STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TEAMSTERS LOCAL 214,
Labor Organization - Respondent,

Case No. CU10 G-035

-and-

DENICE GREER,
An Individual - Charging Party.
_____/

APPEARANCES:

Wayne A. Rudell P.L.C., by Wayne A. Rudell, for Respondent

Ernest L. Jarrett P.C., by Ernest L. Jarrett, for Charging Party

DECISION AND ORDER

On December 29, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the charge filed by Charging Party, Denice Greer, fails to state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217 and should be dismissed. Charging Party alleged that Respondent, Teamsters Local 214, breached its duty of fair representation to her and to the bargaining unit of security officers to which Charging Party belonged by: failing to prevent Charging Party's former employer, Detroit Public Schools (Employer), from subcontracting the bargaining unit's work and failing to require the Employer to take certain actions with respect to the processing and resolution of grievances. The ALJ found these claims were previously litigated by the parties in both state and federal courts, and, therefore, are barred from further review by the doctrine of collateral estoppel. In light of the fact that Charging Party was attempting to re-litigate claims that she had previously pursued and lost in state and federal court suits against Respondent, the ALJ concluded that the charge is frivolous and recommended that the Commission impose sanctions. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on February 22, 2012. Respondent filed an untimely request for an extension of time to file its response to the

exceptions. Inasmuch as the request did not assert good cause, the request was denied. Respondent did not file a response to the exceptions. However, on November 20, 2012, Respondent submitted a copy of the opinion in *Greer & Certain Members of Teamsters Local 214 v Detroit Public Schools, Robert C. Bobb, & Teamsters Local 214*, unpublished opinion per curiam of the Michigan Court of Appeals, issued November 15, 2012 (Docket No. 304197), affirming the Wayne Circuit Court's decision on summary disposition and its order denying reconsideration in Case No. 10-100019 CL. Charging Party did not object to this Commission's consideration of that submission. We take judicial notice of the fact that the Michigan Supreme Court's website reveals that as of the date of this decision, this matter was pending before the Court on an application for leave to appeal, Supreme Court Docket No. 146426. On December 18, 2012, Respondent submitted the decision of the United States Court of Appeals for the Sixth Circuit in *Greer & 178 members of Teamsters Local 214 v Detroit Public Schools*, Case No. 11-2249, affirming the District Court order in that case. Again, Charging Party did not object to or comment on our consideration of that submission.

In her exceptions, Charging Party contends that the ALJ erred when he denied her motion to disqualify him. She argues that the ALJ was biased against members of the bargaining unit and, therefore, could not act in his capacity as a neutral arbiter. Charging Party also argues that the ALJ erred in applying the doctrines of res judicata and collateral estoppel to this matter because she claims that she was not given a fair opportunity to litigate her claims in the state and federal court cases. Charging Party contends that the ALJ erred in applying MCL 423.215(3)(f) with respect to the Employer's decision to subcontract the work of the security officers. Charging Party also takes exception to the ALJ's statements finding that her claims are frivolous and urging the Commission to impose sanctions.

We have considered the arguments made in Charging Party's exceptions and find no basis to reverse the ALJ's decision.

Factual Summary:

The facts in this case were set forth fully in the Decision and Recommended Order and need not be repeated in detail here. The essential facts are not disputed. Charging Party was formerly employed by Detroit Public Schools (Employer) and was a member of a bargaining unit of security officers represented by Respondent. The Employer subcontracted all of the bargaining unit's work and laid off bargaining unit members. Respondent challenged the Employer's actions in numerous unfair labor practice charges before this Commission[1], and in an action for injunctive relief in Wayne Circuit Court, Case No. 10-08773 CL; Court of Appeals docket number 299804, decision issued August 20, 2012

Charging Party's charge alleges that Respondent failed to take various actions to represent the bargaining unit and enforce its collective bargaining agreement with Detroit

[1] See cases titled *Detroit Public Schools –and- Teamsters Local 214*, Case Nos. C07 K-252, C09 G-103, C10 F-129, and C10 G-175.

Public Schools. The charge does not contain sufficiently specific allegations to meet the pleading requirements of Rule 151(2)(c) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.151(2)(c). On August 9, 2010, the ALJ ordered Charging Party to provide a more definite statement of the charge. In response, on September 30, 2010, she filed an amended charge, which alleges certain perceived deficiencies in Respondent's performance as bargaining representative. Within months of filing the charge in this matter, Charging Party also filed a complaint against Respondent in Wayne Circuit Court, Case No. 10-010019-CL, alleging that Respondent had breached its duty of fair representation with respect to Charging Party and other members of the bargaining unit of which Charging Party was formerly a member.

The ALJ issued an order to show cause on March 9, 2011, which advised Charging Party of various Commission, state court, and federal court decisions regarding a union's duty of fair representation and other issues raised by the amended charge. The order required Charging Party to file a written statement explaining why the charge should not be dismissed. Charging Party filed her response on April 29, 2011, as well as a supplemental response on June 3, 2011.

On June 16, 2011, Charging Party's counsel sent a letter to the ALJ in which he stated that he represented Greer and 194 of the members of her former bargaining unit "in connection with two lawsuits in which substantially similar allegations have been made against the Union." In the June 16, 2011 letter, Charging Party objected to the ALJ's actions in issuing the show cause order and allowing Respondent to reply to Charging Party's responses to that order, questioned the ALJ's impartiality, and asserted that filing a motion for disqualification of the ALJ is being contemplated.

