STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION
Labor Organization-Respondent,

-and- MERC Case No. CU18 E-009

TATYANA FORD
An Individual-Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Reardon Co., L.P.A., by Fil Iorio for the Respondent

Tatyana Ford appearing on her own behalf

ORDER OF REMAND

Tatyana Ford filed this charge alleging that the Respondent Grand Rapids Employees Independent Union (sometimes referred to as "GREIU" or "Union") violated § 10(2)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(a), when it expelled her indefinitely from the Union. On April 18, 2019, Administrative Law Judge Travis Calderwood issued a Decision and Recommended Order[1] concluding that there was no "relevant and admissible evidence that could support a finding that [Ford's] expulsion was in retaliation for her filing of the prior unfair labor practice charges." Accordingly, the ALJ recommended that summary disposition be granted to the Union. Ford timely filed exceptions to the ALJ's decision.

Because this matter turns on witness credibility, we conclude that it is inappropriate to resolve this matter on a motion for summary disposition. Contrary to the ALJ, we conclude that there was sufficient evidence from which a finder of fact *could* have determined that Ford's expulsion was motivated by her filing of unfair labor practice charges. But we emphasize that we do not believe that a finder of fact was *required* to make such a determination. There is ample evidence in the record that would support a finding that GREIU took its action because it believed Ford breached her duty as a union officer by taking internal documents to the police in support of (what it, the Union, believed to be false) criminal charges. If the Union was motivated by Ford's prior filing of unfair labor practice charges, it violated PERA. If it was instead motivated by Ford's actions with the local police, it did not violate the statute. If it had mixed motives, GREIU's liability turns on whether it would have imposed the same discipline if the prior unfair labor practice charges had not been in the mix. See *SEIU Healthcare Workers* (*Kaiser*), 349 NLRB 753 (2007). Because we conclude that the record could support findings in either direction on these

[1] MOAHR Hearing Docket No. 18-009133

questions and the ALJ ruled on a motion for summary disposition without making factual findings or credibility determinations, we remand for the ALJ to make factual findings.

Our decision is merely interlocutory, so we will spare the parties an extensive recitation of the facts and procedural background. The legal framework sets up the relevant inquiry: If the Union expelled Ford for going to the police, it might have breached an ethical norm, the Union's own internal policies, or even a legal duty that lies outside of our jurisdiction. But it did not violate any law that we are charged with enforcing. If the Union expelled Ford for filing unfair labor practice charges, however, it violated the PERA under our decision in *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016).

The record contains sufficient evidence from which a factfinder could infer that the Union's action was motivated by the filing of the unfair labor practice charges. In particular, the Union initiated proceedings to discipline Ford shortly after the ALJ decision in her unfair labor practice proceedings—and shortly after a membership meeting in which that ALJ decision was explicitly discussed. At that meeting, Kevin Hines used the phrase "acting in malice" or "malicious prosecution" to refer to those unfair labor practice proceedings. The disciplinary proceedings were initiated less than three weeks after that meeting, and the Union appointed Hines to serve on the hearing board that would preside over them. The ALJ erred in determining that there was no evidence that could support a finding of retaliatory motive.

But that is not the end of the case. Under *Wright Line*, 251 NLRB 1083 (1980), Ford must carry the burden of proving that her prior unfair labor practice charges were a reason that the Union imposed its discipline on her. Assuming Ford can carry that burden, *Wright Line* gives the Union the opportunity to avoid liability by showing that it would have made the same decision in the absence of the retaliatory motive.

We conclude that the record presents legitimate issues of fact on both of these questions. Although there is evidence from which a factfinder would be permitted to infer a motive to retaliate for filing MERC charges, a factfinder would not be required to find such a motive on this record. There is ample evidence supporting the Union's position that it instead acted because of Ford's taking internal Union documents to the police on (what Union officials believed to be false) embezzlement charges—charges that were ultimately not prosecuted. And even if the Union had mixed motives for its action, a factfinder could readily conclude that it would have made the same decision even if the prior unfair labor practice charges had not been in the mix.

