STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT FEDERATION OF TEACHERS,
Public Employer-Respondent,

-and-

Case No. CU13 G-032
Docket No. 13-008315-MERC

ATHENA MARSH,
An Individual-Charging Party.
_____/

APPEARANCES:

Sachs Waldman, P.C., by Mami Kato, for Respondent

Athena Marsh, appearing on her own behalf

DECISION AND ORDER

On January 23, 2014, Administrative Law Judge Julia C. Stern issued a 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

_____/s/_____
Edward D. Callaghan, Commission Chair

_____/s/_____
Robert S. LaBrant, Commission Member

_____/s/_____
Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT FEDERATION OF TEACHERS,
Respondent-Labor Organization,

Case No. CU13 G-032
Docket No. 13-008315-MERC

-and-

ATHENA MARSH,
An Individual-Charging Party.
_____/

APPEARANCES:

Sachs Waldman, by Mami Kato, for Respondent

Athena Marsh, appearing for herself

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On August 14, 2013, Athena Marsh, a teacher employed by the Detroit Public Schools (the Employer) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against her collective bargaining representative, the Detroit Federation of Teachers (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. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

On November 8, 2013, the Respondent Union filed a motion for summary dismissal of the charge based on Marsh's failure to state a claim or, in the alternative, for an order requiring Marsh to respond in writing to show why her charge should not be dismissed. On November 18, 2013, I sent Marsh a letter outlining what I believed her allegations against the Respondent to be and asking Marsh to answer certain questions about these allegations. The letter also directed Marsh to explain, in writing, the basis of her claim that the Respondent Union violated its duty to represent her and to specifically identify the Union's acts or failure to act which she asserted had harmed her. Marsh did not respond to this letter. On December 17, 2013, pursuant to my authority under Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, I issued an order to

Marsh to show cause why her charge should not be dismissed for failure to state a claim upon which relief could be granted under PERA. Marsh also failed to respond to the order.

Based on the facts set out in Marsh's charge and outlined below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Marsh alleges that the Respondent Union violated its duty of fair representation toward her after she sought its assistance with a variety of problems, including problems with her principal. She asserts that the Union showed hostility toward her and failed to act in good faith and honesty. She also asserts that the Respondent acted negligently in failing to make a record of a grievance she filed and that it then attempted to cover up its negligence by denying that it had received a copy of the grievance.

Facts:

As noted above, Marsh is employed by the Detroit Public Schools (the Employer) as a teacher. In early 2013, Marsh sought help from Union representatives for a number of employment-related problems. After speaking several times with her building representative, Marsh decided to ask for a meeting with Union Vice-President Edna Reaves. On or about March 27, 2013, Marsh sent Reaves an email complaining about being assigned to teach a class in a subject in which she was not certified. She also complained about missing a lunch period, about the lack of supplies in her classroom, and about other issues not specified in the charge. When Marsh did not receive a reply, she resent the email on April 6, 2013. Reaves replied to the April 6 email the same day, telling Marsh that she had left Marsh a voicemail message. However, Marsh had not received a voicemail message from Reaves. On April 8, Marsh and Reaves had a conversation during which, according to Marsh, Reaves tried to make it appear that it was Marsh's fault that a meeting had not yet been scheduled between them. Marsh was given an appointment to meet with Reaves at the Union's offices on April 12.

Among the issues Marsh wanted to discuss with Reeves was the conduct of Marsh's principal. Marsh brought a file of memos, emails and other documents to the April 12 meeting to support her claim that the principal was harassing her, but Reaves did not look at the documents. After listening to Marsh, Reaves told Marsh that most of the things she had mentioned were not contractual issues and that the Union could not do anything about them. Reaves said that a grievance could have been filed over the missed lunch period, but that it was now too late to file a grievance over that issue. Marsh asked Reaves about the lack of supplies, and Reaves gave her a section of the contract to cite if she wanted to file a grievance over this issue. Marsh and Reaves also discussed Marsh's written classroom evaluation, and Marsh told Reaves that the evaluation was performed three days after she was placed in a class that she was not certified to teach. Reaves told Marsh that Marsh could file a grievance over being assigned to teach a subject for which

she was not certified. Reaves did not mention to Marsh that she could or should submit a written rebuttal to the evaluation. She did, either during this meeting or sometime later, tell Marsh that evaluations were "nonnegotiable."[1] Marsh asked Reaves to prepare the grievance for her, but Reaves told her that members write their own grievances at step one of the grievance procedure. Marsh also asked Reaves how she was going to give the grievance to her principal, since Marsh was on Family Medical Leave Act (FMLA) leave at the time. Reaves told her to give it to the principal when she returned from leave.

About her meeting with Reaves, Marsh states:

> Why couldn't she talk to the district about all of my previous concerns instead of saying they are not contractual issues? I desperately wanted to meet with her to try to get relief from all the evil things that the principal was doing. This person literally was trying to ruin my career based on lies and "harassment." When I finally did, she would not lift a finger to try to help me. I told her everything from based on a 10 minutes observation of independent practice in my classroom, she concluded in writing that I misrepresented myself in my interview and could not teach (she had a personal vendetta against me from the start) to the principal called the police on me and I did nothing wrong.

Marsh obtained a grievance form and, sometime later, filled it out. It is not clear from the charge what subjects were covered by the grievance. According to Marsh, she and another teacher tried unsuccessfully to find the section in the contract which Reaves had given Marsh that allegedly covered the lack of supplies. The grievance does appear to have included a complaint about the unfairness of Marsh's evaluation. Since Marsh had not yet returned to work from her FMLA leave, she gave the grievance to someone else to give to the principal on June 14, 2013. Marsh also emailed a copy of the grievance to Reaves on June 19, and brought a copy of the grievance to the Union's offices on June 20.

Reaves claimed that she never received a copy of the grievance. It is not clear from the charge whether the Employer acknowledged receiving it. On July 16, 2013, Union President Keith Johnson called Marsh, "interrogated her," and told her that "because of the way [Marsh] handled the situation," the Union would not be proceeding to step two with her grievance.

About the Union's refusal to proceed with the grievance, Marsh states:

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[1] Section 15(3)(l) of PERA makes the following a prohibited subject of bargaining between a public school employer and the unions representing its teachers:

Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.

> The union notified me that they would not be proceeding with step 2 of the grievance and I still don't understand why. They fail to realize that I was ill through this whole mess and that despite that, I did what they asked me to do. They also fail to realize that no other evaluations were done after I met with Edna. I also told her that an evaluation was done on me three days after I got placed in the class that I was not certified to teach.

Marsh did not explain in her charge whether she knew what Johnson meant when he said the Union was not proceeding with the grievance because of the way she handled the situation. Nor did she explain what she meant by "interrogation." In my November 18, 2013 letter to her, I asked Marsh to indicate whether Johnson gave her any additional explanation of why the Union was not proceeding with the grievance. I also asked her to clarify whether she was alleging that the Union had misplaced the grievance or, if so, that this had anything to do with the Union's decision not to take the grievance to the next step. As noted above, Marsh did not respond to my letter or to my December 17, 2013 order to show cause.

According to Marsh, she had a number of email exchanges and/or conversations with Reaves between June 20 and the date she filed the charge. Sometime during this period, or earlier, Reaves told Marsh that "evaluations are nonnegotiable." However, she told Marsh that she could talk to the Employer about Marsh's evaluation if Marsh provided her with a written rebuttal. On July 16, 2013, Reaves sent Marsh an email stating that Reaves had spoken to the Employer. However, on July 31, 2013, she sent Marsh another email stating she had not spoken to the Employer.

Discussion and Conclusions of Law:

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty 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. *Goolsby v Detroit*, 419 Mich 651,679(1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967).

