STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:
ALBION PUBLIC SCHOOLS,
Respondent-Public Employer in Case No. C02 K-239

-and-

AFSCME COUNCIL 25, LOCAL 2826,
Respondent-Labor Organization in Case No. CU02 K-061

-and-

JOANN REESE,
An Individual Charging Party.
_____/

APPEARANCES:
Dean & Fulkerson, P.C., by John L. Gierak, Esq., for the Public Employer

Miller Cohen, by Richard G. Mack, Esq., for the Labor Organization

Joann Reese, *in propria persona*

DECISION AND ORDER

On October 27, 2005, Administrative Law Judge David M. Peltz 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

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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Joann Reese, *in pro per*

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Lansing, Michigan on March 7, 2003 and September 8, 2004, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcripts, exhibits and post-hearing briefs of the parties filed on or before November 8, 2004, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charges and Background Matters:

Charging Party Joann Reese is employed by Albion Public Schools as a secretary and is a member of a bargaining unit represented by AFSCME Council 25, Local 2826. On November 4, 2002, Reese filed unfair labor practice charges against both the school district and AFSCME. In Case No. C02 K-239,

Reese alleges that the Employer discriminated against her on the basis of race by refusing to honor her request to transfer to a front office position at Crowell Elementary School after her position at Albion Senior High School was eliminated. The charge in Case No. CU02 K-061 alleges that AFSCME violated its duty of fair representation with respect to that transfer request by failing to enforce contractual provisions pertaining to seniority.

This matter was originally scheduled to be heard on March 7, 2003. On that date, I indicated to the parties that the allegations concerning the school district did not appear to state a valid claim under PERA. Therefore, I concluded that dismissal of the charge in Case No. C02 K-239 was warranted under Rule 165, R 423.165, of the General Rules and Regulations of the Employment Relations Commission. However, Charging Party was given the opportunity for oral argument in accordance with *Smith v Lansing School District*, 428 Mich 248 (1987). With respect to Case No. CU02 K-061, Charging Party requested that the matter be adjourned without date so that she could procure the services of an attorney.

On or about July 15, 2003, Charging Party notified the undersigned that she wished to proceed with the case. An evidentiary hearing was scheduled for October 10, 2003. However, the hearing was adjourned multiple times thereafter at the request of the parties, including at least one instance in which Reese failed to appear on the date and time scheduled for hearing. On July 7, 2004, AFSCME filed a motion to dismiss, alleging that Reese had abandoned the charge. I denied the Union's motion and the evidentiary hearing in Case No. CU02 K-061 was held on September 8, 2004.

Findings of Fact:

AFSCME, Local 2826 represents several bargaining units of employees of Albion Public Schools, including a unit of paraprofessionals, a custodial unit, and a unit of secretarial and clerical employees. With respect to the secretarial and clerical unit, AFSCME, Local 2826 and the school district are parties to a collective bargaining agreement covering the period July 1, 2001 to June 30, 2004. Article VIII, Section 4 of the secretarial/clerical contract provides, in pertinent part:

> Seniority will be the controlling factor in all actions relative to layoffs, transfers and recalls where the qualifications to do the work assigned are met. The superintendent or his/her designated representative reserves the managerial right in making the final decision but subject to the grievance procedure.
>
> In the event of a layoff, probationary employees will be terminated in the number necessary. Further reductions shall be on the basis of employee's seniority and their ability to perform the work of the classification in which they can be placed without training.

In early 2002, Charging Party was informed by her building principal that her position as a Secretary I at Albion Senior High School was being eliminated. Shortly thereafter, Sue Merritt, chapter chairperson for the clerical unit, contacted Charging Party and, according to Reese, advised her that she had the right to bump any other Secretary I within the district with less seniority. Merritt denies telling Reese that she had any bumping rights under the contract. On March 22, 2002, Merritt faxed to Reese job

descriptions for other secretarial positions at Albion Public Schools. Charging Party and Merritt then met several times to discuss alternative positions within the district in which Reese might be placed.

On July 8, 2002, Charging Party and her husband met with Merritt and AFSCME 25 staff representative Jerome Buchanan. According to Charging Party and her husband, Buchanan told Reese that she had "bumping rights" under the contract and directed her to select another secretarial position. Both Merritt and Buchanan deny that Reese was told she could bump into another position. In fact, Buchanan testified that he explained to Reese that the contract did not provide for bumping. In any event, it is undisputed that several positions were discussed at the meeting and that Charging Party ultimately decided that she wished to take the front office position at Crowell Elementary School. At the time, that position was held by Jan Hrab, who has approximately two months less seniority with the school district than Charging Party.