At the ALJ hearing, Hines testified that Ford's decision to bring embezzlement charges to the police had caused serious harm to the Union. He believed that Ford had "ruined the reputation" of the "entire union. People wanted to leave. People didn't want to go to our union anymore." He also suggested that her actions had caused psychological injury to the accused union members who feared that they "could have went to prison." And Hines, Lisa Angus, and Allen Brock all testified that they believed that Ford had abused her prior position as union treasurer by bringing the police documents that she had only been able to access because of that position. All of this testimony suggests that the Union acted because Ford went to the police. A reasonable factfinder could certainly draw such an inference.

Notably, Ford was not the only member whom the Union disciplined for going to the police. Three other members went to the police along with Ford: Rich Troeger, Mark Anderson, and Lucia Anderson. In the same disciplinary hearing in which the union expelled Ford, it also imposed serious punishments on Troeger, Anderson, and Anderson. In particular, it expelled them from the Union for three years and barred them for life from serving in Union office. There is no evidence that any of those three members filed previous unfair labor practice charges. That the Union imposed such severe sanctions on them—and not just on Ford—supports the conclusion that the motivation for the disciplinary proceeding was their going to the police, not Ford's prior unfair labor practice charges.

Of course, Ford did receive a more severe punishment than did the others. That disparity is evidence from which a factfinder could infer an improper retaliatory motive against Ford. But it does not conclusively establish such a motive. The hearing record contains evidence from which a factfinder could draw a contrary inference. Hines testified that he believed that Ford was the ringleader of those who went to the police. And Hines and Brock testified that Ford, as the local's former treasurer, was the only one of the complaining members who had access to the internal Union documents that were taken to the police. Hines testified that he thought the person who took the documents deserved the most severe penalty. Angus testified that taking union documents violates an officer's oath to the Union. Taken together, this testimony—if credited by a factfinder—provides a fully sufficient explanation for the more severe punishment visited on Ford.

Questions of motive rest significantly on the credibility of witnesses. That is particularly true where, as here, reasonable factfinders could draw multiple, conflicting inferences from the testimony. Because the ALJ granted the motion for summary disposition after a full hearing, there is no need to take further testimony. But the ALJ saw the witnesses, and we did not. We should not resolve these credibility issues in the first instance. See e.g., *Zeeland Ed Ass'n*, 1996 MERC Lab Op 499, 507; *E Jackson Pub Schs*, 1991 MERC Lab Op 132, 139.

We reverse the recommended grant of summary disposition and remand so that the ALJ can make findings of fact, with a particular focus on witness credibility.

ORDER

The recommended order on summary disposition is set aside and the matter is remanded to the ALJ for further proceedings consistent with this Order of Remand.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair

Edward D. Callaghan, Commission Member

Robert S. LaBrant, Commission Member

Dated: January 8, 2020

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION,
Respondent-Labor Organization,

Case No. CU18 E-009
Docket No. 18-009133-MERC

-and-

TATYANA FORD,
An Individual Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Reardon Co., L.P.A., by Fil Iorio for the Respondent

Tatyana Ford appearing on her own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On May 1, 2018, Charging Party, Tatyana Ford, filed the above unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against her bargaining representative, the Grand Rapids Employees Independent Union (Respondent or GREIU). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System.

Background and Procedural History:

On October 11, 2016, Charging Party, an employee of the City of Grand Rapids (Employer or City) and member of a bargaining unit represented by the GREIU filed two charges with the Commission, Case No. CU16 J-054; Docket No. 16-029307-MERC and Case No. CU16 J-055; Docket No. 16-029308-MERC, against the GREIU. Both cases challenged Respondent's actions following a one-day suspension issued by the City on December 9, 2015. In Case No. CU16 J-054, Charging Party alleged the GREIU acted unlawfully by violating various provisions of its constitution. In Case No. CU16 J-055, Charging Party asserted that the GREIU breached its duty of fair representation under PERA by failing or refusing to advance a grievance challenging the suspension to arbitration.

