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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SCHOOLCRAFT COMMUNITY COLLEGE
Public Employer-Respondent in MERC Case Nos. C18 E-037 and C18 I-090,

-and-

SCHOOLCRAFT COLLEGE FACULTY FORUM
Labor Organization-Respondent in MERC Case Nos. CU18 F-017 and CU18 I-028,

-and-

NICHOLAS MARCELLETTI,
An Individual Charging Party
_____/

APPEARANCES:

White Schneider PC, by Erin Hopper-Donahue, for the Labor Organization

Thrun Law Firm PC, by Raymond M. Davis, for the Public Employer

Nicholas Marcelletti, appearing on his own behalf

DECISION AND ORDER

On July 15, 2019, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order on Orders to Show Cause and Motions for Summary Disposition[1] in the above matter, finding that Respondents did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210.

On July 25, 2019, Charging Party filed "exceptions" to the ALJ's Decision and Recommended Order. Although we do not believe that Charging Party's "exceptions" comply with Rule 176(4) of the Commission's General Rules, 2002 AACS R 423.176(4), we recognize that Charging Party is an individual not represented by counsel and, in this particular case, to the extent we are able, we will address Charging Party's "exceptions." See *Macomb County and AFSCME Council 25 and Its Affiliated Local 893*, 30 MPER 12 (2016).

[1] MOAHR Hearing Docket Nos. 18-010046, 18-018537, 18-012548, 18-018538

Factual Summary:

The facts involved in this dispute are set forth in the ALJ's Decision and Recommended Order and are not in dispute.

Charging Party Marcelletti was employed by Schoolcraft Community College (College or Employer) as a probationary part-time professor in the Department of Natural Sciences and was covered by a collective bargaining agreement between the College and the Schoolcraft College Faculty Forum (Union). On May 2, 2018, Charging Party was terminated by the College. According to Charging Party, he then contacted the Union's grievance chair, Jerome Lavis, about his termination but was told that "the Faculty Forum could do nothing in this matter" and that if the Union pursued the termination, they "would spend a lot of money and still lose."

Nonetheless, the Union did file a grievance on August 14, 2018 but, after the College denied the grievance, the Union chose not to pursue it further.

On May 8, 2018, Charging Party filed a charge, Case No. C18 E-037, against the College alleging that the College "unlawfully broke the terms and conditions of my contract." On June 12, 2018, Charging Party also filed a charge against the Union alleging that the Union's failure to challenge his termination constituted a "breach of contract" and "taking fees under false pretenses," Case No. CU18 F-017.

On September 7, 2018, Charging Party filed another unfair labor practice charge against the College, Case No. C18 I-090, in which he claimed that the Employer "failed in its contractual responsibility to inform [him] of his right to file a grievance."

On September 10, 2018, Charging Party filed another charge against the Union, Case No. CU18 I-028, and argued that the Union's failure to timely challenge his termination constituted a breach of the Union's statutory duty of fair representation

After the cases were consolidated, the parties appeared before the ALJ for oral argument on February 20, 2019. Following arguments by the parties, the ALJ concluded on the record that Charging Party had failed to allege a claim under PERA against either Respondent. On July 15, 2019, the ALJ issued his Decision and Recommended Order on Orders to Show Cause and Motions for Summary Disposition and recommended that the Commission dismiss the charges in their entirety.

Discussion and Conclusions of Law:

Charging Party does not take exception to the ALJ's finding that he failed to state a claim against either Respondent. In his exceptions, he contends that the ALJ demonstrated bias in favor of the Respondents. Nonetheless, he has not identified anything in the record that might indicate bias toward any party. To the contrary, we believe that a review of the record establishes that the ALJ acted with complete impartiality and neutrality.

As noted in *Cain v Dep ' t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996), a party claiming judicial partiality bears a heavy burden of overcoming the presumption of judicial impartiality. To demonstrate judicial bias, a party must establish that the trial court was actually biased against the party. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible. *Cain*, supra, at 496.

See also *Michigan State University*, 16 MPER 52 (2003), in which we found that a discharged probationary worker failed to state claims against his former employer and union and failed to indicate anything in the record that might indicate bias toward any party.