Following the meeting, Buchanan sent a letter to Assistant Superintendent Corey Netzley notifying the Employer of Charging Party's intentions. The letter, which was dated July 17, 2002, stated:

> As we understand, Ms. Reese's position as Secretary I in the High School is being eliminated prior to the start of the 2002/2003 school year.
>
> Sue Merritt, the Clericals Representative and myself, have met with Ms. Reese to review her qualifications as well as her seniority. Based on our meetings, Ms. Reese has decided on the Secretary I position at Crowell School.
>
> I hope the transition from one school to another will not be a problem, however, if you have any question's [sic] please call.

On July 31, 2002, Hrab filed a grievance with the Employer asserting that Charging Party did not have the right under the contract to displace her from her position. Hrab alleged that Charging Party was not qualified for the front office position at Crowell Elementary School, and that the Employer violated the collective bargaining agreement by failing to notify her of its decision to remove her from the front office position until three days prior to the effective transfer date. On or about August 1, 2002, Netzley made the determination that Charging Party did not have the right to displace Hrab from her Secretary I position at Crowell Elementary School.

By letter dated August 7, 2002, Netzley notified Charging Party that he was reassigning her to a secretarial position at the Brighter Futures office at Crowell Elementary, effective August 12, 2002. After receiving the letter, Charging Party contacted Merritt for an explanation. Merritt told Charging Party that Hrab had more experience with the duties assigned to the front office secretary at Crowell. Merritt also explained to Reese that a new principal was starting at Crowell and that it would be difficult to have a new principal and a new secretary at the same time. Charging Party asked Merritt to write a grievance on her behalf. Merritt was busy attending to issues related to the beginning of the school year and asked Charging Party to write the grievance herself.

Charging Party drafted a grievance which she hand-delivered to Merritt on or about August 21, 2002. In the grievance, Charging Party alleged that the Employer violated the collective bargaining agreement by refusing to allow her to exercise her seniority. Merritt forwarded the grievance to Buchanan. After reviewing the document, Buchanan instructed Merritt not to file it based upon the fact that it was poorly written and because it would likely be rejected by AFSCME's arbitration department or result in an unfavorable decision from an arbitrator. Merritt did not immediately notify Charging Party of the Union's decision not to file the grievance. Instead, Buchanan spoke to Reese around the same time and told her that he hoped to resolve her issues during an upcoming meeting with the Employer. Buchanan explained to Reese that he had worked out an agreement with the Employer to extend the time period for filing a grievance while discussions were ongoing.

Buchanan discussed Charging Party's situation with representatives of the Employer at a meeting on or about August 26, 2002. During the meeting, Buchanan stated that it was Charging Party's desire to return to a position in her old building, and the Employer agreed to try and move Reese back to Albion Senior High School. However, Charging Party was unhappy with the agreement negotiated by Buchanan and instead demanded another meeting with her Union representatives to discuss the issue.

On August 30, 2002, Charging Party and her husband met with Buchanan and AFSCME Administrative Director Dennis Nauss. Charging Party expressed her belief that she had a right to "bump" into the Secretary I position at Crowell Elementary based upon the fact that she had more seniority than Hrab. Nauss explained to Charging Party that although the collective bargaining agreement provides that seniority will govern with respect to layoffs and transfers, the contract does not explicitly provide for bumping. Nauss indicated that without any language in the contract setting forth the mechanics for bumping, it would be too risky for the Union to take the matter to grievance arbitration. At the conclusion of the meeting, Nauss promised Reese that the Union would again attempt to discuss the matter with the Employer.

On September 19, 2002, the Union and the Employer met in another effort to resolve the issue. The parties initially discussed drafting a letter of understanding to clarify the contract language with respect to seniority. However, the Employer's representatives ultimately decided to leave the language as is and negotiate an agreement specific to Reese. The agreement reached by the Union and the Employer gave Reese three options: (1) remain in her current position at Brighter Futures; (2) return to Albion Senior High School as an attendance secretary, which is a Secretary I position; or (3) assume the position currently occupied by the least senior Secretary I in the bargaining unit, which would require Reese to divide her time between the Harrington School office and food service at the high school. Charging Party was notified of the agreement via a letter signed by Netzley, Merritt and Buchanan. The letter provided that Reese had until September 25, 2002, to make her selection and that a failure to respond would be interpreted as a desire to remain at Brighter Futures.

Charging Party refused to sign the September 19, 2002, settlement agreement. As a result, she continued working as a Secretary I at the Brighter Futures Office and remained there at the time of the hearing in this matter. The secretarial position at the Brighter Futures office is now based out of Albion Senior High School, the same building in which Charging Party was working before her position was

eliminated. As a Secretary I at Brighter Futures, Charging Party is earning more money than in her previous position at the high school.

Ocie Lee Holloway was president and chapter chairperson of AFSCME Local 2826 from 1976 to 1999. He testified that members of Local 2826 have "bumped" into other positions in the past after their jobs at the school district were eliminated. However, Holloway was not in office when the current contract was executed, and he could only recall one instance in which a member of the secretarial/clerical unit bumped another employee. That incident occurred in 1978, more than 24 years before the instant charge was filed. Accordingly, I do not find Holloway's testimony reliable on the issue of bumping with respect to the secretarial/clerical unit.