On July 19, 2011, Charging Party filed a motion to disqualify the ALJ. The motion was based on Charging Party's claim that the ALJ was biased against her and members of the bargaining unit for which Charging Party was formerly a steward. In Charging Party's affidavit, and the identical affidavits by two other individuals, in support of the motion to disqualify, the affiants asserted that in 2007, the ALJ conducted settlement discussions between Charging Party's former employer Detroit Public Schools and Respondent. Charging Party asserted that she and other union stewards were present and the ALJ attempted to pressure the union stewards into agreeing with the proposed settlement. According to the three affidavits, the ALJ threatened to have the stewards "locked up" if he found out that the stewards had "torpedoed" the agreement. Charging Party also accused the ALJ of being "an advocate for the Union, and in turn, an adversary of the Charging Party" in entering his March 9, 2011 order to show cause.

On August 9, 2011, Respondent replied to the motion to disqualify the ALJ and filed a motion for summary disposition. Charging Party responded to the motion for summary disposition on September 23, 2011. Respondent's motion for summary disposition was supplemented on November 3, 2011 with the submission of the opinion and order by United States District Judge Zatkoff, in *Greer & Members of Teamsters Local 214 v Detroit Public Schools*, Case No. 10-14623 issued September 12, 2011, which granted the Defendant's Motion for Judgment on the Pleadings and to Dismiss. In that case, the plaintiffs alleged that they were deprived of property and liberty in violation

of their rights to due process under the 14th Amendment to the United States Constitution. Judge Zatkoff found that the plaintiffs failed to show that the collective bargaining agreement supported their claim to a continued right of employment. He also held that § 15(3)(f) of PERA made the subcontracting of noninstructional support services a prohibited subject of bargaining such that if the collective bargaining agreement included a provision restricting the Detroit Public Schools from subcontracting the work of the security officers, it would be unenforceable. The court explained that, in the absence of a property right to continued employment recognized by Michigan law, the plaintiffs had no property interest that could be protected by the 14th Amendment.

The decision of the United States Court of Appeals for the Sixth Circuit affirmed the District Court order granting judgment on the pleadings. The Court of Appeals declined to rule on the question of whether the plaintiffs had a legitimate claim of entitlement to continued employment, but held that even if they did, they had been afforded due process. The Court of Appeals noted that the issue of the lawfulness of the security officers' employment termination was addressed in a grievance procedure under the collective bargaining agreement and in unfair labor practice charges before MERC. Thus, the Sixth Circuit concluded that the complaint did not allege facts demonstrating a viable due process claim for deprivation of property.

On November 8, 2011, the ALJ held oral argument by the parties, after the conclusion of which the ALJ stated his decision with respect to Charging Party's response to the order to show cause, Respondent's motion to dismiss, and Charging Party's motion to disqualify. The ALJ disputed assertions regarding the incident in 2007 mentioned in the affidavits submitted in support of the motion to disqualify and denied that motion. The ALJ discussed each allegation in the amended charge and, assuming the facts alleged to be true, found that the charge fails to state a claim upon which relief could be granted under PERA.

Discussion and Conclusions of Law:

The Motion to Disqualify

In her exceptions, Charging Party contends that the ALJ erred by denying her motion to disqualify him. Although the ALJ's denial of the motion to disqualify is only referenced in a footnote in his Decision and Recommended Order, his reasons are stated in detail on the record. We have thoroughly reviewed the record and Charging Party's reasons for her motion to disqualify and find that the ALJ did not err in denying the motion.

Charging Party's motion to disqualify the ALJ is based on two things: Charging Party's accusation that the ALJ demonstrated a lack of impartiality in his conduct of other proceedings in 2007 and Charging Party's contention that the ALJ's March 9, 2011 order to show cause demonstrated bias. If the facts were as indicated by Charging Party regarding the ALJ's conduct of the proceedings in 2007, we must question why Charging Party did not move to disqualify ALJ O'Connor as soon as she learned that this matter had been assigned to him. Instead, she waited until after the ALJ's August 9, 2010 order

requiring Charging Party to provide a more definite statement of the charge, after she filed an amended charge on September 30, 2010, after the ALJ issued an order to show cause on March 9, 2011, after Charging Party filed her response to the order to show cause on April 29, 2011, and after she filed a supplemental response to the show cause order on June 3, 2011, before she decided to raise the issue of the ALJ's alleged bias. If the ALJ's actions were as egregious as Charging Party would have us believe, we doubt that Charging Party would have waited until July 19, 2011, almost a year after his first ruling in this case, to move for his disqualification. Charging Party has offered no explanation for her delay.

We also reviewed the ALJ's March 9, 2011 order to show cause and find it typical of the orders issued by ALJs in cases before this Commission where charging parties have alleged a breach of the duty of fair representation by their union but have failed to allege facts that state a claim upon which relief can be granted. We find nothing in the show cause order to support Charging Party's allegation that the ALJ "became an advocate." The order to show cause states the law with respect to the duty of fair representation and cites supporting cases. Where it is evident from a charge that a cognizable claim under PERA has not been alleged, an order to show cause gives the charging party the opportunity to show why their claim should not be summarily dismissed. By stating the law with respect to the union's duty of fair representation, the ALJ has informed parties of the elements necessary to state a claim upon which relief can be granted. Where there is a cognizable claim, this process may give a charging party the opportunity to present argument in an effort to show the sustainability of the charge. In this case, the ALJ correctly found that the allegations in the charge and the amended charge are not sufficient to state a claim upon which relief can be granted, and by issuing the order to show cause, allowed Charging Party a further opportunity to state her claim.