In the present case, although Charging Party Marcelletti essentially argues that the ALJ demonstrated bias by ruling in favor of Respondents, such is not sufficient to establish judicial bias or partiality. Consequently, we believe that Charging Party's exceptions are without merit and that the charges he filed against the College and the Union should be dismissed in their entirety. See *City of Detroit and ATU, Local 26*, 30 MPER 61 (2017).

ORDER

The unfair labor practice charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair

Edward D. Callaghan, Commission Member

Robert S. LaBrant, Commission Member

Dated: MAR 1 3 2020

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

SCHOOLCRAFT COMMUNITY COLLEGE,
Respondent-Public Employer in
Case No. C18 E-037; Docket No. 18-010046-MERC,
Case No. C18 I-090; Docket No. 18-018537-MERC,

-and-

SCHOOLCRAFT COLLEGE FACULTY FORUM
Respondent-Labor Organization in
Case No. CU18 F-017; Docket No. 18-012548-MERC,
Case No. CU18 I-028; Docket No. 18-018538-MERC,

-and-

NICHOLAS MARCELLETTI,
Individual Charging Party.
_____/

Appearances:

White Schneider PC, by Erin Hopper-Donahue, for the Respondent-Labor Organization

Thrun Law Firm PC, by Raymond M. Davis, for the Respondent-Public Employer

Nicholas Marcelletti appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON ORDERS TO SHOW CAUSE AND MOTIONS FOR 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, the above captioned charges were assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, formerly the Michigan Administrative Hearing System (MAHS), on behalf of the Michigan Employment Relations Commission. Pursuant to Rule 164 of the Commission's General Rules, R 423.164, 2002 AACS; 2014 AACS, these matters have been consolidated.

Unfair Labor Practice Charges and Procedural History:

Charging Party's initial charge, Case No. C18 E-037; Docket No.18-010046-MERC, was filed on May 8, 2018, against his former employer, Schoolcraft Community College (College or Employer). Charging Party, who was terminated by the Employer for various reasons, claims that the Respondent "unlawfully broke the terms and conditions of my contract." Reasons provided by the Employer for his termination according to Charging Party included a violation of the College's policy regarding keeping his classroom locked and that he "was not a good fit for the department." On May 22, 2018, I directed Charging Party to show cause in writing why his charge against the Employer should not be dismissed for failing to state a claim upon which relief can be granted under PERA. Charging Party filed his response to that order on June 5, 2018. That response did not make any allegations that Charging Party had been terminated in violation of PERA, i.e., retaliation for exercising his rights guaranteed under Section 9 the Act.

On June 12, 2018, Charging Party filed Case No. CU18 F-017; Docket No. 18-012548-MERC, against his bargaining representative, the Schoolcraft College Faculty Forum (Union). That charge alleged that the Union's failure to challenge his termination constituted a "breach of contract" and "taking fees under false pretenses." The Union's response was received on July 19, 2018, claiming that its long-standing practice was to not challenge the termination of probationary part-time faculty. Upon careful review of the allegations as set forth by Charging Party and the Union's response to said charges, I concluded that dismissal of Case No. CU18 F-017 may be appropriate. On July 23, 2018, I directed Charging Party to show cause in writing why his charge against the Union should not be dismissed for failing to state a claim upon which relief can be granted under PERA.

Charging Party filed responses to the July 23, 2018, order to show cause on August 7, 2018, and August 17, 2018, respectively. Charging Party, in his earlier response, disputes the Union's claim regarding not grieving matters involving probationary part-time faulty. According to Charging Party, Jerome Lavish of the Union told Charging Party that the Union would not grieve the termination "because the [Union] would lose anyway and they did not want to spend that money." Charging Party's later response included an August 14, 2018, grievance filed by Lavish on behalf of the Union challenging Charging Party's termination. That response also included additional requests regarding relief relative to Case C18 E-037, in which among other things, Charging Party requested that the College be fined a minimum of $40,000, with 10% of the fine total to be awarded to Charging Party, and further that the College's state funding be withheld until such time as he was rehired.

