STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SOUTH LYON COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C02 H-193

-and-

CHARLOTTE FULKERSON,
An Individual-Charging Party.
_____/

APPEARANCES:

David Hershey, Labor Relations Consultant, Michigan Association of School Boards, for the Respondent

Law Offices of Lee & Clark, by Michael K. Lee, Esq., for the Charging Party

DECISION AND ORDER

On May 9, 2006, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, South Lyon Community Schools, unlawfully discriminated against Charging Party Charlotte Fulkerson. The ALJ found unlawful discrimination when Respondent terminated Charging Party as a result of her refusal to accept its offer of a position which, if accepted, would have required Fulkerson to withdraw a grievance previously filed against Respondent. The ALJ found that Respondent violated Section 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) and (c), as alleged in the charges, and recommended that we order that Respondent cease and desist from discharging or discriminating against employees for activity protected by Section 9 of PERA. The recommended remedy also included a notice posting.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On June 1, 2006, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. After filing a timely request, Respondent was granted an extension until July 5, 2006 to file a response to the exceptions. On July 17, 2006, Respondent

filed an untimely response in support of the ALJ's Decision and Recommended Order that we do not consider in reaching our decision in this case.

In her exceptions, Charging Party contends that the ALJ erred when she failed to grant back pay and benefits as part of the remedy. We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

The facts in this case are set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Charging Party is a member of a bargaining unit of secretarial and clerical employees and the school secretary at Respondent's Salem Elementary School. She was granted a personal leave of absence for ninety-one days commencing on October 9, 2000. In November 2000, she requested and was granted an extension of her leave through July 10, 2001. The applicable collective bargaining agreement provides that employees returning from a personal leave of one year or less do not have the right to return to their former positions, but can fill any vacancy for which they are qualified.

On May 4, 2001, Charging Party notified Respondent of her desire to return to a position upon expiration of her leave, and on May 21, 2001, she applied for a vacant food services secretary position. Respondent deemed her unqualified and declined to award her that position.

On June 13, 2001, Charging Party's union filed a grievance asserting that Respondent's decision to deny her the food service position was arbitrary. A demand to arbitrate the grievance was made on June 27, 2001. On July 10, 2001, Charging Party's leave of absence was automatically extended by contract for one year or until there was a vacant position for which she was qualified.

In January 2002, Respondent offered Charging Party a secretarial position at the high school at the beginning of the 2002-2003 school year in return for the withdrawal of her grievance. She did not accept this offer. In May 2002, Respondent offered to reimburse the dental insurance premiums that Charging Party paid after May 1, 2001 in addition to placing her in the high school position, conditioned upon the withdrawal of her grievance. While this proposal was pending, Respondent posted three vacant secretarial positions, and Charging Party advised her union that she would agree to withdraw her grievance if Respondent awarded her one of these positions or allowed her to interview for them. Respondent rejected the offer and, on June 24, 2002, sent the following letter to Charging Party:

> South Lyon Community Schools offered to bring you back from your leave of absence to a position at the high school for which you are qualified. You declined that offer. Therefore this letter is notification that you have been terminated as an employee of South Lyon Community Schools effective Friday, June 21, 2002.

Charging Party filed an unfair labor practice on August 29, 2002. The grievance protesting Respondent's refusal to award the food service position to Charging Party was granted by an arbitrator on December 30, 2004.[1] In the arbitrator's award, Respondent was ordered to reinstate Charging Party with back pay from the date that her leave should have ended to April 26, 2002, the date beyond which the arbitrator found that the parties had failed to process the grievance in a timely manner. Charging Party began working in the food service secretary position in February 2005.

The ALJ found that Respondent violated Sections 10(1)(a) and (c) of PERA when it terminated Charging Party's employment prior to the expiration of her leave of absence because she refused an offer of suitable work conditioned upon the withdrawal of her grievance. No exception has been taken to this finding, and we adopt it as our own. Charging Party, however, has filed an exception to the ALJ's recommendation of a remedy without back pay and benefits.

Discussion and Conclusions of Law:

Charging Party was contractually entitled to a leave of absence until July 10, 2002. In accordance with the contract, Respondent could have properly terminated her employment when her leave expired. When Respondent sent a letter of termination to Charging Party on June 24, 2002, it cut off her contractual rights. The ALJ reasoned that because Charging Party was on leave of absence when she was terminated on June 24, 2002, and because there was no evidence that she would have obtained another position before her leave expired, the remedy for Respondent's unfair labor practice should not include back pay. We agree that a remedy which includes back pay is not appropriate in these circumstances. For these same reasons, we decline to award benefits as part of the remedy.

