STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C08 D-077,

-and-

DETROIT FEDERATION OF TEACHERS,
Labor Organization-Respondent in Case No. CU08 D-022,

-and-

VERLINA E. BREWER,
An Individual-Charging Party.
_____/

APPEARANCES:

Verlina E. Brewer, *In Propria Persona*

DECISION AND ORDER

On June 4, 2008, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the unfair labor practice charge filed by Charging Party, Verlina E. Brewer, against Detroit Public Schools (DPS or the Employer) in Case No. C08 D-077 should be dismissed for failure to state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The ALJ also found that the unfair labor practice charge filed against the Detroit Federation of Teachers (DFT or the Union) in Case No. CU08 D-022 should be dismissed for failure to state a claim upon which relief can be granted. The ALJ recommended dismissal of both charges pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165. The Decision and Recommended Order on Summary Disposition was served on the interested parties in accordance with Section 16 of PERA.

Charging Party requested and was granted an extension until July 25, 2008 to file her exceptions to the ALJ's Decision and Recommended Order on Summary Disposition. She filed her exceptions on July 24, 2008. Neither Respondent filed a response. On June 2, 2009, Charging Party filed a motion to reopen the record, offering several documents

for inclusion in the record including a copy of a grievance, which she asserts that she filed against the Employer on December 16, 2007. Neither Respondent has responded to Charging Party's motion.

In her motion to reopen the record, Charging Party claims that the Union admitted that some time in December 2007 it had misplaced her grievance and the time period for further pursuing her claim expired before she was able to get the Union to take any action. She also seeks to have us consider the Union's May 11, 2009 refusal to pursue her grievance on the grounds of untimeliness. However, neither Charging Party's exceptions nor her charge against the DFT assert that her grievance was misplaced by the Union or that the Union failed to pursue her grievance because it was untimely. Charging Party's belated assertion of a different theory on which to base her charge against the Union does not justify reopening the record.

Rule 166 of the Commission's General Rules, 2002 AACS, R 423.166, states, in pertinent part, that a motion to reopen the record will be granted only upon a showing of all of the following:

a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
b) The additional evidence itself, and not merely its materiality, is newly discovered.
c) The additional evidence, if adduced and credited, would require a different result.

Accordingly, we deny Charging Party's motion to reopen the record for the reason that she has not met any of the requisites as enumerated in Rule 166.

In her exceptions, Charging Party alleges that the ALJ erred when he failed to find that the Union acted arbitrarily, discriminatorily, or in bad faith in refusing to pursue her grievance against the Employer. She contends that the ALJ erred by failing to find that the Union's continual refusal to meet with her and its ultimate decision not to pursue her grievance were indicative of hostility and dishonest abuse of discretion, constituting a breach of the Union's duty of fair representation. Charging Party also asserts that although the Commission's policy is to limit its interference with a union's discretionary decision about how or whether to proceed with a grievance, this case should be an exception to the general rule because of the underlying public interest concerns regarding the safety of public schools. She suggests that because both the Employer and the Union have failed to enforce safety policies within the public schools, the Commission should intervene and mandate that the DFT pursue her grievance. We have reviewed Charging Party's exceptions, and we find them to be without merit.

Factual Summary:

The facts in this case were set forth fully in the Decision and Recommended Order on Summary Judgment and will be repeated only as necessary here. Charging Party was a substitute teacher for the Employer and part of a bargaining unit of employees represented by the Union. In her charge against the Employer, she alleges that

the DPS violated the collective bargaining agreement by terminating her in January 2008 for her refusal to allow an allegedly violent student into her classroom. Charging Party also claimed that a year before her termination, she was harassed by a principal following a similar incident. She also claims that the Employer unlawfully failed to report information regarding her years of service with the DPS to a federal student loan program for her to receive credit.

In her charge against the Union, Charging Party alleges that the DFT breached its duty of fair representation by failing to pursue grievances on her behalf with respect to the preceding allegations against the Employer.

Discussion and Conclusions:

We agree with the ALJ that Charging Party's claim against the Union in Case No. CU08 D-022 must be dismissed for failure to state a claim upon which relief can be granted. The charge against the Union does not allege facts, nor were facts offered in response to the ALJ's show cause order, from which we could find that the Union's decision not to pursue Charging Party's grievance was arbitrary, capricious, or made in bad faith. Although Charging Party asserts in her exceptions that the Union abused its discretion, she has failed to allege facts sufficient to support that conclusion. See *City of Detroit*, 17 MPER 47 (2004).

Charging Party implores this Commission to disregard established precedent holding that, absent an abandonment of its distinct responsibilities under its duty of fair representation, 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. *Teamsters Local 214*, 20 MPER 114 (2007). With regard to the merits of the public policy concerns raised by Charging Party in her exceptions, it must be noted that public policy considerations are generally matters left up to the legislative process. *Morgan v Taylor Sch Dist*, 187 Mich App 5; 466 NW2d 322; 4 MPER 22017 (1991). Although the interests and rights of the people of the state should always be considered, respected, and protected, the Commission is not compelled to view these factors as justifications for circumventing the mandates of established law. *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339 (1996).