Charging Party's Representation of Other Employees in Her Former Bargaining Unit

In her exceptions, Charging Party contends that the ALJ erred by "disregard of the fact that as a union steward, the Charging Party brought the charge in her representative capacity, on behalf of all similarly situated bargaining unit members represented by Teamsters Local 214." Several of Charging Party's allegations relate to claims of other individuals. Charging Party has no standing to pursue these claims. While Charging Party contends that she represents the members of her former bargaining unit, she cannot do so by merely filing a charge in her own name.

For the claims of other employees to be pursued, those claims must be filed by those individuals in their own names. The claims belonging to the other members of Charging Party's former bargaining unit can only be filed on a charge form containing the name, mailing address, and signature of each charging party. Rule 151(2) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.151(2). The charge filed herein was filed only in Denice Greer's name and signed only by her. Accordingly, the ALJ did not err in concluding that Charging Party cannot pursue the claims of her former coworkers in this matter since those other individuals are not parties.

Although Greer was a union steward and had authority from Respondent to represent other members of the bargaining unit in grievance matters, that authority is limited to the circumstances in which she was acting as an agent of Respondent in dealings with Detroit Public Schools. Greer's authority to represent her former coworkers in this matter must come from the individual coworkers. However, since those former coworkers are not parties to this action, they have no interest in this case that Greer can represent.

Collateral Estoppel and Res Judicata

Charging Party also takes exception to the ALJ's finding that the charge is barred by the doctrine of collateral estoppel. Respondent contends that the matter is barred by: the Wayne Circuit Court's decision in *Greer & Certain Members of Teamsters Local 214 v Detroit Public Schools, Robert C. Bobb, & Teamsters Local 214*, unpublished opinion of the Wayne Circuit Court, Hon. Robert Ziolkowksi, issued January 6, 2011 (Docket No 10-100019 CL) recon den'd May 3, 2011; and by the United States District Court decision granting judgment on the pleadings in *Greer & 178 members of Teamsters Local 214 v Detroit Public Schools*, unpublished opinion of the United States District Court for the Eastern District of Michigan, Hon. Lawrence P. Zatkoff, issued September 12, 2011 (Docket No. 10-14623). The Wayne Circuit Court decision was subsequently affirmed by the Michigan Court of Appeals in Docket No. 304197 and is currently before the Michigan Supreme Court in Docket No. 146426. The federal District Court decision was affirmed on other grounds by the United States Court of Appeals for the Sixth Circuit in Docket No. 11-2249.

The doctrine of collateral estoppel prohibits the litigation of an issue in a new action between the same parties or their privies when the original case resulted in a final judgment and the issue in question was actually litigated and necessarily determined in the earlier matter. *Leahy v Orion Twp*, 269 Mich App 527, 530, 711 NW2d 438, 441 (2006). A court's judgment is final when all appeals have been exhausted or the time for further appeal has elapsed. *Cantwell v City of Southfield*, 105 Mich App 425, 430, 306 NW2d 538, 540 (1981). Res judicata prohibits parties from retrying the same claim and applies when: (1) a decision on the merits was issued in the earlier case; (2) the decision in the earlier case has become final; (3) the same parties or their privies were involved in both matters; and (4) the disputed matter in the later case was or could have been resolved in the earlier one. *Dart v Dart*, 460 Mich 573, 586, 597 NW2d 82, 88 (1999); *Ditmore v Michalik*, 244 Mich App 569, 576, 625 NW2d 462, 466 (2001).

Charging Party asserts that both the state court and federal court decisions are currently on appeal. As noted above, the Michigan Supreme Court and Court of Appeals website supports Charging Party's contention with respect to a pending appeal of the state court decision. Accordingly, there is no final judgment in the state court matter and neither res judicata nor collateral estoppel applies. We have no similar evidence with respect to the federal court decision.

Charging Party's federal court complaint in *Greer & Members of Teamsters Local 214 v Detroit Public Schools*, alleged that she and other members of the security officers'

bargaining unit were deprived of property and liberty without due process of law in violation of the 14th Amendment to the United States Constitution. Respondent was not a party to that action and the question of whether Respondent breached its duty of fair representation was not an issue; therefore, res judicata would not apply to this matter.

The decision by United States District Judge Zatkoff, found the plaintiffs failed to show that the collective bargaining agreement supported their claim to a continued right of employment. He found that § 15(3)(f) of PERA made the subcontracting of noninstructional support services a prohibited subject of bargaining such that if the collective bargaining agreement included a provision on subcontracting the services of the security officers, it would be unenforceable. Thus, the federal district court found plaintiffs had no property interest in continued employment and no contract breach by Detroit Public Schools with respect to the layoffs of the security officers. Arguably, Judge Zatkoff's opinion could have supported application of the doctrine of collateral estoppel to the issue of whether Respondent breached its duty of fair representation because, in this case, Respondent's duty depends on the showing of a contract breach by Detroit Public Schools. In the absence of a breach of contract by Detroit Public Schools, there is no basis for finding a breach of the duty of fair representation. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993); *Martin v E Lansing Sch Dist*, 193 Mich App 166, 181 (1992). However, Judge Zatkoff's opinion and order was not a final judgment.

