**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent in MERC Case No. C14 I-101, Docket No. 14-022636-MERC

-and-

DETROIT FEDERATION OF PARA-PROFESSIONALS,
Labor Organization-Respondent in MERC Case No. CU14 I-038, Docket No. 14-022637-MERC

-and-

CORTEZ LAWRENCE,
An Individual Charging Party.
_____/

APPEARANCES:

Joline R. Davis, Assistant Director of Office of Labor Relations, for Public Employer-Respondent

Liz Duhn, AFT Michigan Staff Attorney, for Labor Organization-Respondent

Lance W. Mason, for Charging Party

## DECISION AND ORDER

On September 11, 2015, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and 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: October 30, 2015

**STATE OF MICHIGAN**
**MICHIGAN ADMINISTRATIVE HEARING SYSTEM**
**EMPLOYMENT RELATIONS COMMISSION**

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DETROIT PUBLIC SCHOOLS,
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Respondent-Labor Organization in MERC Case No. CU14 I-038, Docket No. 14-022637-MERC

-and-

CORTEZ LAWRENCE,
Individual Charging Party.
_____/

APPEARANCES:

Joline R. Davis, Assistant Director of Office of Labor Relations, for the Respondent-Public Employer

Liz Duhn, AFT Michigan Staff Attorney, for the Respondent-Labor Organization

Lance W. Mason, for the Charging Party

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

On September 11, 2014, Cortez Lawrence, (Charging Party) filed the present unfair labor practice charges against both his former employer, the Detroit Public Schools (Employer) and his former bargaining representative, the Detroit Federation of Para-Professionals (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, this case was assigned to Travis Calderwood, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

The Unfair Labor Practice Charge and Procedural History:

Charging Party's September 11, 2014, charge against the Employer alleges that he was terminated from employment on July 11, 2014, because of his Employer's mistaken conclusion that he

was actively fighting another employee rather than defending himself from an unprovoked attack as he claimed. Charging Party's charge against the Union, filed that same day, alleges that the Union breached its duty of fair representation when it refused his request to challenge his termination through the parties' grievance procedure.

An evidentiary hearing was held in Detroit on October 27, 2014. At the onset of the hearing both Respondents made motions on the record requesting dismissal of the charges against each of them respectively. The Employer argued that the charge as filed did not state a claim under PERA upon which relief could be granted because Charging Party had not alleged any facts that, if proven true, could show he was engaged in protected or concerted activity. The Union argued that its decision not to process a grievance in this matter did not violate its duty of fair representation because it made the decision after determining the grievance was without merit and without evidence to support the claims made by Charging Party in the request. I denied both motions at that time but advised the parties that I would keep them under advisement and revisit them, if need be, at the conclusion of the hearing.

Following several hours of testimony, Charging Party had not presented evidence to substantiate any claim against either Respondent. For that reason, I determined that it would be necessary to reconsider the previous motions made by Respondents. I directed Charging Party's attorney to immediately proffer a verbal offer of proof to establish he was capable of presenting credible evidence that, if true, could establish a claim under PERA for which relief could be granted. After considering the offer of proof and the extensive arguments made by the representatives for each party on the record, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165(1). See also *Detroit Pub Sch*, 22 MPER 19 (2009) and *Oakland Co and Oakland Co Sheriff v Oakland Co Deputy Sheriffs Ass' n*, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party failed to state a claim under PERA for which relief could be granted against either Respondent. I informed the parties that following the receipt of the transcript, I would issue a written decision and recommended order. That decision and recommended order is as follows.

Findings of Fact:

Cortez Lawrence had been an employee of the Detroit Public School (District) for almost thirteen years prior to his termination in September 2014. Lawrence began as a food service assistant and then was promoted to a supervisory position.[1] At all times relevant to these proceedings Lawrence was represented by the Union.

Respondents are parties to a collective bargaining agreement set to expire on June 30, 2016. That contract has a grievance procedure which culminates in binding arbitration. That process, as set forth in Article X of the contract, states in relevant part:

> Step 1
>
> Complaints, grievances, or disputes arising out of the operation and interpretation of this Agreement shall be presented to the Principal for Noon-Hour Aides and for Office of School Nutrition employees to the applicable supervisor or his representative within

1 There was some discrepancy as to whether Charging Party was in a position titled as a "supervisor." Nonetheless, the record clearly establishes that, in whatever position Charging Party held prior to his termination, he did possess some sort of minimal supervisory responsibilities over other food service employees.

fourteen (14) calendar days from the time that the event took place or within fourteen calendar days of the date it is reasonable to assume that the employees or Union first became aware of the conditions giving rise to the grievance.

Upon receipt of the grievance, the principal or the applicable unit head shall arrange for a conference within seven (7) calendar days after receipt of the grievance.

The grievant may be heard personally and may request representation by the Union. The Union will be afforded the opportunity to be present at any grievance hearing.

