbitration. However, Donald Gardner, Director of AFSCME Council 25's Arbitration Department, testified that he was on the panel that reviewed the grievance and given the contract language and his experience in many arbitration cases, an arbitrator might well have found the letter of intent to arbitrate sufficient to preserve the timeliness of the grievance. More importantly, Gardner testified that the Arbitration Review Panel was not aware, when it was deliberating on Charging Party's grievance, that there was any question regarding the timeliness of the processing of the grievance.

Gardner explained that the Arbitration Review Panel consists of in-house AFSCME attorneys and arbitration advocates who routinely handle arbitration cases. The panel, he testified, reviews 1500 cases a year and gave considerable weight to the fact that Charging Party had refused to accept the gravity of the situation into which he had placed the children and had recently been disciplined for similar conduct. In addition, Charging Party continually insisted that he had done nothing wrong. The panel concluded that an arbitrator was unlikely to overturn the discharge on the merits. We agree with the ALJ that the decision of the Union's Arbitration Review Panel was reasoned and was well within the bounds of ordinary union decision making. Accordingly, its decision to not pursue arbitration did not breach the Union's duty of fair representation.

Moreover, to prevail on a violation of the duty of fair representation regarding a disputed grievance handling claim, Charging Party was required not only to allege that the union violated its duty of fair representation, but also to allege that the employer violated the collective

bargaining agreement by terminating him. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993). The ALJ is correct that Charging Party failed to show that the employer violated the contract. He found that Charging Party made no effort whatsoever to establish that the employer acted unreasonably or acted in a discriminatory manner. Rather, said the ALJ, Charging Party "focused on blaming the Union because he believed that …. he was entitled to go to arbitration regardless of the Union's assessment of the merits of the dispute." Charging Party claimed that the employer's lack of a specific written policy prohibiting bus drivers from sleeping on their buses supported his claim. The ALJ found that he had not minimally met his burden of establishing that the employer breached the contract. We agree.

Charging Party also asserts that the ALJ erred in finding Assistant Superintendent Klumpp's testimony and the testimony of Donald Gardner, Director of AFSCME's Arbitration Department, credible. When an ALJ's credibility finding is questioned by a party, the Commission has found "the ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. This Commission will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary." *City of Inkster*, 26 MPER 5 (2012); *Redford Union Sch Dist*, 23 MPER 32 (2010); *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499. The Michigan Court of Appeals has held that MERC must give due deference to the review conducted by the ALJ, in particular with respect to the findings of credibility. *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541 (1994).

Summary

For all of the above reasons, we agree with the ALJ that the Union did not violate its 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 order dismissing 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 15, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN AFSCME COUNCIL #25,
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Docket No.: 11-000601–MERC

ARLAN JACKSON,
Individual Charging Party.
_____/

APPEARANCES:

Kenneth J. Bailey, Jr., on behalf of Respondent Labor Organization

Arlan Jackson, Charging Party, appearing on his own behalf

DECISION AND RECOMMENDED ORDER

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 assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. This decision and recommended order is based upon the entire record, including the transcript of an evidentiary hearing and timely briefs filed by both parties:

The Unfair Labor Practice Charge and Proceedings:

A charge was filed against Michigan AFSCME Council #25 by Arlan Jackson, on November 18, 2011, asserting that AFSCME breached its duty of fair representation by failing to properly advance a discharge grievance to the next step in the grievance procedure in a timely fashion, resulting in the denial of the grievance. Jackson had been a special education bus driver for Mecosta Osceola School District until he was terminated for falling asleep on his parked bus with students on board.

The Union brought a motion to dismiss Jackson's case without a trial, filed on January 18, 2012, which correctly asserted that to prevail Jackson would have to show both that the Employer violated the Collective Bargaining Agreement in firing him and that the Union violated its legal duty when it decided not to go to arbitration over his discharge. Significantly, the Union's

motion was supported by affidavits asserting that Jackson was fired for falling asleep in a school bus, with children aboard, and that he early on admitted to falling asleep. The Union asserted that the only issue really in dispute was not whether Jackson had committed the offense, but only the severity of the discipline. The motion noted that Jackson had a prior disciplinary suspension that was not grieved and which could, therefore, have been relied on by an arbitrator.

Jackson asserted that the real reason the Union failed to go to arbitration on the grievance regarding his termination was that they had missed the deadline for filing for arbitration. Upon review of Mr. Jackson's response to the motion, I determined that there appeared to be genuine questions of fact as to the Union's motive in declining to arbitrate the grievance over Jackson's discharge. Therefore I denied the Union's Motion**.**

Jackson was cautioned that although the Union's motion had been denied, Jackson remained obliged to prove each element of his claim. That included establishing that the termination of his employment for admittedly sleeping on a school bus with children with disabilities aboard violated the collective bargaining agreement. Additionally, Jackson was obliged to prove that the Union's claimed reason for not proceeding to arbitration, that is, its assessment of the merits of the case, was merely a pretext.

The matter was tried on a single day of hearing, the parties each had ample opportunity to present evidence through witnesses and through documents, and timely post-hearing briefs were filed by both parties.

Findings of Fact:

Jackson had been a school bus driver for Mecosta Osceola School District for about five years and was assigned to drive a fourteen passenger van for students with disabilities. Some or all of the students were autistic.

In December 2010, Jackson was issued a two day disciplinary suspension for engaging in unprofessional conduct regarding two special needs students. The students had apparently been unruly on the bus. Jackson decided it would be unsafe or unreasonable to continue the route with the two students aboard. Even based on Jackson's description, it did not appear that the students' conduct was far outside the norm for the special needs children in his charge. Jackson returned to a school building and dropped the children off at the curb. He did not properly turn custody of the children over to a responsible school employee.

After he dropped the two students back at the school, and the matter was reported, the assistant superintendent called Jackson and directed him to return to the school to pick up the students. Jackson refused, assertedly

insisting that he did not care if the students were autistic, they "needed to learn to behave". He was charged with failing to follow the accepted protocol for such events, including failing to initially call his supervisor and with insubordination. Jackson received a two day unpaid suspension and was warned that any future similar event could result in his termination. He did not grieve this suspension.

Several months later, Jackson was observed by multiple coworkers sleeping while in the driver's seat of a running van with special needs students on board and under his supervision. Jackson had pulled into a District parking area where students were transferred from one bus to another. His van was positioned in an openly visible area. Several fellow bus drivers, also Union members, observed him fast asleep with his head back and his mouth open. Their concern was sufficient that one of the drivers slowly drove in a circle around Jackson's bus, the sound of which did not awaken Jackson, and then the other driver called in to the District to report the circumstances.

When interviewed by Mark Klumpp, assistant superintendent, Jackson admitted to having fallen asleep, with the vehicle running, but asserted that it occurred only briefly. Jackson attempted to minimize the offense by asserting that his vehicle was, of course, parked and that he had taken care to lock the doors so that the students could not exit the vehicle. The coworkers were also interviewed and the Employer concluded that Jackson had indeed been asleep and that it was a matter of more than just a few seconds as claimed by Jackson, based in part on the coworkers' assertion that they had driven around the van slowly to check on Jackson's status. Klumpp concluded that Jackson's conduct was dangerous, given that children were aboard the bus. Klumpp also took into account his observation that Jackson responded in a very aggressive manner when Klumpp initially confronted him over the issue, with Klumpp describing Jackson as having been so agitated that the Union steward physically intervened. Klumpp also took into account Jackson's recent suspension and Jackson's insistent refusal to acknowledge that there was anything wrong with his falling asleep with autistic children aboard his running vehicle. Upon conclusion of the investigation, Jackson was fired.

On May 30, 2011 the Union filed a timely grievance regarding the termination, which was denied by the Employer on June 14, 2011. That denial was timely appealed to the School Board by letter of June 17 and was denied again on July 25, 2011 by the School Board.

Both the Local Union chapter chair, Lisa Dubois, and the AFSCME field staff representative, Barry Thurston, had advised Jackson that they thought it unlikely that his case would be advanced to arbitration by AFSCME Council #25. A substantial part of the rationale offered by Dubois and Thurston to Jackson was that Jackson admitted to falling asleep, that he had prior relevant

discipline, and that he refused to acknowledge that the conduct was inappropriate.

