STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND VALLEY STATE UNIVERSITY,
Public Employer-Respondent in Case No. C09 K-213,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2074,
Labor Organization-Respondent in Case No. CU09 K-038,

-and-

BEVERLY MOORE,
An Individual-Charging Party.
_____/

APPEARANCES:

Barnes and Thornburg, L.L.P, by Donald P. Lawless, Esq., for Respondent Employer

Beverly Moore, *In Propria Persona*

DECISION AND ORDER

On January 21, 2010, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order on Summary Disposition in the above matters recommending dismissal of the unfair labor practice charges filed by Charging Party, Beverly Moore, against Respondents, Grand Valley State University (Employer) and American Federation of State, County and Municipal Employees, Local 2074 (Union). The ALJ found that the charges, as well as Charging Party's other pleadings failed to state claims upon which relief could be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201-423.217. The allegations against the Employer claimed retaliatory treatment for protected activity stemming from Charging Party's filing of several grievances and a prior unfair labor practice charge. The charge against the Union alleged a breach of its duty of fair representation for not attending several disciplinary hearings on Charging Party's behalf. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On February 16, 2010, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. On March 1, 2010, Respondent Employer filed a brief supporting the ALJ's conclusions. Respondent Union did not respond to the exceptions.

In her exceptions, Charging Party asserts that both charges should survive summary dismissal. She reiterates her earlier allegations of (1) the Employer's efforts to retaliate against her for filing prior grievances and an unfair labor practice charge, and (2) the Union's acquiescence and breach of its duty by not providing her representation. After careful review, we find the exceptions to be without merit.

Discussion and Conclusions of Law:

In Case C09 K-213, Charging Party alleges that the Employer unfairly subjected her to interrogation and disciplinary action without the aid of Union representation. She asserts this action was in retaliation to her recent filing of several grievances and an unfair practice charge. Under PERA, public employers are prohibited from engaging in actions that interfere with or restrain an employee's exercise of the specific rights set forth in section 9. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974). Included in this protection is an employee's right to union representation during an investigatory interview where there is reasonable fear that disciplinary action may result. *Wayne Westland Sch*, 1987 MERC Lab Op 624. However, the employee must affirmatively request union representation in order to invoke this protection under PERA. *Univ of Michigan*, 1977 MERC Lab Op 496, 500.

We find that the allegations do not support a charge that the Employer retaliated against Charging Party for engaging in protected activity. Based on her own pleadings, Charging Party assumed that the Union would be present at her mandatory disciplinary meeting on June 29, 2009 since the Employer had also mailed a copy of the meeting notice to the Union. Even after the meeting began, Charging Party never requested that a Union representative be present. Similarly, at a disciplinary meeting on August 24, 2009, Charging Party's request for Union representation occurred only after being informed that she was being sent home. Once the request was made, the Employer adjourned the meeting to the next day allowing time to contact the Union. In light of the above, we agree with the ALJ that the Employer did not violate Section 10 of PERA. Instead it appears that Charging Party's request for union representation, when affirmatively made, was honored by the Employer. Further, Charging Party fails to provide any other factual allegations to support her claim of retaliatory conduct by the Employer. In the absence of a cognizable PERA claim, summary dismissal of this charge is appropriate under Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.165.

In Case CU09 K-038, Charging Party alleges that the Union breached its duty owed to her by not "intervening" or "showing up" to represent her at three disciplinary meetings. It is well understood that a union must serve the interests of its members overall and may exercise considerable discretion in deciding what action is appropriate (*Michigan State Univ Admin-Prof'l Ass'n*, MEA/NEA, 20 MPER 45 (2007)), so long as its decisions are not arbitrary, biased, discriminatory or in bad faith. *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21; 466 NW2d 333 (1991). We view Charging Party's allegations as insufficient to support a charge that the Union acted improperly when it did not attend the disciplinary sessions on June 24, 2009 and August 24- 25, 2009. As the ALJ suggests, it would be unreasonable to expect the Union to be present to provide representation where Charging Party has not requested assistance. Lacking a valid claim, this charge must also be dismissed under R 423.165.

Finally, we have carefully examined the remaining issues raised by Charging Party and find that they would not change these results. Accordingly, we affirm the ALJ's finding of fact and conclusions of law and summarily dismiss these charges.

ORDER

The unfair labor practice charges are dismissed in their entirety.

