STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT ASSOCIATION OF EDUCATIONAL
OFFICE EMPLOYEES,
Labor Organization-Respondent,

Case No. CU09 K-041

-and-

CHERYL L. HARVEY,
An Individual-Charging Party.
____/

APPEARANCES:

Mark H. Cousens, Esq., for Respondent

The Mungo Law Firm, P.L.C., by Leonard Mungo, Esq., for Charging Party

DECISION AND ORDER

On April 8, 2010, Administrative Law Judge Doyle O'Connor 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

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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: ____________

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

In the Matter of:

DETROIT ASSOCIATION OF EDUCATIONAL
OFFICE EMPLOYEES,
Respondent-Labor Organization,

-and- Case No. CU09 K-041

CHERYL L. HARVEY,
Individual Charging Party.
____/

APPEARANCES:

Leonard Mungo, for Charging Party

Mark H. Cousens, for Respondent Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 et seq, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). This matter is being decided pursuant to an order to show cause why the charge should not be dismissed for failure to state a claim and pursuant to the Union's motion to dismiss.

The Unfair Labor Practice Charge:

On December 2, 2009, Cheryl L. Harvey (Charging Party) filed a Charge against the Detroit Association of Educational Office Employees (Union or Respondent). The Charge asserts that the Union failed to properly represent Harvey, gave her false information, delayed pursuit of a grievance related to her termination from employment, and told her on November 4, 2009, that it would not go to arbitration over her February 13, 2009, termination from employment with the Detroit Public Schools.

Pursuant to R 423.165(2)(d), on December 17, 2009, the Charging Party was ordered to show cause why the charge against the Union should not be dismissed for failure to state a claim upon which relief can be granted. Charging Party was advised in that Order that a timely response to the Order would be reviewed to determine whether a proper claim had been made and whether a hearing should therefore be scheduled. Charging Party was further

cautioned that if the Charge and her response to the Order did not state a valid claim, a decision recommending that the Charge be dismissed without a hearing would be issued. Charging Party sought and was granted an extension of time to secure counsel who filed a timely response to the Order on January 29, 2010.

Charging Party's response to the Order seemingly abandoned the earlier claim that the Union had acted improperly in choosing to withdraw the grievance related to Harvey's termination from employment. The response expressly asserted that no claim was made based on the failure to take the matter to arbitration; rather the complaint was based on the alleged delay in advising Harvey that the Union would not proceed. According to Harvey, the Union timely grieved the February 2009 termination; conducted a grievance meeting with the employer in March 2009; initially processed paperwork in June 2009 to arbitrate the matter; then in November 2009 advised Harvey that the matter would not be arbitrated. The response to the Order focused on that five month delay, between the June preliminary decision to arbitrate the matter and the November withdrawal from arbitration, as the basis of the Charge against the Union. The response to the Order further asserted, without citing any factual or legal support, that she would have been able to pursue the grievance on her own if the Union had notified her prior to withdrawing the matter from arbitration.

The Union replied with its motion to dismiss, supported by the affidavit of the Union officer directly responsible for withdrawing the grievance. In that affidavit, it is asserted that Harvey was initially suspended from work pending investigation of apparent falsification of payroll records. Certain records had been obviously altered, to Harvey's benefit, although she denied culpability. Other documents had been destroyed, which Harvey admitting doing. The Union represented Harvey in the investigation and filed a grievance after she was nonetheless terminated. Harvey attended, at her request, a meeting of the Local Union executive board, which had authority to decide whether to arbitrate the termination grievance. The grievance was initially pursued to toll the time limits under the contract while the Local Union executive board considered the merits of the case. The affidavit further asserts that a review of the case by the Union's counsel and its American Federation of Teachers (AFT) Union staff representative concluded that the grievance would not succeed as there was substantial evidence showing that Charging Party had altered payroll records for her own benefit. In October 2009, the Local Union executive board decided not to pursue the grievance further. The Local Union officer then advised Harvey that the grievance would not be pursued.

Harvey was advised by the ALJ by letter of March 8, 2010, that the Union's response was supported by affidavit and raised substantial grounds, which if uncontested, would warrant summary disposition. Harvey was invited to respond in kind or to withdraw the Charge without a ruling by the ALJ that would give rise to collateral estoppel as to any factual findings made. Harvey was further cautioned that if her response did not state a valid claim requiring an evidentiary hearing, a decision recommending that the Charge be dismissed without a hearing would be issued.

Charging Party filed a timely response to the Union's motion and affidavit on March 29, 2010. While Charging Party's reply was supported by affidavit, it did not challenge any of the relevant factual assertions made in the Union's motion and affidavit. Rather, Harvey

acknowledges that she was represented by the Union at meetings with management and that she was invited to, and did, appear at a Local Union executive board to seek the Union's support in further pursuing the grievance. Harvey does not seek to dispute the factual claim made by the Union that the withdrawal of the grievance was based on an executive board vote which followed a review by both the Union's counsel and its American Federation of Teachers (AFT) Union staff representative, who concluded that the grievance would not succeed. The brief filed on behalf of Harvey again seems to not dispute the authority of the Union to reach an adverse conclusion as to the merits of the grievance; rather, the brief asserts that the Union's improper conduct was its withdrawal of the grievance without prior notice to Harvey. The brief further asserts that the lack of prior notice precluded Harvey from pursuing the grievance on her own, which she asserts is authorized by MCL 423.201(2) and 423.211.