We also agree with the ALJ that Charging Party's allegations in Case No. C08 D-077 do not state a claim upon which relief can be granted under PERA. The allegations by Charging Party assert she was fired. Notwithstanding the opportunity granted by the ALJ's order to show cause, Charging Party has not shown that the Employer terminated her employment based on considerations unlawful under PERA. Her charge against the DPS does not support a finding that she engaged in any protected activities for which she was subject to discrimination or retaliation in violation of the Act We, therefore, find that the unfair labor practice charge must be dismissed. *Village of New Haven*, 1992 MERC Lab Op 608; 5 MPER 23085 (1992).

Charging Party's claims concerning the Employer's failure to submit information to a student loan program are clearly beyond the scope of this Commission's jurisdiction. As to her claim that she was wrongfully terminated for excluding an allegedly violent

student from her classroom, even if we were to treat this as a hybrid breach of contract claim against both the Employer and the Union, this claim fails. In a hybrid action alleging both a breach of contract by an employer and a breach of the union's duty of fair representation, the breach of contract claim against the employer cannot be pursued unless the complaining party is successful in the breach of the duty of fair representation claim. *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480 (1993); *City of Lansing (Bd of Water & Light)*, 20 MPER 33 (2007). Because the charge against the Union fails to allege facts sufficient to establish that it violated its duty of fair representation, we find that Charging Party has failed to state a claim against the Employer based upon an alleged breach of contract.

We have considered all other arguments presented by Charging Party and conclude that they would not change the result in this case.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Respondent-Public Employer in Case No. C08 D-077,

-and-

DETROIT FEDERATION OF TEACHERS,
Respondent-Labor Organization in Case No. CU08 D-022

-and-

VERLINA E. BREWER,
An Individual Charging Party.
_____/

APPEARANCES:

Verlina E. Brewer, *in pro per*

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 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules, acting on behalf of the Michigan Employment Relations Commission.

This matter comes before the Commission on unfair labor practice charges filed by Verlina E. Brewer on April 28, 2008, against the Detroit Public Schools and the Detroit Federation of Teachers. With respect to Respondent Detroit Public Schools, Brewer asserts that the Employer breached the collective bargaining agreement when it terminated her on January 21, 2008, after she refused to allow an allegedly violent student into her classroom. Brewer contends that a year prior her termination, she was harassed by a principal following a similar incident. Finally, Brewer asserts that the Employer acted unlawfully in failing to provide information pertaining to her employment with the school district to the "student loan program." With respect to the Detroit Federation of Teachers, Brewer alleges that the Union violated PERA by failing to pursue grievances on her behalf arising from the aforementioned incidents.

In an order entered on May 6, 2008, Charging Party was granted fourteen days in which to show cause why the charges should not be dismissed for failure to state claims upon which relief can be granted under PERA. Charging Party did not file a response to the order to show

cause with respect to her charge against Respondent Detroit Public Schools in Case No. C08 D-077.

On May 12, 2008, Charging Party filed what appears to be an amended charge against the Detroit Federation of Teachers in Case No. CU08 D-022. This new charge recounts two incidents in which Brewer was disciplined by the Employer following her refusal to allow allegedly disruptive or violent students into her classroom. Brewer contends that the Employer converted a grievance meeting concerning the first incident into a disciplinary hearing and that her Union representative refused to protest that decision or process a grievance on her behalf. With respect to the second incident, Charging Party contends that her Union representative refused to file a grievance on her behalf because he did not think she would prevail, and that the Union president failed to respond to her telephone calls concerning the issue. In addition, Brewer asserts, without any additional explanation, her belief that the Union "will not support a substitute teacher in the same manner that they will support a contract teacher."

I find that the charge against the Employer in Case No. C08 D-077 must be dismissed for failure to state a claim under PERA. Where a charge is facially defective, the failure of Charging Party to respond to the order to show cause, in and of itself, warrants dismissal. In any event, I find that Charging Party has not raised any issue cognizable under PERA as to Respondent Detroit Public Schools. With respect to public employers, PERA 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. In the instant case, Charging Party has not alleged that the Detroit Public Schools discriminated or retaliated against her because of union or other protected concerted activity. Accordingly, I find that dismissal of the charge in Case No C08 D-077 is warranted.

Similarly, the charge against Respondent Detroit Federation of Teachers must also be dismissed for failure to state a claim upon which relief can be granted. 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). 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). 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.

Despite having been given an opportunity to do so, Charging Party has alleged no facts from which it could be concluded that the Union acted arbitrarily, discriminatorily or in bad faith

with respect to its representation of her. Neither in the charge nor the amended charge has Brewer alleged that the Union acted out of improper motive. Likewise, there is no allegation that the Union's decision was arbitrary or the result of gross negligence. Thus, pursuant to Rule 165, R 423.165, of the General Rules and Regulations of the Employment Relations Commission, dismissal of the charge in Case No. CU08 D-022 is also appropriate.

RECOMMENDED ORDER

The unfair labor practice charges in Case Nos. C08 D-077 and CU08 D-022 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

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

Dated: _____