STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LANSING SCHOOLS EDUCATION ASSOCIATION,
Respondent-Labor Organization,

Case No. CU98 I-49

-and-

MARY KELLEY COBB,
An Individual Charging Party.
_____/

APPEARANCES:

White, Przybylowicz, Schneider and Baird, P.C., by Anthony J. Szilagyi and Thomas A. Baird, for Respondent

Mary Kelley Cobb, In Pro Per

DECISION AND ORDER

On January 13, 2000, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 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

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISMISSAL

Oral argument on this case was conducted in Lansing, Michigan, on July 13, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to a charge filed by Mary Kelley Cobb against her bargaining agent, the Lansing Schools Education Association (the Union), under Section 10(3)(a)(i) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.10, MSA 17.455(10), and upon a motion for summary dismissal filed by the Union on February 23, 1999. Based on the facts as alleged by Cobb in her charge, including attachments, and her bill of particulars filed November 20, 1998, and on the arguments made by the parties in their briefs and on oral argument, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA.

The Unfair Labor Practice Charge:

The charge in this case was filed on September 29, 1998 by Mary Kelley Cobb, an elementary school special education teacher employed by the Lansing Public Schools (the Employer). Cobb's principal allegation is that the Union breached its duty of fair representation in September 1998 by reversing an earlier decision to take to arbitration a grievance involving discipline issued to Cobb in

February 1998. Cobb alleges that the Union's decision not to arbitrate was unreasonable and arbitrary. She also alleges that the Union's decision was made in bad faith and constituted retaliation against her because she filed a previous unfair labor practice charge against it (Case No. CU96 C-12) and had also filed charges with the Michigan Civil Rights Commission. The Union's change of mind, Cobb alleges, also violated the language of Step 3 of the grievance procedure. That provision requires the Union, if it decides to stop processing a grievance, to notify the grievant within twelve days of receiving the Step 2 answer so that the grievant can continue to process the grievance without the Union's support. Cobb further alleges that the Union breached its duty of fair representation by basing its decision not to arbitrate on Cobb's refusal of an unreasonable Employer settlement offer in July 1998.

Cobb also alleges that in June 1998, the Union unlawfully refused to file a grievance over disparities between the discipline Cobb had received and the discipline issued to another employee for similar conduct. In addition, Cobb asserts that the Union violated its duty of fair representation by failing to prepare properly for the arbitration. She alleges that the Union's Univerv representative, James Boerma, failed to interview witnesses whose testimony contradicted the Employer's version of events. She also alleges that the Union assigned a new Univerv representative to her unit so close to the time of her scheduled arbitration that this new representative, Diane Waller, would not have been able to adequately prepare for the case. She alleges that the Union improperly failed to notify her of this change in representative and the reasons therefore. Cobb also alleges that after she refused the July 1998 settlement offer, the Union ceased its efforts to help her obtain reimbursement of legal fees from the Union's legal services insurance plan.

Finally, Cobb alleges that in April 1998 the Union unlawfully refused Cobb's March 3, request that its Uniserv Director review her personnel file and the files of other employees to determine whether there had been a pattern of harassment by the Employer against her since her hire in 1988.

In addition to the above, Cobb's charge includes numerous allegations involving Union actions outside the six month statute of limitation under Section 16(a) of PERA, or, in this case, before March 29, 1998. Cobb's discipline resulted from an incident which took place on November 25, 1997. After the incident, Cobb was placed on paid leave while the Employer investigated. While the Employer was completing its investigation, criminal charges were filed against Cobb for assault and, later, for disturbing the peace in a public building. Cobb was tried on these charges and acquitted in May 1998. Cobb alleges that the Union violated its duty of fair representation toward her when it refused, on December 5, 1997, to assist her in filing a lawsuit over the action of the Employer's superintendent in telephoning Cobb's sister and giving her his account of the November 25 incident. Cobb also alleges that the Union violated its duty of fair representation by refusing, in January 1998, to assist her in filing a lawsuit against the Employer based on false statements made about her to a parent by the superintendent and by Cobb's principal.

Cobb's charge includes other allegations of Union misconduct outside the statutory limitations period. In January 1998 the Employer notified the Union that Cobb would have to undergo a psychological evaluation before she could return to work. On February 11, 1998, Cobb asked the

Union to insist that the psychological evaluation exclude any questions which might be used against her in the criminal action. After Cobb's attorney contacted the Employer, an agreement was reached among the Employer, the Union and Cobb's attorney regarding the type of report the psychologist would make to the Employer. Cobb alleges that the Union violated its duty of fair representation by failing to act on her February 11 request, thereby forcing her to hire her own attorney.

