STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Respondent-Public Employer in Case No. C98 I-184,

- and -

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 547,
Respondent-Labor Organization in Case No. CU98 I-45,

- and -

REGINA TILLMAN,
An Individual Charging Party.
_____/

APPEARANCES:

Gordon Anderson, Esq., for the Public Employer

Korney & Heldt, by J. Douglas Korney, Esq., for the Labor Organization

Regina Tillman, in Pro Per

DECISION AND ORDER

On July 9, 2003, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent, Detroit Public Schools (Employer), did not discriminate against Charging Party Regina Tillman in violation of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ further found that Respondent International Union of Operating Engineers, Local 547 (Union), did not breach its duty of fair representation to Charging Party in violation of PERA. The ALJ recommended dismissal of the charges against both Respondents. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Charging Party was granted an extension to file exceptions, and filed timely exceptions and a motion to reopen the record on September 16, 2003.

In the exceptions and motion to reopen the record, Charging Party contends that the ALJ erred by dismissing the charges against both Respondents. Charging Party also alleges that the arbitrator erred by failing to award her back pay and benefits. She contends that the record is

incomplete and that the ALJ's Decision and Recommended Order is not based on the facts. We have carefully and thoroughly reviewed the record. For the reasons expressed below we find Charging Party's exceptions and motion to reopen the record to be without merit.

Procedural History:

Charging Party filed the charges in this matter on September 2, 1998. The matter was scheduled for a hearing on January 12, 1999, before Administrative Law Judge James P. Kurtz. However, without going on the record, the parties agreed that Charging Party's grievance should be resolved through arbitration and that the hearing on the unfair labor practice charges should be adjourned pending the results of the grievance arbitration. On May 27, 1999, the arbitrator issued an opinion and award directing the Employer to place Charging Party in an available bargaining unit position. In a supplemental opinion and award issued December 12, 2000, the arbitrator denied Charging Party's claim for back pay and benefits. Well over a year after the arbitrator's supplemental opinion was issued, in May 2002, Charging Party requested that a hearing be scheduled on the charges in this matter. The matter was heard on November 22, 2002, before ALJ Roulhac.

Motion to Reopen the Record:

With the motion to reopen the record, Charging Party submitted about forty documents for our consideration. Commission Rule 166(1), R 423.166(1), governs motions for reopening the record and provides:

> A motion for reopening of the record will be granted only upon a showing of all of the following:
>
> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
> (c) The additional evidence, if adduced and credited, would require a different result.

With the exception of a letter of recommendation from Tillman's supervisor and several documents that are already part of the record in this matter, all of the documents offered by Charging Party have dates that precede the date of the hearing. Charging Party has not explained her failure to offer these documents at the November 2002 hearing. Although Charging Party filed her exceptions without the assistance of counsel, an attorney represented her at the hearing. Nevertheless, no attempt was made to introduce these documents at that time. However, even if we were to admit these documents into the record at this point, they would not require a different result. The documents offered by Charging Party do not support her contention that she engaged in protected concerted activity that led to the Employer's decision to terminate her employment or her contention that the Union breached its duty of fair representation. Therefore, Charging Party's motion to reopen the record is denied.

Exceptions:

In the exceptions, Charging Party maintains that the ALJ erred in dismissing the charges against the Employer and the Union. However, in reviewing the exceptions and the accompanying document, it is clear that her primary objections relate to the arbitrator's rulings. She asserts that when reinstated to employment by the arbitrator, she should have been awarded back pay and applicable benefits. According to the record, in a supplemental opinion and award issued on December 12, 2000, the arbitrator denied her claim for back pay and benefits, with the exception that if accumulated vacation and sick time was not paid at the time of discharge it should be returned to her. This Commission has no authority to alter or enforce an arbitrator's award. Charging Party also asserts that Respondents have not credited her seniority correctly, which affects the calculation of her accumulated vacation and sick time. Without reaching the question of whether this states a cause of action under PERA, the record reflects that Charging Party did not amend the charge to include events after her reinstatement. We find that the ALJ properly excluded evidence in support of allegations not included in the charge. The only claims properly before us are whether the Employer's termination of Charging Party's employment with the Detroit Public Schools was motivated by union activity, and whether the Union's actions with respect to the termination grievance breached its duty of fair representation. Our examination of the record reveals no support for either of these claims. We therefore adopt the Administrative Law Judge's findings of fact and conclusions of law and issue the following Order:

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

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Maris Stella Swift, Commission Member

Dated: _____

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APPEARANCES:

Gordon Anderson, Esq., for the Public Employer

Korney & Heldt, by J. Douglas Korney, Esq., for the Labor Organization and the Stationary Engineers Education Center[1]

Gary A. Benjamin, Esq., and Steven Cozart, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan on November 22, 2002, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 *et seq*. The proceeding was based upon unfair labor practice charges filed on September 2, 1998, by individual Charging Party Regina Tillman against Respondents Detroit Board of Education, a public employer, and the International Union of Operating Engineers, Local 547, (IUOE) a labor organization, and the Stationary Engineers Education Center, a private entity.[2] Based upon the record and a post-hearing brief filed by the labor organization on January 17, 2003, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA.

[1] During the November 22, 2002 hearing, Charging Party dismissed her charge against the Stationary Engineers Education Center, a private entity.

[2] A January 12, 1999, hearing before an Administrative Law Judge was adjourned without date based on the parties' agreement to arbitrate their dispute. Proceedings before the Commission were resumed in June 2002, when the matter was set for hearing.

The Unfair Labor Practice Charge:

In her September 2, 1998 charge, Charging Party claims that the Respondent Union failed to properly or fairly represent her after she was terminated from an apprenticeship program and from her employment. She claims that Respondent Employer terminated her employment because of her union activities.

Findings of Fact:

The facts are essentially undisputed. Charging Party Regina Tillman was hired by the Detroit Board of Education in January 1989, and was a member of IUOE, Local 547. The Union and the Employer are parties to a collective bargaining agreement. In 1995, Charging Party became an apprentice at the Stationary Engineers Education Center. The Center provides education and training for Detroit Board of Education employees who are interested in becoming journeymen operating engineers. The four-year program consists of 7,000 hours of on-the-job work experience and 1,144 hours of classroom instruction. A Joint Apprenticeship Committee (JAC) administers the Center. The Committee is composed of an equal number of union and employer representatives. Students may address complaints and concerns about the apprenticeship program to the U.S. Department of Labor, Bureau of Apprenticeship Training (BAT). Shortly after becoming an apprentice, Charging Party complained to the Employer's Labor Affairs Division that her tenure and seniority had not been properly transferred to the Education Center. Her complaints were resolved.

In March 1998, Charging Party was expelled from the apprenticeship program, because of the JAC's conclusion that she had cheated on her homework and then lied to the JAC. The BAT investigated a complaint filed by Charging Party protesting her termination. The BAT concluded that Charging Party's expulsion was proper.

Subsequently, in May 1998, after returning to her employment with the Detroit Board of Education, Charging Party's employment was terminated. The Union refused Charging Party's request to file a grievance against the Stationary Engineers Education Center, but represented her in arbitrating a grievance filed against Respondent Detroit Public Schools for terminating her employment.[3] Subsequently, Charging Party was reinstated.

Conclusions of Law:

To establish a prima facie case of discrimination under Section 10 of PERA, a party must show: (1) employee, union, or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *City of Detroit*, 1992 MERC Lab Op 597.

[3] On May 27, 1999, the arbitrator granted Charging Party's grievance and directed the Detroit Board of Education to place her in an available bargaining unit position for which she was qualified. In a December 12, 2000 supplemental opinion and award, Charging Party's claim for back pay and benefits was denied.

I find that Charging Party failed to present any evidence that would support a finding that Respondent Detroit Public Schools violated PERA. The record indicates that other than complaining to the Employer's Labor Affairs Division shortly after becoming an apprentice about improperly transferring her tenure and seniority to the Education Center, Charging Party did not engage in any protected activity. I find nothing on the record to indicate that her 1995 complaints about tenure and seniority were remotely related to her termination three years later.

Similarly, I find nothing on the record to support a finding that Respondent IUOE violated PERA by refusing to file a grievance against the Education Center for expelling Charging Party from the apprenticeship program. PERA regulates the relationship between public employees, public employers, and labor organizations. The IUOE does not have a labor agreement with the Education Center; Charging Party was not employed by the Center; and the Center is not a public employer within the meaning of PERA. Charging Party presented no evidence that the Union did not fairly represent her in her grievance against the Respondent Detroit Board of Education. Her grievance was arbitrated and she was restored to a bargaining unit position, albeit without back pay and benefits.

Based on the above findings of fact and conclusions of law, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____