STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN ASSOCIATION OF POLICE,
Labor Organization - Respondent,

Case No. CU10 L-047

-and-

THOMAS ASH,
An Individual - Charging Party.
____/

APPEARANCES:

Pierce, Duke, Farrell & Tafelski, P.L.C., by M. Catherine Farrell, for Respondent

Fixel Law Offices, P.L.L.C., by Joni M. Fixel, for Charging Party

DECISION AND ORDER

On January 27, 2012, Administrative Law Judge David Peltz 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

____
Nino E. Green, Commission Member

____
Christine A. Derdarian, Commission Member

Dated: ____________

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN ASSOCIATION OF POLICE,
Respondent-Labor Organization,

Case No. CU10 L-047

-and-

THOMAS ASH,
An Individual Charging Party.
_______________________________________/

APPEARANCES:

Fixel Law Offices, PLLC, by Joni M. Fixel, for Charging Party

Pierce, Duke, Farrell & Tafelski, PLC, by M. Catherine Farrell, for Respondent

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed by Thomas Ash on December 17, 2010 against the Michigan Association of Police ("MAP" or "the Union"). 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 charge was 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).

The Unfair Labor Practice Charge and Procedural Background:

The charge asserts that the Union breached its duty of fair representation by failing or refusing to challenge the applicability of an election of remedies clause upon which Charging Party's former employer was relying in seeking to block an arbitration proceeding pertaining to Ash. In an order issued on February 10, 2011, I directed Ash to show cause why the charge should not be dismissed for failure to state a claim under the Public Employment Relations Act (PERA). Charging Party filed a response to that order on March 2, 2011. Thereafter, the case was placed in adjourned without date status while counsel for MAP recuperated from an accident.

On November 20, 2011, MAP filed a reply to Charging Party's response brief. In its reply, Respondent asserts that it was Ash himself who triggered the election of remedies provision by filing a federal lawsuit to reclaim his job. The Union argues that it made a good faith decision to forgo the grievance arbitration procedure after reviewing case law on the issue of whether election of remedies provisions in collective bargaining agreements are enforceable and controlling. Respondent further asserts that Ash filed a similar duty of fair representation complaint against the Union in Livingston County Circuit Court. According to the Union, that complaint was later dismissed on substantive grounds.

Based upon a review of the pleadings in this matter, I determined that dismissal of the charge on summary disposition appeared to be warranted on the ground that it was Charging Party's filing of a complaint in federal court which triggered the contract's election of remedies provision. In addition, I noted that dismissal was likely appropriate based upon the doctrines of re judicata and/or collateral estoppel. Accordingly, in an order issued on December 1, 2011, I directed Charging Party to either withdraw the charge or file a supplemental brief addressing the issue of whether the circuit court's order required dismissal of the instant charge. Charging Party was specifically cautioned that a failure to timely respond to the order would result in dismissal of the charge without a hearing.

Charging Party's response was due by the close of business on December 21, 2010. No brief was received by my office, nor did Charging Party request an extension of time to file his supplemental pleading.

Finding of Facts:

The following facts are not in dispute. Charging Party was employed by the Livingston County Sheriff's Department as a police sergeant and was a member of a bargaining unit represented by MAP. The most recent collective bargaining agreement between the County and MAP covered the period January 1, 2008 to December 31, 2010. The contract contained an election of remedies clause which stated:

> When remedies are available for any complaint and/or grievance of an employee through any administrative or statutory scheme or procedure, in addition to the grievance procedure provided under this contract, and the employee elects to utilize the statutory or administrative remedy, the Union and the affected employee shall not process the complaint through and grievance procedure provided for in this contract. If an employee elects to use the grievance procedure provided for in this contract and, subsequently, elects to utilize the statutory or administrative remedies, then the grievance shall be deemed to have been withdrawn and the grievance procedure provided for hereunder shall not be applicable and any relief granted shall be forfeited.

