STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND VALLEY STATE UNIVERSITY,
Respondent-Public Employer in Case No. C10 H-202,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 2074
Respondent-Labor Organization in Case No. CU10 H-037,

-and-

BEVERLY MOORE,
An Individual-Charging Party.
_____/

APPEARANCES:

Barnes & Thornburg, L.L.P., by Donald P. Lawless, for the Public Employer

Kenneth J. Bailey, AFSCME Council 25, for the Labor Organization

Beverly Moore, *In Propria Persona*

DECISION AND ORDER

On January 10, 2012, 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 complaints.

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:

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APPEARANCES:

Barnes & Thornburg LLP, by Donald P. Lawless, for the Public Employer

Kenneth J. Bailey for the Labor Organization

Beverly Moore appearing on her own behalf

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

This case arises from unfair labor practice charges filed on August 10, 2010 by Beverly Moore against her former employer, Grand Valley State University, and her labor organization, American Federation of State, County and Municipal Employees (AFSCME) Council 25, Local 2074. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charges were assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

Background:

Moore has previously filed multiple charges against Grand Valley State University and AFSCME Local 2074, each of which were summarily dismissed. In Case No. C09 D-048, Moore alleged that the University treated her unfairly and that the Employer's conduct violated "Title II of the Civil Rights Act of 1964 and the ADA statutes". In addition, Moore asserted

claims related to her belief that the Employer intended to fire her in the near future and that the Employer's agents had broken into her home and had taken or rearranged her personal belongings. In Case No. CU09 D-012, Moore alleged that the Union breached its duty of representation with respect to its handling of various grievances. On July 2, 2009, ALJ Doyle O'Connor issued separate decisions dismissing both charges on summary disposition. The ALJ concluded that the conclusory allegations set forth by Moore did not state claims under PERA and that the charge against the University in Case No. C09 D-048 was untimely. When no exceptions were filed, the Commission issued orders adopting the ALJ's decisions on September 15, 2009. See *Grand Valley State Univ*, 22 MPER 84 (2009) and *AFSCME Local 2074*, 22 MPER 83 (2009).

On August 12, 2010, the Commission issued an order affirming ALJ Julia C. Stern's recommendation to dismiss charges filed by Moore against the University and AFSCME on November 10, 2009. In Case No. C09 K-213, Moore had asserted that the Employer retaliated against her for filing grievances and for bringing the prior unfair labor practice charges. The charge in Case No. CU09 K-038 alleged that the Union breached its duty of fair representation by failing to attend several disciplinary hearings on Moore's behalf. In her Decision and Recommended order, which was likewise issued on summary disposition, Judge Stern found that the charges, as well as Moore's other pleadings, failed to state claims for which relief could be granted under PERA. The Commission agreed, concluding that Charging Party had failed to set forth facts which would establish that the University subjected Moore to interrogation and disciplinary action without the aid of Union representation or that AFSCME had acted improperly in not attending disciplinary meetings. See *Grand Valley State Univ*, 23 MPER 70 (2010).

The Instant Charges:

The charge in Case No. C10 H-202 asserts that the University violated PERA by failing or refusing to provide Moore with union representation at a March 8, 2010 meeting with her supervisor during which the Employer allegedly refused to accept a doctor's note excusing Moore from work. The charge further contends that the Employer terminated Moore on March 10, 2010 in retaliation for her having engaged in protected concerted activity. Although Moore was purportedly terminated, in part, for reporting to work late on March 7, 2010, the charge contends that she was actually attempting to contact the Union at that time to discuss "ever present discrimination, retaliation and whistleblowing." In Case No. CU10 H-037, the charge asserts that AFSCME Local 2074 breached its duty of fair representation under PERA by allowing the University to repeatedly "accost" Moore and by failing or refusing to meet with her after she was sent home from work on March 8, 2010.

A hearing was initially scheduled for January 5, 2011. On November 18, 2010, the University filed a motion for summary disposition, asserting that Charging Party had failed to state a claim upon which relief can be granted under PERA. On November 23, 2010, the University notified the undersigned by letter that it had been unable to serve Moore with a copy of the motion. According to the University, the motion was returned as "undeliverable, as Charging Party's address of record is simply a slab with no trailer on it." After the MAHS office

unsuccessfully attempted to reach Moore by telephone, I issued an order adjourning the hearing and directing Moore to provide my office with up-to-date contact information.

On January 6, 2011, AFSCME Local 2074 filed a motion for summary disposition. Charging Party filed a brief in opposition to the Employer's motion for summary disposition on February 1, 2011 and multiple responses to the Union's motion on April 15, 2011 and April 18, 2011 respectively. In these pleadings, Moore raised new allegations pertaining to events dating back to 2009. Moore also argued that the Employer and the Union violated PERA by failing to provide her with information or respond to requests made under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*.

Oral argument was held before the undersigned on June 14, 2011, at the conclusion of which Charging Party was asked by the undersigned to specify what remedy she was seeking in connection with this matter. Moore stated that she wanted the Commission to order financial restitution and punitive damages, but that she was not seeking reinstatement because the work environment was "too hostile" and because University officials had been entering her apartment while she was at work.