Pursuant to Section 16(a) of PERA, only the actions of the Union occurring within the statutory limitations period can be addressed in this decision. However, for purposes of clarity I have included the facts pertaining to these allegations in my statement of facts.

Facts:

Cobb was hired by the Employer in 1988 as an elementary school special education teacher. On the morning of November 25, 1997, Cobb was at Lansing Sexton High School to attend a conference regarding the academic performance of her older daughter. That same morning, Cobb's younger daughter, also a high school student, was involved in a fight with another girl. While these two girls were in the office of the assistant principal, Cobb and her older daughter, having finished their conference, heard about the fight. The two of them entered the assistant principal's office and Cobb's older daughter began hitting the girl who had been in the fight with her sister. A melee resulted, involving both Cobb's daughters and another girl who had been waiting outside the assistant principal's office with her father. The assistant principal, who attempted to restrain Cobb's older daughter, later asserted that Cobb joined in the fight on the side of her daughter; Cobb herself was hit by the third girl. Eventually the principal, several security guards, and the third girl's father restrained and separated the girls. Cobb denied that she assaulted anyone and maintained that she was attempting to restrain her older daughter. Cobb admitted that she refused the principal's order to leave the building without her daughters, and she also admitted that she called the principal an "a_ _," and an "old fool." After the incident Cobb was placed on administrative leave with pay effective December 1, 1997, pending the Employer's investigation of the incident.

The superintendent and/or the high school assistant principal filed complaints against Cobb with the Ingham County Prosecutor's office. These complaints resulted in Cobb being charged with two counts of assault and battery and one count of disturbing the peace in a public building.

On about December 1, 1997, the Employer's superintendent telephoned Cobb's sister, informed her that Cobb had been placed on administrative leave, and gave her an account of the November 25 incident. Cobb complained to Boerma that the superintendent had invaded her privacy. Boerma told her that this was not a grievable issue under the contract. Cobb accepted that statement, but pressed Boerma to take some other type of action. Boerma then asked the Union's attorneys for a legal opinion. On December 5, Boerma told Cobb that the Union attorney had told him that Cobb did not have a legal right to prevent the superintendent from speaking to anyone, including Cobb's sister and/or the media, about the incident.

On January 26, 1998, Cobb complained to Boerma that the superintendent had told the parent

of one of her students that she needed medical verification to return to work and had implied that she(Cobb) had a nervous breakdown. Cobb asked Boerma to get an opinion from the Union's attorney regarding whether these statements constituted defamation. She also asked Boerma for an opinion on whether the Employer could legally require medical verification as a condition of her return to work. Boerma told Cobb that if he approached the superintendent about his conversation with the parent he (the superintendent) would just deny making the statement. The Union's local president, however, telephoned the parent to explain the situation. In a letter to the superintendent dated May 27, 1998, Boerma demanded that the superintendent, and Cobb's principal who allegedly made similar remarks to the same parent, apologize to Cobb.

On February 10, 1998, after the Employer completed its investigation, a meeting was held to inform Cobb that she was being issued a three-day suspension without pay and a written reprimand for the November 25, 1997, incident. Cobb was also ordered to undergo a psychological evaluation before she could return to work. The Employer later prepared a letter summarizing the meeting and delivered it to Cobb. The letter/reprimand states that Cobb was being disciplined for "conduct unbecoming a professional teacher," and noted that the Employer reserved the right to impose additional discipline if Cobb was convicted of assault and battery. The letter also noted that James Boerma, the Union's Uniserv representative, proposed in the meeting that the evaluation be conducted by a psychologist who had seen Cobb in the past. The Employer, however, insisted that the examination be done by another psychologist.

On February 11, Cobb wrote Boerma telling him that the Union should insist that a neutral psychologist be selected by mutual agreement. She also stated that she had talked to her lawyer about the Employer's demand that she undergo the psychological examination, and that the attorney had told her that the information provided by the psychologist to the Employer should be limited because anything in her personnel file could be accessed by anyone, including the prosecutor's office. Boerma did not follow up on this request. Cobb's attorney contacted the Employer. On about March 13, the Employer, Boerma and Cobb's attorney reached agreement on a psychologist to conduct the evaluation. They also agreed that the psychologist's report to the Employer would state only that Cobb was psychologically fit to resume her teaching responsibilities, was not fit to resume her teaching responsibilities, or was fit to resume her duties only if she participated in a regimen of counseling. The evaluation was scheduled for March 24, and on April 15, 1998, Cobb returned to work.