Despite the stated misgivings about the merits of the grievance and the likelihood that it would not actually be pursued, on August 2, 2011, the Local Union chapter chair sent the District a letter indicating that the Union intended to refer the matter for arbitration. Such steps are often taken to merely preserve the time limits while a substantive decision is reached, often at a higher step in the Union chain of command, on whether to actually pursue a matter. The collective bargaining agreement required that such a dispute be referred to the American Arbitration Association (AAA) within 30 days of the School board denial of a grievance. The AFSCME field staff representative, Barry Thurston, did not send that notice to the AAA, or seek a timely extension of time from the Employer.

The matter was submitted for further review by the AFSCME Council #25 arbitration department review panel, which routinely selects from among the many grievances filed throughout the State to determine which cases will actually be arbitrated. On October 5, 2011, the panel sent Jackson a letter, consistent with the earlier advice given Jackson by his local Union representatives that indicated that AFSCME would not be taking the case to arbitration. The panel's letter stated:

> There appears to be no dispute about the facts of this case. To the Grievant's credit, he told the truth about his actions. However, caring for children is a very serious job and the Grievant's action put into place a real risk of safety for the children in his care. This would be grounds for termination even without his prior disciplinary record.

Jackson was further advised in that letter of his right to supplement the record with any facts which he felt had been overlooked by the arbitration review panel.

On October 17, 2011, Jackson appealed to the AFSCME panel to reverse its refusal to take his case to arbitration. Rather than challenging their decision regarding the merits of the dispute over his termination, Jackson raised a new issue. He asserted that he had learned, in the course of a collateral proceeding, that the Employer asserted that the demand for arbitration had not been timely filed. The Employer had not raised a timeliness defense in the grievance procedure, but had, in an unemployment compensation hearing, asserted its belief that Dubois' notice was inadequate to timely advance the termination grievance to arbitration.

Jackson's several appeals to AFSCME were denied, with the final rejection letter of December 6, 2011, stating:

> The Panel re-reviewed the file along with the newly submitted statement from the Grievant. The Panel finds no new evidence in which the determination is found to be in error. The Grievant admitted to his actions . . . the Employer has met the standards for just cause for discipline . . .

Jackson did not pursue any further internal AFSCME remedies and instead pursued this unfair labor practice case which had already been filed in November of 2011.

Barry Thurston, a full-time AFSCME field servicing representative, testified regarding his handling of the matter. Like Dubois, Thurston early on concluded that AFSCME Council 25 was unlikely to actually take the matter to arbitration. His conclusion was based on the seriousness of the charges, that Jackson admitted falling asleep with children on the bus, the prior related discipline, and that Jackson remained uncontrite over either incident. Thurston and Dubois met with Jackson after the School Board denial of the grievance to explain that it would be difficult to advance the case to arbitration given Jackson's admissions.

Thurston was responsible as the servicing agent for some 27 separate AFSCME units which had separate contracts with various employers. At the point of the School Board's denial of the grievance, and the point at which Thurston was to advance the grievance file to the AFSCME Council 25 arbitration panel for review, Thurston was unaware of what the contractual deadline was for actually filing a case for arbitration. Thurston testified that he assumed at the time that it was probably sixty days, as was true for some other contracts for which Thurston was the Union servicing agent, although he was unable in his testimony to identify any other contracts where the time limit for filing for arbitration was sixty days. In fact, the collective bargaining agreement with Mecosta Osceola School District, at **Article 6 Grievance Procedure** provided:

> If the Union is not satisfied with the disposition of the grievance at Level Three, it may within thirty (30) days after having received the decision of the Board, refer the matter for arbitration to the American Arbitration Association.
>
> * * *
>
> Should the Union or the grievant fail to appeal a decision within the limits specified . . . all further proceedings on a previously initiated grievance shall be barred.
>
> * * *
>
> The time limits in this Article shall be strictly observed but may be extended by written agreement of the parties.

Thurston testified regarding his normal practice in handling grievances and seeing to their being advanced to the next step in the grievance procedure. Although he is typically the only full-time salaried Union representative involved with handling particular grievances in the field, Thurston asserted that he does nothing until he receives the full packet of information from the appropriate Local Union officer. He does not concern himself with monitoring compliance with time limits in grievance handling by his subordinate Local Union officials. He does not even keep himself familiar with what those time limits are, instead he waits until he receives what he determines to be all the necessary information, and then he checks the time limits. He had in place no mechanism whatsoever to see to it that grievances under his jurisdiction were timely advanced to the next step. His practice focused on leaving responsibility with the Local Union officers, rather than with himself, and did not focus on preserving the rights of Union members regarding pending grievances. Thurston asserted that this particular failure to monitor the time limits was a mere unintentional mistake.

