STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS COMMUNITY DISTRICT,
Public Employer-Respondent

MERC Case No. C18 I-087

-and-

MARY P. DAVENPORT,
An Individual Charging Party.
_____/

APPEARANCES:

Mary P. Davenport, appearing on her own behalf

DECISION AND ORDER

On December 7, 2018, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] 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 either 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

Issued: February 15, 2019

[1] MAHS Hearing Docket No. 18-017794

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT PUBLIC SCHOOLS COMMUNITY DISTRICT,
Public Employer-Respondent

Case No. C18 I-087
-and- Docket No. 18-017794-MERC

MARY P. DAVENPORT,
An Individual-Charging Party.
_____/

APPEARANCES:

Mary P. Davenport, appearing for herself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On August 31, 2018, Mary P. Davenport filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against her employer, the Detroit Public Schools Community District, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. Pursuant to Section 16 of the Act, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System.

On September 17, 2018, pursuant to Rule 165(2)(d) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.165(2)(d), I issued an order directing Davenport to show cause why her charge should not be dismissed because the charge failed to state a claim upon which relief could be granted under PERA. Davenport filed a timely response to my order on October 9, 2018.

Based on facts set out in Davenport's charge and in her response to my order, as outlined below, I make the following conclusions of law and recommended order.

The Unfair Labor Practice Charge:

Davenport is employed as a special education teacher for the emotionally impaired at Respondent's Bow Elementary-Middle School. On June 13, 2018, after being on administrative leave for an extended period, Davenport was issued a five-day unpaid suspension for allegedly using corporal punishment on a student. Davenport alleged in her charge that this suspension was unfair and unjust, and that she did not receive a fair hearing from Respondent on these charges. Davenport

also alleged that from November 2017 to March 18, 2018, the date she was placed on administrative leave, she was forced to work without a paraprofessional in her classroom despite that fact that the individualized education plan (IEP) of one of her students required this. In my September 17, 2018, order to Davenport to show cause why her charge should not be dismissed, I noted that Davenport had not explained why or how the Respondent's actions, as set out in the charge, violated PERA. In her response, Davenport stated as follows:

> Davenport filed a complaint with MERC because she believed her rights as a collective [sic] member had been violated. DPS placed Davenport in an unsafe environment when they were aware that an Emotionally Impaired Classroom was functioning without a paraprofessional. The District knew this was a violation of state and federal law/collective bargaining agreement and didn't attempt to rectify this situation until Davenport was placed on Administrative Leave. Davenport was protecting herself and students from an aggressive student that had attacked her twice prior to the alleged assault on February 16, 2018. Davenport also alleged that Principal [DaRhonda] Evans created a hostile work environment which impeded her ability to work as a certified teacher in the instructional environment. Davenport contends the discipline she received was arbitrary and capricious and was written in retaliation for Davenport complaining to the leadership team regarding her working conditions. Davenport feels the discipline was unwarranted and unjust and requests the administrative law judge to hear and review the case to decide if any of Davenport's rights were violated under the collective bargaining agreement the Detroit Public Schools has with the Detroit Federation of Teachers. The administrative law judge should be aware that the Detroit Federation of Teachers is prohibited from grieving discipline and evaluations based on the new tenure year law [sic], thus requiring Davenport to apply to a third party to settle this grievance with the DPS.
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> Given the many discrepancies and miscommunications with the Detroit Public Schools, Ms. Davenport requests a third-party review of this case by an administrative law judge. The District didn't follow their own policy outlining how an employee should be disciplined. The policy states first an employee should receive a verbal warning and then discipline must be done in a progressive manner. Detroit Community Schools did not provide Davenport a safe and secure working environment when they allowed a certified teacher to work alone with nine males without a paraprofessional in the classroom. In addition, they did not provide Davenport any training on restraining students who become physically aggressive toward staff and students.

Facts:

The pertinent facts, as set out by Davenport in her charge and in her response to my order, are as follows. During the 2017-2018 school year, Davenport had a student in her classroom (hereinafter student A) whose individualized education plan (IEP) and behavioral intervention plan (BIP)

provided that he have individual supervision. At the beginning of the school year, a paraprofessional was assigned to Davenport's classroom. In November 2017, Davenport complained that the paraprofessional was not respecting her authority and was attempting to take over Davenport's role as teacher. Davenport requested a transfer to another school or another classroom. Instead of transferring Davenport, Respondent's Special Education Office moved the paraprofessional to another special education classroom at Bow. However, Davenport was not assigned a new paraprofessional. From November 2017 until she was placed on administrative leave in March 2018, Davenport worked without an additional adult in her classroom. According to Davenport, this violated state and federal laws and regulations and the collective bargaining agreement between Respondent and the Detroit Federation of Teachers (DFT), Davenport's bargaining agent. In late November 2017, after her paraprofessional had been reassigned, Davenport was assaulted by student A for the second time that school year.