The Sixth Circuit of Court of Appeals affirmed the District Court's order granting judgment on the pleadings. However, the Court of Appeals declined to rule on the question of whether the plaintiffs had a legitimate claim of entitlement to continued employment. Instead, the Sixth Circuit held that even if the plaintiffs had a legitimate claim of entitlement to continued employment by Detroit Public Schools, they had been afforded due process with respect to the termination of their employment. The judgment in this case would not have a preclusive effect on the question of whether Detroit Public Schools breached its contract with Respondent since it declined to address that issue. Accordingly, the ALJ's decision should be modified to find that this matter is not barred by the doctrines of res judicata and collateral estoppel.

Application of § 15(3)(f) of PERA to the Termination of the Security Officers.

Charging Party also cites as error the ALJ's finding that Detroit Public Schools lawfully subcontracted the work of the security officers pursuant to § 15(3)(f) of PERA. Charging Party contends that the ALJ misconstrued the language of § 15(3)(f), but offers no authority to support her interpretation of § 15(3)(f). We find no error in the ALJ's interpretation of § 15(3)(f). It should also be noted that in the absence of exceptions, this Commission adopted the decision of ALJ Stern recommending the dismissal of a charge on this issue filed by Teamsters Local 214 against Detroit Public Schools and concluding:

> [T]he subcontracting of the security work which took place in 2010, including the procedures for obtaining the contract and the identity of the contractor, and the impact of the contract on employees and the bargaining

> unit, were all prohibited subjects of bargaining under §15(3)(f) and that [Detroit Public Schools] had no duty to bargain over any of these issues.

Detroit Pub Sch, 25 MPER 84 (2012) (no exceptions). See also *Lakeview Cmty Sch*, 25 MPER 37 (2011), where we considered the wording of § 15(3)(f) as it applied to the subcontracting of work performed by noninstructional support employees.

The Allegations in the Charge

Charging Party also cites as error the ALJ's failure to address issues in the charge which were not directly related to the July 30, 2010 termination of the remaining bargaining unit members by Detroit Public Schools. Charging Party contends the ALJ failed to consider the record as a whole and erred by focusing on the amended charge. The question before the ALJ was whether Charging Party had stated a claim upon which relief could be granted in her amended charge. We have reviewed Charging Party's response to the ALJ's order to show cause and her supplemental response. However, neither those documents nor Charging Party's other submissions sufficiently supplemented the amended charge for it to state a claim upon which relief can be granted under PERA. The ALJ adequately addressed the charges. As he indicated, Charging Party's dissatisfaction with the Union's efforts in resolving grievances is not sufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131. Charging Party's complaint about Respondent's failure to provide her with information she requested in her capacity as union steward involves the internal structure and affairs of the labor organization and is outside the scope of PERA. *City of Lansing*, 21 MPER 9 (2008). Charging Party has failed to allege facts establishing that Respondent's conduct toward her was arbitrary, discriminatory, or in bad faith and not merely a disputed tactical choice. *Vaca v Sipes*, 386 US 171, 177 (1967); *Goolsby v Detroit*, 419 Mich 651, 679 (1984). Accordingly, we agree with the ALJ that Charging Party has failed to state a claim upon which relief can be granted.

Charging Party also excepts to the ALJ's recommendation that sanctions be imposed against Charging Party because he found her claims to be frivolous. Inasmuch as Respondent has not requested attorney fees[2] and the Commission majority has previously held that§ 16(b) of PERA does not authorize us to award attorney fees[3] we decline to do so in this case.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. After a careful and thorough review of the record, we find that the ALJ's Decision and Recommended Order is affirmed as modified herein.

[2] The Commission has held that it will only award the extraordinary remedy of attorney fees and costs where that remedy has been requested by the affected party. *City of Jackson*, 1979 MERC Lab Op 1146, 1155.

[3] See *Wayne Co*, 26 MPER 22 (2012).

ORDER

The charges in this case are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TEAMSTERS LOCAL 214,
Labor Organization-Respondent,

-and- Case No. CU10 G-035

DENICE GREER,
Individual Charging Party.
_____/

APPEARANCES:

Ernest Jarrett, on behalf of Charging Party

Wayne Rudell, on behalf of Respondent Teamsters Local 214

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

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 Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission.

The Unfair Labor Practice Charge and Findings of Fact:

On July 28, 2010, a Charge was filed in this matter by Denice Greer, Charging Party and former Detroit Public Schools employee, asserting that unspecified representatives of Teamsters Local 214 had violated the Act. The Charge listed eight numbered allegations, none of which described with any particularity who allegedly did what or when they did, or failed to do, the act in question. Such allegations failed to meet the minimum pleading requirements set forth in R 423.151(2). Pursuant to R 423.165(2)(d), the

Charging Party was ordered to provide a more definite statement of the Charge against the Union.

Charging Party responded with an Amended Charge, which generally alleged that the Union did not do enough to avoid a loss of security officer jobs through sub-contracting by the Detroit Public Schools. Because Unions generally have the discretionary authority to decide whether or not, and how, a particular dispute should be pursued, these allegations did not appear to state claims under PERA and the charge appeared therefore subject to being dismissed without a hearing.

