STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CALHOUN COUNTY MEDICAL CARE FACILITY,
Public Employer - Respondent in Case No. C06 J-239,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 79,
Labor Organization - Respondent in Case No. CU06 J-044,

-and-

HOLLY ANNE NEWMAN,
An Individual Charging Party.
_____/

APPEARANCES:

David J. Converse for the Individual Charging Party

Nantz, Litowich, Smith, Girard & Hamilton, by Steven K. Girard, Esq., for the Public Employer

Clifford L. Hammond, Esq., for the Labor Organization

DECISION AND ORDER

On September 25, 2008, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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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 March 26, 2007 before David M. Peltz, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript, exhibits and post-hearing briefs filed by the parties on or before May 29, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Background Matters:

This matter comes before the Commission on unfair labor practice charges filed by Holly Anne Newman on October 6, 2006 against Calhoun County Medical Care Facility (CCMCF) and

Service Employees International Union (SEIU), Local 79. The identically worded charges allege that the Employer unlawfully terminated Newman on April 9, 2006 and that the Union failed to represent Newman in connection with the discharge.

On November 16, 2006, the Employer filed a motion to dismiss the charge against it in Case No. C06 J-239. The motion asserted that Newman failed to serve a copy of the charge on the Employer, and that the facility did not actually receive notice of the proceeding until October 30, 2006, when the Employer was served by the Commission with the charge, along with a Complaint and Notice of Hearing. For this reason, the Employer argued that the charge should be dismissed as untimely under Section 16(a) of PERA. The Employer further claimed that dismissal was warranted because the charge in Case No. C06 J-239 failed to state a claim against it upon which relief could granted under PERA.

On November 30, 2006, I issued an order requiring Newman to show cause why her charge against CCMCF should not be dismissed for the reasons stated in the Employer's motion. Newman filed a response to the order to show cause on December 13, 2006. In her response, Newman asserted that she did not serve copies of the charge on the Employer because she was unaware that such action was required under PERA. In addition, Newman alleged that she was "unfairly" fired from her job at the facility and that the Employer acted with "malice" in connection with her termination. In an order issued on December 28, 2006, I indicated that Charging Party would not be permitted to present evidence against the Employer at hearing and that a written decision recommending dismissal of the charge in Case No. C06 J-239 would follow. A hearing on the allegations against the Union was held on March 26, 2007.

Findings of Fact:

Charging Party was employed by CCMCF as a nurse and was a member of a bargaining unit represented by SEIU, Local 79. She was hired by the Employer on or about March 28, 2005. During her first thirteen months working for CCMCF, Charging Party was disciplined by the Employer on four separate occasions for incidents involving improper or inappropriate patient care, including three suspensions without pay. The last of these incidents occurred on April 6, 2006, when Charging Party allegedly failed to ensure that a resident received proper treatment. As a result of that occurrence, Charging Party was issued a one-day suspension without pay. At no time did Charging Party file a grievance or request the assistance of the Union with respect to these disciplinary actions.

On April 9, 2006, Charging Party was called into a meeting with Angie Woodard, the Employer's director of nursing, to discuss two additional instances of alleged misconduct by Newman, both of which allegedly occurred at the facility on April 7, 2006. Charging Party was accused of putting an insulin syringe in her mouth and leaving pills at the bedside of a resident. Woodard asked Charging Party if she wanted someone from the Union to take part in the disciplinary meeting. Charging Party expressed a desire for Union representation, but indicated that she did not want the Union steward, Carol Fisher, to assist her. After being told that Fisher was the only Union representative available at the time, Charging Party asked Woodard if one of her fellow nurses, Amy Thomas, could attend. The Employer obliged and Thomas was called into the meeting. Thereafter, Charging Party's employment with the facility was terminated for

negligence and misfeasance of duties, grossly poor nursing care, falsification of facility records and violations of safety rules.

On April 11, 2006, Charging Party left a message for SEIU labor consultant Ray Murdaugh. Murdaugh returned Charging Party's call later that same day. Charging Party told Murdaugh that she was not interested in filing a grievance over the termination or getting her job back. At the hearing in this matter, Newman explained, "I didn't want to work for an employer who basically told me I was a liar." However, Charging Party did request that Murdaugh assist her in getting paid for the leave time which she had accumulated at the facility. Murdaugh promised to contact the facility's administrator, Donna Mahoney, to determine whether such relief was possible.