An evidentiary hearing was held on the consolidated cases before ALJ David M. Peltz on April 17, 2017. Respondent, following Charging Party's presentation of testimony and documentary evidence, moved for a directed verdict. ALJ Peltz indicated that he was prepared

to grant the motion and that he would issue a written Decision and Recommended Order to that effect. In said Decision and Recommended Order, issued on December 19, 2017, ALJ Peltz found that, with respect to both cases, Charging Party failed to meet her burden of proving that Respondent GREIU breached its duty of fair representation in violation of PERA and recommended that each be dismissed.

On April 12, 2018, Charging Party filed another unfair labor practice charge against the GREIU, Case No. CU18 D-007; Docket No. 18-007461-MERC. This case was assigned to the undersigned. In this case, Charging Party alleged that in retaliation for her filing of the prior unfair labor practice charges, Respondent had violated its duty of fair representation by preventing her from accepting a nomination to seek election for the position of Steward. The charge was initially set to be heard on May 30, 2018.

On May 1, 2018, Charging Party filed the present charge. In this most recent filing, Charging Party alleges that she was expelled from the Union indefinitely in retaliation for her prior filings with the Commission. Additionally, she also alleged that the GREIU was in violation of Section 10(9) of the Act because it did not have an "independent examiner to verify the exclusive bargaining representative's calculations and files."[1]

On May 10, 2018, Respondent moved for dismissal of Case No. CU18 D-007 on timeliness grounds. In a letter dated May 15, 2018, I directed Charging Party to respond to Respondent's motion. Moreover, I indicated that I would be holding the present charge in abeyance pending a decision on Respondent's motion in Case No. CU18 D-007.

On May 17, 2018, the Commission issued its Decision and Order in Case Nos. CU16 J-054 and CU16 J-055, affirming the ALJ's recommendation of dismissal.

On May 29, 2018, Charging Party timely filed her response to Respondent's motion in Case No. CU18 D-007. In a Decision and Recommended Order issued August 24, 2018, I determined that the actions of which Charging Party was complaining of had occurred outside of the Act's strict six-month statute of limitations and recommended that the Commission dismiss the charge in its entirety.[2] In a notice of hearing and accompanying letter sent

[1] Section 10(9) of the Act provides:

> By July 1 of each year, each exclusive bargaining representative that represents public employees in this state shall have an independent examiner verify the exclusive bargaining representative's calculation of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment during the prior calendar year and shall file that verification with the commission. The commission shall make the exclusive bargaining representative's calculations available to the public on the commission's website. The exclusive bargaining representative shall also file a declaration identifying the local bargaining units that are represented. Local bargaining units identified in the declaration filed by the exclusive bargaining representative are not required to file a separate calculation of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment. For fiscal year 2011-2012, $100,000.00 is appropriated to the commission for the costs of implementing this subsection. For fiscal year 2014-2015, $100,000.00 is appropriated to the commission for the costs of implementing this subsection.

[2] The Commission, on October 25, 2018, adopted my Decision and Recommended Order when no exceptions were filed.

contemporaneously with that decision, Case No. CU18 E-009 was scheduled for hearing on September 24, 2018 and I indicated that while I was recommending dismissal of Case No. CU18 D-007, the facts alleged therein in, if proven true, could be considered in CU18 E-009 as background evidence to show a pattern of discrimination.[3]

On September 10, 2018, the September 24, 2018, hearing was adjourned to October 22, 2018, upon the request of the Respondent and over Charging Party's objection. On September 17, 2018, five subpoenas were issued upon Respondent's request. On September 18, 2018, four subpoenas were issued upon Charging Party's request.

On October 3, 2018, Respondent filed a Motion to Dismiss or in the Alternative Motion for More Definite Statement and accompanying briefs in support thereof arguing that dismissal was appropriate under Rule 165(2)(b) and (d) of the Commission's General Rules, R 423.165, 2002 AACS; 2014 AACS. Upon careful consideration of the Motion(s), and in light of the late nature of the pleadings relative to the upcoming hearing and the numerous subpoenas already requested by the parties, I issued an interim order on October 10, 2018, denying Respondent's motion as to Charging Party's claims of unlawful retaliation and reserving decision with respect to the Section 10(9) allegations until Charging Party had an opportunity to respond at the start of the October 22, 2018, hearing. In denying part of Respondent's motion involving unlawful discrimination, I cited to *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016), in which the Commission had stated that "a labor organization that resorts to restraint and coercion to restrict the right of an employee to file a charge, restrains or coerces the employee in the exercise of a [Section] 9 right in violation of [Section] 10(2)(a)."

