STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Public Employer-Respondent in MERC Case No. C17 C-025/Hearing Docket No. 17-006839,

-and-

PROFESSIONAL & ADMINISTRATIVE ASSOCIATION, LOCAL 4467,
AFT MICHIGAN, AFT,
Labor Organization-Respondent in MERC Case No. CU17 C-006/Hearing Docket No. 17-006842,

-and-

JOSEPH G. LEAVELL, SR,
An Individual Charging Party.
_____/

APPEARANCES:

Mark H. Cousens, appearing on behalf of Respondent-Labor Organization

Joseph G. Leavell, Sr., appearing on his own behalf

DECISION AND ORDER

On July 13, 2017, Administrative Law Judge David M. Peltz 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: August 24, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Respondent-Public Employer in Case No. C17 C-025; Docket No. 17-006839-MERC,

-and-

PROFESSIONAL & ADMINISTRATIVE ASSOCIATION, LOCAL 4467,
AFT MICHIGAN, AFT,
Respondent-Labor Organization in Case No. CU17 C-006; Docket No. 17-006842-MERC,

-and-

JOSEPH G. LEAVELL, SR,
An Individual Charging Party.
_____/

APPEARANCES:

Mark H. Cousens, appearing on behalf of the Labor Organization

Joseph G. Leavell, Sr., appearing on his own behalf

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from unfair labor practice charges filed on March 21, 2017, by Joseph G. Leavell, Sr. against his Employer, Wayne County Community College District (WCCC), and his Union, the Professional & Administrative Association, Local 4467, AFT Michigan, AFT (P&AA). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charges were consolidated and assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The charge in Case No. C17 C-025; Docket No. 17-006839-MERC alleges that the WCCC violated PERA and the collective bargaining agreement by "hiring and/or placing 15 to 20 individual(s) [sic] in union positions without exercising due process." In addition, Charging Party asserts that the Employer acted unlawfully by instituting an investigation into a sexual harassment complaint brought against Leavell by a co-worker.

In the charge, Leavell asserts that he "feel[s] harassed and intimidated" by the College and his co-worker because of his "involvement with union business practices." The charge in Case No. CU17 C-006; Docket No. 17-006842-MERC alleges that the P&AA breached its duty of fair representation

toward Leavell by filling job vacancies in violation of the collective bargaining agreement and by failing to comply with various provisions of the Union's constitution and by-laws.

In a pretrial order issued on April 12, 2017, I directed Charging Party to show cause why the charges he filed against the WCCC and the P&AA should not be dismissed without a hearing.[1] Charging Party's response was due by no later than the close of business on May 3, 2017. No response was received by that date, nor did Charging Party request an extension of time in which to file a response by the date specified in the order.

On May 17, 2017, two weeks after the due date, Charging Party sent an email to my office requesting an extension of time to file a response with respect to the charge against the P&AA in Case No. CU17 C-006; Docket No. 17-006842-MERC. In the email, Charging Party asserted that the extension was necessary because he "just received and read the Order to Show Cause (it arrived after the original due date)." However, Charging Party did not provide any documentation to support this assertion.

I then issued an order directing Charging Party to file documentation supporting his claim that he did not receive the April 12, 2017, Order to Show Cause until after the date upon which a response was due. Charging Party was specifically directed to file: (1) a copy of the envelope in which the Order to Show Cause was received clearly showing the date stamp from the post office; and (2) a sworn affidavit stating the date upon which Leavell received the order and an explanation, if known, as to why the order was not timely received. Because Charging Party's request for an extension did not reference the charge against the WCCC in Case No. C17 C-025; Docket No. 17-006839-MERC, I indicated that I would be formally recommending dismissal of that charge upon final resolution of these consolidated cases.

Charging Party filed a response to the order on May 26, 2017. In his response, Leavell asserted that the Order to Show Cause had arrived at his post office box on May 16, 2017, after the original due date had passed, and that he had disposed of the envelope in which it had arrived. Leavell requested an additional 14-day extension so that he could gather more information and investigate the possibility of hiring an attorney to represent him in this matter. Leavell indicated that he had scheduled an appointment with an attorney for June 1, 2017. Charging Party's response did not, as required, include a sworn affidavit supporting his factual assertions.

