STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WESTERN MICHIGAN UNIVERSITY,
Public Employer-Respondent in Case No. C14 F-069/Docket No. 14-014116-MERC,

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1668,
Labor Organization-Respondent in Case No. CU14 F-032/Docket No.14-014117-MERC,

-and-

GLORIA HARRISON,
An Individual-Charging Party.
_____/

APPEARANCES:

Gloria Harrison, appearing for herself

DECISION AND ORDER

On October 22, 2014, Administrative Law Judge Julia C. Stern issued her 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 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: January 16, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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-and-

GLORIA HARRISON,
An Individual-Charging Party.
_____/

APPEARANCES:

Gloria Harrison, appearing for herself

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On June 23, 2014, Gloria Harrison filed the above unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against her former employer, Western Michigan University, (the Employer) and her collective bargaining representative, AFSCME Council 25 and its affiliated Local 1668 (the Union) pursuant to §§10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and MCL 423.216. Pursuant to Section 16 of PERA, the charges were assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On July 9, 2014, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, I issued an order directing Harrison to show cause in writing why her charges against both Respondents should not be dismissed for failure to state a claim upon which relief could be granted under PERA. On September 10, 2014, Harrison filed a timely response to my order. Based upon the facts as alleged by Harrison in her charge, in her response to my order, and in documents attached to her response, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

Harrison was employed by the Employer in its building and support services department until her termination on September 24, 2013. Harrison alleges that the Employer violated PERA by discharging her in retaliation for reporting her harassment by her co-workers and because she refused to withdraw her complaints of harassment. Harrison alleges that the Union violated its duty of fair representation by refusing to arbitrate the grievance she filed over her termination.

Facts:

The Employer maintains a policy covering workplace threats, violence, and weapons. The policy prohibits employees from making threats or engaging in violent activities, including but not limited to: (1) causing physical injury to another person; (2) making threats of any kind; and (3) aggressive, hostile or violent behavior, such as intimidation of others, attempts to instill fear in others, or subjecting others to emotional distress. The policy states that employees are responsible for notifying the Employer's department of public safety or the assistant vice president for human resources of any threats they have witnessed or received, or any behavior they have witnesses which they regard as threatening or violent, when the threat or behavior is job-related, might be carried out on the Employer's property, or is connected to University employment.

On August 1, 2013, Harrison was returning her keys at the end of the workday when an employee "came across the hallway and shoulder tackled" Harrison, i.e., brought her weight up hard against the underside of Harrison's shoulder joint. According to Harrison, a supervisor witnessed this incident. The same day, Harrison went to her physician and was prescribed medicine for pain and inflammation. Sometime thereafter, she submitted a worker's compensation form reporting this as a job-related injury.

On August 12, 2013, as Harrison was exiting her building at the end of the workday, a co-worker hit Harrison on the neck with her fist. The employee who hit Harrison on August 12 was not the same employee who shoulder tackled her on August 1. According to Harrison, at least one other employee observed this attack. As Harrison was walking to her car, the employee who had hit her came up and apologized. However, later that same evening, the same employee drove up to Harrison as she was crossing a parking lot to enter a store. The employee pointed her finger through her open car window and said, "I am watching you." The following morning, this employee's son, who was also a co-worker, came up to Harrison and began joking with her. Harrison found this threatening since he had rarely spoken to her before this date.

On August 14, Harrison asked her supervisor to fill out a work-related injury report for the August 12 incident. Harrison went to the Employer's clinic, where the physician noted bruising on her neck. On August 15, 2013, Harrison was shoulder tackled again in the hallway on the Employer's premises by yet another co-worker.

Harrison's shoulder pain worsened. She returned to her physician and was prescribed physical therapy. On around August 30, 2013, she reported the above incidents to the Employer. She was immediately placed on paid leave pending the Employer's completion of an investigation.

On September 6, Harrison was directed by the Employer to appear for an investigatory interview in the presence of a Union representative and was questioned about the incidents listed in her report. Harrison was told that the employees she had named as witnesses did not support her account of events.

On September 9, 2013, Harrison received a letter from the Employer stating that, according to the information provided by its investigation, she might have violated several work rules. These rules included a rule prohibiting the intentional falsification of personnel records, payroll reports, or University records. Harrison was instructed to report to a disciplinary action conference with her Union representative to discuss the matter further.

No conference was held. However, on September 24, 2013, Harrison was given a letter stating that she was being given a written warning and that her employment was being terminated. Harrison's termination letter stated, "After further investigation, we feel these incidents [sic] are false in nature and have affected the morale and work environment of co-workers in a negative manner."

The Union filed a grievance in which it requested that Harrison be returned to work and made whole. It also requested that the Employer utilize an employee conflict resolution team. In a written answer to the grievance, the Employer stated that the collective bargaining agreement gave the Employer the right to make reasonable rules and regulations not in conflict with the agreement, and to impose penalties ranging from a written warning up to and including discharge for violation of the rules Harrison was alleged to have broken. The Employer's grievance answer also stated:

> Upon a thorough investigation and interview of the alleged witnesses and supervisor, it is very clear that the employee was not attacked by co-workers, that the employee was not attacked while at work or on Western Michigan University premises, and that the employee was not injured as alleged on University reports that she filed. The employee's conduct of insistence of violence by co-workers, falsification, and ensuing visits to the University Health Center are extremely disturbing and disruptive to the workplace.