Murdaugh was not able to reach Mahoney until sometime during the morning of April 13, 2006. Mahoney confirmed to Murdaugh that Charging Party had been terminated and told him that Newman was not eligible to receive payment for accumulated leave time under the contract due to the fact that she had been terminated for cause. Following his conversation with Mahoney, Murdaugh left a message with Charging Party. She returned the call later that day. Murdaugh explained to Newman the Employer's position regarding payment of accumulated leave time. Upon learning that the Employer would not grant her request, Charging Party complained that Murdaugh's conduct had caused her to miss the deadline for filing a grievance. Murdaugh told Newman that he would contact the Employer and seek an extension of the grievance filing deadline. He then called Mahoney back and arranged for an extension until 5:00 p.m. that day.

Murdaugh notified Charging Party of the extension that same day and instructed her to immediately get in touch with Fisher, her Union steward. Newman complained that she did not want Fisher handling her case. At the hearing in this matter, Newman explained that she did not trust Fisher and that she did not believe that Fisher had her "best interests at heart." Murdaugh told Charging Party that there was no other Union representative available at the time to assist her with the filing the grievance. Charging Party then contacted Fisher at work and arranged to meet her at the facility later that afternoon to obtain a copy of the grievance form. When Charging Party arrived at CCMCF, Fisher had already filled out portions of the document for Newman. Fisher gave the form to Charging Party, who then left the facility to complete the paperwork. She returned later that afternoon and turned in the grievance. At some point that day, Newman also filled out a CCMCF exit interview questionnaire and submitted it to the Employer

Several days later, Murdaugh notified Charging Party that a third-step meeting would be held concerning her grievance on April 19, 2006. Charging Party attended the meeting, accompanied by Murdaugh. The meeting began with Mahoney reading the allegations which led to Newman's termination. Charging Party denied the allegations and Murdaugh asked Mahoney whether there was any way Newman could get her job back. Mahoney stated that the Employer would not return Newman to work at the facility. Murdaugh then left the room for a side bar conference with Mahoney in an attempt to resolve the matter. When Murdaugh returned, he told Charging Party that the Employer had agreed to her request for payment of accumulated leave

time.[1] However, Charging Party rejected the Employer's proposal. In addition to accumulated leave pay, Charging Party now wanted a neutral letter of reference from the Employer and a withdrawal of any charges which may have been pending before the State of Michigan. The meeting concluded with no settlement agreement having been reached.

On April 21, 2006, Charging Party received a letter from the Employer confirming her rejection of the Employer's settlement offer and formally denying the grievance. Thereafter, Murdaugh submitted the matter to the Union's grievance review committee. Murdaugh recommended to the committee that the grievance not be advanced to arbitration. At hearing, Murdaugh explained that his recommendation was based on Charging Party's prior disciplinary record and the fact that Charging Party had been employed at the facility for only a short time prior to her termination.

On May 4, 2006, SEIU staff attorney Cliff Hammond notified Charging Party in writing that the Union's grievance review committee had evaluated her grievance and decided not to proceed to arbitration. According to the letter, the committee determined that there was no merit to the grievance and that CCMCF had just cause to terminate her employment. Hammond noted that Charging Party had until May 18, 2006 to appeal the committee's decision and included detailed instructions for filing such an appeal. In a letter to Charging Party dated May 25, 2006, Union president Willie Hampton notified Charging Party that her grievance would be reviewed by a sub-committee of SEIU's executive board on June 21, 2006. The letter requested that Charging Party be present at the meeting with any relevant witnesses and documents. Although Charging Party testified that she never received either letter, the Union produced documentation at hearing establishing that both letters were sent to Newman's home address and, despite several delivery attempts, were never claimed.

On July 12, 2006, Charging Party received a letter from Hammond indicating that the Union sub-committee had found her grievance to be without merit and that its recommendation would be submitted to the full executive board for approval at its next regularly scheduled meeting on July 18, 2006. Charging Party appeared at that meeting and was given an opportunity to address the board. As part of her presentation, she submitted to the board a copy of a letter establishing that the State of Michigan had dismissed the charges against her arising from the incident which led to her termination from CCMCF. The board decided to table further discussion of Newman's grievance until its next meeting. Following the meeting, Hampton requested that Charging Party provide him with all of the evidence relating to her grievance. Newman faxed that information to the Union on August 1, 2006.

On October 13, 2006, the Union notified Charging Party that her grievance would be considered at the SEIU general meeting on October 17, 2006. Charging Party attended the meeting and was given approximately five minutes to present her case to the membership.

[1] At the hearing in this matter, Charging Party testified that when the side bar conference concluded, Mahoney indicated that the Employer would have agreed to reinstate her but for the exit interview which she gave following her termination. Mahoney did not testify at the hearing and, therefore, Newman's testimony was excluded as hearsay. Nevertheless, it should be noted that Murdaugh testified emphatically that the Employer never made any offer to return Newman to her position at the facility and that the exit interview had no bearing on the Employer's decision. According to Murdaugh, the only reference to the exit interview came when Mahoney asked Newman why she would even want to continue to work at the facility "with the kind of exit interview you gave us."