In an order issued on May 31, 2017, I granted Charging Party's second extension request. Charging Party was given until the close of business on June 14, 2017, in which to show cause why the charge against the P&AA in Case No. CU17 C-006; Docket No. 17-006842-MERC should not be dismissed without a hearing.

The order specified that Charging Party's response would be considered only if it was accompanied by a sworn affidavit stating the date upon which Charging Party received the Order to Show Cause and an explanation, if known, as to why the order was not timely received.

[1] On April 20, 2017, Respondent P&AA filed a motion for summary disposition in this matter. Because the issues addressed therein were essentially duplicative of those referenced in the Order to Show Cause, I did not specifically require Charging Party to respond to the Union's motion.

A copy of the May 31, 2017, order was sent to Charging Party at the post office box listed as Leavell's address of record on the unfair labor practice charge form. Charging Party did not file a response to that order, nor did he request an extension of time to file a response by the date specified in the order. On June 18, 2017, the order was returned to MAHS by the United States Postal Service (USPS) with the notation, "RETURN TO SENDER. UNCLAIMED. UNABLE TO FORWARD." On June 28, 2017, my office attempted to contact Leavell by telephone at the number listed on the charge form. The call went to voicemail and my staff was unable to leave a message because, according to the system, the voicemail box had not been set up.

Discussion and Conclusions of Law:

Pursuant to Rule 165(1), R 423.165(1), of the General Rules and Regulations of the Employment Relations Commission, which govern practice and procedure in administrative hearings conducted by MAHS, the ALJ may "on [his] own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." See Rule 1501, R 792.11501, of the MAHS Administrative Hearing Rules. Among the various grounds for summary dismissal of a charge is the failure by the charging party to "respond to a dispositive motion or a show cause order." Rule 165(h). See also *Detroit Federation of Teachers*, 21 MPER 3 (2008), in which the Commission recognized that the failure of a charging party to respond to an order to show cause may, in and of itself, warrant dismissal of the charge. In any event, accepting all of the allegations in the charges as true, dismissal of these consolidated cases on summary disposition is warranted.

In Case No. C17 C-025; Docket No. 17-006839-MERC, Charging Party asserts that the WCCC violated PERA and the collective bargaining agreement by placing 15 to 20 individuals in "union positions" without "due process." The Commission's role in disputes involving alleged contract breaches is limited. *Genesee Twp*, 23 MPER 90 (2010) (no exceptions). Where there is a collective bargaining agreement covering the subject matter of the dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is present. *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65 (2013). An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated. See e.g., *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. However, a claim alleging repudiation of the collective bargaining agreement by a public employer can only be brought by the labor organization which is a party to that contract; an individual member of the bargaining unit has no standing to assert a contract repudiation claim. Therefore, the allegation set forth by Leavell in Case No. C17 C-025; Docket No. 17-006839-MERC regarding a purported contract breach by the WCCC fails to state a claim under PERA and must be dismissed on summary disposition.

Charging Party further contends that the WCCC violated PERA by initiating a sexual harassment investigation against him based upon a complaint asserted by a co-worker. Leavell contends that the investigation constituted harassment "because of [his] involvement with union business practices." Section 9 of the Act 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 pursuant to the terms of 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 the Act prohibit a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities described above. PERA does not, however, prohibit all types of discrimination or unfair treatment by a public employer, nor does the Act provide a remedy for a breach of contract claim asserted by an individual employee. The Commission's jurisdiction with respect to claims brought by individual employees against public employers is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in, or refusal to engage in, union or other concerted activities protected by PERA.