The Local Union submitted Harrison's grievance to AFSCME Council 25's arbitration review committee to determine whether the grievance should be submitted to arbitration. By letter dated April 16, 2014, the arbitration review committee rejected the grievance. The letter stated that Harrison had made statements that other employees had physically assaulted her and listed witnesses to these events, but that the witnesses did not corroborate Harrison's allegations. The letter also stated that Harrison was accused of falsifying documents, including medical forms, related to these incidents.

On April 26, 2014, Harrison appealed the arbitration review committee's decision. In her appeal, Harrison stated that there was no proof that she falsified any documents, and that "the witnesses are not going to speak up because they are afraid of being harassed and then fired and that is why no one is telling the truth." Harrison pointed out that she had never received any form of discipline in more than five years of employment. She also argued that it was improper to issue her a

warning and to terminate her at the same time. By letter dated May 16, 2014, the arbitration review panel again rejected the grievance, stating that there was nothing in the file to refute the Employer's allegation that Harrison had made unsubstantiated accusations against other employees and filed false medical documents.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. "Lawful concerted activities for mutual aid and protection" includes complaining with other employees about working conditions and taking other actions in concert with other employees to protest or change working conditions. Sections 10(1)(a) and (c) of PERA prohibit a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against its employees because they have engaged in, or refused to engage in, union activities or other concerted protected activities. However, PERA does not prohibit all types of unfair treatment of a public employee by his or her employer. Absent an allegation that the employer interfered with, restrained, coerced, or discriminated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by PERA, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions or remedy its allegedly unfair treatment of an employee. See, e.g., *City of Detroit (Fire Dep't*), 1988 MERC Lab Op 561, 563-564; *Detroit Bed of Ed*, 1987 MERC Lab Op 523, 524.

Harrison asserts that the Employer had the burden to show that her allegations about her co-workers were false, and that the Employer did not do so. She asserts that she was unfairly discharged for complaining to the Employer about her co-workers' physical assaults. She also asserts that her discharge was retaliation for reporting unlawful harassment and/or an attempt by the Employer to prevent her from becoming eligible for longevity or retirement payments. Even if these assertions are true, however, I find that Harrison has not stated a claim under PERA because she has not alleged that the Employer interfered with, restrained, coerced, or discriminated against her for engaging or refusing to engage in activities of the type protected by this statute.

Even if Harrison had alleged that she was discharged in retaliation for protected activity, her charge against the Employer would be barred by the six month statute of limitations in §16(a) of PERA. Under §16(a), the Commission lacks jurisdiction to find an unfair labor practice based on conduct occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the party against whom the charge is made. An unfair labor practice charge that is filed more than six months after the commission of the alleged unfair labor practice is untimely and must be dismissed. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004); *Police Officers Labor Council, Local 355*, 2002 MERC Lab Op 145; *Walkerville Rural Cmty Schs*, 1994 MERC Lab Op 582. The Employer discharged Harrison on September 24, 2013, and Harrison did not file her charge until more than six months later, on June 23, 2014. For these reasons, I conclude that Harrison's charge against the Employer should be dismissed.

Harrison's charge against the Union alleges that the Union violated its duty of fair representation under PERA by rejecting her grievance for arbitration. Since the Union rejected the grievance in April 2014, her charge against the Union is timely.

A union representing public employees owes these employees a duty of fair representation under §10(2)(a) of PERA. The union's legal duty under this section 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 is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct," while "discrimination" under this standard is limited to "intentional and severe discrimination unrelated to legitimate union objectives." *Merritt v International Assn of Machinists and Aerospace Workers*, 613 F3d 609, (CA 6, 2010), citing *Spellacy v Airline Pilots Assn*, 156 F3d 120, 126 (CA 2, 1998). Harrison does not allege that the Union had an improper motive for rejecting her grievance for arbitration.

Because a union's ultimate duty is toward its membership as a whole, a union does not have the duty to arbitrate or even file a grievance in all circumstances when an individual member asks it to do so. Rather, 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 its likelihood of success. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A union's good faith, nondiscriminatory, decision not to proceed with a grievance is not arbitrary unless it falls so far outside a broad range of reasonableness as to be considered irrational. *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35, *citing Air Line Pilots Assn v O'Neill*, 499 US 65, 67 (1991). The fact that an individual member is dissatisfied with the union's decision, or its efforts on his behalf, does not establish that the union has breached its duty of fair representation. *Eaton Rapids EA*, supra.

In the instant case, Harrison alleged that three of her co-workers engaged in serious misconduct, allegations that led to Harrison's termination. According to the documents which Harrison attached to her charge, the Union claimed that it refused to arbitrate Harrison's grievance because the witnesses she named to the events about which she complained would not support her accounts of these events, and, aside from Harrison's own statements, there was no other evidence that these events took place. Harrison has not asserted any facts to suggest another reason for the Union's action. As noted above, as long as it acts in good faith and does not discriminate, a union has the discretion to decide not to arbitrate a grievance based on its assessment that the grievance was not likely to succeed. I conclude that, based on the facts as Harrison has asserted them, the Union's refusal to arbitrate her grievance was not arbitrary, and that her charge against the Union should be dismissed. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 22, 2014