On March 9, 2011, I issued an order to show cause why this matter should not be dismissed for failure to state a cognizable claim. In that Order Charging Party, who at that point was acting *in pro per*, was advised that she should take into account that the following issues were well established under the law governing this agency:

1. The union's ultimate duty is toward the membership as a whole, rather than solely to any individual and therefore a union has the legal discretion to decide to present particular grievances for the general good of the membership even though they conflict with the desires and interests of certain employees. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-146 (1973); *Lansing Sch Dist*, 1989 MERC Lab OP 210, 218, *aff'd* Mich App No. 116345 (March 26, 1991), *lv app den* 439 Mich 955 (1992).
2. The Commission has "steadfastly refused to interject itself in judgment" over grievance decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11.
3. In analyzing the National Labor Relations Act on which PERA was premised, the US Supreme Court held in *Airline Pilots v O'Neill*, 499 US 65 (1991): *"Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of*

reasonableness," that it is wholly "irrational" or "arbitrary." (*Citations omitted).*" See also, *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35.

4. The 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.

5. Charging Party here contends that the conduct was a violation of the Union's normal procedures; however, a union's failure to follow its own internal rules does not, standing alone, constitute a breach of the duty of fair representation. See e.g. *Registered Nurses and Registered Pharmacists of Hurley Hospital*, 2002 MERC Lab Op 394 (no exceptions). Internal union matters are outside the scope of PERA, but are left to the members themselves to regulate. *AFSCME Council 25, Local 1918*, 1999 MERC Lab Op 11; *MESPA (Alma Pub Schs Unit)*, 1981 MERC Lab Op 149, 154.

6. A union does not breach its legal duty of fair representation merely by a delay in processing grievances, if the delay does not cause the grievance to be denied. *Service Employees International Union, Local 502*, 2002 MERC Lab Op 185.

7. A union has considerable discretion to decide how, and even whether or not, to pursue and present particular grievances or disputes. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-146 (1973).

8. A union representative or attorney need not follow the dictates of the grievant but may investigate and present the case in the manner he or she determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729; *AFSCME Council 25*, 1992 MERC Lab Op 166.

9. A Union is not, under its legal duty of fair representation, obliged to pursue non-contractual remedies outside of the ordinary grievance procedure. See, *SAAA*, 1997 MERC Lab Op 436 & 1997 MERC Lab Op 439.

10. It is not unlawful for a union or its elected officials to take positions which may benefit the union as an institution, even if those decisions conflict with the desires or interests of certain employees. See e.g. *City of Flint*, 1996 MERC Lab Op 1, 12; *Lansing School District*, 1989 MERC Lab Op 210, 218.

11. The Commission has consistently held that a union's failure to communicate with a member, or a steward, about his or her grievance is not in itself a breach of its duty of fair representation. See, e.g., *Suburban Mobility Authority for Regional Transportation (SMART)* 19 PER 39 (2006)*; Wayne Co (Sheriff's Dep't),* 1998 MERC Lab Op 101, 105 (no

exceptions); *Southeastern Michigan Transportation Authority*, 1988 MERC Lab Op 191, 196 (no exceptions); *AFSCME Local 1600*, 1981 MERC Lab Op 522, 527 (no exceptions).

12. To pursue a charge against the union, charging party must allege and be prepared to prove that the union's conduct toward them was arbitrary, discriminatory or done in bad faith and not merely a disputed tactical choice. *Vaca v Sipes*, 386 US 171, 177 (1967); *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Detroit Federation of Teachers (Steward)* 21 MPER 15 (2008) (no exceptions).

13. To pursue such a claim, charging party must allege and be prepared to prove not only a breach of the duty of fair representation by the Union, but also allege and prove a breach of the collective bargaining agreement by the Employer. *Knoke v E Jackson Pub Sch Dist*, 201 Mich App 480, 485 (1993); *Martin v E Lansing Sch Dist*, 193 Mich App 166, 181 (1992).

14. The limitations period begins to run when a charging party knew, or should have known of the acts constituting an unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

A response to the Order to show cause was due on March 30, 2011. None was filed; however, Charging Party secured counsel who on April 5, 2011, filed an appearance and a request for an extension of time, which was granted even though it was itself, untimely. A response to the Order was filed on April 29, 2011. Charging Party was directed to file a supplemental response, which was filed on June 3, 2011. On July 19, 2011, Charging Party filed a motion to disqualify the ALJ, to which Respondent replied on August 9th.[4]

Also on August 9, 2011, Respondent filed its motion for summary disposition. On August 26, 2011, I *sua sponte* granted Charging Party an unrequested extension of time in which to respond to Respondent's motion for summary disposition, rather than defaulting her upon the failure of her counsel to timely respond to that dispositive motion, and I then granted additional time at the request of Charging Party's counsel. A substantive response to the motion for summary disposition was filed on September 23, 2011.

[4] The motion to disqualify was denied on the record on November 8, 2011, as unmeritorious and as untimely, where it was brought well into the litigation and only after I had issued the Order to show cause why the charge should not be dismissed.

