STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GOVERNMENT ADMINISTRATORS ASSOCIATION,
Labor Organization-Respondent,

Case No. CU11 C-008

-and-

DONNA MORICONI SEELY,
An Individual-Charging Party.
____/

APPEARANCES:

Law Offices of Gregory, Moore, Jeakle & Brooks, P.C., by Gordon A. Gregory, for Respondent

Donna Moriconi Seely, *In Propria Persona*

DECISION AND ORDER

On November 17, 2011, Administrative Law Judge Doyle O'Connor 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

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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:

GOVERNMENT ADMINISTRATORS ASSOCIATION,
Respondent-Labor Organization, Case No. CU11 C-008

-and-

DONNA MORICONI SEELY,
An Individual Charging Party.
____/

APPEARANCES:

Donna Moriconi Seely, Charging Party, appearing on her own behalf

Gordon Gregory, appearing on behalf of the respondent Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY JUDGMENT

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 Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge, Orders to Show Cause, and Motion to Dismiss:

On March 3, 2010, Donna Moriconi Seely (Charging Party) filed a Charge against the Government Administrators Association (Association or Respondent). The Charge asserted that the Union failed to resolve several employment related issues raised by Seely regarding the assignment or pay rates of other employees in 2009. The Charge further asserted that, following Seely's termination from employment in September of 2010, while on a medical leave, the Association conferred with Seely and advised her that they did not believe her termination was grievable, as she was being treated as a voluntary quit based on her apparent failure to return to work upon the June 2010 expiration of her disability leave.

Because it appeared that the allegations filed in the above matter did not properly state a claim under the Public Employment Relations Act (PERA), the statute that this agency enforces, and that the charge was therefore subject to dismissal without a hearing, I issued an order to show cause why the case should not be dismissed. With that Order, Charging Party was provided with a description of the existing case law covering a union's duty of fair representation, including:

1. The 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 present particular grievances for the general good of the membership even though they 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).
2. 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.
3. In analyzing the National Labor Relations Act on which PERA was premised, the US Supreme Court held in *Airline Pilots v O'Neill*, 499 US 65, (1991): "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," that it is wholly "irrational" or "arbitrary." (*Citations omitted)."* See also, *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35.
4. The fact that a member is dissatisfied with their union's efforts or ultimate decision is insufficient to constitute a proper charge of 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.
5. To pursue a charge against the union, charging party must allege and be prepared to prove that the union's conduct toward them was arbitrary, discriminatory or done in bad faith and not merely a disputed tactical choice. *Vaca v Sipes*, 386 US 171, 177 (1967); *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Detroit Federation of Teachers (Steward)* 21 MPER 15 (2008) (no exceptions).
6. To pursue such a claim, charging party must allege and be prepared to prove not only a breach of the duty of fair representation by the Union, but also allege and prove a breach of the collective bargaining agreement by the Employer. *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).
7. The limitations period begins to run when a charging party knew, or should have known, of the acts constituting an 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).

Charging Party was specifically cautioned that to avoid dismissal of the Charge, the written response to the Order must assert facts that establish a violation of PERA. Seely was further directed that the response must describe who did what and when they did it, the date on which Seely was terminated from employment, the date on which Seely was first advised by the Association that it

considered her termination to be not grievible as a voluntary quit, and explain why the Association's actions constitute a violation of PERA.

Charging Party did file a timely response to this Order. The Association then filed a Motion to Dismiss the Charge and that motion was supported by an affidavit of Union official Lawrence Verbiest. In his affidavit, Verbiest detailed his contacts with Seely, beginning on August 30, 2010, and his contractual explanation for his analysis of the merits of the proposed grievance over her termination. Seely was directed to respond to that Motion and was instructed that her response must take into account the case law described above, which required that Charging Party be prepared to factually allege, and later prove, that the Employer violated the contract and that the Association's response failed to meet the minimum conduct allowed by law. A timely response to the second order and to the Respondent's motion to dismiss was filed, but was not supported by affidavit. Neither party requested oral argument.

For the purpose of deciding this motion, all facts and reasonable inferences are taken in the light most favorable to Charging Party. Charging Party was employed as a psychologist at the Wayne County jail until she suffered a non-work related closed head injury which caused cognitive impairments and which led to her leaving work on a disability leave of absence commencing in September 2009. Multiple extensions of the leave were granted, including on June 4, 2010. The final extension came with the express representation that no further extensions would be granted. Consistent with that, the Employer refused to further extend Seely's leave of absence beyond June 21, 2010, resulting in her formal termination from employment in August 2010. There were apparently confusing and conflicting responses by various members of management in response to Seely's several efforts to have her leave time again extended. The employer defined Seely's termination as "voluntary quit" based on her failure to report to work following the final denial of an extension of her leave of absence. Seely was still undergoing treatment related to cognitive impairments when her leave of absence, and consequently, her employment, was terminated. Seely does not assert that she is presently capable of returning to her former employment.

After her August 2010 termination, Seely contacted her union representative, who advised her either on or about August 30, 2010 or on September 8, 2010, that he believed her proposed grievance to be without merit as the employer was contractually entitled to treat her as a "voluntary quit".[1] Despite her multiple responses to Orders and to the Respondent's motion, Seely does not identify any underlying contractual violation by the employer which would arguably support a grievance regarding her termination from employment. The affidavit in support of the Respondent's motion to dismiss details the Union's analysis of the relevant collective bargaining agreement, which led to the Respondent's asserted conclusion that the proposed grievance was unmeritorious.

<u>Discussion and Conclusions of Law</u>:

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1 There is a dispute between the parties as to when Seely was first told by the Respondent that it would not pursue a grievance over her termination. The Respondent's position was supported by affidavit, while Charging Party's was not. That dispute of fact would be material on the question of whether the charge was barred by the statute of limitations. Given the procedural posture of the matter, I am presuming for purposes of this decision that the charge was timely.

The charge in this matter asserts 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 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 a 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 Respondent's obligations to Seely. There are no facts asserted to support an allegation that the Respondent acted out of improper motive.2 Likewise, there is no 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 in terminating Seely. The crux of this dispute is Seely's allegation that the Respondent did not adhere to her wishes that a grievance be pursued even though the Union had concluded that it was unmeritorious.

The fact Seely 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 not pursue. 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, based on Charging Party's own explanation of the reason for her discharge, including her continuing disability, and her failure to assert a contract violation by the Employer in terminating her, it is impossible to infer that a decision by the Union to not pursue a grievance was irrational.

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2 Seely does assert in her supplemental response to the Second Order to Show Cause that the Respondent intentionally encouraged the Employer to discriminate against Seely based on her disability. That conclusory assertion is unsupported by any factual allegation that the Respondent was even aware of Seely's situation or the controversy over the denial of another leave extension until after she was already terminated from employment, nor by any factual allegation that the Respondent harbored animus toward those with disabilities.

The conclusory 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
Michigan Administrative Hearing System
Administrative Law Judge

Dated: November 17, 2011