Discussion and Conclusions of Law:

Charging Party alleges that the Union violated its duty of fair representation when it determined that she was not entitled to the front office secretary position at Crowell Elementary. Reese argues that she relied upon the Union's representations that she had the right to "bump" other unit members with less seniority, and that the Union's decision not to file a grievance on her behalf was contrary to Article VIII, Section 4 of the collective bargaining agreement and the past practice of the parties. The Union contends that its representatives consistently told Charging Party that she had no bumping rights under the contract, and that they acted reasonably and in good faith in attempting to find Charging Party another position within the district with which she would be satisfied.

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interest 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), citing *Vaca v Sipes*, 386 US 171 (1967). *Goolsby*, at 679, defined "arbitrary conduct" as conduct that is impulsive, irrational, or unreasoned, or inept conduct undertaken with little care or with indifference to the interests of those affected. Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe, supra*. A union satisfies its duty of fair representation as long as its decision was not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35.

Having reviewed the record in its entirety, I find no evidence that the Union acted arbitrarily, discriminatorily or in bad faith with respect to its representation of Charging Party. Susan Merritt contacted Charging Party soon after learning that Reese's position at Albion Senior High School was being eliminated. Thereafter, the Union called, faxed and met face to face with Reese on multiple occasions. The Union also had several meetings with the Employer in an attempt to rectify Charging Party's employment situation. Throughout the entire process, Reese was offered a number of jobs within the school district. Ultimately,

the Union negotiated a settlement agreement with the Employer which gave Charging Party the choice of three positions. Although Charging Party refused to sign that agreement, she remains employed by the school district at Albion Senior High School and currently earns more money as the Brighter Futures secretary than in her prior position with the school district.

As noted, there was conflicting testimony regarding what Merritt and Buchanan initially told Reese concerning her right to displace other secretarial/clerical employees. Reese testified that Merritt and Buchanan indicated to her that she had the right to "bump" less senior secretaries, and that it was not until the August 30, 2002 meeting that the Union informed her that the contract did not provide for bumping. Merritt and Buchanan denied ever having told Charging Party that she had bumping rights under the contract. I credit Charging Party's testimony with respect to this issue. Charging Party was a believable witness with a good recollection of events. Moreover, the July 17, 2002 letter from the Union notifying the school district that Reese had selected the front office position at Crowell Elementary School directly contradicts the testimony of the Union representatives on this point. However, the fact that Merritt and Buchanan initially provided Reese with conflicting or erroneous information concerning bumping rights does not, in and of itself, establish a breach of the duty of fair representation under PERA.

There is no evidence that Merritt and Buchanan intentionally misled Reese or that she detrimentally relied upon their advice. Ultimately, the Union decided not to file a grievance on Charging Party's behalf based upon its conclusion that the contract did not provide for bumping, and Buchanan, Merritt and Nauss communicated this determination to Reese. There is nothing in the record to suggest that the Union's interpretation of the contract was unlawful. Although Article VIII, Section 4 of the agreement provides that seniority will govern with respect to transfers, the contract does not state that unit members may use their seniority to displace other employees from their positions, and there is no credible evidence in the record establishing that this contract language has ever been interpreted in such a manner as to allow for bumping. A union has no duty to pursue a grievance which has no merit or which would be futile to pursue, nor does an individual member have the right to demand that a grievance be filed or processed to arbitration. See *Wayne County Community College*, 2002 MERC Lab Op 379, 381; *SEMTA*, 1988 MERC Lab Op 191, 195; *Grosse Ile Office & Clerical Assn*, 1996 MERC Lab Op 155. Although Charging Party disagrees with the position taken by the Union, she has not established that AFSCME acted unlawfully in refusing to process her grievance.

I also find that Charging Party has failed to state a claim against the Respondent school district upon which relief can be granted under PERA. It is well-established that PERA does not prohibit all types of discrimination or unfair treatment, nor does the Act provide an independent cause of action for an employer's breach of contract. Absent an allegation that the Employer interfered with, restrained, coerced or retaliated against her for engaging in conduct protected by Section 9 of PERA, the Commission is foreclosed from making a judgment on the merits or fairness of the Employer's action. See e.g. *City of Detroit (Fire Dept.)*, 1988 MERC Lab Op 561, 563-564; *Detroit Board of Education*, 1987 MERC Lab Op 523, 524. Charging Party has not alleged that the school district restrained, coerced or retaliated against her because she engaged protected activities. Rather, Charging Party's claim against the Employer is that it violated the collective bargaining agreement by refusing to allow her to transfer to a position at

Crowell Elementary School, and that it did so in retaliation for her filing a Title VII claim in federal court. I conclude that neither allegation states a claim under PERA.

For the reasons set forth above, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated:_____