On September 7, 2018, Charging Party filed with the Commission another unfair labor practice charge against the College, Case No. C18 I-090, in which he claimed that the Employer "failed in its contractual responsibility to inform [him] of his right to file a grievance." More specifically, Charging Party alleges that on May 2, 2018, he contacted the College's Human Resources department and asked whether there was an appeal process to which they responded there was not one. Charging Party further claimed that, on May 7, 2018, he asked Dean Cheryl Hawkins, whether he could file a grievance over his termination; she responded the "decision was final." Moreover, after he was told in August of 2018 by the Union that it could grieve his termination, a grievance was filed, however, according to Charging Party that grievance was

denied by the college as untimely. This unfair labor practice charge, later docketed by MAHS as Docket No. 18-018537-MERC, was not referred to my office until August 21, 2018, along with Case No. CU18 I-028, described below.

On September 10, 2018, while preparing a Decision and Order addressing the outstanding Order(s) to Show Cause directed to Charging Party in Case Nos. C18 E-037 and CU18 F-017, my office received by facsimile what appeared to an amendment to CU18 F-017. That filing indicated that the College had denied the August 14, 2018, grievance challenging his termination as untimely and that the Union's failure to timely challenge his termination constituted a breach of the Union's statutory duty of fair representation. Charging Party also made claims that the Union admitted that its prior position with respect to filing a grievance on his behalf was based on a misinterpretation of the contract. In a letter dated that same day, I directed the Union to either file objections to the proposed amended charge under Rule 153(2) of the Commission's General Rules, R423.153(2), and/or file a position statement responding to the new allegations. Unbeknownst to my office at the time, the September 10, 2018, filing had also been sent to the Commission which docketed the filing as a new charge, Case No. CU18 I-028. On September 21, 2018, my office received Case No. CU18 I-028 as a new case from the Commission at which time MAHS assigned it Docket No. 18-018538.

On October 1, 2018, my office received from Charging Party additional allegations against the College which were treated as an amendment to Case No. C18 E-037. Those new allegations claimed that the collective bargaining agreement's provision that restricted the ability to file for arbitration to the Union alone was unlawful. Furthermore, Charging Party also alleged that the College had unlawfully changed his "institutional administrator", presumably his supervisor, without his knowledge, stating in the pleading:

> The new institutional administrator conducted an evaluation, best described as a "secret institutional administrator" who conducted a "secret evaluation" of [Charging Party's] performance that lead [sic] to his termination.

Given the flurry of filing and the general confusion that occurred with items being sent to both my office and the Commission, together with the still outstanding order(s) to show cause, I held a telephone pre-hearing conference with the parties on October 9, 2018. During that call I summarized the status of each of the four pending unfair labor practice charges and further indicated that the October 1, 2018, filing would be considered an amendment to Case No. C18 I-090, and that all cases were consolidated. Both Respondents indicated their desire to file motions for summary disposition after which a briefing schedule was set.

On November 7, 2018, both Respondents filed motions seeking dismissal of the charges; the Union requested oral argument. The College's motion, while awkward in its wording, appears to argue that Charging Party has failed to allege a claim under PERA for which relief could be granted. The Union's motion also claims that Charging Party failed to allege any claim under the Act while also arguing that there are no genuine issues of material fact and that it is entitled to judgement as a matter of law. Charging Party's response to the College's motion and request for oral argument was filed on November 20, 2019; his response to the Union's motion and request for oral argument was filed on December 10, 2019.

The parties appeared before the undersigned for oral argument in Detroit, Michigan, on February 20, 2019. Following arguments by the parties, I concluded on the record that Charging Party had failed to allege a claim under PERA against either Respondent for which relief could be granted. I indicated that upon receipt of the transcript, I would issue a decision and recommended order that the Commission dismiss the charges in their entirety; this is that order.

Factual Background:

The following factual background is derived from the parties' pleadings, including but not limited to an affidavit sworn to by Charging Party and attached to his December 10, 2018, response, as well as from arguments made during the oral argument held before the undersigned on February 20, 2018, and not in dispute.