On the morning of October 22, 2018, prior to the start of the hearing, I received a written response from Charging Party addressing her Section 10(9) claims. Following a brief oral argument, I granted that part of Respondent's motion seeking dismissal of the Section 10(9) allegations on the basis that nowhere within Section 10 or Section 16 of the Act does the language provide support that an alleged violation of Section 10(9) is remediable through the unfair labor practice procedure.

Following Charging Party's presentation of witness testimony and documentary evidence, I indicated that I was prepared to direct a verdict in favor of Respondent on the basis that Charging Party had failed to present relevant and admissible evidence necessary for the undersigned to conclude that the Respondent's decision to expel her from the Union indefinitely violated the Act. After allowing Charging Party to argue why her charge should not be dismissed, I informed the parties that I would set forth detailed findings of fact, conclusions of law and the reasons for my determination that the charge should be dismissed in the form of a written Decision and Recommended Order. Those findings of fact, conclusions of law and reasons are set forth below.

Findings of Fact:

Article VIII, entitled "Miscellaneous Provisions", of the Union's Constitution, provides at Section 1 the following:

[3] See *City of Detroit*, 1989 MERC Lab Op 547.

> Except to the extent specified in this Constitution, no Officer of the Union shall have the power to act as agent for, or otherwise, the Union in any way whatsoever. No member or group of the members, or other person, or group of person, shall have the power to act on behalf of, or otherwise bind the Union, except to the extent specifically authorized in writing by the President of the Union, or by the Union Executive Board.

Article XII, "Grounds for Charges Against Members, Officers, and Stewards" provides at Section 3 the following:

> Any Officer, Steward, or Member may be charged and disciplined for engaging in conduct which constitutes a violation of his or her duties and obligations to the membership. The basis for such charges shall consist of, but not limited to the following:
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> ***
>
> i. Deliberately engaging in conduct in violation of the responsibility of members toward the GREIU as an institution.

Article XIII, entitled "Disciplinary Proceedings" provides the Union's internal process for handling charges brought by members of the Union against other members. Section 5 requires that charges be filed "within thirty (30) days after the basis for the alleged violation has been or should have been discovered." Section 6 provides the level of specificity required with allegations that the same include the specific portions of the Union's Constitution that are alleged to have been violated and a statement of facts sufficient to "fairly inform the accused of the specific acts" with which they are being charged. That Section goes on to provide that the Union's Executive Board can vote to dismiss charges that fail to meet the above pleading requirements, but that charge(s) can be refiled provided the refiling "does not exceed the original thirty (30) day time limit."

Sometime in the fall of 2017, Charging Party was nominated and/or nominated herself for an open Steward position; an election had been scheduled to fill the position. Two other individuals had also been nominated for the position as well. Union policy was for such individuals to be contacted by the Union to confirm the nomination. Mark Anderson, the Union's 2nd Vice President at the time, explained that the Union does this to confirm that the nomination had not been made in jest or as a joke. Charging Party contacted Anderson to determine why she had not been contacted to accept the nomination. Anderson claimed that following the inquiry he contacted Kenny Godwin, the Union's President at the time, to learn more. At some point following this, Charging Party was contacted, and she did accept the nomination. Prior to the election, the other individuals who had also been nominated withdrew and Charging Party assumed the position.

In early October, the Union learned that allegations regarding embezzlement of Union funds had been made to the Wyoming Police Department. As a result of the allegations, Godwin was contacted by the police and may have actually gone down to the Department to participate in an investigatory interview. At a meeting held on October 3, 2017, the Union's Executive Board met to discuss the recent allegations of embezzlement. Anderson, who was present at the

meeting testified that Charging Party and another Union member, Rich Troeger, were identified at the meeting as the two individuals who had made the allegations to the Department.[4]

On October 9, 2017, Charging Party filed internal union charges against President Godwin alleging that the President discriminated against her by ordering a GREIU employee not to contact her regarding her nomination.