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:

GRAND VALLEY STATE UNIVERSITY,
Public Employer-Respondent in Case No. C09 K-213,

-and-

AFSCME LOCAL 2074,
Labor Organization-Respondent in Case No. CU09 K-038,

-and-

BEVERLY MOORE,
An Individual-Charging Party.
_____/

APPEARANCES:

Barnes and Thornburg, L.L.P, by Donald P. Lawless, Esq., for the Respondent Employer

Beverly Moore, appearing for herself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On November 10, 2009, Beverly Moore filed the above charges with the Michigan Employment Relations Commission (the Commission) against her employer, Grand Valley State University (the Employer) and her collective bargaining representative, AFSCME Local 2074, (the Union), pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charges were assigned to Julia C. Stern, administrative law judge for the State Office of Administrative Hearings and Rules. Since the events alleged to constitute the unfair labor practices were related, the charges were consolidated.

On November 17, 2009, I issued an order to Moore to show cause in writing why both her charges should not be dismissed because they did not comply with the Commission's rule requiring that the charge include a clear and complete statement of the facts and because the charges, as filed, did not allege a violation of PERA by either the Employer or the Union. On December 10, Moore filed a timely response to my order. On December 16, the Employer filed a motion for summary disposition. Moore did not file a response to this motion. Based on facts alleged by Moore and facts not in dispute contained in the Employer's motion, I make the

following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

> Moore's charge against the Employer read as follows:
>
> On Monday, June 29, 2009 I was called to come to work by Tim Thimmesch, Vice-President of Facility Services, for a disciplinary process without union representation. On Tuesday, August 25, 2009, I was sent home from work without union representation by Janet Aubril, Supervisor of Facility Services. On Wednesday, August 26, 2009, I was sent home from work without union representation by Tim Thimmesch, Vice President of Facility Services.

Moore alleged that this conduct violated Section 10(1)(c) and 10(1)(d) of PERA.

> Moore's charge against the Union read as follows:
>
> On June 29, 2009 and August 25 and August 26, 2009, Union Local 2074 allowed University management to meet with me resulting in discipline without pay. The Union in collusion with management of the University deprived me of three weeks pay in June of 2009.

Moore alleged that this conduct violated Sections 10(3)(a) and 10(3)(b) of PERA.

In her response to the order to show cause, Moore asserted that the Employer interrogated and disciplined her without union representation in order to retaliate against her for filing previous unfair labor practice charges, charges with other agencies, and numerous grievances under the collective bargaining agreement. She alleged that the Union violated PERA by failing to show up at her June 29, 2009 meeting with Thimmesch and by failing to "intervene or represent her or show up, at least," with respect to all three incidents.

Facts:

Moore is employed by the Employer as a custodian and is a member of a bargaining unit represented by the Union. Between 1998 and June 2009, Moore filed a number of grievances under the union contract, including grievances alleging harassment and discrimination based on a non-qualifying handicap. In April 2006, Moore filed a charge against the Employer with the Equal Employment Opportunity Commission (EEOC) alleging discrimination in training and promotion. In April 2009, she filed unfair labor practice charges against both the Employer and the Union (Case Nos. C09 D-048 and CU09 D-012). [1] On June 12, 2009, she filed a second charge with the EEOC alleging handicap discrimination.

[1] On July 2, 2009, Administrative Law Judge Doyle O'Connor recommended that both charges be summarily dismissed for failure to state claims upon which relief could be granted under PERA. In his decision and recommended order, the ALJ noted that while Moore asserted in conclusory terms that the Employer had retaliated against her for writing grievances, the facts set forth in her charge related only to alleged handicap discrimination.

On June 14, 2009, Moore called and left a message with her supervisor stating that she would be out sick. Later that evening, the supervisor called Moore back and warned her that she had only nine hours of paid sick time. Moore told her supervisor that her absence would be covered under worker's compensation because it was caused by a work-related back injury. Between June 15 and June 28, Moore did not report to work, call her supervisor, submit medical documentation to the Employer, or file an injury report to initiate a worker's compensation claim. On June 25, the Employer sent Moore a letter noting that she had failed to do these things and citing Section 8.3 of the collective bargaining agreement. This provision states that an employee will be considered to have quit on his or her last day of work if he or she is absent from work for three or more consecutive working days without notifying his or her supervisor, unless the employee is prevented from giving notice by causes beyond the employee's control.[2] The letter directed Moore to call immediately and speak directly to Thimmesch. It warned that if she did not do so before the end of the day on June 30, she would be considered to have resigned. A copy of this letter was sent to Mike Spofford, the Union's chief steward.