Thurston denied knowledge of when exactly he forwarded the Jackson termination grievance related materials to the AFSCME Council #25 Arbitration Review Panel. Thurston never filed an arbitration demand with the AAA regarding the termination of Jackson. The AFSCME Council #25 arbitration review panel's initial letter advising that it would not pursue the Jackson termination to arbitration was regardless dated more than 60 days after the School Board had denied the grievance and the time limit for pursuing the matter to arbitration had run.

Donald Gardner is the director of AFSCME Council #25's arbitration department and was part of the panel which reviewed the grievance over the Jackson termination. Gardner testified regarding the general practice of AFSCME when the arbitration panel reviews cases and regarding its review of the Jackson termination in particular. The review panel consists of in-house AFSCME attorneys and arbitration advocates who routinely handle arbitration cases. The panel reviews some 1500 cases a year. Gardner was himself an arbitration advocate.

In reviewing the termination, Gardner credited Jackson's honesty in admitting that he had fallen asleep. Gardner also took into account that the vehicle was running, that there were autistic children on the bus, and that it was a smaller Chevy type van. Gardner considered aggravating circumstances that Jackson was a relatively short term employee and had recently been disciplined for an arguably similar job performance deficiency. Gardner gave considerable weight to the fact that, while Jackson was honest about falling asleep, he persisted in trying to justify his conduct by asserting that no real harm had occurred and that Jackson just didn't seem to grasp the gravity of the situation. The panel concluded that an arbitrator was unlikely to overturn the termination on the merits. As Gardner put it: "*whether he's nodding or*

sleeping or however you want to put it, he was not conscious for a period of time". That coupled with the prior discipline, was enough to establish the misconduct.

Gardner was adamant that at the time the panel reviewed the merits of the grievance there had been no threshold issues yet raised by the Employer. That is, there was no question before the panel over whether or not the grievance had been timely pursued. There was nothing in the grievance chain to suggest any timeliness problems, and the question had not been a part of the panel's evaluation of the merits of the grievance. I credited Gardner's testimony on this central issue.

Gardner did in his testimony address the timeliness issue, based on his review of the specific contract language and his experience in myriad grievance arbitration cases. It was Gardner's opinion that an arbitrator, had the case been advanced that far, could well have found Dubois' timely letter of intent to arbitrate sufficient to preserve the timeliness of the grievance.

Jackson represented himself at the evidentiary hearing on the unfair labor practice charge and appeared comfortable and capable in that role. Even at trial, Jackson appeared unswayed in his belief that his conduct, which was objectively deficient in both incidents which led to discipline, was instead not unreasonable. It is notable that Jackson declined to testify at trial regarding his own conduct, insisting instead on focusing solely on the Union's alleged failings in this matter. Jackson remained resolutely unapologetic and seemingly unaware of the seriousness, or the central point, of either incident which led to his suspension and later termination, wherein he had placed special needs children, who were placed in his care and custody, at risk.

Discussion and Conclusions of Law:

There is no dispute as to the controlling law. The Union, as exclusive bargaining agent, had a duty to fairly represent the members of its unit. The Union's ultimate duty is toward the membership as a whole rather than solely to any individual, and, therefore, the Union has the legal discretion to decide to present particular cases in a particular manner, even though their decisions may conflict with the desires and interests of certain employees. A union has considerable discretion to decide how, and even whether or not, to pursue and present particular grievances or disputes. *Lowe v Hotel & Restaurant Employees Union, Local 705,* 389 Mich 123, 145-146 (1973). To pursue a charge against a union, a charging party must allege and be prepared to prove that the union's conduct toward them was arbitrary, discriminatory or done in bad faith and not merely a disputed tactical choice, or even merely negligent. *Vaca v Sipes*, 386 US 171, 177 (1967); *Goolsby v Detroit and AFSCME*, 419

Mich 651, 679 (1984); *Detroit Federation of Teachers (Steward)* 21 MPER 15 (2008) (no exceptions). To establish a breach of the duty of fair representation, it is not enough to establish the commission of an error by the representative and harm flowing from that error, as might suffice in a legal malpractice action, for as the Commission recently held in *DPOA (Boroski),* 25 MPER 6 (2012), a union is not expected to always make the right or best decisions, so long as it acts in good faith and avoids being arbitrary. Citing, *City of Detroit*, 1997 MERC Lab Op 31.

