STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF PONTIAC,
Respondent – Public Employer in Case No. C02 J-236,

-and-

PONTIAC PROFESSIONAL MANAGEMENT ASSOCIATION,
Respondent – Labor Organization in Case No. CU02 J-060,

-and-

KAREN PERRY,
An Individual Charging Party.

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APPEARANCES:

Clark Hill, PLC, by Reginald M. Turner, Esq., and Joseph R. Furton, Esq., for the Public Employer

Rachel N. Helton, Esq., for the Labor Organization

Janet E. Sowell, Esq., for the Charging Party

DECISION AND ORDER

On March 19, 2004, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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Nora Lynch, Commission Chairman

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Harry Bishop, Commission Member

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Maris Stella Swift, Commission Member

Dated: ____________

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

CITY OF PONTIAC,
Respondent – Public Employer in Case No. C03 J-236,

- and -

PONTIAC PROFESSIONAL MANAGEMENT
ASSOCIATION,
Respondent – Labor Organization in Case No. CU03 J-060,

- and -

KAREN PERRY,
An Individual Charging Party.
____/

APPEARANCES:

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

On October 3, 2003, Charging Party Karen Perry filed unfair labor practice charges against Respondents City of Pontiac ("the Employer") and the Pontiac Professional Management Association ("PPMA"). The charge against the Employer reads:

> Terminated based on race & sex. Although I was terminated a white male was kept in position. Since termination another white male was hired to perform duties. Eliminated permant [sic] position and replaced with contractual employee to perform same responsibilities. Did not give proper notification to union prior to eliminating my position as stated in contract with City of Pontiac. See attachment.

The charge against the PPMA reads:

> Union failed to take appropriate actions based on race and sex. Union did not file a grievance on behalf of my position being eliminated from bargaining unit. As according to union contract. [sic] Non representation

[sic] with the City of Pontiac to find new position as stated in union contract.

On January 9 and January 20, 2004, respectively, the Employer and PPMA filed Motions for Summary Disposition. The Employer alleges that: the Public Employment Relations Act (PERA), MCL 423.201 *et. seq.*, does not grant the Michigan Employment Relations Commission ("Commission') jurisdiction to hear claims of sex and race discrimination; claims alleging a violation of the collective bargaining agreement are not cognizable by the Commission; the contractual violation issues are currently pending in the Oakland County Circuit Court; and the Commission should defer to those proceedings. The PPMA also contends that the Commission lacks jurisdiction to hear claims of race and sex discrimination. It also claims that: Charging Party was a probationary employee when she was terminated; the collective bargaining agreement between the PPMA and the Employer provides that the PPMA may only represent probationary employees relative to wages, hours and conditions of employment; and when Charging Party was discharged, she was represented by another bargaining unit.

Facts:

Charging Party has worked for the Employer for sixteen years. She was employed as a Public Information Specialist and was represented by the Pontiac Municipal Employees Association ("PMEA) prior to November 1996, when she was appointed to an exempt position as an Executive Office Technician. The Employer granted Charging Party a leave of absence that allowed her to preserve her right to return to her PMEA bargaining unit position when her exempt position ended.

In January 2000, the MERC certified Teamsters Local 214 ("Teamsters") as the new exclusive collective bargaining representative of employees previously represented by PMEA. In December 2001, when Charging Party's exempt position ended, she did not return to her position as Public Information Specialist in Teamsters Local 214, PMEA's successor. Rather, effective December 27, 2001, she accepted employment as a Programmer Analyst, a position represented by the PPMA.

Subsequently, the Employer eliminated the Programmer Analyst position and on May 24, 2002, Charging Party was terminated. A white male who Charging Party claims was less qualified, replaced her. The PPMA refused to file a grievance protesting Charging Party's termination. Among other reasons, the PPMA claimed that Charging Party, during her first six months of employment, was a probationary employee and the parties' collective bargaining agreement prohibits the PPMA from representing probationary employees who are discharged.

On May 28, 2002, four days after Charging Party's termination, Teamsters filed a grievance on her behalf. The grievance was advanced to arbitration. In an August 1, 2003 award, the Employer was ordered to reinstate Charging Party to her position as a Programmer Analyst in Teamsters' bargaining unit with full pay and benefits. The matter is currently pending in the Oakland County Circuit Court.

Conclusions of Law:

In hybrid breach of contract/breach of the duty of fair representation cases, a

viable claim under PERA cannot be established without evidence that the labor organization breached its duty of fair representation and the employer violated the collective bargaining agreement. *Knoke v. E. Jackson Sch. Dist*., 201 Mich App 480, 485 (1993); *Martin v. E. Lansing Sch. Dist*., 193 Mich App 166, 181 (1992).

The duty of fair representation requires a union to (1) serve the interest of all members without hostility or discrimination, (2) exercise discretion with complete good faith and honesty, and (3) avoid arbitrary conduct. *Goolsby v Detroit,* 419 Mich 651 (1984), citing *Vaca v Sipes*, 286 US 171 (1967). A union has considerable discretion to decide which grievances to pursue and which to settle. When evaluating whether to accept a grievance, a union also has discretion to consider the likelihood of success and the interest of the union membership as a whole. *Lowe v Hotel & Restaurant Employees Union, Local 705,* 389 Mich 123, 145-146.

Charging Party claims that the Employer's Motion for Summary Disposition should be denied because its actions were motivated by her participation in protected activity. She asserts that an employee may not be discharged or otherwise discriminated against for attempting, in good faith, to enforce a right claimed under the agreement and the right to file a grievance is a fundamental right under Section 9 of PERA.

I find no merit to Charging Party's arguments. There is no mention in her charge that the Employer retaliated against her for filing a grievance or for engaging in any other activity protected by Section 9 of PERA. Rather, she claimed that he was terminated based on race and sex without notice to the PPMA as required by the contract. The Commission has long held that alleged violations of Civil Rights statutes are beyond the scope of its jurisdiction. See e.g., *City of Highland Park Fire Dept*., 1985 MERC Lab Op 1226. Charging Party's claim, therefore, does not state a claim for which relief can be granted under PERA.

Similarly, the Union is under no obligation to, as characterized by Charging Party, "take appropriate actions based on race and sex." Unions are not obligated to represent employees who pursue private claims of racial and sex discrimination. *AFSCME Local 1418*, 1996 MERC Lab Op 314. Moreover, the record demonstrates that four days after Charging Party was discharged, Teamsters Local 214, the successor to PMEA, filed a grievance challenging her termination; prevailed before an arbitrator; and is currently litigating the matter in the Oakland County Circuit Court. Even if the PPMA were obligated to file a grievance protesting Charging Party's discharge, its failure to do so was *de minimus* and does not establish a violation of PERA. I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: March 19, 2004