On February 8, 2018, Davenport wrote a letter to Respondent Superintendent Nikolai Vitti about her situation. On February 12, Davenport met with the acting head of the Respondent's Special Education Office and with Ricky Fountain, whom she did not identify in her pleadings. Davenport was told that the paraprofessional's transfer to the other classroom had already been approved by Respondent's Human Resources office. Davenport was also told that despite the provisions in her student's IEP, Respondent was not required to assign her another paraprofessional. During this meeting Davenport "voiced her concerns regarding working in a hostile working environment," because of her complaints. She was told that Respondent would "look into her concerns." However, Davenport never received a response from either Fountain or the head of the Special Education Office to her concerns. On or about February 14, 2018, Davenport met with two supervisors from the Special Education Office, Roslyn Hester and Madelyn Hunter, who told her that if Davenport and the paraprofessional could not get along, one of them was going to have to leave Bow.

On February 16, 2018, Davenport was working in her classroom without a paraprofessional when student A attempted to attack another student in the room. Davenport intervened and forced student A into a chair. Student A got up from the chair and headed toward the classroom door. When the door was shut by a third student, this student and student A began fighting. Davenport once again intervened and, when student A attempted to bite her, she grabbed and pushed him away from her. Student A proceeded to knock over several desks and chairs before tripping and falling to the floor. When Evans entered the room a few minutes later, student A was sitting on the floor and Davenport was sitting at a student desk. Evans ordered Davenport to her office, leaving the classroom unsupervised. After a few minutes in Evans' office, Davenport requested a union representative whereupon Evans told Davenport to return to her classroom. Evans later took both student A and another student to her office for a short period before sending them back to Davenport's classroom.

After February 16, the school was closed for about a week for a break. On the first day school reopened, student A told Davenport that Evans was going to get Davenport fired. Shortly thereafter, student A stopped attending school.

During a special education in-service session held at Bow on March 13, 2018, Davenport and the paraprofessional met with Hester, Hunter, Evans, and Bow's social worker for about an hour.

During this meeting, the paraprofessional complained about Davenport and said that she did not want to come back to Davenport's classroom. Davenport agreed that she should not come back and, at Hester and Hunter's request, gave them a letter stating that Davenport did not want the paraprofessional returned to her classroom.

Student A did not return to Davenport's classroom until March 15, 2018. About 45 minutes after school began that day, Evans came to Davenport's classroom with a security guard and told her that student A was being transferred to another special education classroom, the classroom where Davenport's former paraprofessional was now assigned. On March 16, Davenport was called into Evans' office after school and told to report to Respondent's Human Resources Office on March 19. When Davenport reported to Human Resources, she was told that she was placed on administrative leave for an incident that occurred on February 16, 2018.

A hearing/interview regarding the February 16, 2018 incident was conducted by a Respondent hearing officer, Angela Calloway, on March 28, 2018. Prior to the hearing, Respondent's Human Resources Office sent a packet of documents to DFT representative Judy Smith. These materials included a letter, dated December 7, 2017, from Bow's occupational therapist stating that Davenport had assaulted a student and called him the "n" word. Davenport had never seen this letter before Smith showed it to her. Smith accompanied Davenport to the hearing. At the hearing, Evans read aloud statements that she had taken from Davenport and several students and a statement that Bow's social worker had taken from student A on February 28, 2018. At Davenport's request, another teacher, Ms. Bobo, was allowed to testify. Bobo had been present during the incident mentioned in the December 7 letter. She testified that a student had called Davenport a bitch, but she denied that Davenport had used the "n" word or assaulted the student. According to Davenport, Calloway seemed uninterested in Bobo's testimony or in other facts presented during the hearing which contradicted Evans' version of events. Calloway also refused to allow Smith to put into the record certain information favorable to Davenport. After the hearing, the DFT objected to Calloway's refusal to admit the information. Respondent agreed to a second hearing/interview but, according to Davenport, Calloway again appeared uninterested in listening to any evidence favorable to her.

Davenport remained on administrative leave pending Calloway's decision. On June 13, 2018, Calloway issued a decision finding that Davenport was guilty of administering corporal punishment and suspending her for five days. Later, in a written response to a complaint filed by Davenport with the Michigan Civil Rights Department, Respondent admitted that it could not substantiate that the alleged February 16, 2018 assault had occurred. It also told the Civil Rights Department that Davenport had been disciplined for unprofessional conduct.

