STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MT. CLEMENS COMMUNITY SCHOOL DISTRICT,
Respondent-Public Employer in Case No. C04 A-029,

-and-

AFSCME COUNCIL 25, LOCAL 873,
Respondent-Labor Organization in Case No. CU04 A-009,

-and-

SARA LOUISE NALLS,
An Individual Charging Party.
_____/

APPEARANCES:

A. Philip Easter, Esq., for the Public Employer

Miller Cohen, P.L.C., by Bruce A. Miller, Esq., and Richard G. Mack, Jr., Esq., for the Labor Organization

Murray & Bond, P.C., by E. Patrick Murray, Esq., for the Charging Party

DECISION AND ORDER

On March 18, 2005, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

These cases were heard in Detroit, Michigan, on August 25, 2004, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and post-hearing briefs filed by October 26, 2004, I make the following findings of facts and conclusions of law.

The Unfair Labor Practice Charge:

On January 30, 2004, Charging Party Sara Louise Nalls filed an unfair labor practice charge against Respondent Mt. Clemens Community School District alleging denial of contractual rights and discrimination. On the same date, she filed an unfair labor practice charge against her labor organization, AFSCME Council 25, and its affiliate, Local 873, alleging denial of representation and denial of contractual rights.

Findings of Fact:

Charging Party Sara Louise Nalls is employed by the Mt. Clemens Community School District (District) and is a bargaining unit member of AFSCME Council 25, Local 873 (Union).

The bargaining unit consists of two classifications: paraprofessionals and classroom aides. Prior to May 2003, Charging Party was one of six paraprofessionals employed by the School District. On or about May 13, 2003, the District announced that it was eliminating four paraprofessional positions, including the library technology position held by Charging Party. Charging Party was given the option of exercising her seniority to bump into a classroom aide position, a lower classification. Charging Party testified that she refused the District's offer because she "felt there was a process in place and established via the contract that would allow me rights to bump" into one of the remaining paraprofessional positions that was held by a less senior employee.

Article X of the collective bargaining agreement between the Respondents provides, in part, as follows:

> Any employee laid off, job eliminated, or involuntarily transferred may exercise their total district-wide seniority to bump into an equal or lower classification for which they are qualified. The determination of the qualification [sic] for a position shall rest with the Board of Education.

In a May 15 letter to Ida McGarrity, the president of Local 873, A. Phillip Easter, the District's assistant superintendent for human resources, explained the qualifications for the elementary school paraprofessional position that Charging Party sought and why she did not qualify for the position. He indicated that the elementary school technology position required a minimum of two years related occupational experience and experience working with elementary age students, especially K-2. Easter explained that the library technology position that Charging Party held required a minimum of two years related occupational experience or an associate degree and experience working with secondary age students and a computer/library background. Easter indicated that all of Charging Party's work experience had been at the secondary level and that she did not have the extensive "compass learning" training that was necessary to perform in the elementary technology position.

The same day, Charging Party and two of the other paraprofessionals whose positions were eliminated met with McGarrity and AFSCME Council 25 representative Brenda Adams. According to McGarrity, the employees were informed that the Union would follow "whatever the procedure was in the collective bargaining agreement." The employees were also told that a grievance would not be filed at that time because the next day the Union and the District were planning to hold a special conference to discuss the matter. After the conference with the District, McGarrity told the employees that the District had agreed to delay implementing the "process of bumping" until after a May 31 union membership meeting.

In the meantime, Charging Party and other employees whose positions had been eliminated submitted written grievances to the Employer claiming that their seniority and bumping rights had been violated. The Employer returned the grievances and informed the employees that Article VIII of the contract provided that only the Union was allowed to submit written grievances. During a subsequent union membership meeting, McGarrity told Charging Party and the other affected employees that the Union would not file a grievance because based on the language of the contract, the District "has final rights to determine the qualifications for [bumping into] a position."