Discussion and Conclusions of Law:

Where a charge fails to state a claim under the Act, it is subject to dismissal pursuant to an order to show cause issued under R423.165. This matter is being decided based on the initial Charge and the response by Charging Party to the order to show cause why the matter should not be dismissed, with the facts asserted therein assumed to be true for purposes of this Decision. Additionally, this Decision relies on the Union's motion to dismiss which was supported by a facially competent affidavit, to the extent that the factual claims made by the Union are not challenged by Charging Party.

Here the individual employee was first suspended and then discharged for falsifying payroll records. It is undisputed that the Union initially represented Harvey, filed a grievance and attended a grievance hearing; that later Harvey was invited to appear before the Local Union executive board to plead her case that the matter should go to arbitration; that the Local Union executive board decided not to further pursue the matter and that Harvey was then notified of their decision. It is asserted by the Union, with unopposed affidavit support, that the Local Union executive board decision was supported by a review of the case by both the Union's counsel and its American Federation of Teachers (AFT) Union staff representative who concluded that the grievance would not succeed.

Charging Party's pursuit of the Charge is seemingly premised, as asserted in her pleadings, on the mistaken belief that she could have pursued the grievance to arbitration on her own, if only the Union had notified her in advance that they did not intend to further pursue the matter. Charging Party's assertion that the withdrawal of the grievance without prior noticed prejudiced her supposed right to pursue the matter on her own is without support in the law. It is well settled that a union has no duty to pursue a grievance which has no merit or which would be futile to pursue, and that an individual member does not 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. The fact that the Union did not obtain Harvey's consent, or advise her in advance before withdrawing the grievance does not, as Charging Party contends, establish a PERA violation. See e.g. *Suburban Mobility Authority Regional Transportation,* 17 MPER 71 (2004); *Wayne County Community*

College, supra. Furthermore, notwithstanding the language of MCL 423.201(2) and 423.211 which allow an individual employee to initially bring a grievance or complaint to the attention of the employer, the formal grievance and arbitration procedures are creations of the collective bargaining agreement and a part of the bargaining obligation, which solely runs between the employer and the recognized bargaining agent, such that an individual employee lacks individual standing to take a case to arbitration or to otherwise insist on further processing of a particular grievance. *United Steelworkers of America, Local 14317 (Murray and Sturgeon)*, 2002 MERC Lab Op 167; *Coldwater Community Schools*, 1993 MERC Lab Op 94; *Detroit Public Schools*, 1985 MERC Lab Op 789.

Finally, Harvey complains of the delay from June to November in the Union decision making process and complains of an alleged lack of communication from the Union. A union does not breach its legal duty of fair representation merely by a delay in processing grievances, if the delay does not cause the grievance to be denied. *Service Employees International Union, Local 502*, 2002 MERC Lab Op 185. Although public employers and labor organizations have a duty under the Act to supply relevant information to each other in a timely manner, see e.g. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Pub Schs*, 1995 MERC Lab Op 384, 387, there is no corresponding duty on the part of a union to provide individual members with specific information pertaining to their employment, nor does the union have any legal obligation to disclose the existence of such information to its members. *Michigan Education Association (Andriacchi),* 22 MPER 85 (2009).

A union's ultimate duty is toward the membership as a whole, rather than solely to any individual and, therefore, a union has the legal discretion to decide to present or to withdraw particular grievances for the general good of the membership even though they conflict with the desires and interests of certain employees. *Lowe v Hotel & Restaurant Employees Union, Local 705,* 389 Mich 123, 145-146 (1973); *Lansing Sch Dist*, 1989 MERC Lab OP 210, 218, *aff'd* Mich App No. 116345 (March 26, 1991), *lv den* 439 Mich 955 (1992). A union's decision on how to proceed in a grievance case is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill,* 499 US 65, 67 (1991); *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35. The fact that a Harvey is dissatisfied with her former union's efforts or ultimate decision is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Assoc,* 2001 MERC Lab Op 131; *Wayne County DPW,* 1994 MERC Lab Op 855. Even if the Union's refusal to pursue the grievance was based on a mistaken interpretation of the facts, a mere showing that the Union made the wrong choice is insufficient to establish the hostility, ill will, malice, indifference, or gross negligence that is required to support a claim. *DAEOE Local 4168*, supra; City *of Detroit, 1997 MERC Lab Op 31*.

In the instant case, there is no factually supported allegation which, if true, would establish that the Union acted arbitrarily, discriminatorily or in bad faith with respect to Charging Party. At best, the Charge suggests that representatives of the Local Union at some point did a poor job of communicating with Harvey with respect to the status of the grievance. However, the Commission has repeatedly held that a lack of communication alone is insufficient to establish a breach of the duty of fair representation. See e.g. *Detroit*

Ass'n of Educational Office Employees(DAEOE), AFT Local 4168, 1997 MERC Lab Op 475; *Technical, Professional and Officeworkers Ass'n of Michigan*, 1993 MERC Lap Op 117; *Southfield Schools Employees Ass'n*, 1981 MERC Lab Op 710.

In the instant case, there is no factual allegation that the Union objectively failed to properly investigate or handle the grievance, or that Charging Party suffered any cognizable loss as a result of the delay in notification of its withdrawal. Charging Party does not contend that representatives of the Union exhibited bias or hostility against her. Under such circumstances, Charging Party's allegations fail to state a claim upon which relief can be granted under PERA for breach of the duty of fair representation.

RECOMMENDED ORDER

The unfair labor practice charge is dismissed in its entirety

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: April 8, 2010