STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TECHNICAL, PROFESSIONAL & OFFICEWORKERS ASSOCIATION OF MICHIGAN,
Public Employer - Respondent, Case No. CU10 C-012

- and -

SANOVIA BROWN,
An Individual Charging Party.
_____/

APPEARANCES:

Frank A. Guido, Esq., General Counsel, for Respondent

Parker, McGruder & Associates, by Bradley M. Peri, for Charging Party

DECISION AND ORDER

On September 16, 2010, Administrative Law Judge Doyle O'Connor issued a 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

In the Matter of:

Technical, Professional and Officeworkers
Association of Michigan (TPOAM),
Respondent-Labor Organization,

-and- Case No. CU10 C-012

Sanovia Latrice Brown,
Individual Charging Party.
_____/

Frank A. Guido, Attorney for Respondent

Bradley M. Peri, Attorney for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of 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. Based upon the entire record, I make the following conclusions of law, and recommended order.

The Unfair Labor Practice Charge and the Motion for Summary Disposition:

On March 30, 2010, a Charge was filed in this matter by Sanovia Latrice Brown (Charging Party) asserting that Technical, Professional, and Officeworkers Association of Michigan (TPOAM or the Union) had violated the Act by allegedly failing to fairly represent the Charging Party regarding her discharge from employment with the 50th District Court under a contract requiring just cause for termination, on a charge of improperly handling court files. The TPOAM pursued a motion for summary disposition, asserting that the Charge failed to state a claim, in that a neutral decision not to pursue the discharge grievance was made after full review by the Union's legal counsel as detailed in a letter of March 11, 2010 to the Charging Party, and that many of the allegations were untimely filed.[1] Charging Party filed a response in opposition to the motion on August 6, 2010. On August 10, 2010, the undersigned offered Charging Party the opportunity to file a supplemental response to the motion, as the initial response did not appear to articulate any claim under the Act and seemingly failed to assert any claim for relief

[1] The initial, April 16, 2010, motion for summary disposition was denied as it was not properly supported by affidavit. See, *Bluewater Transportation*, 22 MPER 72 (2009). The TPOAM's later, July 19, 2010, motion to the same effect was supported by a competent affidavit.

which could be granted. Charging Party filed a timely second response to the motion, clarifying her arguments and specifying the proposed relief sought.

Charging Party expressly waived any claim that the Union acted improperly in ultimately making the decision to withdraw the grievance over her termination from employment. Rather, Charging Party asserts that the Union improperly failed to secure an express extension of time at the early stages of the grievance processing; that it failed to keep her accurately informed of the handling of the grievance; and that the Union acted improperly in not actually withdrawing her grievance until 20 months had passed following her discharge. Charging Party additionally makes conclusory legal allegations, unsupported by any factual representations, that the Union's conduct was arbitrary, conducted with hostility, with fraudulent and discriminatory intent, and with an absence of good faith. The Charging Party submitted an affidavit of Rachel Huff, local Union officer, in support of her opposition to the motion for summary disposition. That uncontested affidavit of Huff reveals that the Union's business agent from the outset advised the local Union officer that he believed the grievance to be unmeritorious; that it was pursued with the faint hope of securing a favorable settlement; and that the grievance was deliberately held in abeyance with management's concurrence while another discharge case was pursued, and then further held in abeyance in the ultimately unsuccessful hope that the rumored pending departure of the immediately involved office manager would make the case more attractive if the manager was not available to testify. Charging Party did not allege in either the original charge or in her responses to the motion for summary disposition that the Employer's decision to terminate her employment was a violation of the collective bargaining agreement.

The affidavits submitted by the Union establish, to the extent that they are not opposed by contrary affidavits, that the Union held the grievance in abeyance for a considerable period of time; secured the concurrence of management in holding the case in abeyance and confirmed that agreement in writing; and that the grievance matter was ultimately reviewed by the Union's general counsel, who concurred with the business agent that the case was unmeritorious, based on the strength of the Employer's proofs of wrongdoing by Charging Party. While Charging Party insists that the Union did not properly or timely secure an extension of time on the processing of the grievance, no facts are offered to counter the Union's affidavit to the contrary, which was supported by a copy of a contemporaneous letter to the Employer confirming the agreement to hold the case in abeyance. Regardless of that arguable factual dispute, there is no suggestion that the Employer ever asserted that the grievance was time-barred and, therefore, any resolution of that factual dispute would not be determinative of any legal issue and, therefore, is not material.