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. The types of activities protected by PERA include filing or pursuing a grievance under a union contract, participating in union activities, joining or refusing to

join a union, and joining with other employees to protest or complain about 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, disciplining, or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities protected by PERA.

However, not all types of unfair treatment of its employees by a public employer violate PERA. PERA does not provide employees with a mechanism for appealing disciplinary actions that are merely unjust or unfair. Nor does the Commission have jurisdiction to adjudicate a public employee's claim that his or her employer violated the collective bargaining agreement between the employer and the employee's bargaining agent. *Wayne Co Cmty College,* 1985 MERC Lab Op 930, 936; *Detroit Bd of Ed,* 1994 MERC Lab Op 351, 354 (no exceptions); *Burt Twp Sch Dist,* 23 MPER 45 (2010) (no exceptions). Moreover, the Commission's authority is limited to PERA. It has no jurisdiction to enforce state and federal statutes or regulations dealing with workplace safety or the education of students with disabilities. Absent an allegation that the employer interfered with, restrained, coerced, or retaliated 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. See, e.g., *City of Detroit (Fire Dep't*), 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524. I find that Davenport's claim that by failing to assign a paraprofessional to work in her classroom Respondent forced her to work in an unsafe environment and/or violated state or federal laws of regulations, does not state a claim upon which relief can be granted under PERA. I also find that her claims that she did not receive a fair hearing from Respondent and that her five-day suspension was arbitrary and capricious also fail to state a claim under PERA.

In her response to my order to show cause, Davenport asserts that she was disciplined in retaliation for complaining about working conditions, i.e., the behavior of the paraprofessional assigned to her classroom and the fact that she was not assigned a replacement when that paraprofessional was removed from her classroom. Davenport maintains that Respondent violated the collective bargaining agreement, as well as state and federal laws and regulations, by failing to assign another paraprofessional to her classroom.

As noted above, PERA protects employees' right to engage in "concerted," i.e. jointly arranged, planned or carried out, activities for mutual aid or protection. Because a collective bargaining agreement is itself a product of "concerted" action, an employee filing a grievance based upon a provision in a collective bargaining agreement is protected by PERA from retaliation for filing that grievance as long he or she acts in good faith. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 265-66 (1974). See also *Warren Consolidated Schs,* 28 MPER 7 (2015) (no exceptions). Davenport, however, does not assert that she filed or attempted to file a grievance with the DFT or that she even asserted, in her discussions with Respondent representatives, that failing to assign another paraprofessional to her classroom violated the collective bargaining agreement.

Like PERA, the federal National Labor Relations Act (NLRA), 29 USC 151 et seq, also protects "concerted activity for mutual aid or protection." The lead case under the NLRA explaining the line between individual and "concerted" activity is *Meyers Indus, Inc v Prill,* 268 NLRB 493 (1984) (*Meyers I*), rev' d sub nom *Prill v NLRB*, 755 F2d 941 (DC Cir), cert, den, 487 US 948 (1985), on remand, *Meyers Indus, Inc v Prill*, 281 NLRB 882 (1986) (*Meyers II*), aff' d sub nom *Prill*

v NLRB, 835 F2d 1481 (DC Cir), cert denied, 487 US 1205 (1988). In *Meyers I,* the National Labor Relations Board, (NLRB) explained that "to find an employee' s activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." On remand in *Meyers II*, the Board reiterated that standard, but clarified that concerted activity also "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II* at 887. The Commission has adopted the *Meyers* test in interpreting Section 9 of PERA. *Grandvue Medical Care Facility¸* 27 MPER 37 (2013); *Warren Consolidated Schs.* Here, Davenport's complaint about Respondent's failure to assign another paraprofessional to her classroom was essentially an individual complaint and she has not asserted that she sought the assistance of, or even discussed her complaint with, anyone other than her supervisors. I find that Davenport has not alleged that she engaged in activity protected by PERA or alleged facts that would support such a claim. I find, therefore, that Davenport has not alleged a claim of unlawful retaliation under PERA.

Rule 165 of the Commission's General Rules states that an administrative law judge assigned to hear a case for the Michigan Employment Relations Commission may, on his or her own initiative or on a motion by any party, order dismissal of a charge or issue a ruling in favor of a party without a hearing based on grounds set out in the rule. These include, as set out in Rule 165(2)(f), failure to allege a claim on which relief may be granted by the Commission. Based on the facts as alleged by Davenport, and in accord with the conclusions of law set forth above, I conclude that Davenport's charge does not state a claim upon which relief can be granted under PERA. I recommend, therefore, 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: December 7, 2018