STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ANN ARBOR PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C08 I-185,

-and-

ANN ARBOR EDUCATION ASSOCIATION,
Labor Organization-Respondent in Case No. CU08 I-048,

-and-

KAREN B. FIVENSON,
An Individual-Charging Party.
_____/

APPEARANCES:

Karen B. Fivenson, *In Propria Persona*

DECISION AND ORDER

On December 2, 2008, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondents 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:

ANN ARBOR PUBLIC SCHOOLS,
Respondent-Public Employer in Case No. C08 I-185,

-and-

ANN ARBOR EDUCATION ASSOCIATION,
Respondent-Labor Organization in Case No. CU08 I-048,

-and-

KAREN B. FIVENSON,
An Individual Charging Party.
_____/

APPEARANCES:

Karen B. Fivenson, appearing on her own behalf

DECISION AND RECOMMENDED ORDER 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, on behalf of the Michigan Employment Relations Commission (MERC).

This case arises from unfair labor practice charges filed on September 12, 2008, by Karen B. Fivenson against Ann Arbor Public Schools and Ann Arbor Education Association. The charges alleged that Respondents violated PERA by "Failure to Represent." In an order issued on September 18, 2008, I directed Fivenson to show cause why the charges should not be dismissed for failing to meet the minimum pleading requirements set forth in R 423.151(2). Charging Party filed a timely response to the Order to Show Cause on September 30, 2008.

In her response, Charging Party alleged that Respondent, Ann Arbor Public Schools, violated PERA by discriminating against her on the basis of race and national origin, negatively evaluating her job performance and failing to give her an opportunity to improve her work skills. Charging Party further asserted that the Employer acted unlawfully by denying her "the opportunity to seek Union advise or representation" at a meeting on April 29, 2008, during which the school district allegedly ordered to her to resign or "face harsh

reprisal by never being hired by the employer again." Lastly, Fivenson claimed that the Union violated the Act by failing to represent her in connection with the evaluation process and the April 29, 2008 meeting.

On October 15, 2008, I issued a supplemental order directing Charging Party to show cause why the charges should not be dismissed for failure to state a claim upon which relief can be granted under PERA. Fivenson filed a response to that order on October 30, 2008.

Discussion and Conclusions of Law:

Neither the original charge, nor the various supplemental pleadings filed by Charging Party in this matter, state a claim upon which relief can be granted under PERA. As noted in my order of October 15, 2008, the Commission has no jurisdiction to remedy ordinary contract breaches, nor is it MERC's role to hear civil rights claims, including allegations of discrimination on the basis of race, gender, religion or national origin. With respect to a claim brought by an individual employee against a public employer, the Commission's jurisdiction is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in union or other protected concerted activities. Absent a factually supported allegation that the public employer interfered with, restrained, coerced or retaliated against the employee for engaging in such activities, the Commission is foreclosed 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, the pleadings filed by Fivenson in this matter do not provide a factual basis which would support a finding that Charging Party engaged in any protected concerted activity for which she was subject to discrimination or retaliation.

Nor do the facts as alleged by Fivenson support her contention that the Employer violated PERA by failing to give her the opportunity to seek Union representation at the April 29, 2008 meeting. In her October 30, 2008, supplemental pleading, Charging Party argues that although she never specifically requested Union representation during the meeting, she asked the Employer for an additional day to consider the resignation offer and that it was her subjective intent to use that time to seek the advice of her Union. Under both the National Labor Relations Act (NLRA) and PERA an employee has the right, upon request, to the presence of a union representative at an investigatory interview. *NLRB v Weingarten, Inc.*, 420 US 251 (1975). See also *University of Michigan*, 1977 MERC Lab Op 496. However, this obligation, arises only when the employee requests representation by his or her Union. *Grand Haven Board of Water and Light*, 18 MPER 80 (2005); *City of Marine City (Police Dep't)*, 2002 MERC Lab Op 219 (no exceptions). Moreover, an employee has no right to union representation at a meeting held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. See e.g. *City of Kalamazoo*, 1996 MERC Lab Op 556, 562; *Baton Rouge Water Works Co*, 246 NLRB 995, 997 (1979).

In the instant case, Charging Party never asked the Employer to allow her to consult with the Union during the April 29, 2008, meeting, nor did she make any statement which

might reasonably be interpreted as a request for Union representation. Moreover, the allegations set forth by Fivenson in the charge and the supplemental pleadings do not even remotely suggest that the meeting in question was convened for the purpose of interrogation or investigation. Charging Party does not assert that she was asked any questions during the meeting which might have led to discipline. Rather, it is apparent that the Employer called the meeting to inform Fivenson that she would not be allowed to continue working in her position as a paraprofessional at Wines Elementary School. To that end, Charging Party was given the choice of either resigning her employment or being terminated with the understanding that she would never be rehired by the school district. It is plainly evident that this was not the type of investigatory meeting to which *Weingarten* rights attach. Based on these facts, no PERA violation by the Employer can be established and the charge in Case No. C08 I-185 must be dismissed on summary disposition.

The charge against Respondent, Ann Arbor Education Association, in Case No. CU08 I-048 also fails to state a cognizable claim under the Act. 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. The union's ultimate duty is toward the membership as a whole, rather than solely to any individual. The union is not required to follow the dictates of any individual employee, but rather it may investigate and handle the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. The fact that a member is dissatisfied with her 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; *Wayne County DPW*, 1994 MERC Lab Op 855.

Accepting as true the allegations set forth in the charge and the supplemental pleadings, it is clear that the Union did not violate PERA with respect to its representation of Fivenson. The Union met with Charging Party regarding her contention that she was being discriminated against by her supervisor, listened to her concerns, requested additional information from Fivenson, and provided her with the telephone number of the Michigan Civil Rights Commission. According to Fivenson, the Union discouraged her from filing a grievance on the ground it would be a "long process" which would likely not bring her the relief she was seeking. Ultimately, the Union decided not to represent her in connection with the alleged discrimination. Although Charging Party obviously disagrees with that determination, there is no factually supported allegation that the Union's decision not to file a grievance was arbitrary, discriminatory or made in bad faith. Under such circumstances, the charge against the Union in Case No. CU08 I-048 must also be dismissed.

RECOMMENDED ORDER

The unfair labor practice charges in Case Nos. C08 I-185 and CU08 I-048 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: _____