While the Teamsters' motion relied on multiple grounds, a significant issue was the asserted preclusive effect of the final judgment entered by the Wayne County Circuit Court in a parallel and intertwined duty of fair representation and breach of contract action involving the same parties, as well as apparently additional parties, in which the Court expressly held that there had been no breach of the duty of fair representation. *Greer v Detroit Public Schools and Teamsters Local 214*, WCCC Case No 10-100019 CL (Order Granting Defendants' Motions for Summary Disposition, 1/6/11; *recon den'd* 5/3/11; Hon. Robert Ziolkowksi). The Teamsters additionally challenged Greer's standing to assert certain claims, where the claims made or relief sought appear to relate to other individuals.[5] There was also a statute of limitations issue raised. There was also raised the effect of a decision by ALJ Stern granting partial summary judgment in the ULP case directly addressing the sub-contracting of the work in question. See *Detroit Public Schools*, C10 G-175 Interim Order (6/27/11, ALJ Julia Stern).

On November 3, 2011, the Teamsters supplemented their original motion with a later issued decision by the Federal court in a related case in which Greer was the lead plaintiff, represented by the same counsel as in this case. In that decision, the Court dismissed Greer's substantive claims with prejudice, holding that there was "no plausible claim" of a breach of contract and that any contractual agreement purporting to restrict the disputed sub-contracting would have been regardless unenforceable under PERA. *Greer, et al, v Detroit Public Schools*, ED Case No 10-14623 (Opinion and Order, 9/12/11, Hon. Lawrence P. Zatkoff).

At the conclusion of oral argument on November 8, 2011, I placed my bench opinion on the record, which is incorporated in my findings that follow.

Discussion and Conclusions of Law:

The substantive portion of my findings of fact and conclusions of law from my bench opinion are set forth below:[6]

JUDGE O'CONNOR:

[5] Despite repeated inquiries by me, Charging Party's counsel never filed an appearance or asserted substantive claims on behalf of any individual(s) other than Greer.

[6] The transcript excerpt reproduced herein contains typographical corrections and other non-substantive edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

As I indicated, I've heard extensive argument by counsel. You both can talk on, and you took that opportunity today.[7] I've received multiple rounds of pleadings by the parties. I think every issue that could have been explored was explored.

I am prepared to issue a bench opinion in this matter. And procedurally the way that works here is I will issue a bench opinion, it will be on the record, the transcript will be prepared by the court reporter within about ten days. The time for filing exceptions, that is, an appeal from the decision, runs from when the written decision is issued, not from today.

Now, we're here both on my order to show cause why the charge shouldn't be dismissed for a failure to state a claim and on the Union's subsequent motion to dismiss.

The material facts are not in dispute. The employer, Detroit Public Schools, subcontracted out a piece of work performed by security officers represented by the Teamsters Union and later subcontracted out the entirety of that work. An arbitrator found no contract violation. The state circuit court on summary judgment held that there was no breach of the duty of fair representation. The federal district court held that there was no plausible claim of a breach of contract and no enforceable underlying contractual right regarding subcontracting, regardless. The federal court analyzed the amendments to PERA, which made the question of subcontracting of noninstructional support personnel a prohibited subject of

[7] Counsel utilized over three hours for oral argument.

bargaining. I believe the federal court, not that they need my affirmation, correctly analyzed that statute and correctly relied on the Michigan Supreme Court decision which both affirmed the constitutionality of that statute and interpreted the statute as mandating that the question of subcontracting of noninstructional support personnel in a public school was a prohibited subject of bargaining, that even if the parties discussed it and reached a contractual agreement regarding it, that that contractual agreement was absolutely, as a matter of law, unenforceable.

The Teamsters pursued multiple ULPs before MERC [related to the subcontracting dispute] without securing the relief that they sought. The Teamsters successfully sought injunctive relief to protect the security officers, with that injunction later overturned by the Court of Appeals.

Certain members of the security officers bargaining unit filed a decertification petition against the Teamsters at the height of the dispute, which, as a matter of law, precluded the Teamsters from continuing any efforts to bargain with the employer regarding issues important to those security officers.

The amended charge, paragraph 6 and paragraph 10, asserts, and those are the principal assertions actually in that charge, that the union acted improperly in failing to continue to bargain with the employer after the decertification petition was filed. That occurrence was caused by the decision to file the decertification petition. [The pendency of that petition] mandated that the Teamsters and the employer cease bargaining regarding the security officers. It tied their hands.

The material facts are not in dispute here. And I mentioned, the Teamsters pursued multiple ULPs before MERC. I wanted to be more specific about that: In addition to the case that was earlier before me, which was *Teamsters and DPS*, C07 K-252, the Teamsters litigated an extremely contentious grievance arbitration before Arbitrator Joseph Girolamo, to an inconclusive award in Case A07 I-0063. The parties also litigated related claims in multiple MERC unfair labor practice cases brought by the Teamsters against the employer, Detroit Public Schools, including Case C07 J-228, C09 G-103, C10 F-129, and C10 G-175. In all those cases, the Detroit Public Schools was the respondent. There were further claims litigated in a related case of *Detroit Public Schools* in R09 C-047 and in UC09 C-009. Additionally, as I mentioned, [an election] petition was filed by a competing labor organization in *DPS and the Michigan Association of Police (MAP), and Teamsters Local 214*, R10 B-020, seeking to replace the Teamsters as the representative of the school security officers. The Teamsters pursued a charge against yet another competing labor organization in *Police Officers Labor Council (POLC)*, CU09 G-021.