Boerma filed a timely grievance protesting Cobb's discipline in mid-February 1998. Pursuant to Step 4 of the grievance procedure, the Union submitted the grievance for binding arbitration and, on March 9, 1998, the Employer and the Union selected an arbitrator. A tentative date of July 16, 1998 was selected for the arbitration. In April 1998 the Employer offered to settle the grievance by reducing Cobb's suspension from three to two days. The Union rejected this offer. On May 27, 1998, Cobb was acquitted of the criminal charges. This same day Cobb reported to Boerma that the testimony of several witnesses at the trial had contradicted the statements attributed to them in the Employer's investigatory report. Boerma wrote the superintendent warning him not to try and use false testimony at Cobb's arbitration hearing.

On March 3, 1998, Cobb made a written request to Boerma to review her personnel file and the files of other employees to determine if the files showed a pattern of harassment of her by the Employer dating back to her date of hire. On March 23, Cobb renewed her request. On April 28, Boerma stated in a memo to Cobb that he had spent about four hours reviewing the files, had not yet completed the task, but that he intended to do so. He also indicated that, as he saw it, there was no particular deadline for him to complete this job. There is no indication whether Boerma ever finished looking at these files.

On about June 25, Cobb asked Boerma to file a grievance alleging that she had received disparate treatment. This request was based on the fact that the Employer had given only a reprimand to a teacher who had been accused of improper conduct during a meeting with her own child's teacher. Boerma said he would look into it. About this time or shortly thereafter, the Employer made another offer to settle Cobb's grievance. The Employer offered to rescind Cobb's three day suspension and to replace the original written reprimand with a letter of reprimand containing an apology to be signed by Cobb.

Sometime in late June 1998, Diane Waller replaced Boerma as the Uniserv Director assigned to Cobb's bargaining unit. On July 1, Cobb called Boerma to ask about the upcoming arbitration and was referred to Waller. When Cobb reached Waller, Waller told her that she did not believe the grievance should go to arbitration, that she believed that Cobb was merely trying to make a point, and that Waller would recommend to the Union's grievance committee that the case be withdrawn from arbitration. Waller did not tell Cobb about the Employer's new settlement offer in this conversation. Waller then wrote Cobb a letter setting out her reasons for recommending that the grievance not go forward to arbitration. Although this letter was dated July 2, Cobb did not receive it until after July 9. In the letter Waller said that based on the fact that Cobb had admitted calling the principal an "a _," and an "old fool," in front of high school students and parents, Waller was convinced that the Union could not prevail in an arbitration. Waller also stated that the fact that Cobb had been prosecuted, although not convicted, indicated that there were witnesses who would testify that Cobb's actions overall were "less than appropriate and potentially insubordinate and unprofessional."

On July 8, the superintendent sent Waller a draft letter to be signed by Cobb as a settlement of the grievance. The Employer and the Union agreed to postpone the arbitration scheduled for July 16. On July 9, Waller, a Union attorney, and the Union's grievance chairman met with Cobb and her husband to review this settlement offer. At this meeting Waller said that the Employer's offer was similar to the discipline imposed upon the teacher who had had a dispute with her child's teacher. Waller told Cobb that she should accept the Employer's offer. Cobb, however, refused to sign the letter. Cobb said that the only settlement acceptable to her would have to include an expungement of any reference to the November 25, 1997, incident from her personnel file. Cobb told the Union that she understood the risk of losing the arbitration, but that she wanted the Union to go forward anyway. The Union's grievance chairman then explained to Cobb that the Union's grievance committee would meet to consider whether it wished to go forward with the arbitration, and that Cobb would be permitted to appear and speak at that meeting. The grievance chairman also told Cobb that if the grievance committee decided not to proceed to arbitration, Cobb would be given an

opportunity to participate with the committee in further negotiations over the proposed settlement before the grievance committee informed the Employer of its decision not to go to arbitration.