Facts:

The following facts are not materially in dispute. Charging Party was employed by Grand Valley State University as a custodian and was a member of a bargaining unit represented by AFSCME Local 2074. Her personnel file contains documentation reflecting a history of progressive discipline imposed by the University for various work-related incidents, including several instances in which Charging Party was disciplined for failing to properly communicate with the University regarding absences.

In February of 2010, Charging Party returned to work from a leave of absence. Following her return, the University questioned Moore regarding a doctor's evaluation which she had submitted. The Employer instructed Charging Party to provide additional medical documentation by no later than March 5, 2010. Charging Party did not submit the requested information by that date.

When Charging Party arrived for work on March 7, 2010, she punched in at the time clock, but did not proceed immediately to her workstation. Instead, she spent time on the computer at the service building writing to her Union representatives about alleged harassment by the Employer, including the University's insistence that she provide more sufficient medical documentation.

At the start of the workday on March 8, 2010, Charging Party was called into a meeting with her supervisor and asked whether she had the additional medical documentation which had previously been requested by the University. When Charging Party failed to produce the documentation, the supervisor instructed her to go home and not to return until she complied with the University's request. On her way out the door, Charging Party muttered "low-life" or "low-lifes" in reference to either the supervisor specifically or management generally.

Charging Party did not request Union representation before or during the March 8th meeting with her supervisor. After the meeting, however, she notified AFSCME of what had occurred and requested the Union's assistance. Two days later, the University convened another meeting to investigate Charging Party's work behavior. Moore attended the meeting, along with several Union representatives. At the conclusion of the meeting, the Employer announced that Charging Party's employment would be terminated.

In mid-March, the Union notified Charging Party that a separation agreement had been negotiated pursuant to which Moore would receive financial compensation. Charging Party rejected the terms of the proposed settlement. Thereafter, the Union filed a grievance with the Employer challenging Moore's termination and requesting that she be reinstated. In August or September of 2010, the Union sent Moore a letter informing her that its arbitration review committee had decided not to advance the grievance to arbitration. Although the letter included instructions on how to appeal the Union's decision, Charging Party took no further action with respect to the grievance.

Discussion and Conclusions of Law:

Accepting all of Moore's allegations as true, dismissal of the charges on summary disposition is warranted. In her response to the motions for summary disposition and at oral argument, Charging Party references several incidents and events which allegedly occurred well before the filing of the instant charge. For example, Moore repeatedly complains that University prevented her from returning to work in November of 2009. Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any 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 Comm Sch*, 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). As noted, Moore filed her charges against the University and AFSCME Local 2074 on August 10, 2010. Accordingly, any allegations pertaining to events occurring prior to March 10, 2010, are untimely under Section 16(a) of the Act.

Charging Party raises a myriad of allegations against the University pertaining to her termination from employment on March 10, 2010. Specifically Charging Party alleges that the decision was in retaliation for her long history of filing grievances under the collective bargaining agreement and she asserts that the Employer unlawfully disciplined her for attempting to contact her Union two days before she was fired. The elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. 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, 126 (1974); *City of Grand Rapids (Fire*

Dep't), 1998 MERC Lab Op 703, 707. Once the prima facie case is met, 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, 419. See also *MESPA v. Evart Pub Sch*, 125 Mich App 71 (1983).

In the instant case, neither the pleadings filed by Charging Party, nor her statements at oral argument, provide any factual basis which would support a finding that Moore engaged in protected activity for which she was subject to discrimination or retaliation in violation of PERA. Although Moore asserts that the Employer retaliated against her for filing grievances over the course of her employment with the University, she was unable to set forth any facts which, if true, would establish a causal connection between these activities and her termination in March of 2010. When asked at oral argument whether she has any evidence to support her belief that her termination was in response to the grievances, Moore responded by asking rhetorically, "What other reason could there be?" To infer anti-union animus based upon such an assertion would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*, and I decline to do so here. Charging Party's allegations of disparate treatment are similarly insufficient to establish a PERA violation. Although Charging Party contends that other employees were allowed to engage in the same conduct for which she was disciplined, she admitted at oral argument that she did not know whether any of the other employees had a similar disciplinary record at the time of the alleged misconduct.

Charging Party also failed to assert any facts from which hostility to her protected rights could reasonably be inferred. To the contrary, the undisputed facts establish that there was a history of work-related issues involving Moore for which she was repeatedly disciplined. Although Charging Party asserts that many of these incidents involved allegations which were "trumped up" by the University, she does not contest the fact these incidents are all documented within her personnel file and that they formed the basis for progressive discipline. There is also no material dispute of fact regarding the events immediately preceding her discharge. Charging Party does not deny that she failed or refused to provide the University with the additional medical documentation requested by the Employer when she returned from her leave of absence in February of 2010, nor does Moore contest the fact that she was absent from her workstation at the start of her shift on March 7, 2010. Although Charging Party disputes that she referred to her supervisor as a "low life" while walking out of a meeting on March 8, 2010, she admits to having used that pejorative to refer to management generally at the conclusion of the meeting. An employee alleging unlawful discrimination under PERA must establish initially that the adverse employment action taken against her was caused, at least in part, by her union or other protected activities and not simply that the employer's decision was unreasonable, unfair or made without just cause. In the instant case, Charging Party has not demonstrated that she is capable of meeting her burden of proving anti-union animus on the part of the University.