Sometime between June 25 and June 28, the Employer sent Moore another letter directing her, under threat of discharge, to attend a meeting with Thimmesch on June 29. The Union was also sent a copy of this letter. According to Moore, she expected that since the Union had been notified of the meeting, it would send a representative. No union representative appeared and Moore did not ask for one. During the meeting, Thimmesch asked Moore questions about her absence. Moore gave Thimmesch a copy of a doctor's note stating that she had been unable to work between June 9 and June 29. She also gave Thimmesch a partially completed injury report.

Moore was not paid for the days she was absent. On July 10, Moore received a written warning for failing to telephone her supervisor between June 15 and June 29 and give the expected duration of her absence and for failing to complete an injury report. On July 14, Moore filed a grievance alleging that the Employer was applying its rules disparately. Moore asked that the warning be removed from her file and that she be made whole.

On August 18, Moore was again absent from work. Section 12.3.3 (B) of the collective bargaining agreement gives the Employer discretion to request a doctor's statement for an absence. Moore's supervisor, Janet Aubil, sent her an email on August 19 telling her to provide a doctor's statement for the August 18 absence. On August 20, Aubil sent another email instructing Moore to have the doctor's statement in by Monday, August 24. On August 24, Moore told Aubil that the doctor's office had faxed the note. Sometime during Moore's shift on August 25, Aubil told Moore that the Employer had not received any doctor's note. She said that since Moore had not supplied the note, she could not work the remainder of her shift. The following day, August 26, Moore came to Aubil's office with a note signed by her doctor's

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He also recommended that the charge against the Employer be dismissed as untimely filed. Moore did not file exceptions to his recommendations, which were adopted by the Commission on September 15, 2009.

[2] Section 12.3.3(A) of the contract also states that an employee shall notify his or her supervisor of an absence in advance and state the expected duration thereof unless the failure to notify is due to circumstances beyond the control of the employee.

office manager. The note stated that Moore had made an appointment with the doctor on August 19, but had not been seen since she did not pay the co-pay for the visit. Timmesch took Moore into his office and told her that this note was not sufficient as it was not a note from a doctor excusing the absence. Moore objected. After Moore began raising her voice, Timmesch told her to go home for the rest of her shift. Moore then asked for a union representative. Timmesch agreed to meet with her and Spofford the following day. The Employer did not agree to accept the note as proof of illness on August 18. Moore was not paid for August 18 or for the time she did not work after being sent home on August 24 and August 25.

On August 31, Moore received a written warning for failure to provide a doctor's statement for the August 18 absence. The warning noted that she had received a previous warning on July 10. The August 31 warning stated, "Future failure to communicate with your supervisor as directed about absences (including leaving early or arriving late) and/or failure to provide written doctor's statement to document the need for absences upon request will result [in] additional discipline including suspension or discharge." Moore filed a grievance asserting that the Employer lacked just cause for the August 31 discipline.

Discussion and Conclusions of Law:

The Charge in Case No. C09 K-213

Section 10(1) (a) of PERA prohibits employers from coercing, restraining or interfering with employees' exercise of their Section 9 rights to engage in union and other concerted protected activity. An employee has the right under PERA right to union representation when he or she reasonably believes that an interview may lead to discipline. *Wayne-Westland EA v Wayne Westland CS*, 176 Mich App 361 (1989), *aff'g* 1987 MERC Lab Op 624; *lv den* 433 Mich 910 (1989). A public employer violates Section 10(1) (a) of PERA when it refuses an employee's request for union representation at an investigatory interview. *Univ of Michigan*, 1977 MERC Lab Op 496. Although some collective bargaining agreements require that a union representative be present at a meeting called solely to inform an employee of a disciplinary decision, an employer does not violate Section 10(1)(a) of PERA by refusing to provide the employee with a union representative at this type of meeting. *Walled Lake Con Schs*, 1985 MERC Lab Op 448; *City of Wyoming*,1983 MERC Lab Op 1024; *City of Detroit*, 1981 MERC Lab Op 282; *City of Detroit (DOT)*, 1991 MERC Lab Op 390. Even if the purpose of the meeting is to investigate possible misconduct, however, an employee must invoke his or her rights under PERA by requesting a union representative. *Univ of Michigan*, at 500; *City of Oak Park*, 1995 MERC Lab Op 596. 598.

There is no dispute that Moore did not ask for a union representative at her June 29, 2009 meeting with Thimmesch or during her August 25 conversation with Aubil. On August 26, Moore asked for a union representative only after she and Thimmesch had discussed her doctor's note and Thimmesch had told her to go home for the rest of her shift. Timmesch agreed to meet with her and her union representative the following day. I find that the Employer did not violate Section 10(1)(a) of PERA as it never refused Moore's request for a union representative.