The Union's attorney wrote to Cobb on July 10. The attorney explained to Cobb that the decision whether to proceed to arbitration belonged to the Union. She also told Cobb that she thought that the Employer's proposed settlement was excellent in light of the fact that success in the arbitration appeared unlikely. The attorney explained to Cobb that in her opinion it was likely that an arbitrator would find that the Employer had just cause to discipline Cobb for inappropriate and unprofessional conduct based on the things that Cobb had admitted doing and saying.

The Union's grievance committee met on September 2, 1998. Cobb attended this meeting. The grievance committee voted not to proceed to arbitration on Cobb's grievance, but decided not to inform the Employer of this fact until Cobb had an opportunity to participate in negotiating the details of a settlement. Cobb informed the grievance chairman that she did not want to discuss settlement. On September 16, the grievance committee met again to reconfirm its decision not to proceed to arbitration; Cobb was notified of this decision and of her internal union appeal rights by letter dated September 21. On October 6, 1998, after the instant charge had been filed, Cobb attended another meeting of the grievance committee. At that meeting she was given a copy of a letter of counseling covering the November 1997 incident signed by the superintendent and dated October 2, 1998.

On December 5, 1997, Cobb applied for reimbursement of her attorney fees for defending herself in the criminal matter from the Union's Educators Employee Liability insurance policy. In her application she asserted that the conduct for which she was being investigated arose out of her employment. The insurance carrier rejected her application on March 13, 1998. On May 29, after Cobb had been acquitted of the criminal charges, Boerma offered to intercede on her behalf with the insurance company. On July 2, Boerma wrote to the Union's attorneys, urging them to represent Cobb in her dispute with the insurance company and arguing that the insurance company had erred in concluding that Cobb's case did not involve a school related matter. In August 1998, Cobb asked Boerma again to assist her, and Boerma again contacted the Union's legal department. On September 1, 1998, a staff attorney provided Cobb and Boerma with a legal opinion explaining why, in the attorney's opinion, Cobb's case was not covered by the legal services policy. This opinion stated that the November 25, 1997, incident did not arise out of the course of Cobb's express or implied employment activities, but while she was at the high school in her capacity as a parent. The opinion also noted that Cobb, in her grievance, had asserted this fact as a defense. Discussion and Conclusions of Law:

The Union first alleges that Cobb failed to exhaust her contractual remedies. According to the Union, under the contractual grievance procedure an employee has the right to file his or her own grievance. Moreover, when the Union decides not to process a grievance to the next step, an employee has the right to continue to process the grievance without the Union's assistance. The Union points out that while Cobb alleges that on several occasions the Union breached its duty of fair representation by refusing to file grievances for her, Cobb never asserts that she attempted to file a

grievance herself. The Union cites *City of Detroit (Parks and Recreation Dept),* 1992 MERC Lab Op 672 (1992); *City of Pontiac Fire Dept*, 1991 MERC Lab Op 149; and *Wayne County Community College*, 1989 MERC Lab Op 973 for the proposition that a charge alleging that a breach of the duty of fair representation with respect to a grievance must be dismissed where the employee has failed to exhaust his contractual remedies. These cited cases, however, merely hold that a union does not owe an employee a duty to pursue a grievance where the employee neither files a grievance nor requests the union to file one on his behalf.

The Union also argues that Cobb's charge should be dismissed because she failed to exhaust her internal union remedies. Unlike some other jurisdictions and the federal courts, however, this Commission has never explicitly required exhaustion of internal union remedies as a prerequisite to bringing a charge of unfair representation under PERA. Since I conclude that the charge should be dismissed on other grounds, I see no need to take up the issue here.

The Union's third argument is that Cobb has failed to allege facts sufficient to support a finding that the Union acted in bad faith or in an arbitrary, discriminatory, or dishonest manner. The Union asserts that Cobb's charge should therefore be dismissed for failure to state a claim under the Act. Since this decision is based on a motion to dismiss, all Cobb's allegations must be accepted as true and construed in a light most favorable to her. *Wayne County Dept of Public Health,* 1998 MERC Lab Op 590. I agree with the Union. The fact set forth above raise no issue of unfair representation as that term as been defined in the 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. *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; (1967)*; Goolsby v Detroit*, 419 Mich 651(1984). In the area of grievances, a union has considerable discretion to decide which grievances will be pressed and which will be settled. An individual member does not have the right to demand that his grievance be pressed to arbitration, and the union is not required to carry every grievance to the highest level, but is permitted to assess each with a view to individual merit. Having regard for the good of the general membership, a union is vested with discretion which permits it to weigh the burden upon contractual grievance machinery, the amount at stake, the likelihood of success, and the cost. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123 (1973).