Charging Party's claim that she was unlawfully denied union representation during the March 8, 2010 meeting with her supervisor is insufficient to establish a violation of PERA. It is well-established under both the National Labor Relations Act (NLRA) and PERA that an employee has the right, upon request, to the presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to

discipline. *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 actually requests representation by the Union. *Grand Haven Bd 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, it is undisputed that Charging Party never asked the University to allow her to consult with AFSCME representatives at any time before or during the March 8, 2010. Moreover, it clear from the pleadings and Charging Party's statements on the record at oral argument that the meeting in question was not convened for the purpose of interrogation or investigation. Rather, it is apparent that Charging Party's supervisor called the meeting to follow-up on the Employer's request that Moore provide additional medical documentation pertaining to her leave of absence and, when Moore indicated that she was unable or unwilling to produce the information, the meeting immediately concluded and Moore was sent home. In essence, the meeting was held solely for the purpose of informing Charging Party of, and acting upon, a previously made personnel decision and, therefore, Moore had no right to union representation. In contrast, the meeting held two days later was, by all accounts, investigatory in nature and was attended by both Moore and various AFSCME representatives. Accordingly, Charging Party's assertion that the University violated her *Weingarten* rights fails to state a claim for which relief can be granted under PERA.

Similarly, Charging Party's contention that the Employer and the Union violated PERA by refusing to provide her with information fails to state a claim under the Act. It is true that public employers and labor organizations have a duty under PERA to supply relevant information to each other in a timely manner. See e.g. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Pub Schs*, 1995 MERC Lab Op 384, 387. This obligation is part and parcel of the general duty to bargain in good faith set forth in Section 15 of the Act. The Commission has consistently and repeatedly held that an individual bargaining unit member has no standing to assert a breach of the duty to collectively bargain, as such a claim can only be brought by a public employer or labor organization acting in its capacity as the employees' exclusive bargaining representative. See e.g. *City of Detroit (Bld & Safety Engineering)*, 1998 MERC Lab Op 359, 366; *Oakland Univ*, 1996 MERC Lap Op 338, 342-343; *Detroit Fire Dep't*, 1995 MERC Lab Op 604, 613-615; *AFSCME Council 25*, 1994 MERC Lab Op 195; *Detroit Pub Sch*, 1985 MERC Lab Op 789, 791-793; *Oakland County (Sheriff's Dep't)*, 1983 MERC Lab Op 538, 542, enf'd Mich App Docket No. 72277 (12-6-84). There is no duty on the part of an employer or union to provide individual members with specific information pertaining to their employment, nor does an employer or union have any obligation under PERA to disclose the existence of such information to a public employee.

With respect to AFSCME specifically, Charging Party repeatedly asserted, both in her pleadings and at oral argument, that the Union has, for many years, failed to take action on her behalf to protect her from harassment by the Employer. As noted, however, allegations pertaining to events occurring more than six months prior to the filing of the charge are untimely

under Section 16(a) of PERA. Accordingly, the gravamen of this dispute must be Charging Party's contention that AFSCME did not take appropriate action on her behalf following her termination on March 10, 2010. 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 Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. The Union's decision on how to proceed is not unlawful 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 mere 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. To prevail on a claim of unfair representation, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993).

Beyond the conclusory assertion that the Union was acting in collusion with the University, Charging Party has failed to set forth any factually supported allegation which would establish a breach of the duty of fair representation by AFSCME, nor was Charging Party able to describe with specificity how the conduct of the University violated the collective bargaining agreement. It is undisputed that AFSCME representatives attended the March 10, 2010 investigatory meeting, at the conclusion of which the Employer announced its decision to terminate Moore's employment. Thereafter, the Union negotiated a settlement agreement with the Employer pursuant to which Moore would have received financial compensation. After Charging Party rejected that agreement, the Union filed a grievance challenging Moore's termination and requesting reinstatement. In August or September of 2010, the Union sent Moore a letter informing her that it had decided not to advance the grievance to arbitration. Moore did not appeal that decision. Although she now takes exception to the representation she received from the Union, there is no factually supported allegation which, if true, would establish that AFSCME was hostile to Moore, that it treated her differently than other, similarly situated bargaining unit members or that it acted arbitrarily, discriminatorily or in bad faith in any respect in its dealings with Moore during the six months preceding the filing of the charge. Therefore, I conclude that the charge against the Union in Case No. CU10 H-037 must be dismissed for failure to state a claim upon which relief can be granted under PERA.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I hereby recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charges filed by Beverly Moore against Grand Valley State University and AFSCME Council 25, Local 2074 in Case Nos. C10 H-202 and CU10 H-037 respectively are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 10, 2012