The College and Union were both signatories to a collective bargaining agreement effective August 2015 through August 2018. Article V, Section 1, entitled "Probationary Status" stated:

> Full-time faculty members shall initially be employed in a probationary status for up to the first three years of their employment with Schoolcraft College. A full-status contract shall be offered to the faculty member upon completion of this three-year period if the faculty member's evaluations have been satisfactory; and if the faculty member has successfully met any conditions which may have been established, as part of the probationary contract, at the time of hire; and if there exists a continuing need for the faculty member's services. If all of these conditions have not been met, the College may either terminate the faculty member's employment or offer an extension of the probationary period for up to a fourth year to allow more time for the conditions to be met. If all conditions have not been met at the end of the fourth year of probation, the faculty member's employment shall be terminated. If the conditions have been met, a full-status contract shall be offered to the faculty member.

Article V, Section 5, provides the various mechanisms by which a faculty member's probationary status could terminate, and states in Subsection D, in the relevant part:

> The release of a full-time faculty member on probationary status may take place at the end of the probationary contract period without recourse to the grievance procedure.

Article XI, provides the contract's four-step grievance procedure ending in binding arbitration. Section 1 of that article defines the term "grievant" as "any faculty member, group of faculty members, or the [Union] asserting the claim." The first three steps of the grievance process can be initiated by the Union or an individual employee or employees, while the fourth step, arbitration, can only be initiated by the Union. The deadline for initiating any grievance at the first step is fifteen days from the discovery of the action giving rise to it.

Article XVI governs the employment of part-time faculty, stating in the relevant portion the following under subsection 2:

> Probation. For the first eight (8) semesters/sessions of teaching, part-time faculty shall be considered probationary employees. During this period, successful performance (as demonstrated by appropriate evaluations) is necessary for continued employment.
>
> 1. During the probationary period, part-time faculty members shall be obligated to attend mandatory orientation(s) as determined by the appropriate administrator.
>
> 2. Failure to offer employment to a probationary part-time faculty member due to poor performance, as evidenced by his/her evaluations, shall not be subject to the grievance procedure.

Charging Party was employed by the College as a probationary part-time professor in the Department of Natural Sciences, from sometime in the fall of 2013 through May 2, 2018.[1] On May 2, 2018, Charging Party was notified by letter that the College was discontinuing his services. According to Charging Party, that same day he contacted the College's Human Resources Department to ask whether there was an appeal process to which he was told there was none. Moreover, on or around May 7, 2018, Charging Party had a conversation with Dean Cheryl Hawkins on the telephone "regarding filing a grievance pertaining to his termination" after which she told him the "decision was final."

Around this same time, Charging Party reached out to the Union's grievance chair, Jerome Lavis, and the two shared several emails. According to Charging Party's affidavit, he and Lavis had a phone conversation in which Lavis told him that "the Faculty Forum could do nothing in this matter" and that if the Union pursued the termination, they "would spend a lot of money and still lose."

While it was the Union's initial position that it did not grieve termination of part-time probationary faculty, the Union did file a grievance on August 14, 2018. On August 20, 2018, the College, through Michele Kelly, Dean of Liberal Arts and Sciences, issued its response denying the grievance. Kelly's written response first cited the contract's fifteen-day window in which a grievance must filed, and then stated in the relevant part:

> During the week of May 7, Mr. Marcelletti and Dr. Hawkins discussed over the phone the reasons for ending his employment at the College which included the following:
>
> - not maintaining the lab
> - opening the lab for students without providing supervision
> - poor evaluation results (below 3.88)

[1] During the oral argument, Charging Party, without reservation, conceded that he was a probationary part-time professor at the time that his employment with the College was terminated.

