STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UTICA COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C12 I-171
-and- Docket No. 12-001556-MERC

UTICA EDUCATION ASSOCIATION,
Labor Organization-Respondent,

Case No. CU12 I-037
-and- Docket No. 12-001557-MERC

LAWANDA PARKER,
An Individual-Charging Party.
_____/

APPEARANCES:

Lusk & Albertson, PLC, by Robert Thomas Schindler, for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee, for the Labor Organization

Lawanda Parker, appearing on her own behalf

DECISION AND ORDER

On January 29, 2014, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the charges against Respondents, Utica Community Schools (Employer) and Utica Education Association (Union), did not state claims upon which relief can be granted under § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ concluded that Charging Party failed to set forth sufficient factual allegations to establish a prima facie case of unlawful discrimination or retaliation by the Employer; nor did she suffer any adverse employment action that would constitute a PERA violation. The ALJ also concluded that Charging Party failed to set forth any factually supported claim indicating a breach of the duty of fair representation against the Union. The ALJ found that the charge failed to describe with specificity how the Employer violated the collective bargaining agreement in assembling a grade change review panel regarding a student's protest of a grade given by Charging Party. The ALJ further found that the charge failed to allege that the Union acted arbitrarily, discriminatorily or in bad faith in its dealings with Charging Party. The ALJ recommended dismissal of the unfair labor practice charges against both Respondents in their entirety. The Decision and

Recommended Order on Summary Disposition was served on the parties in accordance with § 16 of PERA.

On February 21, 2014, Charging Party filed Exceptions to the ALJ's Decision and Recommended Order on Summary Disposition, excepting solely to the ALJ's findings with respect to the charge against the Union. On February 27, 2014, the Union filed a response to Charging Party's exceptions and requested oral argument. On March 10, 2014, Charging Party filed a reply to the Union's response to her exceptions. The Union did not file objections to Charging Party's reply to its response to the exceptions. The Commission Rules do not provide for the filing of a reply to the response to exceptions. Inasmuch as the Union did not object to the filing of a reply, the Commission has considered Charging Party's reply in reaching its decision.

In her exceptions, Charging Party argues that the ALJ failed to provide her with a full and fair hearing. Additionally, Charging Party argues that the ALJ erred by failing to conclude that the Union breached its duty of fair representation when it failed to provide Charging Party with the names of the bargaining unit members who sat on the review panel and with the documents submitted to the panel for its consideration.

In its response to Charging Party's exceptions, the Union contends that Charging Party's exceptions fail to comply with Rule 176, of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R423.176. The Union argues that the ALJ's decision was based on the applicable law and should be affirmed.

After reviewing the exceptions and the Union's response to the exceptions, we find that oral argument would not materially assist us in deciding this case. Therefore, the Union's request for oral argument is denied.

Because Charging Party did not file exceptions to the ALJ decision in Case No. C12 I-171 against the Employer, we adopt the ALJ's findings of fact and conclusions of law as to that case and dismiss the unfair labor practice charge against the Employer in its entirety.

We have reviewed Charging Party's exceptions in Case No. CU 12 I-037 and find them to be without merit.

Factual Summary:

We adopt the facts as found by the ALJ since this matter is being decided on Summary Disposition. We agree with the ALJ that there are no material facts at issue.

Charging Party has been a teacher in Respondent Utica Community Schools since 1975 and is a member of a bargaining unit represented by Respondent Union. On January 31, 2012, Nanette Chesney, the principal of Charging Party's school, received a written complaint from a parent concerning a failing grade issued by Charging Party to one of her students. After discussions with Charging Party, Chesney informed her that the school district would convene a grade change review panel unless Charging Party either changed the grade or granted the

Employer permission in writing to make the change. The panel would be convened pursuant to school district Policy 5500, quoted at length in the ALJ decision.[1]

A panel was convened to review the grade change request on March 5, 2012. The composition of the panel was dictated by Policy 5500 and it was composed of three teachers selected by the Union, one school board member, and Michael Bender, Executive Administrator of Schools (designee of the Superintendent of Schools). The panel reviewed documents, deliberated, and changed the grade from an E to a D. Charging Party was not allowed to participate in the meeting or review the documents relied upon by the panel, which was also consistent with the policy.