The Commission has steadfastly refused to interject itself in judgment over grievance handling decisions by unions where arguable tactical choices are made by the union. See, for example, *City of Flint*, 1996 MERC Labor Opinions 1. See also, *Detroit Federation of Teachers (Steward)* 21 MPER 15 (2008), holding that a reasonable good faith tactical choice by a Union is not a breach of the duty of fair representation.

In analyzing the National Labor Relations Act (NLRA), on which PERA was premised, the United States Supreme Court held, in *Airline Pilots v O'Neill,* 499 US 65 (1991), that:

> Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," that it is wholly "irrational" or "arbitrary".

(Citations omitted*).* See also, *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35.

The case law is also clear that the fact that a member or members are dissatisfied with their union's effort, with the union's ultimate decision or with the outcome of those decisions, is insufficient to constitute a proper charge of a breach of the duty of fair representation. An individual member does not have the right to demand that his grievance be pressed to arbitration, and a union obviously is not required to carry every grievance to the highest level, but must be permitted to assess each with a view to individual merit. See, *Eaton Rapids Education Association*, 2001 MERC Lab Op 131.

Jackson does not assert any hostility or animus toward him, or discriminatory motive or treatment, by the Union officials involved, including Dubois, Thurston, Gardner, or the other members of the arbitration review panel.

Rather, Jackson's core argument is that he suspects that the AFSCME arbitration review panel in fact rejected the grievance over his termination not on the merits, but rather in order to cover up for Thurston's alleged failure to timely file an arbitration demand with AAA. Jackson adduced no evidence of such a scheme or intent. As indicated in my findings of fact, I credit the testimony of Donald Gardner regarding the handling of the grievance review by AFSCME's arbitration panel. Gardner is a labor relations professional with enormous experience in grievance arbitration. His department handles some 1500 cases per year. He testified unequivocally and credibly that the only issue considered by the arbitration review panel was the merits of the underlying termination. Gardner credibly testified that, in essence, he did not believe any arbitrator was likely to reinstate a school bus driver who had, not once but twice, been disciplined for failing to protect the safety of autistic children who had been placed in his care. Gardner relied in part on Jackson's seemingly unshakeable insistence that he had done nothing wrong and that his falling asleep, or nodding off, on the bus was a trivial matter. Gardner's conclusions were based on his extensive experience and were objectively reasonable. The decision of the AFSCME Council #25 arbitration review panel was a reasoned one, well within the bounds of ordinary Union decision making, and I find that the decision to not further pursue the termination grievance did not breach the Union's duty of fair representation. See, *Vaca; Goolsby; Airline Pilots*; and *Detroit Federation of Teachers*.

Jackson was rightly concerned with the Employer's assertion, in an unemployment compensation hearing, that it believed that the grievance had not been timely pursued to arbitration, despite the admittedly timely notice of intent to arbitrate submitted to the Employer by Dubois. The mere failure to timely advance a grievance through innocent inadvertence by a well-meaning Union official would not constitute extreme recklessness or gross negligence, established by the *Goolsby* court as the standard of care, and therefore would not support a finding of a violation of the duty of fair representation. In *Mass Transportation Authority*, 2000 MERC Lab Op 1, the Commission adopted, without exceptions, Judge Julia Stern's appropriate formulation of the very question:

> I find that the record shows that the Union negligently failed to exercise its discretion within the time limits provided by the contract. However, as Goolsby makes clear, a breach of the duty of fair representation cannot be based on "mere" as opposed to "gross" negligence. In order to constitute a breach of the duty of

> fair representation, a union's conduct, even if inept, must manifest "indifference to the interests of those affected."

See also, *DPOA (Boroski),* 25 MPER 6 (2012), holding *"[A] union is not expected to always make the right or best decisions, so long as it acts in good faith and avoids being arbitrary*".

However, as also held in *Goolsby:*

> Further, for purposes of PERA, we do not interpret a union's responsibility to avoid arbitrary conduct narrowly. In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected. We think the latter proscription includes, but is not limited to, the following circumstances: (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members. We hold that the conduct of defendant union in this case is encompassed by the foregoing prohibitions.