Charging Party asserts in a supporting affidavit that the TPOAM business agent misled her in asserting that a successor labor organization, which apparently petitioned for an election in the midst of the handling of the grievance, had agreed to take over handling of the discharge case. The TPOAM business agent, in his affidavit, denies making that claim to Charging Party, asserting instead that he advised her that TPOAM was not going to pursue the grievance, but rather than withdraw it, TPOAM would leave it pending so that the new Union could consider taking the case up. That claim by the TPOAM business agent is consistent with the March 11, 2010, letter to Charging Party from the Union's general counsel advising her that the grievance would not be pursued, but would be left open so that she could seek assistance from the new Union. The assertions by the Union business agent are supported by the affidavit of Huff,

submitted by Charging Party, in which Huff asserts merely that the business agent suggested that it would be 'better' if the new Union took over the case, and in which Huff consistently recounts the TPOAM position as being that they would not withdraw the grievance in case the new Union chose to pursue it. As with the question regarding the extension of time limits on the grievance, any resolution of that factual dispute would not be determinative of any legal issue and, therefore, is not material.

In her second response to the motion for summary disposition, Charging Party clarified that the relief she sought was limited to: 1) 'backpay' for the time of her termination up to the point 20 months later that the grievance over her termination was withdrawn; 2) reasonable attorney fees; 3) and emotional distress damages.

The facts as asserted in the Charge are presumed true for purposes of the review of Respondent's motion, as are those facts which were supported by affidavits in support of and in opposition to the motion and which were otherwise uncontested.

Discussion and Conclusions of Law:

Under PERA, there is a strict six-month statute of limitations for the filing and service of charges, and a charge alleging an unfair labor practice occurring more than six months prior to the filing and service of the charge is untimely. The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. I do not find the Charge in this matter to be barred by the statute of limitations. The decision by the Union not to pursue the termination grievance further was transmitted to Charging Party on March 10, 2010, seemingly prompting her filing of the Charge on March 30, 2010. While many of the facts alleged by Charging Party occurred outside the statute of limitations, the salient substantive date is when the Union notified Charging Party that it was declining to further represent her.

The charge in this matter is that the Union breached its statutory duty of fair representation. To establish a violation of the duty of fair representation, the Charging Party must demonstrate that the union's conduct toward the bargaining unit member resulted in an adverse outcome and was arbitrary, discriminatory or done in bad faith. *Vaca v Sipes*, 386 US 171, 177 (1967); *Goolsby v Detroit*, 419 Mich 651, 679 (1984). To prevail on such a claim, a charging party must establish not only a breach of the duty of fair representation, but also an underlying 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). Allegations in a complaint for a breach of a union's duty of fair representation must contain more than conclusory statements alleging improper representation. *Martin v Shiawassee County Bd of Commrs*, 109 Mich App 32 (1981); *Wayne County Dept Public Health*, 1998 MERC Lab Op 590, 600 (no exceptions); *Lansing School District*, 1998 MERC Lab Op 403.

The charge in this matter fails to make any factual allegation that, if proven, would establish a breach of the Union's obligations to Brown. There is no factually supported allegation that the Union acted out of improper motive. Likewise, there is no factually supported allegation that the Union's decision was arbitrary or the result of gross negligence. There is no allegation that the employer violated the collective bargaining agreement. The crux of this dispute is the

Union's alleged failure to keep Brown timely apprised of the handling of the grievance and the allegedly unreasonably long delay of 20 months from her termination until the Union made a final decision not to further pursue the grievance.