The County terminated Charging Party's employment on January 27, 2010. A grievance was filed on Charging Party's behalf challenging the termination. The grievance proceeded through the various steps outlined in the collective bargaining agreement and, ultimately, an arbitration hearing was scheduled for August of 2010. Around that same time, Charging Party filed suit in federal district court asserting that the County had violated his rights under the U.S. Constitution. Thereafter, the Employer brought a complaint in Livingston County Circuit Court asserting that the election of remedies clause in the contract prohibited the Union from arbitrating Charging Party's termination.

On or about October 18, 2010, the Employer and the Union stipulated to the dismissal of the circuit court case with prejudice. According to Charging Party, MAP representatives had led Ash to believe that the circuit court case had merit and was proceeding when, in fact, it had been dismissed.

Charging Party contends that the Union's failure to advise him that he could withdraw the federal complaint and proceed to arbitration on the grievance was "arbitrary and capricious." In addition, Charging Party asserts that the Union's agreement to dismiss the case in Livingston County Circuit Court deprived him of the right to have his grievance heard before an arbitrator.

Discussion and Conclusions of Law:

The failure of a charging party to respond to an order to show cause may, in and of itself, warrant dismissal of the charge. *Detroit Federation of Teachers*, 21 MPER 3 (2008). In any event, accepting all of the allegations set forth by Ash as true, dismissal of the charge on summary disposition is warranted.

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. The Commission has repeatedly held that a lack of communication alone is insufficient to establish a breach of the duty of fair representation. See e.g. *Detroit Ass'n of Educational Office Employees, AFT Local 4168*, 1997 MERC Lab Op 475; *Technical, Professional and Officeworkers Ass'n of Michigan*, 1992 MERC Lab Op 117; *Southfield Schools Employees Ass'n*, 1981 MERC Lab Op 710.

Despite having been given a full and fair opportunity to do so, Charging Party has failed to set forth any factually supported allegation which, if true, would establish that the Union acted arbitrarily, discriminatorily or in bad faith in connection with this matter. The right to arbitration of a grievance flows from the collective bargaining agreement between an employer and a bargaining agent. *Grand Traverse Medical Care Facility*, 1993 MERC Lab Op 671, 675; *City of Ann Arbor*, 1993 MERC Lab Op 186, 191. In the instant case, the contract contains an election of remedies clause which provides that a grievance "shall be deemed to have been withdrawn" and the grievance procedure "shall not be applicable" if an employee elects to use the grievance procedure and subsequently elects to "any administrative or statutory scheme or procedure." Although adjudication of Charging Party's civil complaint and arbitration of his grievance are based upon different principles, "election of remedies" clauses in contracts have been upheld where the contract contains an express provision or the "most forceful evidence" of a purpose to exclude claims from arbitration. *City of Grand Rapids v Fraternal Order of Police*, 4415 Mich 628 (1982). See also See also *Kaleva-Norman-Dickson Sch Dist* v *Raleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 592-592, fn 12 (1975).

In the instant case, the election of remedies clause in the contract clearly expresses an intent on the part of the Employer and MAP to exclude claims from arbitration where another remedy has been pursued. Pursuant to this clause, Charging Party's grievance was considered to have been withdrawn and the

grievance arbitration procedure forfeited once Ash filed a complaint in federal court. It was Charging Party's own conduct which triggered the election of remedies clause, and there was nothing the Union could have done thereafter to revive the grievance even if Charging Party had withdrawn his federal court action. See e.g. *Ingham County*, 1993 MERC Lab Op 581 (refusal to bargain and breach of duty of fair representation charges dismissed where agreement contained election of remedies provision which terminated grievance proceedings when employee elected to pursue civil rights claim); See also *Kalamazoo County Educ Ass'n*, 1993 MERC Lab Op 850 (no exceptions). To the extent that the Union failed to timely communicate with Charging Party concerning the status of the grievance and other related proceedings, I find that he was not substantially prejudiced.

Although Charging Party now takes exception to the representation he received from the Union, there is no factually supported allegation which, if true, would establish that MAP was hostile to Ash, that it treated him 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 him. Therefore, I conclude that the charge against the Union must be dismissed for failure to state a claim upon which relief can be granted under PERA.

RECOMMENDED ORDER

The unfair labor practice charge filed by Thomas Ash against the Michigan Association of Police in Case No. CU10 L-047 is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 27, 2012