The principle or the applicable unit head shall render a decision and communicate it in writing to each grievant, the Union, and the DPS Office of Labor Relations within seven (7) calendar days after the completion of the conference.

Step 2 – Appeal to Chief Executive Officer

Within twenty-one (21) calendar days after receipt of the decision of the principal or the applicable unit head, the Union may appeal to the Chief Executive Officer (through the Office of Labor Relations) the decision rendered by the principal or the applicable unit head. The appeal shall be in writing and shall set forth specifically the act, condition, and the grounds on which the appeal is based and shall include a copy of the grievance and all decisions rendered. A copy of the appeal shall be sent to the principal or the applicable unit head.

The Chief Executive Officer or his/her designated representative shall meet with the parties concerned within twenty-one (21) calendar days after receipt of the appeal request. Within twenty-one (21) calendar days after the conference, the Chief Executive Officer shall render a written decision which shall be forwarded to the Union, and the principal or the applicable unit head.

Step 3 – Arbitration

If a grievance is not satisfactorily settled at Step 2, the Union may within thirty (30) calendar days file for arbitration…

On January 22, 2014, Lawrence arrived at the Marcus Garvey school to supervise employees in the kitchen as they prepared breakfast for the students. According to testimony provided by Lawrence, at some time prior to breakfast being served, another District employee, Danterian Hanson, became verbally aggressive towards him. Lawrence tried to diffuse the situation to no avail and shortly thereafter Hanson physically attacked him, striking him twice in the face. Lawrence claims he simply tried to restrain Hanson.

By letter, dated February 18, 2014, Lawrence was directed to attend a hearing on March 11, 2014, for the purpose of investigating his alleged violation of Work Rule #14, which states "employees must not fight on Board property."

At the March 11, 2014, conference, Lawrence was accompanied by Union President Donna Jackson. Testimony was provided by Lawrence as well as other District employees who were present

during the January 22, 2014, altercation between Lawrence and Hanson; Hanson was not present. Jackson was provided an opportunity to speak, at which time she indicated that the Union does not condone fighting and that in her opinion it appeared that Lawrence had been trying to defend himself. Jackson further stated that Lawrence had been a District employee for twelve years.

On July 11, 2014, Lawrence, who had since been transferred to Bunche, another school within the District, was approached by two District supervisors, accompanied by a police officer, and was instructed to proceed to the school principal's office. Once there, Lawrence was given a letter dated July 11, 2014, along with the Discipline Decision rendered by the Office of Employee Relations. That letter stated in bold type the following:

> The purpose of this communication is to inform you that your employment with Detroit Public Schools is terminated for Just Cause, effective July 14, 2014.

Lawrence was then escorted from the building. Lawrence then called Jackson to tell her about the termination and the letter he had just received. Lawrence testified that he told Jackson he wanted to "pursue further action." Jackson indicated that she would contact Lawrence once she had received a copy of the termination letter.

On July 23, 2014, Lawrence sent Jackson an email in which he inquired if the grievance had been submitted yet and also how long the process usually takes. In that same email Lawrence asked if he could get a copy of the parties' contract.

Jackson responded by email almost immediately and asked what grievance Lawrence was referring to. That email went on to state that she had previously told him that, because of the District's "zero tolerance policy" regarding fighting, the decision to terminate him would be a "tough one to battle." Jackson further stated that there was no evidence supporting the claim made by Lawrence that he had been only trying to restrain Hanson and not trying to fight him. Lawrence then sent two more emails to Jackson.

On July 28, 2014, Lawrence sent an email to both the Union and the Employer in which he stated that he wished to file a grievance under the contract challenging the decision to terminate him.

By letter dated August 1, 2014, Jackson provided Lawrence with a blank grievance form to fill out and return to the Union by August 11, 2014. That letter stated in bold face type that "The Union has the right to deny your grievance request for further action." Sometime around then the Union received a call from a woman claiming to be an attorney representing Lawrence. On August 4, 2014, Jackson sent Lawrence another letter in which she asked him to choose whether he wanted the Union to represent him or whether he wished to proceed with other counsel thereby waiving all further Union representation. Lawrence responded on August 6, 2014, by selecting the option that stated "I want the Union to proceed with review process for appeal [sic]." On August 8, 2014, Lawrence sent the completed grievance form to the Union.

Sometime after receiving the completed grievance form from Lawrence, the Union's Executive Board met to discuss whether they would pursue further action with respect to Lawrence's termination. On September 8, 2014, Jackson sent Lawrence a letter indicating that the Executive Board had chosen not to pursue the matter any further. That letter stated, in the relevant part, the following:

> The Executive Board of the Detroit Federation of Para-Professionals has denied your request to take further action for Step III Grievance – Arbitration regarding your case. Your employment with the Detroit Public Schools has been terminated as 'Just Cause' in violating work rule #14 – Employees must not fight on Board property. It is a zero tolerance policy in the Detroit Public Schools in regards to employees fighting on the job. All work rules are disclosed to employees and therefore employees must adhere to all work rules.
>
> Furthermore, in reviewing testimony, there was no clear evidence or witnesses in the testimony that supports your claims of restraining Mr. Hanson. However it is clear there was a fight between you and Mr. Hanson on Board property which is a violation that the Union does not condone and it's against policy. Therefore, the union will not take further action as evidence substantiates just cause for fighting.