On October 30, 2017, several Executive Board Members, including Lisa Angus, the 1st Vice President, Al Brock, a Member-at-Large, and Trustees Bob Ayers and Tracy Roerig, filed charges against Charging Party. While these charges were presumably related to their speculation that Charging Party did in fact make allegations of embezzlement to the Wyoming Police Department, a copy of the charges were not entered into the record. The preceding notwithstanding, the record does indicate that the charges appeared vague and were not very specific as to what Charging Party was being accused of.

An internal hearing was convened on November 29, 2017, to consider the charges brought both by and against Charging Party. Charging Party's allegations against Godwin were dismissed by the Union Hearing Board. The charge brought against Charging Party was adjourned to a later date because one of the individuals bringing the charge, Ayers, was allegedly unavailable to attend.

The Hearing Board reconvened on December 27, 2017, again to consider the charges brought against Charging Party. In a written decision issued that day, the Hearing Board dismissed the charges without prejudice, stating "[t]he Statement of Facts did not fully inform the Charged Party of the specific acts surrounding the charges filed 10/30/2017."

On February 1, 2018, there was a general Union meeting. Charging Party was not in attendance. At that meeting, Al Brock, reported to the members present the result of ALJ Peltz's written Decision and Recommended Order in Case Nos. CU16 J-054 and CU16 J-055. Brock summarized the ALJ's decision and might have read certain portions out loud to the members. According to witness testimony and minutes of the meeting, several members commented with regards to Case Nos. CU16 J-054 and CU16 J-055. Some of the comments included a statement by member Kevin Hines that included the phrase "acting in malice" or some version thereof. Hines could not remember if he used "acting in malice" or "malicious prosecution" but did admit that he was referring to Case Nos. CU16 J-054 and CU16 J-055. Other comments were made regarding what it means to be a "member in good standing" and whether that definition should be changed.[5]

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[4] As will be discussed in more detail below, Anderson also went to the Wyoming Police Department to make allegations of embezzlement. Anderson did not reveal this to the other Executive Board Members during this meeting and it was not until sometime in February that the Union would first learn of this.

[5] The meeting minutes also contained a statement under "New Business" which stated:

> Kevin Hines thanked Al Brock for "bringing it all out." He also stated that moving forward, he would like to see Al and Lisa have some sort of "summit meeting" on how to deal with these types of issues.

Charging Party attempted, unsuccessfully, to tie Hines' statement regarding the summit to her filing of CU16 J-054 and CU16 J-055. However, witness testimony clearly established that he was referring to a "summit" with other unions regarding bargaining issues.

On February 6, 2018, Brock received a response from the Wyoming Police Department regarding a request for information made under the Michigan Freedom of Information Act (FOIA), MCL 15.231 et seq. The response consisted of a partially redacted Case Report covering the embezzlement allegations originally first made on March 27, 2017, by Charging Party, Mark Anderson, Lucia Anderson and Rich Troeger. The initial complaint identified six past or current Executive Board members; Terry Togood, President at the time of the alleged theft, Joe Casalina, a prior President, Frank Dietz, a 1st Vice President at the time of the alleged theft, Lisa Angus, a 2nd Vice President at the time of the alleged theft, Jill Casalina, a Union Secretary at the time of the alleged theft, and Al Brock, a Member-at-Large at the time of the alleged theft. The Case Report went on to provide specific details with respect to the complaint and the Department's investigation into the embezzlement allegations. According to the Case Report, the complainants turned over numerous Union documents and records including, but not limited to, bank statements for 2014, email correspondence, and copies of all rental hall receipts from October 12, 2009, through May 6, 2015.[6] Moreover, the Case Report indicates that Charging Party, who had identified herself to the investigator(s) as the Union's former Treasurer and an individual with an "accounting/financial background", claimed she discovered missing money while she was in the position of Treasurer. The Case Report indicates that in addition to the initial contact with investigators on March 27, 2017, Charging Party and Troeger returned to the Department on April 19, 2017, and Troeger and Lucia Anderson returned sometime on or around October 4, 2017, to provide further details and information to investigators. Ultimately the Department, citing no leads, closed the investigation on October 13, 2017.

