STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENT COUNTY,
Public Employer-Respondent Case No. C10 L-306

-and-

JAMIE LEE DALTON,
An Individual-Charging Party.
_____/

APPEARANCES:

James C. Coward, Kent County Labor Relations Counsel, for Respondent

Scott A. Reynolds for Charging Party

DECISION AND ORDER

On August 10, 2011, Administrative Law Judge David M. Petlz issued his 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

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

Case No. C10 L-306

KENT COUNTY,
Respondent-Public Employer,

-and-

JAMIE LEE DALTON,
An Individual Charging Party.
_____/

APPEARANCES:

Kent County Labor Relations Counsel, by James C. Coward, Jr., for Respondent

Scott A. Reynolds for Charging Party

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 Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on the pleadings and the transcript of the oral argument which was held on June 16, 2011, I make the following findings of fact and conclusions of law.

This case arises from an unfair labor practice charge filed on December 20, 2010 by Jamie Lee Dalton against her employer, Kent County.[1] The charge alleges that Respondent violated PERA on or about June 24, 2010 when it terminated Dalton's employment for allegedly falsifying County documents. In an order issued on February 10, 2011, Dalton was directed to show cause why the charge should not be dismissed on summary disposition. Dalton filed a response to the order to show cause on March 8, 2011.

The parties appeared for oral argument before the undersigned on June 16, 2011. After considering the extensive arguments made by the counsel for each party on the record, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit*

[1] At the same time, Charging Party filed a charge against her labor organization, UAW Local 2600. That charge, Case No. CU10 L-049, was withdrawn by Charging Party on March 8, 2011.

Public Schools, 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). Accordingly, I rendered a decision from the bench, finding that Charging Party had failed to state a valid claim under PERA. The substantive portion of my findings of fact and conclusions of law are set forth below:

> Charging Party was an employee of Kent County and a member of the bargaining unit represented by the UAW Local 2600. Under Section 7.2 of the contract between the County and the Union, there is a requirement that discipline will be of a corrective or progressive nature unless circumstances warrant taking disciplinary action, including discharge . . . .
>
> Under that same section, the contract provides that disciplinary action will only be taken for just cause, and in the event that disciplinary action may result in a loss of pay or discharge, the employee shall be informed of his or her right to representation at the time the disciplinary action may have been imposed. All disciplinary action is to be made in writing and state the reasons for such action, and a copy must be provided to the employee.
>
> Ms. Dalton's last discipline was in April of 2006 [following which] she filed a grievance with the assistance of the Union and she prevailed on that grievance. Thereafter, there was a series of events during which the Charging Party, with the assistance of the Union, took action to enforce her rights under the contract, the last of those events being in 2008 when there was an issue that arose with respect to the Charging Party's performance evaluation and a request that she agree to changes in her performance evaluation or that she would lose some merit pay.
>
> On June 11, 2010, Ms. Dalton's supervisor, Colleen Jillson, informed her and the Union representative that there were some questions about whether she had been working the entire day on May 21st. Charging Party disagreed with that allegation. There was a follow-up meeting on June 21 [during which the Employer set forth] a different allegation . . . involving extensive falsification of records. There was no written documentation provided at that meeting. The Union representative was present. Charging Party was given two options . . . to resign or to be terminated. However, she was allowed to continue to work. [O]n June 22, she was told by [Jillson] that as far as the supervisor was concerned, Ms. Dalton was still a County employee. On the 24th, however, after arriving to work, Ms. Dalton was informed by Ms. Jillson that she would have to leave the building immediately and turn in her items.
>
> On June 25th, the supervisor missed a meeting with the Union representative to discuss the issue. When that meeting eventually occurred on June 28th, and again [the meeting was] attended by the Union representative, Ms. Dalton was given a copy of a [termination] letter and told to return items to the County that were in her possession. Thereafter the Union filed a grievance at Step

III . . . on June 30th of 2010 [which was] denied by the County, and was taken up to the final step prior to arbitration at which the Union decided not to arbitrate the matter. The Charging Party filed the instant charge thereafter.

* * *

Now with respect to conclusions [of law], PERA does not prohibit all types of discrimination [or] unfair treatment by a public employer, nor does the Act provide a remedy for an Employer's breach of a collective bargaining agreement. The Commission's jurisdiction with respect to claims brought by individual employees with respect to public employers 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.

* * *

[W]ith respect to a claim alleging unlawful discrimination or retaliation under Section 10(1)(c) of PERA, the elements are: 1) union or other protected concerted activity; 2) employer knowledge of that activity; 3) anti-union animus; 4) suspicious timing or other evidence that protected activity was the motivating cause of the alleged discriminatory action. *Grandview Medical Care Facility*, 1993 MERC Lab Op 686. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather the Charging Party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 1974. Once the prima facie case is met by the Charging Party, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the Charging Party. *City of Saginaw*, 1997 MERC Lab Op 414.

* * *

[I]n the instant case, neither the charges [and] the pleadings filed by Charging Party, nor the arguments of her counsel today, provide any factual basis which would support a finding that Ms. Dalton engaged in any protected activity for which she was subject to discrimination or retaliation and leading to her termination. Absent such an allegation, the Commission is foreclosed from making a judgment on the merits or fairness of [the] employer's action.