Charging Party appealed the panel's decision and the matter was placed on the agenda for the April 23, 2012 school board meeting. Charging Party was invited to attend the meeting and address the school board. Upon learning that the case file would be shared with the board, Charging Party attempted to withdraw her appeal. She thought, perhaps incorrectly, that if she were not present, it would be unfair for the school board to hear the appeal and the board would not proceed. Bender told Charging Party he would inform the Superintendent that she wished to withdraw her appeal.

The school board did not withdraw the appeal and the matter was considered during closed session at the April 23, 2012 meeting. After deliberating its decision in closed session, the board again opened the meeting to the public and issued a resolution affirming the panel's decision. During the open portion of the meeting, which was televised on local public access television, Charging Party's name was mentioned but the case file was not read and no details of the parent's complaint were disclosed. Charging Party did not attend the meeting.

The Union filed a grievance on Charging Party's behalf challenging the actions of the review panel.[2] The Union refused to provide Charging Party, upon request, with the names of the teachers who sat on the review panel and with the documents considered by both the panel and the school board.

Discussion and Conclusions of Law:

The Union contends, in its response to Charging Party's exceptions, that the exceptions do not comply with Rule 176 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R423.176 and argues that the exceptions should be dismissed on that basis. While it is true that Charging Party's exceptions do not strictly comply with the requirements of Rule 176, we will consider them to the extent that we are able to discern the issues on which Charging Party is requesting our review.[3] *City of Detroit*, 21 MPER 39 (2008); *Gov't Administrators Assn*, 22 MPER 61 (2009). We are able to discern the issues raised by Charging Party in her exceptions and decline the Union's request to dismiss the exceptions on the ground that they are not in compliance with Rule 176.

[1] We discuss relevant sections from the policy in our analysis below.
[2] The grievance was pending on the date of oral argument on the summary disposition motions.
[3] That these submissions were not rejected for failure to comply with our Rules should not be viewed as an indication that we will accept such submissions in the future.

Charging Party claims that she was denied a full and fair evidentiary hearing because she misunderstood the nature of the oral argument on the Employer's and Union's Motions for Summary Disposition. The Union replies that her misunderstanding of the purpose of oral argument is not a valid exception to the ALJ's Decision and Recommended Order on Summary Disposition. We agree. A reading of the transcript of the oral argument reveals that ALJ Peltz carefully explained the nature and purpose of the proceeding and informed Charging Party that only if he did not decide the issue based on the motions would there be an evidentiary hearing at which Charging Party could call witnesses and introduce documentary evidence. ALJ Peltz was careful to explain that the oral argument did not include witness testimony and the submission of exhibits.[4] In *Eaton Rapids Educ Ass'n*, 2001 MERC Lab Op 131, the Commission stated that "[u]nder *Smith v Lansing School Dist*, 428 Mich 248 (1987), summary disposition in administrative proceedings is appropriate where no material facts are at issue; a charging party must simply be afforded opportunity to present oral and written arguments opposing summary disposition." Charging Party filed responses to two of Respondents' three Motions for Summary Disposition and she was permitted two hours for oral argument on all of the motions. Therefore, she was afforded ample opportunity to present both oral and written arguments. Accordingly, she was not denied a full and fair evidentiary hearing; she simply did not present disputed material facts to demonstrate the need for an evidentiary hearing.

Charging Party also takes issue with the ALJ's finding that she did not allege facts which support an allegation that the union acted unlawfully when it selected other bargaining unit members to serve on the grade change review panel and failed to ensure that the process was conducted fairly. 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). A union has considerable discretion in deciding 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 is not required to follow the dictates of any individual employee, but may instead investigate and handle the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. 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. 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 Ass'n*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855. To prevail on a claim of unfair representation on a grievance handling matter, 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.