The unfair labor practice charge protests the June 24, 2002, termination. The evidence does not support a finding that Charging Party suffered economic harm as a result of that event. She was on an unpaid leave when it occurred, and she did not accept Respondent's offer to induce her to withdraw her grievance.

The unfair labor practice charge does not address Respondent's failure to award the food service secretary position to Charging Party. This is a contract issue that was properly determined in the grievance/arbitration procedure.

ORDER

The Commission adopts as its Order the Order recommended by the ALJ.

[1] The ALJ hearing at MERC was repeatedly rescheduled at Charging Party's request to allow her Union to arbitrate her grievances. It was again rescheduled at Charging Party's request when her bargaining representative, the MEA, filed an appearance on her behalf.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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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 or the Act), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on September 7, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before October 31, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Charlotte Fulkerson filed this charge against her former employer, the South Lyon Community Schools, on August 29, 2002. She amended her charge on February 28, 2003. The charge, as amended, alleges that Respondent unlawfully terminated Fulkerson on June 24, 2002 because she rejected its offer to settle a grievance filed on her behalf by her collective bargaining representative, the Michigan Educational Support Personnel Association (the Union). Fulkerson asserts that she was discharged because of her union activity in violation of Sections 10(1)(a) and (c) of PERA.

Facts:

Fulkerson was hired by Respondent in 1993 or 1994. She was a member of the Union's bargaining unit of secretarial and clerical employees. At the beginning of the 2000-2001 school year, Fulkerson was the school secretary at Respondent's Salem Elementary School. In September 2001, she requested a personal leave of absence.

Article XIII (G) of the 1998-2002 collective bargaining agreement between the Union and Respondent stated that employees who had been employed for one year or more could be granted a personal leave of absence without pay for a period up to one year and that the leave could be extended to a maximum of two years. Per this article, employees returning from a personal leave of one year or less did not have the right to return to their former positions, but could: (1) fill any vacancy for which they were qualified, or (2) bump the least senior person in their classification if the returning employee had more seniority than that person and was qualified for their position. Respondent concedes that if there was no position available for an employee when he or she sought to return from leave, under Article XIII (G) the employee was automatically granted an additional leave of absence for up to one year in which to find a position for which he or she was qualified. Article IX of the contract stated that the employer had the right to determine qualifications as long as its determination was not arbitrary or capricious.

Fulkerson was granted a personal leave of absence for ninety-one days commencing October 9, 2000. In November 2000, Fulkerson requested and was granted an extension of her leave through July 10, 2001. On May 4, 2001, Fulkerson informed Respondent's assistant superintendent for administrative services, Marilyn Mitchell, that she wanted to return after her leave of absence expired. On May 21, Fulkerson applied for a vacant bargaining unit position, food services secretary. Fulkerson was interviewed for this position but Respondent deemed her unqualified. Because Fulkerson had no position to which to return on July 10, 2001, her leave of absence was automatically extended per Article XIII (G) for one year or until there was a vacant position for which she was qualified.

On June 13, 2001, the Union filed a grievance asserting that Respondent's decision not to award Fulkerson the food service position was arbitrary. It made a demand to arbitrate this grievance on June 27, 2001. The Union and Respondent then entered into protracted settlement discussions. Respondent was aware that the Union would not accept a settlement offer unless Fulkerson agreed to its terms. In January 2002, Respondent offered to place Fulkerson in a secretarial position at the high school to be created at the beginning of the 2002-2003 school year in return for the Union withdrawing the grievance. Fulkerson did not accept this offer.

In late May 2002, the Employer made a second settlement proposal that included reimbursing Fulkerson for dental insurance payments she made after May 1, 2001 in addition to placing her in the high school position. In early June, after getting the Union's conditional agreement, the Employer presented Fulkerson and the Union with a proposed

written settlement agreement containing these terms. The written agreement, like all Respondent's previous offers, required the Union to withdraw the grievance. Fulkerson told the Union that she would agree to the settlement, and a Union representative signed the agreement on June 10. The agreement was forwarded to Fulkerson for her signature.

On June 6, 2002, Respondent posted three vacant secretarial positions, including counseling secretary, at its middle school. On June 12, Fulkerson sent her Union representative an e-mail stating that she would agree to the withdrawal of the food grievance only if Respondent awarded her one of these positions or at least allowed her to interview for them. The Union representative forwarded Fulkerson's offer to Mitchell, who rejected it. Fulkerson applied for all three middle school vacancies, but was not interviewed for any of the positions.

On June 24, 2002, Mitchell sent Fulkerson a letter that read:

> South Lyon Community Schools offered to bring you back from your leave of absence to a position at the high school for which you are qualified. You declined that offer. Therefore this letter is notification that you have been terminated as an employee of South Lyon Community Schools effective Friday, June 21, 2002.

The Union filed a grievance over Fulkerson's termination and a grievance over Respondent's refusal to consider her for the middle school vacancies. Respondent offered to rescind Fulkerson's termination and place her in the high school position in return for the Union's withdrawal of all her grievances. Fulkerson rejected the offer.

Fulkerson's grievance over Respondent's refusal to award her the food service position was heard by an arbitrator on October 8, 2004. On December 30, 2004, the arbitrator granted the grievance and ordered Respondent to reinstate her, although he awarded backpay only for the period between the date her leave should have ended and April 26, 2002. Fulkerson began working in the food service position in February 2005. After about a week, Respondent offered her the position of counseling secretary at the middle school, which was again vacant, and Fulkerson accepted it. Fulkerson terminated her employment with Respondent in May 2005.

Discussion and Conclusions of Law:

An employee engages in concerted protected activity within the meaning of Section 9 of PERA when, acting in good faith, she files a grievance based on a provision of a collective bargaining agreement. An employer violates Section 10(1) (a) and (c) of PERA when it discharges an employee for taking legitimate actions to enforce her contract rights. *Michigan Employment Relations Commission* v *Reeths-Puffer School Dist*, 391 Mich 253 (1974). I find that Fulkerson's refusal to accept the terms of the grievance settlement Respondent offered her was conduct protected by Section 9, and

Respondent could not retaliate against her for that action.[2] The fact that Fulkerson accepted Respondent's offer and then reneged, or that she would have withdrawn her grievance if Respondent had agreed to different terms, has no bearing on whether Fulkerson's rejection of Respondent's offer was protected by PERA.

When Fulkerson sought to return from a personal leave of absence in the spring of 2001, she applied for a vacant position for which Respondent decided she was not qualified. Because there was no position for her in July 2001, Fulkerson's leave was automatically extended by the terms of Article XIII (G) of the contract until July 10, 2002 or until she found a position for which she was qualified. When Respondent terminated her on June 24, 2002, Fulkerson's leave had not expired. Respondent concedes that Fulkerson was terminated because she refused Respondent's offer of a position. When asked at the hearing why she terminated Fulkerson, Assistant Superintendent Mitchell stated:

> Because we had the contractual responsibility to bring her back to a position for which she was qualified. We determined that position was at the high school, and she turned down that position, and so she lost her rights under the contract for a return from leave.

Respondent's offer, however, was conditioned on Fulkerson withdrawing her grievance over its failure to award her the food service position in May 2001. Respondent, of course, did not interfere with Fulkerson's PERA rights by offering her a position in return for dropping this grievance. In this case, however, Fulkerson was contractually entitled to a leave of absence until July 10, 2002 if she did not find a position for which she was qualified within that period. In other words, Respondent could have terminated Fulkerson after her leave expired on July 10, 2002, but could not do so before that date unless she refused an offer of a position for which she was qualified. I conclude, contrary to Respondent's claim, that its offer to placed Fulkerson in the high school position did not satisfy its obligations under Article XIII (G) because it required Fulkerson to give up a right protected by Section 9, i.e. her right to pursue her grievance. When Respondent sent Fulkerson a letter terminating her on June 24, 2002, it cut off her rights under the contract because she had refused to accept its grievance settlement offer. I conclude that by this action Respondent unlawfully discriminated against Fulkerson because of her union activity in violation of Section 10(1) (a) and (c) of PERA.

Fulkerson did not indicate in her charge or her brief what remedy she believes she is entitled to in this case. Although an arbitrator later concluded that Fulkerson should have been awarded the food service position she applied for in May 2001, Fulkerson was on a leave of absence when she was terminated on June 24, 2002. Both parties agree that Fulkerson was qualified for the new secretarial position at the high school that began in

[2] Fulkerson did not, of course, have the right under PERA to demand that the Union carry her grievance to arbitration. *Lowe* v *Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973).

August 2002. However, Fulkerson never applied for this position, and there is no evidence that Fulkerson would have obtained another position before her leave of absence expired.[3] I conclude, therefore, that the remedy in this case should not include backpay, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent South Lyons Community Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from:

   a. Discharging or otherwise discriminating against employees because of their union or other activity protected by Section 9 of the Public Employment Relations Act.

   b. In any like manner interfering, with restraining or coercing employees in the exercise of the right guaranteed them by that Act.

2. Post the attached notice on Respondent's premises, in a place or places where notices to employees are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

[3] Respondent's refusal to allow Fulkerson to interview for the middle school positions for which she applied in June 2002 was not part of this charge.