STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

MACKINAC STRAITS HOSPITAL,
Respondent-Public Employer in Case No. C05 K-285,

-and-

MICHIGAN AFSCME COUNCIL 25, LOCAL 388,
Respondent-Labor Organization in Case No. CU05 K-058,

-and-

JOANN BIGELOW,
An Individual Charging Party.
_____/

APPEARANCES:

Charles M. Brown, Esq., for the Public Employer

Kristen M. Clark, Esq., for the Labor Organization

Joann Bigelow *in pro per*

DECISION AND ORDER

On August 14, 2006, 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

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Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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In the Matter of:

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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 June 8, 2006, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript and exhibits, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Background Matters:

On November 30, 2005, Joann Bigelow filed unfair labor practice charges against her employer, Mackinac Straits Hospital, and her labor organization, Michigan AFSCME Council 25, Local 388. The charge in Case No. C05 K-285 alleges that the Employer suspended Bigelow from her position as a bath aide on December 14, 2004, and again on November 2, 2005, in retaliation for what management perceived to be Bigelow's attempt to block a November 2004 millage involving

the hospital. In Case No. CU05 K-058, Bigelow contends that the Union failed to represent her fairly in connection with the suspensions.

On March 13, 2006, the Employer filed a motion for summary disposition, arguing that the charge against the hospital is time barred under Section 16(a) of PERA and that none of the allegations set forth by Bigelow state a claim under the Act. Respondent also asserted that there were various technical deficiencies in the charge which warranted its dismissal. Bigelow filed a response to the motion on April 21, 2006, in which she primarily addressed the alleged pleading deficiencies. With respect to the substance of the charge, Bigelow alleged that she "feared being fired for something that the hospital may have concocted to get rid of me." On April 24, 2006, I issued an order indicating that I would be recommending dismissal of the charge in Case No. C05 K-285 on the basis that Bigelow had not alleged any PERA violation by the hospital.

Finding of Facts:

Joann Bigelow is employed by the Mackinac Straits Hospital and is a member of AFSCME Local 388. In April of 2004, Bigelow and other members of the bargaining unit publicly expressed their disagreement with contract language which the Union was proposing during negotiations with the hospital on a new collective bargaining agreement. Later that year, on or about September 28, 2004, Bigelow was elected chapter chairperson of Local 388. On October 10, 2004, Bigelow sent a letter to the membership of Local 388 in which she declined the position. The letter stated:

> Thank you for your votes on September 28th but my name was on the ballet [sic] in error. I had crossed my name off the nomination sheet. This election I feel was an attempt to get back at a few of us that spoke up for everyone's best interest. But at this time I am not going to try to clean up the last union reps [sic] messes.
>
> As I cannot represent you on a contract that we have not seen yet or that I did not agree with. I hope you understand. I did try for you all at one time to fight for what we (as a group) should all get. And never had the backing at that time. The only way we are going to be a strong union is to hold tight to what we have, but at this point it was voted to give it away.

Upon arriving for work on October 23, 2005, Bigelow discovered that one of her fellow bath aides had called in sick. Bigelow immediately notified the charge nurse, Penny Browning, of the situation. Bigelow told Browning that she intended to "drop" two patients from the schedule who had already been bathed several times that week and, instead, focus her attention on the remaining patients. It is unclear from the record whether Browning said anything in response. Bigelow then proceeded with her duties, which included giving baths to five patients. Later that day, another employee spoke to Bigelow's supervisor and complained that two patients had not been bathed.

When Bigelow returned to work the following day, she had a conversation with the hospital's risk management officer, Barb Davis. Davis told Bigelow that there had been a doctor's order on file requiring the hospital to bathe one of the patients whom Bigelow had dropped from the schedule. Bigelow was unaware of the doctor's order because the individual in question was not one of her usual patients. Davis further indicated that Browning had accused Bigelow of yelling at her about

the bathing schedule, an accusation which Bigelow denied. As a result of the incident, Bigelow received a five-day suspension without pay on November 2, 2005, for disregarding an order.