[4] In addition, the ALJ's order setting the case for oral argument states that "[t]he parties should bear in mind that this will not be a full evidentiary hearing. No witnesses will be permitted to testify." Also, ALJ Peltz sent an email to the parties on November 20, 2012, where he explained that "the hearing on November 26, 2012 will be for the sole purpose of conducting oral argument. As indicated in my prior order to the parties, no witnesses will be called and no evidence will be taken at this hearing."

Goolsby v Detroit, 211 Mich App 214 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480 (1993).

We agree with the ALJ that Charging Party failed to set forth any facts in support of her allegations which would establish a breach of the duty of fair representation; nor did she state how the conduct of the Employer violated the collective bargaining agreement. The grade change review panel was convened pursuant to a policy which expressly states that the panel must be comprised, in part, of three teachers selected by the Union. The ALJ is correct that, consistent with the policy, the Union could not have prevented the participation of teachers on the panel. Charging Party has not identified any action taken by the teachers on the panel, or by the full panel, which was improper or contrary to Policy 5500. While Charging Party takes exception to the representation she received from the Union, the ALJ is correct that she has failed to allege facts which, if true, would establish that the Union was hostile to Charging Party, treated her differently than other, similarly situated bargaining unit members, or that it acted arbitrarily, discriminatorily or in bad faith in connection with the grade change matter.

Charging Party also takes exception to the ALJ's finding that the Union's refusal to provide her with the names of the teachers who sat on the panel and copies of the documents provided to the panel and to the school board failed to state a claim upon which relief can be granted. However, the ALJ was correct. While public employers and labor organizations have a duty under PERA to supply relevant information to each other in a timely manner, "there is no corresponding duty on the part of a union to provide individual members with specific information pertaining to their employment, nor does the union have any legal obligation to disclose the existence of such information to its members." *Mich Educ Ass'n*, 22 MPER 85 (2009).

We have carefully examined all other issues raised by Charging Party in her exceptions and find they would not change the result. We, therefore, affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charges in both of these cases and accordingly issue the following Order:

ORDER

The unfair labor practice charges are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 14, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UTICA COMMUNITY SCHOOLS,
Respondent-Public Employer in Case No. C12 I-171; Docket No. 12-001556-MERC,

-and-

UTICA EDUCATION ASSOCIATION,
Respondent-Labor Organization in Case No. CU12 I-037; Docket No. 12-001557-MERC,

-and-

LAWANDA PARKER,
An Individual Charging Party.
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APPEARANCES:

Lusk & Albertson, PLC, by Robert Thomas Schindler, for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee and Megan R. McGown, for the Labor Organization

Lawanda Parker, appearing on her own behalf

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

This case arises from unfair labor practice charges filed on September 4, 2012 by Lawanda Parker against her employer, Utica Community Schools, and her labor organization, Utica Education Association (UEA). 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:

Parker has previously filed charges against both Utica Community Schools and the Utica Education Association. In Case Nos. C99 L-234 and CU99 L-049, Parker alleged that the school district violated the collective bargaining agreement by refusing to post a vacant position for bid in August of 1999, and that the UEA violated its duty of fair representation with respect to its

handling of a grievance arising from Parker's desire to transfer from her position as a junior high social studies teacher to a position as an instrumental music instructor. Parker subsequently amended her charge against the Union to include a claim that the UEA discriminated against her in handling her grievance because of previous disputes between Parker and Union officers. On July 31, 2000, ALJ Julia C. Stern issued an order dismissing both of the charges. Stern concluded that Parker's breach of contract allegation against the Employer did not state a claim under PERA. With respect to the duty of fair representation claim, the ALJ found no evidence that the UEA had acted arbitrarily in investigating Parker's grievance and concluded that the Union had made a reasoned, good faith decision not to take the grievance to arbitration. When no exceptions were filed, the Commission issued an order adopting the ALJ's decision on September 7, 2000. See *Utica Cmty Sch*, 13 MPER 31 (2000).