Hammond interrupted her presentation several times with references to Newman being a "short term employee." He also referred to the Union's long relationship with the CCMCF. Thereafter, the membership voted to deny the grievance. The Union sent a letter to Charging Party confirming that decision on October 23, 2006. Once again, the letter was returned to sender after going unclaimed following three successive delivery attempts.

Discussion and Conclusions of Law:

As previously indicated in the December 28, 2006, order granting the Employer's motion for summary disposition, the charge against Respondent CCMCF in Case No. C06 J-239 must be dismissed as untimely. Under Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission "and the service of a copy thereof" upon each of the named respondents. The statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. The limitations period under the Act commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

In the instant case, the statute of limitations for any claims against the Employer arising from the discharge of Holly Anne Newman began to run on April 9, 2006, the date upon which she was terminated from her employment with CCMCF. In its motion for summary disposition, the Employer asserted that the facility was never served with a copy of the charge by Newman and that it was not until October 30, 2006, that the Employer received formal notice of the existence of this proceeding. Charging Party did not contest this assertion in her response to the motion for summary disposition. In fact, Newman indicated that she was not aware of the service requirement when she filed her charges and therefore did not serve the charge on the Employer. Because the Employer was not served with a copy of the charge until more than six months after her termination, the charge in Case No. C06 J-239 is untimely under Section 16(a) of the Act and must be dismissed on that basis.

Even if the charge against the Employer was timely filed, I find that the allegations set forth therein against the CCMCF do not state a claim upon which relief can be granted under PERA. With respect to public employers, the Act 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 prohibited 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. Neither the charge nor the response to the order to show cause contain any allegation that CCMCF discriminated or retaliated against Newman because of her union or other protected concerted activities. Accordingly, I find that dismissal of the charge in Case No C06 J-239 is warranted.

Similarly, the charge against Respondent SEIU, Local 79 must also be dismissed for failure to state a claim upon which relief can be granted. To prevail on a charge alleging a

breach of the duty of fair representation, the complainant must establish not only a breach of that duty, but also a breach of the collective bargaining agreement. *Knoke v E Jackson Pub Sch Dist*, 201 Mich App 480, 485 (1993); *Martin v E Lansing Sch Dist*, 193 Mich App 166, 181 (1992). In the instant case, Charging Party has not demonstrated any breach of the contract between the Union and the Employer, nor has she established that the Union failed in any way to protect her rights under that agreement.

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests 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). *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*. To this end, a union is not required to follow the dictates of the individual grievant, but rather it may investigate and present the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. The fact that an individual member is dissatisfied with the union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Assoc*, 2001 MERC Lab Op 131.

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. SEIU labor consultant Ray Murdaugh consulted with Newman shortly after her termination. He then contacted the CCMCF administration to discuss Charging Party's request that she be compensated for her accumulated leave time. After that request was denied by the Employer on the ground that such relief was prohibited under the terms of the collective bargaining agreement, Murdaugh arranged for an extension of the grievance filing deadline. Union steward Carol Fisher then assisted Newman in filing a grievance challenging her termination. A third step meeting was held on April 19, 2006, just six days after the grievance was filed and ten days after Newman was discharged. At that meeting, Murdaugh requested that Charging Party be given her job back. When that request was denied, Murdaugh negotiated a settlement which, had it been accepted, would have provided the very relief that Newman initially sought in this matter. Charging Party was later given the opportunity to address the Union's executive board and the membership at large and present evidence regarding the merits of her grievance.

Although the Union ultimately decided not to process Newman's grievance to arbitration, there is nothing in the record to suggest that this decision was arbitrary, improper or irrational. To the contrary, Murdaugh testified credibly that he recommended to the Union not to pursue the grievance due to the fact that Charging Party was a relatively new employee at the facility and because of her extensive disciplinary record. A union has no duty to pursue a grievance which has little merit or which would be futile to pursue, nor does an individual member have the right to demand that a grievance be arbitrated. See *Wayne County Community College*, 2002 MERC

Lab Op 379, 381; SEMTA, 1988 MEC Lab Op 191, 195. While Charging Party obviously disagrees with the position taken by the Union, she has not established that the SEIU acted arbitrarily, discriminatorily or in bad faith in refusing to take the grievance to arbitration.

I have carefully considered all other issues raised by Charging Party and conclude that they do not warrant a change in the result. Based upon the above discussion, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charges in Case Nos. C06 J-239 and CU06 J-044 are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: September 25, 2008