On September 11, 2014, Lawrence filed the present unfair labor practice charges against both the Employer and the Union.

Discussion and Conclusions of Law:

The Commission administers and enforces PERA. 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 kinds of actions with other employees to protest or change working conditions. Section 10(1) of PERA prohibits 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.

In order to establish a prima facie case of unlawful discrimination under PERA that resulted in an adverse employment action, a charging party must allege: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employees' protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006). If the charging party has alleged that the employer's unlawful discrimination is motivated by anti-union animus, that party bears the burden of demonstrating that protected conduct was a motivating or substantial factor in the employer' s decision. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Southfield Pub Schs*, 25 MPER 36 (2011). Only after a charging party establishes a prima facie case of unlawful discrimination does the burden shift to the respondent to demonstrate with credible evidence that the same action would have taken place even in the absence of the protected conduct. *Michigan Educational Support Personnel Ass'n v. Evart Public Schools*, 125 Mich. App. 71, 74 (1983).

Under well-established Commission law, a union's duty of fair representation is comprised of three responsibilities: (1) to serve the interest 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* at 386 US 171 (1967), also *Goolsby v City of Detroit*, 419 Michigan 651 (1984).

A union's actions are lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Airline Pilots Association v O'Neill*, 499 US 65, 67 (1991). Moreover, and of significance to the present matter, in order for an individual charging party to pursue such a claim, the charging party must not only allege and be prepared to prove a breach of the duty of fair representation by the union, but also a breach of the collective bargaining agreement by the employer. *Knoke v East Jackson Schools*, 201 Mich App 480, 485 (1993).

In order to survive a motion for summary disposition predicated on the premise that Charging Party has failed to state a claim of a breach of the duty of fair representation, Charging Party's allegations "must contain more than conclusory statements alleging improper representation." *AFSCME, Local 2074*, 22 MPER 83 (2009), *citing Martin v Shiawassee County Bd of Commrs*, 109 Mich App 166, 181; 310 NW2d 896 (1981). An individual's dissatisfaction with the union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Education Association*, 2001 MERC Labor Op 131. A union's ultimate duty is towards its membership as a whole, and as such, a union is not required to follow the dictates or wishes of an individual employee. Instead, a union may investigate and take action it determines to be best. It is well established that a labor organization possesses the legal discretion to make judgments about the general good of its membership, and to proceed on such judgments despite the fact that they may be in conflict with the desires or interests of certain employees. *Lansing School District*, 1989 MERC Labor Op 210.

Despite being provided ample opportunity throughout the hearing, Charging Party failed to allege any facts that, if proven true, could state a claim under PERA against his Employer. Charging Party's attorney, after being directed to proffer a verbal offer of proof, argued that Charging Party's July 28, 2014, email in which he requested to file a grievance over his termination was the protected activity for which he was retaliated against. 2 Such an argument fails because the conduct Charging Party complained of, i.e., his termination, occurred prior to his engaging in the supposed protected activity. Charging Party's attorney also argued at this time that the Union and the Employer failed to adhere to the agreed upon grievance procedure in so far as there was never an explicitly identified "Step 1" or "Step 2" meeting between the parties. However, Charging Party's attorney did not articulate how such a failure, even if true, could be actionable by Charging Party under the facts provided.

With respect to the Union, the record is devoid of any allegation that, if proven true, could establish that the Union breached any duty that it owed to Charging Party. Jackson testified extensively that the reason for the Executive's Board decision not to pursue arbitration over Lawrence's termination was based on the good faith belief that there was no evidence to support Charging Party's claim that he was defending himself and restraining Hanson as opposed to fighting. At no time during the hearing, either during testimony or upon my direct request, did Charging Party introduce any facts or set forth any allegation that, if proven true, could establish that the Union failed to act in good faith or that its decision not to pursue arbitration violated PERA in any way.

Accordingly, for the reasons set forth above, it is the conclusion of the undersigned that Charging Party has failed to allege any facts which, if proven true, could establish that either Respondent violated PERA. As such, I recommend that the Commission issue the order as set forth below.

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2 Prior to this argument, Charging Party's only articulated gripe against his Employer was that it was wrong in its conclusion that he was engaged in a fight with Hanson rather then he was simply defending himself and restraining Hanson as he steadfastly claims. While Charging Party may be correct in this contention, such does not amount to a claim under PERA.

## RECOMMENDED ORDER

The unfair labor practice charges filed by Cortez Lawrence against the Detroit Board of Education and the Detroit Federation of Para-Professionals are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 11, 2015