On December 8, 2004, Parker and the UEA filed an unfair labor practice charge against the Utica Community Schools in Case No. C04 L-320, alleging that the school district retaliated against Parker in violation of Sections 10(1)(a) and (c) of PERA by eliminating her extracurricular assignment and her position as high school assistant band director in retaliation for her union activity. Following a hearing, ALJ Stern concluded that the Charging Parties had established that Robert Van Camp, who was the principle of Eisenhower High School at the time, harbored anti-union animus toward Parker due to her having complained about a class size problem at the high school during the 2003-2004 school year. The ALJ found that this animus was at least a motivating factor in Van Camp's decision to eliminate the assistant band director assignment and extracurricular position. In reaching this conclusion, the ALJ relied upon the fact that only four months had passed between when Parker first raised the issue with Van Camp and the time that Parker's assistant band director assignment and extracurricular position were eliminated. As a remedy, the ALJ ordered the school district to cease and desist from discriminating against Parker because of her union activity, reinstate Parker's assistant band director position and extracurricular assignment and make her whole for monetary losses she suffered as a result of the Employer's conduct. On October 16, 2007, the Commission issued an order affirming the ALJ's decision in its entirety.

The Instant Charges and Procedural History:

The charges in this matter stem from a decision by the Employer to convene a panel in March of 2012 to review a class grade given by Parker to one of her students. The charge in Case No. C12 I-171; Docket No. 12-001556-MERC asserts that the Employer's decision to assemble the grade change review panel was in retaliation for Parker's actions as a "union activist" and in response to her having filed numerous grievances against the principal of her school. In addition, the charge asserts that the Employer discriminated against Parker for having prevailed against the school district in the 2004 unfair labor practice proceeding referenced above. In Case No. CU12 I-037; Docket No. 12-001557-MERC, the charge asserts that the UEA breached its duty of fair representation under PERA by working with management throughout the grade change process and by failing to ensure that the procedure was conducted fairly. In addition, the charge asserts that the Union refused to provide Parker with information concerning the actions of the grade change review panel. As a remedy, Parker requests that the Commission order the school district to retract the negative comments that were purportedly made about her and to provide accurate information to UEA members who were privy to the allegedly defamatory information

disseminated by the Employer. In addition, Parker seeks compensation for her time spent appearing on the record in this matter, as well as an order requiring the Employer to resolve a number of pending grievances which allegedly relate to management's treatment of staff members.

On October 24, 2012, the Union moved to dismiss the charge in Case No. CU12 I-037; Docket No. 12-001557-MERC on the ground that the charge form filed by Parker failed to specifically identify the UEA as the Respondent-Labor Organization. In an order issued on October 25, 2012, I concluded that the case had been properly captioned as a charge against the UEA and denied the Union's motion.

On November 2, 2012, Utica Community Schools filed a motion for summary disposition in Case No. C12 I-171; Docket No. 12-001556-MERC, asserting that Charging Party had failed to state a claim against the Employer upon which relief can be granted under PERA. The school district asserted that there were no facts alleged by Parker which demonstrated an adverse employment action, union animus or hostility or any causal connection between Parker's protected concerted activities and the actions of the Employer. According to the school district, the grade change incident was handled pursuant to the Employer's established policies and Charging Party's protected activity had no bearing on the district's actions with respect to Parker. The Employer's motion was supported by various documents, including sworn affidavits from the principal of the school to which Parker was assigned and the school district's executive administrator.

Charging Party filed a brief in opposition to the Employer's motion on November 9, 2012. The school district filed a reply to Parker's response on November 19, 2012.

On November 20, 2012, the UEA filed a second motion for summary disposition, this time asserting that dismissal was warranted because Parker had not presented any facts to establish that the Union's actions were arbitrary, discriminatory or in bad faith. The Union contends that the grade change review panel was convened by the school district, not the UEA, as a result of a parent complaint regarding a failing grade and the process was conducted in accordance with the Employer's published policies. Oral argument was held before the undersigned on November 26, 2012.