Moore alleges that the Employer's motive for disciplining her and docking her pay was to retaliate against her for filing grievances, unfair labor practice charges, and EEOC complaints. The filing of an individual grievances based on provisions of a collective bargaining agreement is conduct protected by PERA, because the collective bargaining agreement is the result of "concerted activities by the employees for their mutual aid and protection." *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 261 (1974). A public employer who retaliates against an employee for filing a grievance violates Section 10(1)(c) of PERA. An employer is also prohibited by Section 10(1)(d) of PERA from retaliating or otherwise discriminating against an employee because the employee has filed unfair labor practice charges under the Act.

In my November 17, 2009 order to Moore to show cause why her charge against the Employer should not be dismissed for failure to state a claim, I stated:

> If Moore's intent is to allege that the Employer disciplined her because of her union activity or because she filed a previous unfair labor practice charge or gave testimony, she must set forth facts to support these claims, including what the union activity was, when it took place, when she filed a charge or gave testimony, and her basis for concluding that the discipline she received was motivated by these activities.

In her response, Moore provided the details set forth in the facts regarding her previous charges and grievances. Other than to assert that the discipline was unfair, she did not explain why she had concluded that her discipline was motivated by her protected activities.

The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility towards the employee's exercise of his or her protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Southfield Pub Schs,* 22 MPER 26 (2009); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686. See also, *Waterford Sch Dist*, 19 MPER 60 (2006), *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551-552.

In this case, Moore was disciplined a few months after she filed a previous unfair labor practice charge against the Employer. Proof of motive can be based on direct evidence or inferred from circumstantial evidence based on the record as a whole, including suspicious timing and evidence that the Employer gave false or pretextual reasons for its actions. *Fluor Daniel, Inc*, 304 NLRB 970 (1991); *Starbucks Corporation,* 354 NLRB No 99 (2009). However, suspicious timing, by itself, does not establish unlawful intent. *North Central Community Mental Health*, 1998 MERC Lab Op 417, 437; *Univ of Michigan*, 1990 MERC Lab Op 242, 249. In addition, there is no indication that the reasons the Employer gave for disciplining Moore on July 10 and August 31 were a pretext. Moore does not dispute that she failed to tell her supervisor how long she expected to be absent after June 15. She also does not dispute that she did not provide medical documentation for her extended absence or initiate a claim for worker's compensation until June 29. The fact that Moore received only a written warning for what under the collective bargaining agreement was a dischargeable offense undercuts her argument that

Respondent's motive was retaliatory. As for the disciplinary warning issued to her on August 31, as discussed above, the Employer has the right under the collective bargaining agreement to require an employee to provide a doctor's slip for an absence. When Moore called in sick again approximately six weeks after her extended absence, the Employer demanded that she produce medical documentation. The note from her doctor's office did not explain why she was absent. I find that there is no material dispute of fact in this case that would require a hearing I also find that the facts as alleged by Moore do not establish a causal link between Moore's previous unfair labor practice charge or her other protected activities and her discipline. I conclude, therefore, that Moore's charge alleging that the Employer's actions constituted unlawful retaliation in violation of Sections 10(1)(c) and 10(1)(d) should be dismissed without a hearing. For this reason, I recommend that the Commission issue the order below.

The Charge in Case No. CU09 K-038

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(3) (a) (i) of PERA. The union's duty 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 651,679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967). Section 10(3) (a) (ii) makes it unlawful for a labor organization to restrain or coerce a public employer in the selection of its representatives. A union violates Section 10(3) (b) of PERA if it causes an employer to discriminate against an employee in violation of Section 10(1)(c) of PERA.

In her original charge, Moore alleged that the Union violated PERA by "allowing" the Employer to meet with her on June 29, August 25 and August 26. In her response to my order to show cause, Moore complains that the Union did not "intervene or represent [her] or show up" at these meetings. The facts indicate that Moore was ordered by the Employer to meet with Thimmesch on June 29 to discuss her failure to report to work after June 14. Moore does not assert that she asked the Union for assistance before this meeting, and she did not ask that a Union representative be present. On August 24 and August 25, the Employer sent Moore home in the middle of her shift. There is no indication that the Union knew this would occur on these dates. Despite being directed to do so in my order to show cause, Moore has not explained what actions or inactions by the Union violated PERA in this case. I find that Moore has not stated a claim against the Union, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges in Case Nos. C09 K-213 and CU09 K-038 are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____