Ultimately, and this is factually undisputed, the entire security officer workforce was laid off and replaced by employees of a private contractor, regarding which the Teamsters sought and secured preliminary injunctive relief in Wayne Circuit Court, Case No. 10-08773 CL, which was later overturned in the Court of Appeals [*Teamsters v Detroit Public Schools*, Case No 299804, 8/20/12], and pursued a case before this body, not before me individually, in *Detroit Public*

Schools, C10 G-175, directly related to the subcontracting of that work. The Teamsters also litigated the subcontracting question before Arbitrator Benjamin Wolkinson, to an adverse decision. The parties, actually Charging Party litigated the question of whether the contract was breached in front of Federal Judge Zatkoff, also to an adverse decision.

There's no legitimate dispute as to the controlling law. The Teamsters, as exclusive bargaining agent, had a duty to fairly represent the members of its unit, and this case law was provided to Charging Party earlier in this proceeding, months and months ago. The Union's ultimate duty is toward the membership as a whole rather than solely to any individual, and therefore, the Union has the legal discretion to decide to present particular cases in a particular matter even though their decisions may conflict with the desires and interests of certain employees, and that holding was in *Lowe v Hotel Restaurant Employees*, 389 Mich 123 (1973).

The Commission has steadfastly refused to interject itself in judgment over grievance handling decisions by unions where arguable tactical choices are made by the union. See, for example, *City of Flint*, 1996 MERC Labor Opinions 1. [See also, *Detroit Federation of Teachers (Steward)* 21 MPER 15 (2008), holding that a reasonable good faith tactical choice by a Union is not a breach of the duty of fair representation.]

In analyzing the National Labor Relations Act (NLRA), on which PERA was premised, the United States Supreme Court held in *Airline Pilots v*

O'Neill, 499 U.S. 65 (1991), that "*Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," that it is wholly "irrational" or "arbitrary.*" (*Citations omitted).*"

Case law is also clear that the fact that a member or members are dissatisfied with their union's effort, with the union's ultimate decision or with the outcome of those decisions, is insufficient to constitute a proper charge of a breach of the duty of fair representation. See *Eaton Rapids Education Association*, 2001 MERC Lab Op 131.

The law is also clear the issue of subcontracting of the noninstructional services in the schools is by express statutory amendment a prohibited subject of bargaining. [see § 15(3)(e) of PERA.] That's the Michigan Supreme Court holding in *Michigan AFL-CIO v MERC*, 453 Mich 362 (1996), relying on the *Detroit Police Officers* case of 1974 [*Detroit Police Officers Ass'n v. Detroit,* 391 Mich 44 (1974)]. The parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying

an illegal subject is unenforceable. See also the recent Court of Appeals decision in *AFSCME Council 25 v Woodhaven Schools*, Case No. 299945, which is an unpublished opinion of June 2011.

Now, I want to address with some specificity the actual Amended Charges, which notwithstanding the long argument today, were largely ignored. The Charge is broken into ten separate paragraphs relating to separate events. Now, I'm going to summarize them as I described them.

The first paragraph 1 asserts that the Teamsters failed to "*make the employer hold grievance hearings*" in a timely manner. That does not state a claim under any circumstance under the statute. The Union lacks the authority to make the employer do anything.

Paragraph No. 2 asserts that the Union failed to make the employer make payments to grievants after grievances are settled. Again, that doesn't state a claim under the Act.

Paragraph No. 3 asserts that the Union has failed to "*make the employer adhere to the grievance timelines*", which again does not state a claim. There are a number of decisions involving employers and unions failing to comply with the timelines in the grievance procedure, and only where the failure by the Union to comply with the timeline in the grievance procedure ultimately bars the handling of the grievance is it even a cognizable issue, which is not asserted here.

I should note that as to paragraph 1 and paragraph 3, reference is made to a grievance by an Anthony Merit, who is not a party to this action.

Paragraph 4 asserts that Ms. Greer has requested various documents from the Union, through its business agent, and purportedly did not receive them. That does not state a claim under any set of facts. The Union has no duty to produce information to employees; in fact, it often has a duty to not provide particular individuals with information if in the Union's estimate it would be contrary to the interests of the overall bargaining unit to do so. It would be a violation for the Union to disseminate some information if it thought it would do harm to the members.

Paragraph 5 asserts that the Union failed to bid on the subcontracting of the outsourced security officer jobs. There is no statutory duty for the Union to submit bids of that sort when work is being outsourced, and therefore, there is no set of facts under which that could state a claim.

Paragraph 6 asserts that the union business agent walked away from contract negotiations in February of 2010. That is later supplemented by paragraph 10 which makes the same assertion and asserts that in February 2010 and July 2010, Union president Joseph Valenti and the business agent advised the members that they couldn't proceed with bargaining because a decertification petition had been filed. That would be correct legal advice on the part of those officers, assuming it occurred. They were required by law to stop bargaining with the employer. The

employer regardless was required to stop bargaining with them. [see, *Fenton Area Pub Sch,* 1987 MERC Lab Op 830; *Paw Paw Pub Sch,* 1992 MERC Lab Op 375.]

Paragraph 7 asserts that a former Union business agent was at some point on the Employer's facilities committee, which does not state a claim.

Paragraph 8 asserts that the Union "*failed to file any paperwork when the employer brought in a private company to work along with dues-paying members under the label of a pilot program in which 12 members were laid off.*" That again is a reference to the earlier partial subcontracting of the security officers, at least that's how I understand that sentence; that is a prohibited subject of bargaining. Notwithstanding that, the Union pursued multiple claims regarding subcontracting, all without success.