Facts:

The following facts are derived from the pleadings and the assertions of the parties at oral argument, with all factual allegations set forth by Charging Party accepted as true for purposes of the motions for summary disposition. Lawanda Parker has been employed by Utica Community Schools as a teacher since 1975 and is a member of a bargaining unit represented by the Utica Education Association. Parker has held Union positions throughout most of her tenure with the school district. She is currently building representative at Eisenhower High School. In that capacity, Parker filed thirteen grievances during the fifteen months preceding the events giving rise to the instant charges. The Union prevailed on three of those grievances; the remaining ten grievances were still being processed at the time of the oral argument in this matter.

On September 26, 1994, the school district adopted Policy 5500 concerning requests by students or parents for grade changes. The policy, which was revised by the district on June 11, 2007, provides, in pertinent part:

> The proponent of a grade change must submit a request for a grade change to the principal in writing setting forth the reasons for the grade change within 30 days after the student received the grade.
>
> The Board of Education shall not permit any board member, Superintendent, Assistant Superintendent, principal, assistant principal, guidance director, teacher or any other person to change a grade given to a pupil by a teacher unless the teacher who gave the grade to the pupil is informed of one or more reasons why the grade should be changed and the teacher concurs in the grade change.
>
> If the teacher who gave the grade does not concur in the grade change proposed, the principal of the school, after consulting with the teacher who gave the grade and the proponent of the grade change may cause a review panel to convene to consider a grade change.
>
> If the principal decides to cause the review panel to convene, he or she shall do so not later than 30 days after he or she receives the written request for the proposed grade change.
>
> A notice shall be filed with the Board of Education.
>
> - The review panel considering a grade change shall be composed of:
> - Three teachers selected by the bargaining unit
> - One board member selected by the Board
> - Superintendent or Superintendent's designee
>
> If a member of the review panel is involved in a proposed grade change, that member will be replaced on the review panel by an alternate. The person who causes the review panel to convene shall not serve as a member of the review panel.
>
> The review panel shall meet to consider the proposed grade change within 20 days after the notice is filed with the Board.
>
> The review panel shall not approve a proposed grade change, or approve a proposed grade change as modified by the review panel, unless the review panel finds that the proponent of the grade change has met the burden of establishing there was no rational basis for the challenged grade under the teacher's established grading procedures.

> After evaluating the reasons for the proposed grade changes, the review panel, by a majority of its members, may approve, disapprove, or modify the proposed grade change.
>
> The teacher who gave the grade or the proponent of the grade change may appeal the decision of the review panel to the board no later than 30 days after the date of the decision.
>
> The board shall consider the appeal at a meeting of the board at which the reasons for and against the proposed grade change are reviewed. The board, by a majority of the board members elected and serving, may approve or disapprove the decision of the review panel. The decision of the board on whether or not the grade is to be changed is final.
>
> If there is not timely appeal, the decision of the review panel is final.

On January 31, 2012, Nanette Chesney, the principal of Eisenhower High School, received a written complaint from a parent concerning a failing grade issued by Parker to one of her 10th grade history students. In the letter, the parent made numerous allegations concerning Parker, including a claim that Parker was verbally threatening toward both the parent and student and that Parker had disregarded the student's confidentiality. Chesney discussed the complaint with Parker on several occasions, beginning with a meeting on February 7, 2012. Chesney informed Parker that the school district would convene a grade change review panel pursuant to Policy 5500 unless Parker either changed the grade herself or granted the Employer permission in writing to make the change on her behalf.

Parker took the position that as principal, Chesney had the authority to unilaterally change the grade without her involvement. In an email to Chesney dated February 9, 2012, Parker wrote, "Article 8(b)(7) [of the collective bargaining agreement] is not congruent to the premise or procedure you are working under. Actually, this cited contract provision gives you the right to change the grade. The teacher is provided a meeting, but you would not violate our contract by deciding to change the grade yourself." At oral argument, Parker characterized her email as meaning that it was Chesney's decision whether to change the grade and that she didn't care to involve herself in the process. Parker asserts that she was simply waiting for the school district to inform her of its decision.