[A]lthough there are allegations of Union activity [by Dalton] occurring prior to the incidents giving rise to the charge, those incidents occurred well before the June 2010 termination. We're talking 2006, 2007, and 2008 at the latest. As I understand it, Ms. Dalton continued to work without any discipline imposed on her from 2008 to 2010. . . . Nothing was done, no more discipline in

her file from 2008 to 2010. [Under such circumstances, there can be no causal connection between the protected activities engaged in by Dalton during that time period and her termination two years later.]

* * *

[E]ven assuming for the sake of argument that protected activity and knowledge were established by the Charging Party, I would find that Ms. Dalton has failed to assert any factually supported allegation which, if true, would establish in this case that the Employer harbored anti-union animus or hostility, or that her discharge was in any way motivated by her protected concerted conduct. To infer anti-union animus based on actions which occurred several years prior to the incident giving rise to the instant charge would be to engage in speculation and conjecture within the meaning of the *Detroit Symphony Orchestra* case, and I decline to do so here. Charging Party has also not asserted any fact which would demonstrate any causal connection between her protected activity and her termination.

* * *

[Charging Party alternatively contends that the protected activity for which she was retaliated against was the filing of a grievance over her termination in June of 2010 and her related attempts to consult with the Union concerning the loss of her job. However, those events occurred after the Employer had already commenced the investigation of Charging Party's conduct and gave her the choice to resign or be terminated.]

* * *

[I also find no merit to Charging Party's contention that the Employer violated PERA by failing to follow the collective bargaining agreement with respect her termination. Dalton asserts that the discipline which was imposed was unjust.] And that's really what I see this charge as amounting to. This is an attempt to attack the actual decision to terminate Ms. Dalton [and her] claim that it was without just cause. And that's . . . certainly a fair argument to make, and I'm not at all questioning that Charging Party believes that to be true, and she may have a good reason for that belief. The problem is the contract contains a procedure for making such a claim, and that procedure is the grievance arbitration procedure. And in this case, if either the Charging Party and/or her Union believed that there [were] improper grounds for termination, that issue should have been taken to grievance arbitration. It wasn't. There's nothing the Commission can do to remedy that. We don't remedy breaches of contract. And in fact, an individual employee has no standing under PERA to bring a repudiation claim or otherwise in any attempt o enforce a contractual right. The duty to bargain is between the public employer and the Union. So a claim asserting a breach of [that] duty can only be brought by the labor organization

acting in its capacity as the employee's exclusive bargaining representative. *City of Detroit (Building and and Safety Engineering)*, 1998 MERC Lab Op 359; *Oakland Univ*, 1996 MERC Lab Op 338.

With respect to the grievance processing, [there is some vague allegation that] the Employer tried to short-circuit that procedure. I will note that Section 15 of PERA requires a public employer to meet and confer in good faith with the representative of its employees over terms and conditions of employment, and if requested execute a written document incorporating the agreement. The Commission has held that an Employer violates its duty to bargain in good faith by refusing to process a grievance under a contractual grievance procedure simply because it believes that the grievance lacks merit. *Washtenaw County Road Commission*, 20 MPER 69 (2007); *City of West Branch*, 1978 MERC Lab Op 352. However, the key point is that the Commission does not involve itself in disputes over procedural matters relating to grievance processing unless the Employer's conduct "closes the door" to the entire grievance procedure or substantially frustrates the process. *Gibraltar School District*, 16 MPER 36 (2003).

[I]n the instant case, we have a situation where a grievance was filed. There's no dispute that it was taken through the contractual steps, and that the Union had the opportunity to take it to arbitration and did not do so. So I could not find here any factually supported allegation that the Employer somehow attempted to frustrate the grievance process in the manner described. Even if that were the case, it would likely be a matter that only the Union can bring a charge on.

I'll note one additional issue raised or at least implied by the charge and/or the response to the show cause, and that was some allegation that perhaps Ms. Dalton was prohibited from . . . consulting with her Union representative in connection with this matter. [It is] well-established that employees have the right upon request to have the presence of a Union representative at the investigatory interview. *NLRB v Weingarten, Inc., 420 US 251 (1975). See also University of Michigan, 1977 MERC Lab Op 496.* It's also, however, well-established that an employee has no right to Union representation at a meeting held solely for the purposes of informing the employee of and acting upon a previously made disciplinary decision. *City of Kalamazoo*, 1996 MERC Lab Op 556. And in the instant case, we have a situation where Charging Party was allowed to have a Union representative with her at all meetings except for one, and it's clear from the allegations that have been made, the one meeting in which the Union representative was not there, that that meeting was not an investigatory meeting. It was rather to inform Charging Party that she was terminated, to leave the building, etc. There would be no *Weingarten* rights that would attach at that meeting.

So having found no factually supported allegations here which would support a PERA claim, I conclude that the charge against the Respondent County must be dismissed for failure to state a claim under PERA.[2]

Based on the findings of fact and conclusions of law set forth above, I recommend that the Commission issue an order dismissing the unfair labor practice charge filed by Jamie Lee Dalton against Kent County in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

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

Dated: August 10, 2011

[2] The transcript excerpt reproduced herein contains typographical corrections and other edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.