Paragraph 9 asserts that the Union allowed the employer to harass members by taking them off work without pay for violations, presumably this is describing a disciplinary suspension, without first going through the grievance process. Again, this does not state a claim. It also exhibits a lack of understanding of the normal course of events, which are that the employer may impose a suspension, the employee serves it, the Union grieves it, the Union either wins or loses later. The normal course of events is suspension first, grievance later.

I already addressed paragraph 10, which is the assertion that bargaining stopped because of the decertification petition.

Now, based on all of the above, there is not a single competently pled or plausible factual allegation that the Teamsters did anything other than vigorously pursue the interests of these security officers in an effort to preserve their jobs. At argument I asked repeatedly, “what more could the Teamsters have done”, and the answer in essence was the belief, the assertion, that there was a better argument that could have been made at arbitration. I think the arbitrator's award, as argued by the Teamsters, reflects that that very argument was made at arbitration, and the arbitrator rejected it. That argument was later made by you, Mr. Jarrett, to the Federal judge, who rejected it, finding that it didn't provide a “plausible basis” for a claim.

The Teamsters were litigating these various efforts against subcontracting under circumstances where, as I noted above, the subcontracting of security officers constituted the subcontracting of school noninstructional personnel, which was clearly a prohibited topic of bargaining, such that the Employer had a free hand to do as it saw fit. Every forum that has already reviewed the claims related to the subcontracting rejected those claims, regardless of whether they were brought by the Teamsters through Mr. Rudell or by the charging party through Mr. Jarrett. Each forum, in my opinion, acted properly, given the controlling decision in *Michigan State AFL-CIO* by the Michigan Supreme Court. There has not been raised here today any non-frivolous argument which would avoid the application of *res judicata* or collateral estoppel to those various decisions where charging party was

a party in the circuit court action and in the Federal district court action.

The argument regarding what the Teamsters might have or could have argued in the arbitration case is equally a frivolous argument, first because it appears that the arguments were made by the Teamsters and rejected by the arbitrator, but regardless, because even if the Teamsters had not made an argument which might have been available, because they made a tactical choice to not make that argument, that tactical choice would be no different than the tactical choice, Mr. Jarrett, you acknowledged making in having your clients not cooperate with the Teamsters in preparing that case for arbitration.

There is no factual basis, nor has there ever been any factual basis for these claims under existing law, and it's transparent that Charging Party's counsel willfully ignored controlling case law. There has not been asserted any good-faith argument for any change in that long-standing case law, particularly where the case law is from a decision of the Michigan Supreme Court. Neither this body certainly, nor the Wayne County Circuit Court, nor a Federal district judge, is in a position to hold other than as held by the Michigan Supreme Court in interpreting a Michigan statute.

It appears to me, and I conclude, that these claims were brought and pursued without any lawful purpose such that the pursuit constitutes improper harassment of the respondent in this case. In *City of Detroit*, Case No. C09 I-166, issued June 2, 2011, and presently on appeal to the Commission, I distinguished the *Goolsby* decision [*Goolsby v Detroit*, 211 Mich App 214, 224

> (1995)] and proposed that the Commission assess sanctions against the charging parties for engaging in conduct abusive to the process. As I said, that decision is currently pending on exception before the Commission.
>
> If the Commission adopts my recommended remedy in *City of Detroit*, I would recommend that it likewise consider similar remedies in this matter given the absolutely and profoundly frivolous nature of the claims made, and in particular, and this is the piece that is troubling to me as an attorney, given the continued pursuit of these claims after adverse and controlling decisions were issued by both the State court and the Federal court. To the extent that anyone could have believed there was any merit to this case, that belief should have properly died when both the State court and the Federal court held there was no merit.

The question of the continued pursuit of claims after an adverse ruling is of significance where the case law appropriately seeks to deter such abusive litigation tactics. The doctrine of collateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties, or their privies, when the earlier proceeding resulted in a final judgment and the issue in question was actually necessarily determined in the prior proceeding. See, for example, *People v. Gates*, 434 Mich 146 (1990). The doctrine is intended to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. See *Detroit v. Qualls*, 434 Mich 340 (1990).

Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in the earlier action. *Arim v. General Motors Corp*, 206 Mich App 178 (1994). The courts have held that the decision of an arbitrator can have collateral estoppel effect on subsequent administrative or judicial tribunals and decisions, and has held with respect to the identity of the parties that individual employees are substantially

identical to the labor organizations which represented them both in terms of arbitration and as charging parties before MERC. See, for example, *Senior Accountants, Analysts and Appraisers Association v. City of Detroi*t, 60 Mich App 606 (1975), *aff'd,* 399 Mich 449 (1976). For a general discussion of the collateral estoppel interplay where an arbitration proceeding and an administrative agency proceeding are involved, see also the *Dearborn Heights School District #7 v. Wayne County MEA and Sherrie Adis*, 233 Mich App 120 (1998). Here, the Charging Party has litigated this case to substantive decisions in both State and Federal court, securing judgments finding that there was no plausible claim of a breach of contract and that there was no breach of the duty of fair representation, and those issues are no longer legitimately open to good faith dispute.

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. Based on the findings of facts and conclusions of law set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 29, 2011