Bigelow contacted her steward, Tammy Smith, and requested that the Union grieve the suspension. AFSCME filed a grievance on Bigelow's behalf on November 23, 2005. The Employer upheld the suspension and the Union processed the grievance to the next step of the contractual grievance procedure. A third-step meeting was held on or about December 15, 2005, at which Union representatives, including Smith, AFSCME staff representative Sue Cameron and Chapter Chairperson Roberta Schaedel, argued on Charging Party's behalf. At the conclusion of the meeting, the Employer once again denied the grievance. Thereafter, Cameron forwarded the case to the Union's arbitration review panel.

In a letter dated January 3, 2006, the arbitration review panel notified Charging Party that it had found no violation of the collective bargaining agreement and that the grievance had been rejected. The panel concluded that the hospital had just cause to discipline Bigelow on the basis that she failed to perform work assigned to her, and because she had reassigned work to another employee without supervisor approval. The letter to Bigelow concluded with the following statement:

> If you believe we have erred in the facts or contract provision relating to this grievance, please let us know immediately, in writing, within ten (10) days from the date of this letter. Your written response should specifically outline the basis upon which you conclude an error was made **and supporting documentation should be attached**. Failure to respond within 10 days will result in the file being closed without further notice. (Emphasis in original.)

Charging Party did not submit any documentation to the Union's arbitration review panel, nor did she appeal the panel's decision rejecting the grievance. In a letter dated February 3, 2006, the Union's arbitration director notified Bigelow that her case had been "rejected without appeal" and that the file had been closed.

In May of 2006, Charging Party asked Browning to write a statement on her behalf concerning the October 23rd incident. In a letter addressed to "Whom It May Concern" and dated June 6, 2006, Browning wrote that she and Bigelow had a disagreement concerning job assignments on the date in question, but that they "did not have an argument in the hall way [sic]."

Discussion and Conclusions of Law:

Charging Party contends that the Union's decision not to advance her grievance to arbitration was based, in part, on the fact that she had refused to accept the position of chapter chairperson, and because she publicly complained about the contract which AFSCME was negotiating on behalf of the unit members. In addition, Bigelow asserts that the Union did not conduct a proper investigation before deciding to withdraw the grievance.

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). "Arbitrary conduct" includes impulsive, irrational or unseasoned conduct, inept conduct undertaken with little care or with indifference to the interests of those affected, the failure to exercise discretion or extreme recklessness or gross negligence. *Goolsby*, *supra* at 679. See also *Detroit Fire Fighters Ass'n*, 1995 MERC Lab Op 633, 637-638. 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); *Int'l 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 factors such 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. At Bigelow's request, the Union filed a grievance concerning the suspension and advanced that grievance to step three of the contractual grievance procedure. AFSCME representatives attended the third-step meeting and presented arguments on Charging Party's behalf to the Employer. Thereafter, AFSCME staff representative Sue Cameron forwarded the file to the Union's arbitration panel for review. Ultimately, the panel decided not to advance the grievance to arbitration based upon its conclusion that the Employer had just cause to suspend Charging Party. The arbitration department notified Bigelow of its decision in a timely manner and provided her with instructions on how to appeal its decision. However, Charging Party did not file an appeal or present any documentation to the arbitration department. At the hearing in this matter, Charging Party presented a letter from Browning which she apparently contends would have changed the outcome of her case. However, the letter is dated June 6, 2006 and, thus, was not available to the Union when it made its decision to withdraw the grievance. Moreover, the letter does not necessarily exonerate Bigelow of the allegation that she disregarded an order. Rather, the letter merely clarifies that Bigelow and Browning had a "disagreement" as opposed to an "argument" on the day in question. Although Charging Party disagrees with the Union's refusal to process her grievance to arbitration, she has not established that AFSCME acted unlawfully in making that decision.

I also find that Charging Party has failed to state a claim against Respondent Mackinac Straits Hospital. 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 the Charging Party 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 Dep't)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524. In the instant case, neither the charge nor the response to the Employer's motion for summary disposition contain any allegation that the hospital restrained, coerced or retaliated against Bigelow because she engaged in protected concerted activities. Accordingly, I conclude that the charge in Case No. C05 K-285 fails to state a claim under PERA.

Based upon the above facts and conclusions of law, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: _____