STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MOUNT CLEMENS COMMUNITY SCHOOL DISTRICT,
Public Employer-Respondent in Case No. C07 E-104,

-and-

MOUNT CLEMENS ASSOCIATION OF EDUCATIONAL
OFFICE EMPLOYEES AND MEA/NEA LOCAL 1,
Labor Organizations-Respondents in Case No. CU07 E-025,

-and-

PHYLLIS P. WILLIAMS,
An Individual-Charging Party.
____/

APPEARANCES:

Law Offices of Lee & Correll, by Michael K. Lee, Esq., and Erika Pennil, Esq., for the Labor Organizations

Phyllis P. Williams, *In Propria Persona*

DECISION AND ORDER

On June 29, 2009, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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:

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-and-

PHYLLIS P. WILLIAMS,
An Individual Charging Party.
____/

APPEARANCES:

Phyllis P. Williams, appearing on her own behalf

Law Offices of Lee & Correll, by Michael K. Lee and Erika Pennil, for the Labor Organizations

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 Detroit, Michigan on May 19, 2008, before David M. Peltz, Administrative Law Judge 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 of hearing, exhibits and briefs filed by the parties on or before July 3, 2008, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charges:

On May 17, 2007, Phyllis P. Williams (hereinafter “Williams” or “Charging Party”) filed unfair labor practice charges against her employer, Mount Clemens Community School District (hereinafter “the school district” or “the Employer”) and the Michigan Education Association/National Education Association, Local 1 (hereinafter “MEA/NEA Local 1”). On

October 29, 2007, Williams amended the charge in Case No. CU07 E-025 to add the Mount Clemens Association of Educational Office Employees (hereinafter "MCAEOE") as a Respondent.

The charge in Case No. C07 E-104 asserts that the school district acted unfairly and in violation of the collective bargaining agreement when, on August 15, 2006, it rescinded a job posting for special education secretary, a position to which Williams was qualified, and subsequently assigned that job to another employee, Terri Luxmore. In Case No. CU07 E-025, Williams alleges that MEA/NEA Local 1 and MCAEOE failed to properly represent her by withdrawing grievances challenging the manner in which the Employer filled the special education secretary position.

Procedural History:

On June 22, 2007, I issued an order requiring Williams to show cause why the charge against the Employer in Case No. C07 E-104 should not be dismissed as untimely and for failure to state a claim upon which relief can be granted under PERA. Charging Party filed a timely response to the order to show cause on July 5, 2007. Thereafter, in an order issued on July 9, 2007, I held that summary dismissal of the charge against the school district was warranted and that a Decision and Recommended Order to that effect would be issued following the conclusion of the evidentiary hearing in Case No. CU07 E-025.

On September 19, 2007, MEA/NEA Local 1 filed a motion for summary disposition in Case No. CU07 E-025. In its motion, the Union asserted that the charge against it should be dismissed because Williams is a member of MCAEOE and not a part of any bargaining unit represented by MEA/NEA Local 1. According to the motion, the Local 1 is a "multiple association bargaining organization" comprised of constituent units affiliated with the MEA/NEA. Williams filed a response to the Union's motion on October 4, 2007 and later amended the charge to include the MCAEOE as a Respondent.

On November 20, 2007, Respondent MEA/NEA Local 1 renewed its motion for summary disposition, once again asserting that it owed Williams no duty under the Act. In addition, the Union argued that dismissal was appropriate because Williams had failed to assert any facts which would establish that she was not fairly represented in connection with the special education secretary position. I denied the Union's motion in an order issued on December 6, 2007.

Findings of Fact:

Charging Party has been employed by the Mount Clemens Community School District as a building level secretary at the Lincoln Early Childhood Center since about 2003 and is a member of a bargaining unit of clerical employees represented by the MCAEOE, an affiliate of the MEA/NEA. The Lincoln Early Childhood Center provides special education for students with speech and language impairments. One of Charging Party's primarily responsibilities as a building level secretary is entering student information into the SASI computer database, a system which tracks students as they progress from preschool to graduation.

In July of 2006, the school district posted an opening for the position of special education secretary, a job which had become vacant due to the recent retirement of the incumbent. Several secretaries applied and tested for the position, including Charging Party. The collective bargaining agreement which was in existence at that time gave the school district the exclusive right to determine whether an applicant meets the qualifications for a position. In August of 2006, the Employer rescinded the job posting and instead assigned the position to Terri Lynn Luxmore. At the time, Luxmore was working for the school district as an SASI secretary at Macomb Elementary School and was president of the MCAEOE.

In a letter to the school district dated August 22, 2006, Charging Party argued that she should have been awarded the position pursuant to the terms of the collective bargaining agreement due to the fact that she had more seniority than Luxmore. Charging Party characterized the letter as a "grievance" and forward a copy to Luxmore. Because she was personally involved in the situation, Luxmore decided to recuse herself from handling the grievance and assigned the matter to Cynthia Cuthbertson, the Union's vice president. On August 24, 2006, Cuthbertson filed a formal grievance on Charging Party's behalf asserting that the assignment of Luxmore to the position was a violation of the contract and requesting that the district place Williams in the position of special education secretary or that it compensate her for the difference in pay.

After the school district denied the grievance at step three of the contractual grievance procedure, the MCAEOE advanced it to binding arbitration. Thereafter, the MCAEOE and the Employer mutually agreed to postpone the arbitration of Charging Party's grievance, as well as that of several other pending grievances, and instead attempt to resolve those disputes as part of the negotiations on a new collective bargaining agreement to replace the contract which had expired on June 30, 2006.

The expired collective bargaining agreement had contained language giving the Employer the right to subcontract out any vacant position. As a result, the bargaining unit had lost several positions to subcontracting during the term of the agreement. Although the Union believed that Charging Party's grievance had merit, it was concerned that the district would privatize the special education secretary position if Luxmore were to be removed as result of the grievance. It was in this context that the MCAEOE bargaining team decided to accept a management proposal to settle the contract. Pursuant to that proposal, the Union agreed to withdraw all of the pending grievances, including the Williams grievance, in exchange for concessions from the district which included a two-percent wage increase and maintenance of the bargaining unit's existing health insurance package. The agreement was ratified by the members of the MCAEOE bargaining unit in June of 2007.

On September 12, 2007, the Union filed a second grievance on Charging Party's behalf concerning the special education secretary position. In this grievance, which was signed by the MCAEOE's grievance chairperson, Janet Williams, the Union requested that the school district consider and interview Charging Party for special education secretary or, in the alternative, that it provide a "written reason for the administration's refusal to appoint her to the position." Thereafter, in a letter to Williams dated October 4, 2007, MEA Uniserv director William

Schmidt indicated that the MCAEOE grievance committee had authorized him to advance the grievance to arbitration if neither of the two remedies sought by the Union were granted by the district.

On October 5, 2007, Alvis Phillip Easter, the school district's assistant superintendent for human resources, sent a letter to the MCAEOE addressing the special education secretary position. In the letter, Easter stressed that it was "of paramount importance" that the individual holding the position be able to function well without direct supervision, to be able to work tactfully, cooperatively and effectively with others, to be capable of exercising independent judgment and to work accurately with large volumes of information in a short time period. Based upon this criteria, Easter asserted that Charging Party was not qualified for the position. In the letter, Easter explained:

> I made a reasonable decision based on [Charging Party's] prior work performance and employment records which were actually known to the district, without necessarily relying on written performance evaluations and disciplinary records. There were two individuals who applied for the position, the grievant and a lesser senior employee. Both Grievant and the other employee have both entered student record data in the SASI system for several years. I am directly and personally aware of the quality and accuracy of the data entry skills of the SASI secretarial staff. I observed that Grievant did not minimum [sic] qualifications for the Special Education position with respect to her data entry skills because she routinely entered inaccurate data into the system, and she did not demonstrate the ability to work independently and accurately with large volumes of information in a timely manner. I have been required to correct information in her data base on many occasions before the Pupil Accounting Report could be submitted. The other candidate was qualified in these two vital areas of responsibility. I cannot recall a single instance where I have observed an error in her student records database.

Because Easter had provided an explanation as to why Charging Party was not selected for the special education secretary position, the Union determined that the school district had in fact granted the relief requested in the second grievance. Accordingly, the MCAEOE notified Charging Party by letter dated October 8, 2007 that it considered the matter to have been resolved and that it would not be advancing the grievance to arbitration.

Although Charging Party took issue with Easter's characterization of her work record at the hearing in this matter, Williams acknowledged that she had in fact made some data entry errors. She attributed those errors to her demanding workload and to the fact that her work location is in a busy area of the office. It is undisputed that Charging Party never asked the Union to reconsider its decision to withdraw the second grievance, nor did she ever contact the MCAEOE to contest the allegations set forth by Easter or otherwise seek to present her version of the facts to the school district.

Over the course of two years immediately preceding the dispute over the special education secretary position, Charging Party sought Luxmore's help with entering information

into the SASI database approximately six times. In contrast, Luxmore never sought Charging Party's assistance with respect to data entry during that period. While working for the district as an SASI secretary, Luxmore was audited one time and was not found to have made any database errors. At hearing, Luxmore explained that entering information into the SASI database accurately is a critical task because the school district could lose funding if an error were to occur.

Daniel Hokenga is an MEA Uniserv director. He was assigned to the school district at the time the special education secretary position first became vacant. Hoekenga testified credibly that he did not seek to advance Charging Party's first grievance to arbitration because he believed that the Employer would have subcontracted out the position had the Union prevailed. Hoekenga testified that Charging Party's work record was not exemplary and that others within the district had demonstrated a better work ethic and competency than Williams. In addition, Hokenga asserted that Williams could not have taken the position because the Employer wanted the special education secretary to work 220 days a year and Williams had previously indicated that she did not want to work that many days.

Discussion and Conclusions of Law:

I. Case No. C07 E-104

The charge in Case No. C07 E-104 alleges that Mt. Clemens Community School District violated PERA by rescinding the job posting for special education secretary and unilaterally assigning the position to another employee. Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. The limitations period 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, Williams was aware of the alleged unfair labor practice on or about August 15, 2006, when she learned that the posting for special education secretary had been rescinded and that Luxmore had been assigned to that position. However, the charge was not filed until May 17, 2007, more than nine months later. Therefore, the charge in Case No. C07 E-104 must be dismissed as untimely under Section 16(a) of the Act.

The charge against the school district also fails to state a valid claim under PERA. The Act does not prohibit all types of discrimination or unfair treatment by a public employer, nor does PERA provide a remedy for an employer's breach of a collective bargaining agreement. Rather, the Commission's jurisdiction with respect to public employers is limited to determining whether the employer interfered with, restrained, or coerced a public employee with respect to his or her right to engage in union or other protected concerted activities. The charge against the Mt. Clemens Community School District does not provide a factual basis which would support a finding that Williams engaged in any protected activities for which she was subject to discrimination or retaliation in violation of the Act. Absent such an allegation, the Commission is foreclosed from making a judgment on the merits or fairness of the Employer's action.

Accordingly, the charge against the school district in Case No. C07 E-104 must be dismissed for failure to state a claim upon which relief can be granted.

II. Case No. CU07 E-025

Charging Party contends that she was not fairly represented in connection with the special education secretary vacancy. I conclude that Williams failed to establish that the Unions violated their duty of representation by its handling of this dispute. The MCAEOE filed two separate grievances on Charging Party's behalf challenging the Employer's rescission of the posting for special education secretary and its subsequent decision to assign the job to Luxmore. Although Luxmore was president of the MCAEOE at the time, she properly recused herself from participating in the processing of those grievances so as to avoid any conflict of interest. The Union submitted the first grievance to binding arbitration before deciding to withdraw the matter, as well as other unrelated grievances, as part of a tentative agreement on a new collective bargaining agreement. The tentative agreement, which was ultimately approved by a vote of the entire membership, included a two percent wage increase and the preservation of existing health insurance benefits. Resolution of the grievance also had the practical effect of ensuring that the special education secretary remained a bargaining unit position, an issue which was of grave concern to the Union. The MCAEOE then filed a second grievance on Charging Party's behalf in which it requested that Williams either be considered and interviewed for the position or given a written reason for the school district's refusal to appoint her to the job. The Union processed that grievance to the third step of the contractual grievance procedure and authorized the submission of a demand to arbitrate if the Employer did not respond. When the school district provided Charging Party with a letter explaining its decision regarding the special education secretary position, the Union considered the matter resolved and withdrew the grievance. Charging Party did not challenge the Employer's explanation or request that the Union take further action on her behalf.

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. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). 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. In the instant case, there is no evidence to suggest that either of the Respondent Unions acted arbitrarily, discriminatorily or in bad faith with respect to Williams. To the contrary, the record overwhelmingly establishes that the MCAEOE worked diligently to both enforce the collective bargaining agreement and, at the same time, preserve bargaining unit work and negotiate a contract which was in the best interests of the membership as a whole. The fact that Charging

Party may be 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.

I have carefully considered the remaining arguments of the parties, including the assertion that MEA/NEA Local 1 is not a proper party to this dispute, and conclude that they do not warrant a change in the result. For the above reasons, I hereby recommend that the Commission issue the following order.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charges in Case Nos. C07 E-104 and CU07 E-025 be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: ____________