- recommendation from the department representative not to rehire

> Per the contract language referenced above, there was a 15-day window from the discovery of the event upon which the grievance is based in which to file a grievance. Mr. Marcelletti knew of the college's decision on May 2, 2018 and of the college's reasons the week of May 7; therefore, this grievance is procedurally flawed since it was not filed within the 15-day window.
>
> Additionally, Article XVI Section 2.A.2 provides, "failure to offer employment to a probationary part-time faculty member due to poor performance, as evidenced by his/her evaluations, shall not be subject to the grievance procedure." The aforementioned issues, including evaluation results below 3.88, contributed to the college's assessment of Mr. Marcelletti's performance as poor and not meriting continued employment. Per the contract language, the college's decision is not grievable.
>
> Due to the aforementioned procedural and substantive reasons, this grievance is denied.

Discussion and Conclusions of Law:

The Commission does not investigate charges filed with it. Charges filed with the Commission must comply with the Commission's General Rules. More specifically Rule 151(2)(c) of the Commission's rules, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include:

> A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act, the names of the agents of the charged party who engaged in the violation or violations and the sections of LMA or PERA alleged to have been violated.

Rule 165 of the Commission's General Rules, R 423.165, states that the Commission or an administrative law judge designated by the Commission may, on his or her own motion or on a motion by any party, order dismissal of a charge without a hearing for the grounds set out in that rule, including that the charge does not state a claim upon which relief can be granted under PERA. See, *Oakland County and Sheriff*, 20 MPER 63 (2007); *aff'd 282* Mich App 266 (2009); *aff'd* 483 Mich 1133 (2009.

Charge against the Employer

Section 10(1)(a) of PERA prohibits public employers from engaging in "unfair" actions that seek to interfere with an employee's free exercise of the specific rights contained in Section 9 of the Act. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974). Section 10(1)(c) of PERA make it unlawful for a public employer to "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, a

charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. Id at 74; *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 706.

However, not all unfair, or even unlawful, treatment of its employees by a public employer violates PERA. The authority of the Commission is limited to the enforcement of PERA, and it cannot find an unfair labor practice unless it finds a violation of some provision of Section 10 of that Act. Absent a factually supported allegation that the employer interfered with, restrained, and/or coerced an employee in the exercise of Section 9 rights 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.

Charging Party makes several allegations against the Employer, none of which however articulate a claim that the College's decision to discontinue his employment was predicated on unlawful discrimination or retaliation under PERA. In addition, Charging Party failed to allege any facts that, if proven true, could connect the termination or the College's later actions to any exercise of rights guaranteed to him under Section 9 of the Act. On the contrary, Charging Party's pleadings are replete with allegations unconnected to PERA including, but not limited to, attacks on the process by which he was evaluated, the sufficiency of the College's reasons for his termination, and other procedural or notice concerns. However, absent an actionable and articulated claim under PERA, the undersigned is precluded from passing judgment over the fairness of the College's decisions. Accordingly, dismissal of the charges against the Employer is warranted.

Charge Against the Union

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). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1.

Mere negligence alone is not sufficient to establish a breach of the duty of fair representation and a Union's decision on how to proceed with a grievance is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35.

Moreover, the Commission has held that to prevail on a claim of unfair representation in a case involving the handling of a grievance, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Macomb Cnty*, 30 MPER 12 (2016); *Goolsby,* supra; *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993).

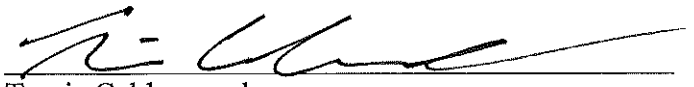
It is clear that Charging Party was dissatisfied with the assistance provided by Lavis and the Union as it related to his desire to challenge the College's decision to discontinue his employment. However, that dissatisfaction alone is not enough to establish that the Union breached its duty to fairly represent him as 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. Here, there is no factually supported allegation which, if true, could establish that the Union's actions were undertaken for unlawful reasons or were so outside a wide range of reasonableness as to be irrational. Moreover, there is to articulated rationale as to how the College's termination constituted a breach of the collective bargaining agreement. Rather the contract appears on its face to preclude the filing of a grievance challenging the termination of a probationary part-time professor.

I have considered all other arguments as set forth by the parties and conclude such does not warrant any change in my conclusions. As such, and for the reasons set forth above, I recommend that the Commission issue the following recommended order.

RECOMMENDED ORDER

The charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: July 15, 2019