Although Cobb alleged that the Union's decided not to arbitrate her grievance in retaliation for her filing of a previous unfair labor practice charge against the Union and/or her filing of civil rights complaints, she offered no facts which would support such a finding. Nothing in the facts as alleged indicates that any of the Union's actions were motivated by personal hostility.

Nor do the facts as alleged support a finding that the Union's acted in an arbitrary or discriminatory manner. The Union's grievance committee concluded in March 1998 that Cobb's grievance had merit and deserved to be arbitrated. After Waller became Cobb's Uniserv representative, Waller reviewed the facts of Cobb's case, concluded that the probability of obtaining

an arbitration award more favorable than the Employer's settlement offer was low, and made a reasoned decision that arbitrating Cobb's grievance did not justify its cost. Waller successfully persuaded the Union's grievance committee to reverse its original decision to arbitrate. The reasons for the Union's decision not to proceed were explained to Cobb in Waller's July 2, 1998 letter, at a meeting held on July 9, and in a letter to Cobb from a Union attorney dated July 10. The evidence indicates that the Union first made a rational, good faith decision to take the grievance to arbitration. After the Employer made a settlement offer and a different Uniserv representative took over the case, it made a rational, good faith decision that the case did not deserve to be arbitrated. The law does not require that the union make the "right" decision about arbitration, and it does not authorize me to second-guess the Union's judgment regarding the likelihood of obtaining a favorable arbitration award. Here, there are no facts alleged which would support a finding that the Union acted irrationally, in bad faith, or in a discriminatory fashion when it changed its mind about arbitrating Cobb's grievance.

Cobb points out that under Step 3 of the contractual grievance procedure, the Union's grievance committee must make its determination regarding a grievance's merit within 12 days of receipt of the Employer's Step 2 answer. She argues that under that provision the Union is barred from changing its mind once it has decided to arbitrate. However, I see nothing in the contract prohibiting the Union from changing its determination after the Step 3 deadlines have passed. In any case, failure to adhere strictly to the language of the grievance procedure does not, without more, prove that the Union acted in bad faith, or in a discriminatory or arbitrary fashion. I conclude that, under the facts as alleged, the Union did not violate its duty of fair representation by refusing to arbitrate Cobb's grievance.

Cobb also asserts that the Union violated its duty of fair representation by failing to adequately prepare for the scheduled arbitration. However, Cobb was not harmed by these alleged failures since no arbitration in fact took place. Cobb complains that she was not adequately notified that her Univerv representative had changed, or the reason for the change. There is no indication in the facts that Cobb was harmed by the alleged delay in notifying her of Waller's assignment. Moreover, where there is no evidence of bad faith, a Union has no obligation to explain its staff reassignments.

Cobb further alleges that after she refused the July 1998 settlement offer, the Union ceased its efforts to help her obtain reimbursement of her legal fees for the criminal case from the Union's legal services insurance plan. The facts as alleged show, however, that even after Cobb had refused the July 1998 grievance settlement offer, Boerma attempted to persuade the Union's attorneys that they should help Cobb challenge the insurance company's rejection of Cobb's claim. At that point, the Union's legal department made a reasoned decision that Cobb's claim did not fall within the terms of the policy, for reasons set forth in its letter dated September 1, 1998.

Cobb complained to Boerma in mid-June 1998 that the discipline she received in February 1998 was more severe than that given to another employee in June for a similar offense and asked him to file a grievance. However, a grievance had already been filed over Cobb's discipline and was

then pending.

The facts indicate that Boerma did at least attempt to comply with Cobb's request that he search the Employer's personnel files for evidence that Cobb has been singled out for mistreatment. The facts as alleged by Cobb indicate that on many occasions the Union attempted to assist Cobb in some way, even though there was no basis for filing a grievance under the contract. It did not provide Cobb with all the help she sought or expected. The facts, however, do not support a finding that the Union breached its duty of fair representation in dealing with these or any of Cobb's other concerns.

For reasons set forth above, I conclude that Cobb has failed to state a valid claim for breach of the Union's duty of fair representation. For that reason, I recommend that the Union's motion for summary dismissal be granted. Pursuant to Section 16 of PERA, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent's motion for summary dismissal is hereby granted, and the charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____