Thurston's description of his own conduct in this case, and his general plan of action in addressing grievance handling does seem to meet precisely the Court's prohibition of "*inept conduct undertaken with little care or with indifference to the interests of those affected*". It was transparent that Thurston's primary concern was not with protecting the interests of the Union members whose units he was charged with servicing. Rather, Thurston's focus was on the bureaucratic concern with requiring that he not be responsible for doing anything until lower level Union officials had forwarded to him a grievance packet which he deemed to be sufficiently complete. Such a posture would be certainly acceptable if in the interim Thurston took steps to see to it that mandatory grievance deadlines were met. To the contrary, Thurston was adamant that he made no effort to discover, much less comply with, such deadlines until the Local Union officials had successfully moved the file from their desk to his. Such a practice by Thurston seems primarily intended to focus blame away from the field servicing representative and on Local Officers for the inevitable untimeliness of some claims, rather than to facilitate the timely handling of matters. Given the variable and often short time limits for advancing grievances to arbitration, Thurston's plan was plainly deficient. Grievances over the termination of a member are of the most fundamental importance to the effected individuals. Thurston's approach was troublingly, if not shockingly, cavalier and evidenced an "*indifference to the interests of those*

affected". Notwithstanding Thurston's' cavalier attitude, the Local Union officer Dubois had filed a timely notice of intent to arbitrate with the Employer.

It is equally apparent that Thurston's handling of the matter, deficient as it may have been, was irrelevant to the ultimate decision-making regarding the grievance, just as it is ultimately irrelevant to my analysis of this unfair labor practice case. The AFSCME arbitration panel review process is a separate function carried by central office attorneys and arbitration advocates. Thurston was not on the panel or present for its deliberations. Thurston did not make a recommendation to the panel on the merits of the termination grievance. At the point that the review panel initially rejected the termination grievance, the Employer had not either formally or informally raised any claim of untimeliness in the advancing of the grievance to the arbitration stage. The panel had in its file the timely letter by Dubois informing the Employer of the Union's intent to arbitrate the matter. I found credible Gardner's testimony that the arbitration review panel was not even aware that there was any question regarding the timeliness of the processing of the grievance. The arbitration review panel did not in any way consider the question of timeliness, which was not presented to it, and rather limited its review to the practical merits of the termination case. As I found above, the decision to not further pursue the termination grievance was a reasoned one, well within the bounds of ordinary Union decision making, and did not breach the Union's duty of fair representation. See, *DPOA (Boroski), supra.*

Moreover, to prevail on a duty of fair representation claim regarding a disputed grievance handling claim, a charging party must allege and prove not only a breach of the duty of fair representation by the Union, but also allege and prove the second prong of the claim, that is that there was an underlying 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). Here, Jackson made no effort to establish that the Employer had violated the contract or had acted unreasonably or in a discriminatory manner. Rather, Jackson focused on blaming the Union because he believed that as a dues paying member he was entitled to go to arbitration regardless of the Union's assessment of the merits of the dispute. Jackson sought to rely on the absence of a specific written Employer policy prohibiting special education bus drivers from sleeping on their buses. Jackson had previously, and recently, been suspended for reckless conduct related to failing to ensure the safety of special needs children placed in his care. He refused to acknowledge any failing on his part, including regarding falling asleep in a running vehicle with autistic children aboard. On these facts, I find that the Charging Party has not minimally met the burden of establishing that the Employer breached the collective bargaining agreement. To the contrary, Jackson's acknowledged conduct was a serious safety violation and was appropriately addressed by the Employer, within the bounds of just cause as

required by the contract, and in keeping with the warning issued with the earlier suspension, by terminating Jackson's employment. I concur with Garner's opinion that it was unlikely that any arbitrator would have put this driver back behind the wheel of a special education bus. With no underlying contractual violation established, Jackson has failed to meet his burden of establishing the second prong of his duty of fair representation claim. Therefore, even had he prevailed here as to the first prong, related to the Union decision to not arbitrate the matter, Jackson has not established any harm and therefore there would be no relief that could be awarded.

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. Based on the findings of facts and conclusions of law set forth above, I recommend that the Commission issue the following order:

I. RECOMMENDED ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 19, 2013