A union acts in bad faith when it "acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Merritt v International Ass'n of Machinists and Aerospace Workers,* 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass'n-Int'l,* 156 F3d 120, 126 (CA 2, 1998). "Arbitrary" conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682. A union violates its duty of fair representation if it acts with reckless disregard for the interests of its members. For example, a union's unexplained failure to meet a time deadline for processing a grievance was held to constitute a breach

of its duty when this failure resulted in the dismissal of the grievance in *Goolsby*. However, as long as it acts in good faith, a union has considerable discretion to decide how or whether to proceed with a grievance, and is permitted to assess each grievance with a view to its individual merit and to weigh the cost of arbitrating the grievance against the likelihood of a successful outcome. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A union's decision to proceed or not proceed with a grievance is not considered arbitrary if it is within a broad range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991). That is, if a union makes a good faith, reasoned decision that a grievance is not worth pursuing, the Commission and courts do not substitute their judgment for that of the union. The fact that an individual member is dissatisfied with the union's efforts does not indicate that the union has breached its duty of fair representation. *Eaton Rapids EA*, *supra*.

In this case, Marsh did not respond to my directive to specifically identify the Union's acts or failure to act which she asserts harmed her. Where a charge fails to state a claim under the Act, it is subject to dismissal pursuant to an order to show cause issued under R 423.165. The failure to respond to such an order may, in itself, warrant dismissal. *Detroit Federation of Teachers*, 21 MPER 3 (2008).

Marsh appears to allege that the Union violated its duty of fair representation by refusing to take the grievance she filed on June 14, 2013 to the next step of the grievance procedure. As noted above, she also states in her charge that the Union attempted to "cover up its negligence." As discussed above, "arbitrary" conduct in the context of the duty of fair representation includes a union's gross negligence or reckless disregard for the interest of its members. As the Court held in *Goolsby*, a union's inexplicable failure to comply with grievance time limits, resulting in the denial of the grievance, constitutes a violation of its duty of fair representation under PERA. According to the facts as alleged in Marsh's charge, on or about June 14, 2013 she filed a grievance with the Employer, or had someone else file it for her. According to Marsh, the Union later claimed, falsely, that she did not provide the Union with a copy of the grievance. It also told Marsh that it would not take her grievance to the next step of the grievance procedure. However, Marsh's charge, as filed, does not offer any factual support for a claim that there was a connection between the Union's refusal to acknowledge receiving a copy of the grievance and its decision not to take the grievance further. I find that the charge does not state a claim with respect to the Union's handling of this grievance.

In addition to asserting that the Union had an obligation to take her June 14 grievance to the next step, Marsh appears to assert that Reaves had a duty to meet with the Employer about Marsh's concerns after their April 12, 2013 meeting, even if these concerns did not involve contractual violations and could not be grieved. As noted above, however, a union has broad discretion to decide how to handle a grievance and whether to proceed with it, as long as it exercises this discretion in good faith and is not discriminatory. This includes, I find, the discretion to decide whether to approach the employer informally to attempt to resolve a matter that is not grievable under the contract. I find that Marsh's claim that the Union violated its legal duty of fair

representation by failing to meet with the Employer to discuss her nongrievable concerns does not state a claim under PERA.

Marsh also appears to allege that the Union violated its duty of fair representation by what she asserts was Reaves' dishonest behavior. That is, Marsh alleges that Reaves covered up her failure to respond to Marsh's March 27, 2013 email requesting a meeting by claiming that she had left Marsh a voicemail. She also alleges that Reaves refused to acknowledge that she had received a copy of Marsh's June 14 grievance. Finally, she alleges that Reaves made contradictory statements regarding whether she had spoken with Marsh's principal. Marsh, however, did not explain how any of the behavior she cites caused her an actual injury. She also complains that the Union was unknowledgeable, argumentative, unsympathetic and made her feel as if she had done something wrong by contacting it and asking questions, but fails to explain how this lack of knowledge or sympathy injured – as opposed to annoyed – her. I conclude that these complaints also fail to state a claim for a breach of the Union's duty of fair representation under PERA. As I conclude that Marsh has failed to state any claim against the Union upon which relief could be granted under PERA. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 23, 2014