The fact that Brown is dissatisfied with her Union's efforts or ultimate decision is insufficient to establish a breach of the duty. *Eaton Rapids Ed Assoc,* 2001 MERC Lab Op 131; *Wayne County DPW,* 1994 MERC Lab Op 855. A union has considerable discretion to decide which grievances to pursue and which to settle. 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 pursue, or not pursue, particular grievances based on the general good of the membership, even though that decision may 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 app den* 439 Mich 955 (1992). A union's decision not to proceed to arbitration with a grievance is not arbitrary 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 Commission has "steadfastly refused to interject itself in judgment" over grievance decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab OP 1, 11. Here, the decision to not pursue the discharge was reviewed and ratified by the Union's general counsel with detailed reasons provided to the grievant in the March 11, 2010 letter, and there has been no challenge to the legitimacy or neutrality of that decision making process. Moreover, with Charging Party conceding that it was not improper for the Union to decide to not further pursue the termination grievance, it is impossible to infer that a decision by the Union not to pursue that grievance was irrational.

Charging Party's core claims are the assertions that the failure to keep her informed, or the mere passage of time itself, constitute actionable breaches of the Union's duty. To the contrary, a mere failure to adequately communicate with a grievant does not breach the Union's duty. Here, as in *Detroit Ass'n of Educational Office Employees, AFT Local 4168*, 1997 MERC Lab Op 475, the delay in advising the employee of the adverse decision by the Union caused no actionable harm where the decision itself, to not further pursue the grievance, was not otherwise a violation of the Union's duty. Similarly, a Union does not breach its legal duty of fair representation merely by a delay in processing grievances, if the delay does not in fact cause the grievance to be denied. *Service Employees International Union, Local 502*, 2002 MERC Lab Op 185. Here, while Charging Party seeks to challenge the manner in which the Union secured the extension of time on the grievance handling, there is no claim that the grievance was time-barred as a result and, therefore, no cognizable claim for relief.

There is a factual dispute over whether the TPOAM business agent told Charging Party that the new Union could, would, or merely might take over handling the grievance. The court in *Quinn v POLC*, 456 Mich 478 (1998), held that a newly certified Union could, but was not obliged to, take over the handling of grievances already pending at the time of certification of the Union. Again, the factual dispute over what Charging Party was told, understood, or believed regarding the possible role of the new Union does not need to be resolved by an evidentiary

hearing, as regardless of the resolution of that factual question, no cognizable claim for relief exists.[2]

Charging Party does not seek a finding that the Union improperly abandoned handling of the termination grievance. She does not seek reinstatement to employment or the continued pursuit of the grievance. Rather, she seeks an award of 'backpay' for the 20 month time period between when she was fired and when the Union finally decided it would no longer pursue the grievance. There is no rational nexus between those events and the claim for 'backpay'. Charging Party was not deprived of any employment entitlements merely by the delay in handling the grievance over her ultimately uncontested termination for cause. She has acknowledged that the Union did not act improperly in determining that it would no longer pursue the grievance. The relief of 'backpay' to a discharged employee who has not been found to have been unjustly discharged is anomalous and, moreover, is barred by MCL 4123.216(b), which provides that "No order of the Commission shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause."

The additional claim for an award of attorneys fee is barred by *Goolsby v Detroit*, 211 Mich App 214 (1995), as outside the authority of the Commission. Similarly, the Commission's authority is limited to remedial relief, rather than punitive or exemplary relief, such that the Commission has held that emotional distress damages cannot be sought through an unfair labor practice charge. See, *Nick's Fine Foods*, 1968 MERC Lab Op 30. Even were there a viable claim of a violation of the Act, the claims for attorney's fees and emotional damages fail to state claims for which relief could be granted.

The allegations in the charge in this matter, even if proved, do not state a claim of a breach of the Union's duty of fair representation, and are, therefore, subject to dismissal, under R 423.165 (2)(d), for failure to state a claim upon which relief could be granted.

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:

[2] Charging Party asserts that the new Union advised her that they would not further pursue the grievance over her discharge. It is not clear whether that grievance was affirmatively withdrawn by the new Union.