On March 5, 2012, a five-person panel met for the purpose of reviewing the grade change request involving Parker. The panel consisted of three teachers selected by the UEA, a school board member, and Michael Bender, Executive Administrator of Schools, as the Superintendent's designee. The panel reviewed various documents, including the parent complaint which first gave rise to the grade change request and records concerning the student's performance in Parker's class. Following deliberations, the panel decided to change the student's grade from an E to a D. Parker was not allowed to participate in the meeting or review the documentation relied upon by the panel. At oral argument, Parker asserted that this was the only instance of which she was aware in which a grade change review panel was convened since the school district first promulgated Policy 5500 in 1994.

Parker initially appealed the decision of the grade change review panel and the matter was scheduled to be heard by the school board at its public meeting on April 23, 2012. Parker was invited to attend the meeting and address the Board. However, when she learned that the case file would be shared with the board members, she attempted to withdraw the appeal. In an email to Bender on either April 19th or April 23rd, Parker wrote, "In my absence it would not be fair to me for the Board to hear the appeal, so you have also forced me to withdraw the Board hearing of the appeal." In response, Bender promised to convey Parker's decision to the Superintendent.

Despite Parker's apparent attempt to withdraw the appeal, the school board considered the matter during closed session at its April 23, 2012 meeting. After reviewing the relevant documentation, the board moved to open session and issued a resolution affirming the panel's decision to change the grade. During that portion of the meeting, which was televised, Parker's name was mentioned; however, the case file was not read publicly and none of the details of the parent's complaint regarding Parker were disclosed. Parker did not attend the meeting.

The UEA filed a grievance on Parker's behalf concerning the grade change process. In addition, Parker filed two grievances on her own challenging the school district's handling of the grade change request. All three grievances were being held in abeyance at the time of the oral argument in this matter.

Discussion and Conclusions of Law:

Charging Party contends that the school district's decision to convene a grade change review panel was both unprecedented and unnecessary given that she had already agreed to change the student's grade. In addition, Parker asserts that management disseminated false information concerning Parker during the grade change review process which attacked her integrity and professionalism. According to Parker, the Employer's actions were in retaliation for her protected concerted activities, including her having filed thirteen grievances against the school district during the fifteen-month period immediately preceding the events giving rise to the charges. Parker also relies upon the fact that she earlier prevailed on an unfair labor practice charge filed in 2004, a case in which the Commission found that the principal at the time had eliminated Parker's extracurricular assignment and her position as high school assistant band director in retaliation for her union activity. With respect to the UEA, Parker contends that the Union breached its duty of fair representation under PERA by selecting unit members to sit on the panel and by failing to ensure that the panel was conducted fairly. Finally, Parker asserts that both the school district and the UEA violated the Act by failing or refusing to provide her with information pertaining to the grade change process.

Accepting all of Parker's factual allegations as true, dismissal of the charges on summary disposition is warranted. Section 10(1)(c) of PERA prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. The elements of a prima facie case of unlawful discrimination under the Act are, in addition to the existence of an adverse employment action: (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. *Huron Valley Sch*, 26 MPER 16 (2012)*; 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.

Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). See also *City of St. Clair Shores*, 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA, supra*.