Thereafter, between May 2003 and January 2004, Nalls continued to ask McGarrity and Adams to file a grievance protesting the District's refusal to allow her to bump into a

paraprofessional position. McGarrity testified that she repeatedly conveyed the Union's position to Nalls and that Nalls would not take "no" for an answer. McGarrity explained that:

> [Nalls] continued to send these notices every month, every week or every day. She would not come to the realization that the union could find nothing grievable.

In the meantime, sometime in July 2003, Nalls asked McGarrity if there were a provision in the contract that allowed aides and paraprofessionals to work as custodians during the summer because she had applied for work and was not hired. McGarrity contacted Tom Minato, the District's facilities manager to determine why Nalls' was not hired. He explained that Nalls was not hired because there was no work. According to McGarrity, Respondent reviewed the District's overtime records and found no discrepancy. Nalls testified that McGarrity told her in July 2003 that the Union steward would meet with the District regarding summer custodial work and would, if necessary, file a grievance. On August 18, 2003, Nalls told McGarrity that a grievance involving summer work as a substitute custodian was a moot issue because she had returned to my regular job for the school year.

Conclusions of Law:

Both Respondents filed motions for summary disposition alleging that the January 30, 2004 charges are barred by the six-month statute of limitations set forth in Section 16(a) of PERA, and for failure to state claims for which relief can be granted

Section 16(a) of PERA states that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. Charging Party claims that the six-month limitations period did not begin to run until August 18, 2003, when she began her assignment as a child development aide. Alternatively, she alleges that the statute of limitations was tolled until she exhausted her rights under the grievance procedure.

Assuming, without deciding, that the charges were timely filed, as to the District, I find that Charging Party has failed to state a claim for which relief can be granted under PERA. It is well settled that PERA does not prohibit all types of discrimination or unfair treatment. Moreover, the Commission has no authority to interpret collective bargaining agreements. To establish that an employer violated PERA, employees must demonstrate that their employer interfered with, restrained, coerced or retaliated against them because they engaged in conduct protected by Section 9 of PERA.[1] *City of Detroit (Fire Dept.)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Edu*, 1987 MERC Lab Op 523, 524. Charging Party has not alleged that the District restrained, coerced or retaliated against her because she engaged in conduct protected by Section 9. Rather, in her post-hearing brief, she argues that the District's violation of the contract, by refusing to allow her to bump into a paraprofessional position and failing to award her a substitute custodial position, are unfair labor practices subject to the grievance process. Clearly, this assertion does not state a claim for which relief can be granted under PERA.

[1]Section 9 of PERA provides: It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of...mutual aid and protection.... MCL 423.209.

To establish a violation of the duty of fair representation, the evidence must show that the union's conduct toward the bargaining unit member was arbitrary, discriminatory or in bad faith. *Vaca v Sipes,* 386 US 171, 177 (1967); *Goolsby v Detroit*, 419 Mich 651, 679 (1984). Moreover, to prevail on such a claim, the charging party must not only establish a breach of the duty of fair representation, but also establish a breach of the collective bargaining agreement. *Knoke v E Jackson Pub Sch Dist,* 201 Mich App 480, 485 (1993); *Martin v E Lansing Sch Dist*, 193 Mich App 166, 181 (1982). Article 10 provides that an employee whose job is eliminated may exercise their seniority to bump into an equal or lower classification. It also vests the District with the authority to determine qualifications for a position. Charging Party has not shown that the Employer violated the contract by concluding that she was not qualified to bump into a paraprofessional position or that the Union's refusal to file a grievance was arbitrary, discriminatory or in bad faith.

I also find that Charging Party offered no evidence to demonstrate that the District's failure to award her a substitute custodial position violated the contract or that Union's conduct toward her was arbitrary, discriminatory or in bad faith. Not only did the Union conduct an investigation and find that no substitute summer custodial work was available, but on August 18, Charging Party informed the Union that the part of her complaint concerning summer work was moot because she had returned to her regular job. Even if Charging Party had not indicated that the issue was moot, I find that the Union did not violate its duty to fairly represent Charging Party by failing to file a grievance after determining that no substitute summer work was available. I, therefore, recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: