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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GREAT LAKES WATER AUTHORITY,
Public Employer-Respondent in MERC Case No. C18 F-051,

-and-

ASSOCIATION OF MUNICIPAL ENGINEERS,
Labor Organization-Respondent in MERC Case No. CU18 F-016,

-and-

SRNIVASA PRASAD,
An Individual-Charging Party.
____/

APPEARANCES:

Cheryl Yapo, for Respondent Great Lakes Water Authority

Partho Gosh, President, Association of Municipal Engineers, Respondent Labor Organization

Srnivasa Prasad, appearing on his own behalf

DECISION AND ORDER

On January 15, 2019, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order[1] in the above matter, finding that Great Lakes Water Authority (Employer) did not violate § 10(1)(a) or (c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) or (c), when it laid off Srnivasa Prasad (Charging Party). The ALJ found that Charging Party did not assert facts to support his claim that his complaints to the Employer about his supervisors and/or his classification constituted concerted activity and concluded that Charging Party's allegation that he was laid off because of these complaints did not state a claim upon which relief could be granted under PERA. The ALJ also found that Charging Party withdrew his charges against the Association of Municipal Engineers (Union) at the hearing and, as such, found that the file in that case should be closed. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

[1] MAHS Hearing Docket Nos. 18-012457 and 18-012458

On February 5, 2019, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. On February 15, 2019, the Employer filed a brief in support of the Decision and Recommended Order of the ALJ and responded to Charging Party's exceptions. In its exceptions, Charging Party contends that the ALJ erred in failing to find that: (1) under the collective bargaining agreement, the Employer could not lawfully terminate Charging Party's employment; (2) the Employer had an obligation to notify the Union if it planned to outsource his union position; (3) Charging Party was treated unfairly as he was unable to claim both short term disability and unemployment benefits at the same time; and (4) Charging Party did not withdraw his charges against the Union.

After review of the exceptions filed by Charging Party, we find them to be without merit.

Factual Summary:

After a complete review of the record in this matter, we find that the facts in this case were set forth fully in the ALJ's Decision and Recommended Order and, as such, need not be repeated in detail here.

Charging Party worked for the City of Detroit, Water & Sewerage Department (DWSD) for many years and was last employed there in the title of senior assistant mechanical engineer. Charging Party's employment with DWSD continued until his employment was transferred to the Employer around January 1, 2016, where he worked in the classification of special projects technician.

Charging Party sent e-mails to various executive team members of the Employer, including the head of human resources, the COO, and the CEO, inquiring as to why he did not receive the title of engineer. Charging Party believes that these inquiries were a problem for these executive team members and that it led to the situation becoming personal. Charging Party "tolerated all the harassment," which, it appears from Charging Party's testimony, included added levels of work.

In August 2017, Charging Party's request for medical leave under the Family Medical Leave Act (FMLA) was approved. In addition, Charging Party also received approval for short-term disability benefits up to November 13, 2017.

On November 27, 2017, the Union was notified that Charging Party would be laid off effective December 2, 2017. On December 9, 2017, Charging Party received notice from the Employer that he had been identified for layoff effective December 2, 2017.

On June 7, 2018, Charging Party filed unfair labor practice charges against the Employer and the Union. Charging Party's charge against the Employer alleged that he was unfairly and improperly laid off; his charge against the Union alleged that the Union violated its duty of fair representation by failing to advance his grievance concerning the termination of his employment.

On June 19, 2018, the ALJ ordered that Prasad show cause as to why his charge against the Employer should not be dismissed. Prasad filed a response to the order on July 9, 2018. The ALJ conducted a hearing at which the Employer moved for dismissal of the charge against it, alleging that the Employer did not interfere with Charging Party's rights under § 9 of PERA. The ALJ raised the question to Charging Party, asking if his charge against the Union was being

withdrawn. To this, Charging Party acknowledged that he could not think of what the Union could have done in the situation at hand.

Discussion and Conclusions of Law:

1. Charge Against the Employer

It is well established that PERA does not prohibit all types of discrimination or unfair treatment by a public employer. *Detroit Pub Sch*, 22 MPER 16 (2009). PERA is intended to prohibit an employer from engaging in actions that would interfere with or restrain an employee's right to engage in lawful concerted activity, as set forth in Section 9 of PERA. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974). Should an allegation fail to be factually supported by evidence that a charging party was discriminated against by an employer because of their union activity, or other activity protected by Section 9 of PERA, the Commission is foreclosed from providing a judgment on whether the respondent's actions would be considered fair. *Detroit Pub Sch*, 22 MPER 16 (2009).

In regard to the Employer, Charging Party believes that the ALJ erred in failing to find that: (1) under the collective bargaining agreement, the Employer could not lawfully discharge Charging Party or terminate Charging Party's employment; (2) the Employer had an obligation to notify the Union if it planned to outsource the union position; and (3) Charging Party was treated unfairly as he was unable to claim both short term disability and unemployment benefits at the same time.

Concerning Charging Party's contention that the Employer could not, under the collective bargaining agreement, lawfully terminate Charging Party's employment, the Employer alleges that, pursuant to Article 2(C) of the collective bargaining agreement, the Employer maintained sole discretion in regard to the decision to layoff Charging Party. Our review of the exhibits indicates that the Employer did, in fact, maintain such discretion and, it is noted that, Article 2(C) of the collective bargaining agreement reads, in part, as "Great Lakes Water reserves the right to lay off Employees in its sole discretion."

Charging Party next contends that the Employer had an obligation to notify the Union if it planned to outsource his union position. Charging Party alleges that these formalities were not followed despite the fact that there remained work to be carried out, thus, making the actions of the Employer unfair.

Rule 176(6) of the General Rules of the Michigan Employment Relations Commission, 2014 AACS, R 423.176(6), states that "[a]n exception to a ruling, finding, conclusion, or recommendation that is not specifically raised is waived." The above argument was not raised in either the charges or at the hearing before the ALJ and, as such, they are not properly before us at this time. See *City of Detroit*, 1993 MERC Lab Op 131, 132; 6 MPER 24028; *Teamsters Local 580*, 1991 MERC Labor Op 575, 576.

Even if that argument had been raised in the charges or at the hearing, it fails to allege a violation of PERA. Charging Party has failed to allege facts to indicate how the Employer's failure to notify the Union violated Charging Party's rights under PERA. Where public employees have an exclusive representative, the duty to bargain runs between the representative and the employer

and not between individual employees and the employer. *City of Detroit (Wastewater Plant)*, 1994 MERC Lab Op 884; 7 MPER 25122. "[A]n individual employee cannot assert that an employer has violated its duty to bargain in good faith with the employee's bargaining representative because the obligation to bargain runs between the employer and the exclusive bargaining representative. An individual employee cannot assert the claims of his or her union." *Wayne Co (Cmty Mental Health Agency)*, 21 MPER 73 (2008) (no exceptions). Any right to notice belongs to the Union. Simply put, Charging Party lacks standing to raise that issue.

Finally, Charging Party contends that the ALJ erred in failing to acknowledge the unfair situation created by the Employer when Charging Party was asked to claim both short term disability and unemployment benefits at the same time. This exception lacks merit as it fails to allege a violation of PERA.

In sum, regarding the Employer, each of Charging Party's exceptions fail to allege a violation of PERA. Nowhere does Charging Party allege that he was laid off due to his union activity. In fact, as referenced by the ALJ, the only point in time in which it appears that Charging Party made any reference to retaliation for his comments towards his supervisors was at the hearing held before the ALJ. At the hearing, Charging Party stated that he had complained to the Employer's upper-management regarding his supervisors and also complained to both upper-management and his supervisors regarding the Employer's refusal to reclassify him as an engineer. However, as noted by the ALJ, the right of employees to engage in "concerted activity for mutual aid and protection" is protected by Section 9 of PERA. For the activity to be considered concerted, the employee must be shown to be seeking a collective goal and not simply seeking to advance his or her personal claim. *City of Detroit (Dept of Water & Sewerage)*, 18 MPER 34 (2005); *MERC v Cafana Cleaners, Inc.*, 73 Mich App 752 (1977). In this, the evidence in the record does not establish that Charging Party's activities were concerted. There is no evidence in the record indicating that any actions taken against Charging Party were based on his union activity.

2. Charge Against the Union

Charging Party contends that the ALJ erred in finding that he withdrew his charge against the Union at the hearing. When questioned by the ALJ about the Union's representation of him, Charging Party stated that he could not think of what the Union could have done in this matter. Thus, it was implicit in Charging Party's statement that he recognized that he had no basis for a charge against the Union. Regardless of the ALJ's finding, Charging Party has not provided any factual support for his allegation that the Union violated its duty of fair representation.

It is well established that 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 with complete good faith and honesty," and (3) "to avoid arbitrary conduct." *Goolsby v Detroit*, 419 Mich 651 (1984) quoting *Vaca v Sipes*, 386 US 171 (1967). Furthermore, within the boundaries of such responsibilities, a union holds a great deal of discretion in deciding how to or whether to proceed with a grievance and must be able to evaluate each grievance based upon their individual merits. *Lowe v Hotel & Restaurant Employees Union, Local 705,* 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A labor organization has the legal discretion to make judgments about the general good of the membership and to then proceed on such judgments, despite the fact that such

judgments might conflict with the desires or interest of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218, citing *Lowe v Hotel and Restaurant Employees Union*. 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 Co, Dep't of Pub Works*, 1994 MERC Lab Op 855. 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. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993). In order to establish a breach of a labor organization's duty of fair representation, a charging party must establish that the labor organization's conduct was arbitrary, discriminatory, or in bad faith. *Goolsby v Detroit*, 419 Mich at 679 (1984).

In the instant case, Charging Party failed to establish that the Union breached its duty of fair representation. There is no evidence in the record that the Union's conduct was arbitrary, discriminatory, or in bad faith. In fact, Charging Party asserted, at the hearing before the ALJ, that he could not think of what the Union could have done given his situation, and he further acknowledged that the Union lacked the funds to pursue arbitration as it had not collected dues from its members.

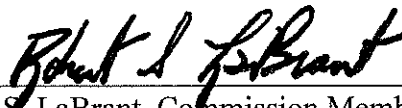
We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we find the exceptions of Charging Party to be without merit and hereby affirm the Decision and Recommended Order of the ALJ. Accordingly, we issue the following Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair



Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: AUG 20 2019

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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GREAT LAKES WATER AUTHORITY,
Public Employer-Respondent in Case No. C18 F-051/Docket No. 18-012457- MERC,

-and-

ASSOCIATION OF MUNICIPAL ENGINEERS,
Labor-Organization-Respondent in Case No. CU18 F-016/Docket No. 18-012458-MERC,

-and-

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SRNIVASA PRASAD,
An Individual-Charging Party.

____/

APPEARANCES:

Cheryl Yapo, for Respondent Great Lakes Water Authority

Partho Gosh, President, Association of Municipal Engineers, for the Respondent Labor Organization

Srnivasa Prasad, appearing for himself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

On June 7, 2018, Srnivasa Prasad filed unfair labor practice charges with the Michigan Employment Relations Commission against his former employer, the Great Lakes Water Authority (the GLWA or the Employer), and his collective bargaining representative, the Association of Municipal Engineers (the Union), pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Prasad's charge against the Employer alleged that the Employer unfairly and unlawfully laid off/terminated him in December 2017. Prasad's charge against the Union alleged that it violated its duty of fair representation by refusing to arbitrate the grievance it filed over his layoff/termination. The two charges were consolidated for hearing before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

On June 19, 2018, pursuant to Rule 165(1) of the Commission's General Rules, 2014 AACS R 423.165, I issued an order to Prasad to show cause why his charge against the

Employer should not be dismissed on the grounds that it did not state a claim under which relief could be granted under PERA and on the grounds that it that it was untimely filed under Section 16(a) of PERA. On July 8, 2018, Prasad filed a timely response to my order, after which I scheduled an evidentiary hearing on both charges.

A hearing was held on Wednesday, July 25, 2018. During the hearing, Prasad conceded that he "could not see what else the Union could have done," and withdrew his charge against the Union. He also, for the first time, alleged that the Employer laid him off/terminated him in retaliation for his complaints to management about his supervisors and about the Employer's refusal to change his classification. At the end of the hearing, the Employer made a motion to dismiss the charge against it. I stated on the record that it was my intention to dismiss the charge against the Employer on the grounds that it did not state a claim upon which relief could be granted, and that I would set out my reasoning in my decision and recommended order.

Based on the record made at the hearing, on arguments made by the parties in pleadings filed before the hearing, and on arguments made by Prasad in a post-hearing brief filed on August 6, 2018, I make the following findings of fact, conclusions of law, and recommended order with respect to Prasad's charge against the GLWA.

Prasad's Unfair Labor Practice Charge Against the Employer:

In the summer of 2017, Prasad was employed by the GLWA performing engineering work and was a member of a bargaining unit represented by the Union. In August 2017, Prasad was granted twelve weeks of Family and Medical Leave Act (FMLA) leave for his back and other health problems. Prasad also began receiving short-term disability benefits as provided for in the collective bargaining agreement between the Employer and Union. Prasad's short-term benefits terminated on November 13, 2017. However, Prasad applied to the Employer's insurance for an extension of his short-term benefits and for long-term disability benefits.

On or around December 9, 2017, while Prasad was in the process of providing the insurance carrier with additional medical documentation for his disability insurance, Prasad received a letter from the Employer, dated December 1, 2017, stating that his "classification of Special Projects Technician (SPT) had been identified for layoff," and notifying him that he was laid off effective December 2, 2017, because "his job assignment had been completed." The Employer confirmed at the hearing that Prasad has no recall rights or expectation of recall, and that his layoff effectively terminated his employment.

The Union filed a grievance over Prasad's layoff. A third step hearing was held on the grievance on December 15, 2017. On January 3, 2018, the Employer provided the Union with a written third step answer denying the grievance. The GLWA asserted that as an SPT, Prasad's employment was at-will and temporary. It also noted that since Prasad's entitlement to short-term disability benefits was not tied to his employment, the fact that he may have been eligible for additional benefits did not preclude his lay off. The Union did not demand to arbitrate Prasad's grievance.

Prasad alleges that his layoff/termination was unfair and discriminatory because, first, the Employer unfairly and without notice to him changed his union position to an at-will position. According to Prasad, the fact that the Employer twice asked Prasad to resign before terminating him indicates that the GLWA did not consider him to be an at-will employee until after it had discharged him. Second, Prasad alleges that his layoff/termination was discriminatory because, although the Employer claimed in its grievance response that the SPT classification would cease to exist after December 31, 2017, at least one other engineer classified as an SPT continued to work after that date. Third, Prasad alleges, as noted above, that the Employer terminated him in retaliation for complaining about his supervisors and about the fact that he continued to be classified as an SPT instead of as an Engineer. Prasad argues that the Employer normally offers employees who are unable to return to work after their FMLA leave expires a variety of options, including an extended leave of absence without insurance benefits, but did not offer them to Prasad.

Findings of Fact:

Background

Prasad was hired by the City of Detroit, Water & Sewerage Department (DWSD) as an engineer in 1995. Prasad was a DWSD employee when, as part of a reorganization, the DWSD decided to eliminate all its existing classifications and create a much smaller number of new ones. For example, all engineering titles, both supervisory and nonsupervisory, were eliminated and a new classification, Engineer, was created. The Respondent Union, which had previously represented supervisory engineers, was selected by the DWSD to be the bargaining agent for the new classification. The DWSD informed its employees that in order to be selected for a new classification, they would have to fill out an application and a self-assessment form which in turn would be reviewed by their supervisors. Among the new classifications created by the DWSD was Special Projects Technician (SPT). The SPT was created to be a "catch-all" classification for DWSD employees who were not selected for any of the new DWSD classifications for which they had applied. Individual SPTs were to be represented by the unions which had represented their previous classifications but SPTs could be assigned any work that they were qualified to perform.

In 2015, while the DWSD's reorganization was in process, the GLWA was created as a new public authority to assume responsibility for water and wastewater treatment functions formerly performed by the DWSD. An agreement for the GLWA to lease DWSD facilities effective January 1, 2016, was executed in the summer of 2015. As part of the agreement creating the new authority, the GLWA agreed to assume and honor all existing collective bargaining agreements between the DWSD and its unions covering DWSD employees transferred to the GLWA. Some DWSD engineers were to transfer to GLWA, while others were to remain employees of the DWSD.

On October 14, 2015, Prasad received a letter from the GLWA offering him employment as of January 1, 2016. The letter stated, "If you accept this offer of employment, your job classification at the GLWA will be the same as your current title at DWSD and there is no change in your salary." Prasad accepted the offer. Around the same time, the DWSD completed the process of selecting employees for the new Engineer classification. Prasad was never

explicitly informed by the DWSD that his application for an Engineer position had been rejected. However, on or about November 10, 2015, Prasad received a memo from the DWSD which stated:

> This memorandum confirms your placement into the DWSD Special Projects Technician – effective 10/12/15. This is a Union position. Your initial salary for this position is $57,528.

The memo did not state that the position was at-will or temporary, and Prasad testified that he was not told at the time that the SPT was a temporary position. At the bottom of the memo, Prasad was asked to check whether he did or did not accept placement in the SPT classification. Prasad accepted placement, signed and dated it on November 20, 2015, and submitted it to the DWSD.

When Prasad became a GLWA employee on January 1, 2016, he was classified as an SPT. The job description for the classification adopted by the GLWA stated that SPTs were to perform work, as directed, involving special project assignments utilizing employees' skill sets. It also stated that the SPT was a "temporary position not to exceed December 31, 2017." Since the SPT was to include employees with a range of skills, the SPT position required only a high school diploma, GED, or "a combination of related work experience and education based on level of special project assignment." The only other requirement for the classification was that it be filled by a current GLWA employee who had applied for a new classification position during the "transition process" but was unsuccessful in securing a position. Unlike the job descriptions for other new classifications, the SPT job description stated that SPT was a "non-Civil Service and at-will" position.

Three employees, including Prasad, previously employed as engineers by the DWSD became employees of GLWA in the SPT classification. One of the three retired in mid-2016, but the third was still working for the GLWA at the time of the hearing in this case in July 2018. As he had been as a DWSD employee, Prasad was assigned to the permit group at the GLWA. In the permit group, Prasad worked with one other engineer and an engineering technician to review drawings and issue permits to contractors for new underground utilities and water and sewer connections.

Between January 2016 and mid-2017, the engineers at the GLWA had several different managers, including some that were employees of outside contractors. Prasad testified that he complained several times during this period to GLWA upper-management about these managers and their incompetency. According to Prasad, he also repeatedly asked these managers and GLWA upper management to change his title to Engineer from SPT, but his requests were ignored. Prasad testified that in March 2017, during a performance review, Prasad's manager asked him if he would agree to resign within two weeks if the Employer reclassified him. Prasad indignantly refused and complained bitterly to the GLWA Director, Sue McCormick, about the offer and his treatment by the Employer.

At some point between January 2016 and late 2017, the GLWA and the Union began negotiating a collective bargaining agreement. One of the proposals presented by the GLWA, and tentatively agreed to by the Union during negotiations, read as follows:

> The following classifications are assigned to this Association:
>
> | Classification | Salary Range |
> |---|---|
> | Engineer | $52,924 - $116,592 |
> | Special Projects Technician | $16,825 -$70,000 |
>
> Special Projects Technician: The Special Projects Technician is an At Will position that may not be exclusive to this Association. Employees placed in the Special Projects Technician classification shall be assigned work that they are qualified to perform and shall be provided reasonable instruction prior to starting the assignment. Placement in the Special Projects classification shall be continued until, in Great Lakes Water's judgment, there is no available work left to perform or it is no longer advantageous to Great Lakes Water's operations. Employees in the Special Projects classification are eligible to apply for promotion to new classifications. Employees in the Special Projects Technician classification may be assigned to projects not previously assigned to members of this Association, provided they are qualified to perform the work. The Association shall not file any grievance, unfair labor practice charge, or lawsuit alleging that non-Association members are performing work that historically was performed by members of its Association.

On November 16, 2017, the Employer and Union entered into a collective bargaining agreement covering the term 2017 through June 30, 2021. The above provision was incorporated into the agreement as an attachment. Article 2 of the agreement states that "where applicable by classification, the Employer reserves the right to discipline and discharge for just cause."

Prasad's Termination and Grievance

In August 2017, Prasad asked GLWA's Office of Organizational Development, its human resources department, for time off because of stress and medical issues that included back pain. Prasad's request was denied, and a human resources employee suggested that he resign instead. Prasad then applied for FMLA leave by submitting his application, and a medical certificate from his doctor, to the Iowa office of Principal Financial Group (Principal). The Employer contracts with Principal, which is also its disability insurance carrier, to process its employees' FMLA requests. Prasad's application for twelve weeks of FMLA leave was quickly approved. Prasad was also approved by Principal to receive short-term disability benefits from August 22, 2017, to November 13, 2017. In early November 2017, at Principal's suggestion, Prasad submitted an application for long-term disability benefits accompanied by a doctor's certification stating that Prasad should not return to work before February 14, 2018. On November 13, 2017, Principal stopped paying Prasad's short-term disability benefit and sent

Prasad application forms for extending his leave of absence and short-term disability benefits beyond November 13, 2017. On or about November 27, Prasad was notified by Principal that it needed additional medical documentation. Prasad continued to have communications with Principal and submitted several medical reports from other doctors. In July 2018, Principal notified him that it had approved his request to extend his short-term disability benefits to February 14, 2018 and that he had also been approved for long-term disability benefits retroactive to February 2018.

On November 27, 2017, the GLWA sent a letter to the Union stating that Prasad had been identified for layoff, effective December 2, 2017, as a result of "the completion of his job assignment." The letter noted that Prasad had been placed in the SPT classification prior to his transfer to the GLWA on January 1, 2016. The following day, November 28, 2017, Prasad received a phone call from the GLWA human resources office telling him to immediately send it a copy of his doctor's certification that he was not released to return to work until February 14, 2018, or he would be considered absent without leave.

On November 30, 2017, Union President Partho Ghosh sent a letter to the human resources department objecting to Prasad's layoff notice. On December 8, 2017, Ghosh submitted a grievance on Prasad's behalf. The grievance noted that Prasad himself had not received an official layoff notice. It also noted that Prasad had been on an approved FMLA leave until November 13, 2017, and that he had filled out Principal's application form for extending his leave and submitted it before the layoff notice was mailed to the Union. The grievance argued that Prasad's layoff notice should be rescinded since Prasad's doctor recommended his return to work on February 14, 2018, and since Prasad had not exhausted his 180 days of short-term disability eligibility. In his cover letter to the grievance, Ghosh noted that there was a shortage of engineers at the GLWA and argued that Prasad should be considered for one of the vacant positions.

On about December 9, 2017, Prasad received a letter from the GLWA dated December 1, 2017 informing him that he was laid off effective December 2, 2017, due to his job assignment being completed. The letter told Prasad that he might be entitled to a payout of accrued paid time off and thanked him for his service. After receiving his layoff notice, Prasad sent an email to GLWA's Board of Directors and its chief executive officer protesting the GLWA's action. Prasad received a written response in the form of a letter from GLWA's general counsel dated December 13, 2017.

A third step meeting on Prasad's grievance was held on December 15, 2017. At this meeting Prasad produced his November 2015 memo from the DWSD stating that the SPT was a "union" position and argued that it could not therefore be at-will. In addition to the arguments set out in the grievance, Ghosh argued that Prasad's job assignment could not have been completed since the work he had been doing was still being performed. On January 3, 2018, the GLWA sent the Union a step three grievance response denying the grievance. The response was in the form of a three-page letter with attachments. The response stated that even if the SPT was a "union" position at the time Prasad was placed in the title by the DWSD, the GLWA job description nevertheless established that Prasad's position at the GLWA was at-will. In response to the Union's argument that Prasad had not exhausted his short-term disability eligibility, the

Employer noted that Prasad's entitlement to disability benefits was not tied to his employment. Therefore, according to the Employer, even if Prasad was approved for an extension of his disability benefits, this would not preclude the Employer from laying him off. The Employer also noted that Prasad's twelve-week entitlement to FMLA leave had ended on November 13, 2017. The Employer's answer stated that Prasad was welcome and encouraged to apply for an Engineer position through the established application process, and that his application would be given due and appropriate consideration. The Union did not advance the grievance to arbitration, the next step of the grievance procedure.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. The types of activities protected by PERA include filing or pursuing a grievance under a union contract, participating in union activities, joining or refusing to join a union, and joining with other employees to protest or complain about working conditions. Sections 10(1)(a) and (c) of PERA prohibit a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities protected by PERA.

Section 16(a) of PERA gives the Commission jurisdiction to remedy violations of Section 10 of PERA. However, not all types of unfair treatment of its employees by a public employer violate PERA. Absent an allegation that the employer interfered with, restrained, coerced, or retaliated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by PERA, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions. See, e.g., *City of Detroit (Fire Dep't)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

There are Michigan statutes, other than PERA, and federal statutes that address aspects of the relationship between public employers and their employees. These include statutes that prohibit discrimination against employees based on race, sex, religion, age and disability. Each statute has its own enforcement mechanism. Some of these statutes are enforced by administrative agencies, while others require aggrieved parties to bring an action in a state or federal court. The Commission's jurisdiction, however, is limited to the enforcement of PERA and related statutes.[1]

Prasad claims that he did not know that his STP position, while included in the Union's bargaining unit, was considered at-will and exempt from the requirement in the Union's collective bargaining agreement that the Employer demonstrate just cause for discharging him. I find that the Union knew, or should have known, that the GLWA considered STPs to be at-will

[1] The Commission is also responsible for administering the Labor Relations and Mediation Act, MCL 423.1 et seq., which does not cover public employers, and the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act, MCL 423.231 et seq.

employees, as the GLWA presented it with a contract proposal that so stated, and the Union agreed to the proposal as part of its new collective bargaining agreement. However, there is no evidence in this record that the DWSD, the GLWA, or the Union informed Prasad that his employment as an STP was at-will before he was terminated. There is also nothing to contradict either Prasad's claim that the work he had been doing as an STP continued to be done after his layoff or his assertion that at least one other STP remained on the job after December 31, 2017. However, the Commission does not have jurisdiction to determine whether an employer has treated an employee fairly, but only whether the employer's conduct violated PERA. I conclude that Prasad's claim that his termination was unfair does not state a claim under PERA.

As I stated in my June 19, 2018, order to show cause, Prasad did not allege in the charge that he was laid off/terminated because he engaged in union activity or otherwise exercising his rights under Section 9 of PERA. Moreover, the facts set out in his charge did not suggest any such connection. At the hearing, however, Prasad alleged for the first time that he was terminated in retaliation for complaining to GLWA upper-management about his supervisors and to upper-management and his supervisors about the Employer's refusal to reclassify him as an Engineer. Section 9 of PERA protects the right of employees to engage in "concerted activity for mutual aid and protection." However, to be protected under this language, the employee activity must be both "concerted" and "for mutual aid and protection." Like Section 9 of PERA, Section 7 of a federal statute, the National Labor Relations Act, (NLRA), 29 USC 150 et seq, also protects the right of employees, in that case employees in the private sector, to engage in "lawful concerted activities for mutual aid or protection." In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), the National Labor Relations Board (NLRB or the Board), the federal agency that enforces the NLRA, held that an employee does not gain the protection of the Act merely by making a complaint about working conditions that might benefit other employees. It held that for his or her complaint about working conditions to be "concerted," an employee not asserting a contractual right must act with or on the authority of his fellow employees, and not solely on his or her own behalf. In *Meyers Industries (Meyers (II)*, 281 NLRB 882 (1986), the Board clarified that acting "with" other employees includes conversations between employees where one employee seeks to initiate or to induce or to prepare for group action. See also, *Fresh & Easy Neighborhood Market, Inc*, 361 NLRB 151 (2014). It also includes the situation where an individual employee brings a truly group complaint to the attention of management after having discussed that complaint with his or her co-workers. In sum, whether an activity is "concerted" may depend on the particular facts. Here, however, Prasad has not asserted that any of his coworkers joined or participated in his complaints about his supervisors and/or his classification or even that he discussed these complaints with them. Because Prasad did not assert facts to support his claim that his complaints to the GLWA about his supervisors and/or his classification constituted concerted activity, I conclude Prasad's allegation that he was laid off/terminated because of these complaints also do not state a claim upon which relief can be granted under PERA.

As noted above, the charge filed by Prasad against the Union in Case No. CU18 F-016/Docket No. 18-012458-MERC was withdrawn at the hearing and the file in that case should be closed. Based on the findings of fact and conclusion of law set forth above, I recommend that the Commission issue the following order in Case No. C18 F-051/Docket No. 18-012457-MERC.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 15, 2019