In the instant case, the record establishes that Charging Party engaged in protected activity of which the Employer was aware when she filed grievances in her capacity as building representative at Eisenhower High School. Nevertheless, I find that Parker has failed to set forth any factually specific allegations which, if true, would prove the remaining elements necessary to establish a prima facie case of unlawful discrimination under PERA. Based upon the undisputed facts, it is clear that the school district acted in substantial accordance with Policy 5500 which was first promulgated in 1994 and revised in 2007. The policy gives the principal the discretion to determine whether to convene a grade change panel if the teacher who gave the grade does not concur in the proposed change. Parker claims that she agreed to the grade change in an email to Chesney dated February 9, 2012, thereby obviating the need for a grade review panel to be assembled. In that email, however, Parker did not explicitly agree that the student's grade should be changed or grant the school district permission to change the grade on her behalf. She merely expressed the position that it would not be a violation of the collective bargaining agreement for Chesney to change the grade herself. In fact, during the oral argument in this matter, Parker admitted that she considered it to be entirely up to Chesney whether to change the grade and that she "did not care" one way or the other. Under these circumstances, I find that Chesney's decision to proceed with the grade change review panel does not establish anti-union animus on the part of the school district.

Although Charging Party claims that she is personally unaware of any other instance in which the school district convened a grade change review panel since Policy 5500 was adopted, she did not set forth any specific facts which would establish that the Employer treated her or any another employee differently under the same or substantially similar circumstances. In fact, Parker acknowledged during oral argument the general principle that "any parent appeal [of a student grade] is a right and must be provided."

As proof that the school district's decision to convene the grade change review panel was unlawful, Parker cites the 2007 decision in which the Commission concluded that Utica Community Schools had eliminated Parker's extracurricular assignment and her position as high

school assistant band director in retaliation for her union activity. See *Utica Community Schools*, 20 MPER 104 (2007). Parker asserts that the prior case establishes animus on the part of the school district and that the Employer's actions in this matter constitute an independent violation of Section 10(1)(d) of PERA, which prohibits a public employer from discriminating against an employee because she has given testimony or instituted proceedings under the Act. The prior Commission decision, however, pertained to events which occurred in 2004 and involved considerably different circumstances. Notably, the individual who was found by MERC to have engaged in discriminatory conduct, Robert Van Camp, was no longer principal at Parker's school in 2012 at the time the grade change request was received and when the grade change panel assembled. Under such circumstances, I find that the prior case does not establish the requisite anti-union animus necessary to prove a violation of Section 10(1)(c) of PERA and that Parker's testimony in connection with that proceeding cannot, on these facts, establish a valid claim under Section 10(1)(d) of the Act.

It is true that Parker engaged in protected concerted activity more recently by filing a series of grievances against the school district during the period immediately preceding the filing of the charges. The Commission has recognized that the timing of the adverse employment action in relation to the employee's union activity may be circumstantial evidence of unlawful motive, and the closer the employer's action follows upon its learning of the union activity, the stronger that evidence becomes. *Mid-Michigan Comm Coll*, 26 MPER 4 (2012) (no exceptions). However, it is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. As the Commission stated in *Southfield Public Schools*, 22 MPER 26 (2009), "[a] temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation." See also *University of Michigan*, 1990 MERC Lab Op 242, 249; *Plainwell Schools*, 1989 MERC Lab Op 464; *Traverse City Bd of Ed*, 1989 MERC Lab Op 556; *West v Gen Motors Corp*, 469 Mich 177, 186 (2003). To conclude that Utica Community Schools harbored anti-union animus based solely upon the fact that Parker, in her capacity as building representative, filed a number of grievances on behalf of unit members during the months preceding the grade change request would be to engage in speculation and conjecture within the meaning of *Detroit Symphony Orchestra*, *supra*.

In any event, I find that Parker has not suffered any adverse employment action which would constitute discrimination or retaliation under the Act. In order for there to be an actionable discrimination claim under PERA, there must be proof of some act on the part of the employer which resulted in adverse consequences affecting the charging party's terms of employment, such as a demotion, diminution of wages, material change in job responsibilities or other tangible consequences. See e.g. *City of Kentwood*, 26 MPER 40 (2013) (no exceptions) (dismissing a charge where there was no factually supported allegations that the employer actually took any adverse employment action, or threatened to take such action); *County of Wayne (Jail Health Services)*, 23 MPER 26 (2010) (no exceptions) (counseling memo did not constitute an adverse employment action where there was no allegation that the charging party was disciplined or punished in any way as a result of the memo). Federal courts have defined adverse employment action in the employment law arena as a materially adverse change in the terms and conditions of employment, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Burlington Indus, Inc v*