The elements of a prima facie case of unlawful discrimination or retaliation under the Act are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Huron Valley Sch*, 26 MPER 16 (2012); *Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. In the instant case, the charge does not assert that Leavell suffered any adverse employment action resulting from the sexual harassment investigation. Moreover, Leavell does not state any facts in the charge which, if true, would establish that the Employer harbored anti-union animus or hostility toward his protected rights, nor does the charge set forth any basis upon which to conclude that Leavell's protected activity was a motivating cause of the allegedly discriminatory action by the WCCC. Rather, Leavell merely asserts that he "feels" that the investigation was initiated in response to his union activities. Such an allegation is insufficient to state a claim for discrimination or retaliation under the Act.

Finally, the charge against the Employer contends that Leavell was bullied, harassed and intimidated by his co-worker. There is no allegation that the co-worker was a supervisor or in any way an agent of the WCCC at the time of the alleged harassment, nor does the charge state facts which would establish that the alleged harassment by the co-worker was in retaliation for Charging Party's protected concerted activities. Accordingly, summary dismissal of the charge in Case No. C17 C-025; Docket No. 17-006839-MERC is warranted.

Similarly, there are no factually supported allegations in the charge filed in Case No. CU17 C-006; Docket No. 17-006842-MERC which, if proven, would establish that the Union acted arbitrarily, discriminatorily or in bad faith with respect to Leavell. A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). The Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. A labor organization has the legal discretion to make judgments about the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218, citing *Lowe v Hotel and Restaurant Employees Union, Local 705*, 389 Mich 123 (1973). The mere fact that a member is dissatisfied with their union's efforts is insufficient

to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855.

Charging Party asserts that the Union breached its duty of fair representation by "collaborating" with the WCCC on filling job vacancies in violation of the collective bargaining agreement. The contract is an agreement between the public employer and the labor organization representing its employees. For that reason, the employer and the union may agree to modify or amend the terms of the contract at any time. Furthermore, the Commission has long held that where an employer and a union concur as to the interpretation of the contract, their construction governs. *Saginaw Valley State Univ*, 19 MPER 36 (2006); *City of Detroit*, 17 MPER 47 (2004). In the instant charge, there is no allegation that the actions of the P&AA were undertaken for unlawful reasons. As noted above, a union has the legal discretion to make judgments about the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. The mere fact that the Union may have agreed with the WCCC on the process for filling job vacancies does not, by itself, establish a breach of the duty of fair representation by the P&AA. Accordingly, the allegation set forth by Leavell concerning purported "collaboration" between the Union and the WCCC fails to state a claim against the P&AA upon which relief can be granted under PERA.

Next, Charging Party contends that the P&AA violated PERA by failing to comply with its own constitution and by-laws governing expenditures, appointments to vacant leadership positions, monthly membership meetings and "regarding union decisions." It is well established that the duty of fair representation does not embrace matters involving the internal structure and affairs of labor organizations which do not impact upon the relationship of bargaining unit members to their employer. *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004); *SEIU, Local 586*, 1986 MERC Lab Op 149. 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. This principle is derived from Section 10(2)(a) of the Act, which states that a union may prescribe its own rules pertaining to the acquisition or retention of membership. The Commission has held that the duty of fair representation applies only to those policies and procedures having a direct effect on terms and conditions of employment. See e.g. *Organization of Classified Custodians*, 1993 MERC Lab Op 170; *SEIU, Local 586, supra*. Accepting as true Charging Party's assertion that the P&AA failed to comply with its own constitution and by-laws, there is nothing in the charge which, if true, would prove that the Union acted arbitrarily, discriminatorily or in bad faith in connection with this matter.

Despite having been given a full and fair opportunity to do so, Charging Party has failed to set forth any factually supported allegations which could establish that either the WCCC or the P&AA engaged in conduct violative of PERA. For this reason, I conclude that the charges must be dismissed for failure to state a claim upon which relief can be granted under the Act and recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Joseph G. Leavell, Sr. against Wayne County Community College in Case No. C17 C-025; Docket No. 17-006839-MERC, and Leavell's charge against the Professional & Administrative Association, Local 4467, AFT Michigan, AFT in Case CU17 C-006; Docket No. 17-006842-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: July 13, 2017