Ellerth, 524 US 742, 761 (1998). In particular, the Sixth Circuit has held that in order to prove an adverse employment action, "[a]t a minimum, the plaintiff must point to a tangible employment action that she alleges she suffered, or is in jeopardy of suffering" because of the employer's actions. *Policastro v Northwest Airlines, Inc*, 297 F3d 535, 539 (CA 6 2002); *Morris v Oldham Cnty Fiscal Ct*, 201 F3d 784, 789 (CA 6 2000); *White v Baxter Healthcare Corp*, 533 F3d 381, 402 (CA 6 2008).

In the instant case, Charging Party claims that she suffered humiliation, embarrassment and damage to her professional reputation by virtue of the fact that three of her fellow teachers were provided with documentation containing criticisms of her job performance and as a result of the school board's announcement of its resolution affirming the grade change. However, there is no factually supported allegation that either the panel members or the board shared the details of the parent complaint or other information with other staff members or the general public. Although Parker's name was referenced during the televised session of the school board at which the resolution affirming the grade change was read, Charging Party admits that the case file was not discussed at that meeting and that none of the details of the parent's complaint regarding Parker were disclosed. Parker does not allege that she was disciplined or demoted as a result of the panel's decision to change the student's grade, nor does she claim to have suffered any decrease in salary or benefits. There is no allegation that the parent complaint was placed in Parker's personnel file or that it in any way impacted her performance evaluation. At the time of the oral argument in this matter, Parker was still working as a teacher at Eisenhower High School. Under these circumstances, I find that the record is insufficient to establish that the actions of the Employer in connection with the grade change review panel constituted retaliation for Parker's union activities. Accordingly, I recommend that the Commission dismiss the charge filed by Parker against the school district in Case No. C12 I-171; Docket No. 12-001556-MERC.

With respect to the UEA, Charging Party repeatedly asserted, both in her pleadings and at oral argument, that the Union acted unlawfully in selecting her fellow bargaining unit members to serve on the grade change review panel and in failing to ensure that the process was conducted fairly. 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).

Here, Charging Party has failed to set forth any factually supported allegation which would establish a breach of the duty of fair representation by UEA, nor has Charging Party described with specificity how the conduct of the school district violated the collective bargaining agreement. As noted, the grade change review panel was convened pursuant to Policy 5500 which explicitly mandates that the panel be comprised, in part, of three teachers selected by the bargaining unit. It is unclear, therefore, how the Union could have prevented the participation of teachers in the review panel process. Charging Party has not identified any action taken by those teachers, or by the panel in general, which was improper or contrary to the language or spirit of Policy 5500. It is undisputed that the UEA filed a grievance on Charging Party's behalf challenging the actions of the grade change review panel and that said grievance, along with two grievances filed by Parker herself, remained pending at the time of the oral argument in this matter. Although Parker now takes exception to the representation she received from the Union, there is no factually supported allegation which, if true, would establish that the UEA was hostile to Parker, that it treated her differently than other, similarly situated bargaining unit members or that it in any manner acted arbitrarily, discriminatorily or in bad faith in connection with its dealings with Parker.

With respect to Charging Party's contention that the Union breached its duty of fair representation by failing or refusing to provide Parker with copies of the documentation provided to the grade change review panel and the school board, Parker has failed to state a claim upon which relief can be granted. While 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, there is no corresponding duty on the part of a union to provide individual members with specific information pertaining to their employment, nor does an employer have any obligation under the Act to provide information to an employee in his or her individual capacity. Accordingly, I conclude that the charge against the Union in Case No. CU12 I-037; Docket No. 12-001557-MERC 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 Lawanda Parker against Utica Community Schools and the Utica Education Association in Case No. C12 I-171; Docket No. 12-001556-

MERC and Case No. CU12 I-037; Docket No. 12-001557-MERC 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 29, 2014