On or around February 18, 2018, Al Brock and Lisa Angus brought internal Union charges against Charging Party, Mark Anderson, Lucia Anderson, and Rick Troeger, alleging that the four had violated Article VIII, Section 1, and Article XII, Section 3(a)(i) of the Union's Constitution. The charges identified February 7, 2018, as the date of discovery and referenced the information received from the Wyoming Police Department. Additionally, the charges provided the following "Statement of Facts":

> On March 27, 2017 Tatyana Ford, Lucy Anderson, Mark Anderson, and Rich Troeger filed an embezzlement complaint with the GRPD. These 4 members acted in the name of the GREIU, without the permission of the President, nor the executive board, a direct violation of Article VIII, section 1 of our Constitution.
>
> On April 19, 2017, at 3:30 p.m. Tatyana Ford and Rich Troeger met with a police officer and acted further on behalf of the GREIU, again without the permission of the President, nor the executive board, again a direct violation of Article VIII, section 1 of our Constitution.
>
> On October 4, 2017, Luci Anderson and Rich Troeger went to the GRPD and met with a police officer, again acting further on behalf of the GREIU, again in direct violation of Article VIII, section 1 of our Constitution.

[6] According to the Case Report, the Union maintains a rental hall of some sort which it rents out to various organizations or events.

By letter dated February 27, 2018, Charging Party was provided notice that a Union Hearing Board had been established to hear the above charges levied by Angus and Brock. The letter identified Kevin Hines, Pat Tate and Ted Jensen, as the members appointed to the Hearing Board. Moreover, the letter listed March 20, 2018, as the date of hearing.

On March 8, 2018, Charging Party responded to the charges against her in writing requesting that the same be dismissed. As grounds for dismissal, Charging Party citied three specific reasons: (1) Angus and Brock had misrepresented the date of discovery as February 7, 2018, as opposed to October 2, 2017, the date in which she claims the Union learned of the investigation by the Wyoming Police Department; (2) under Article XIII the charges were untimely as they had been filed more than thirty days from the actual date of discovery, October 2, 2017; and, (3) the complaint was not substantiated in any way, i.e., no copy of the complaint filed with the GRPD.

On March 20, 2018, the Hearing Board met as scheduled. Charging Party did not appear at that hearing. Hines testified that while he could not remember specifically seeing Charging Party's March 8, 2018, response to the charges, he did claim that if it were provided to him, he would have read it. Hines further testified that he was provided a copy of the Wyoming Police Department's Case Report that had been received in early February of 2018. According to Hines, he could recall that Brock and Angus had with them a stack of documents that were reportedly the documents Charging Party was accused of providing to the Department but that he was not provided them to review. Hines further testified that the panel deliberated for about an hour before rendering its unanimous decision to expel Charging Party indefinitely from the Union; the other three individuals charged were each expelled for a period of three years.

Hines, in explaining his decision-making process as to why Charging Party was expelled indefinitely while the other three accused were expelled for only three years, stated at the hearing the following:

> It was felt again that you were basically behind the effort to take the documents from our union, to provide them to the police, and that you accused people, that you were the ringleader basically, and falsely accused our members of embezzlement and that you provided the material for that and were the impetus for it. Other people participated, but you were the main person and for that reason it was felt that what you had done was so serious there was no other – there was no other thing we could do.

Hines testified consistently and repeatedly throughout the proceedings variations of the above premise referring to Charging Party more than once as the "ringleader" and characterizing the other three members charged with her as "accomplices." Moreover, Hines indicated that his decision was also influenced by his belief, through his reading of the Case Report, that Charging Party was the individual that took the internal documents and records and delivered them to the Wyoming Police Department. Hines claimed that at no point during the hearing or the Panel's deliberation did the subject of Charging Party's prior unfair labor practice charges get discussed. The Union witnesses who testified at the hearing, in addition to Hines, each consistently testified that the nature of the allegations brought against the Charging Party, i.e., unauthorized delivering of internal Union documents to the Wyoming Police Department in connection to embezzlement allegations that ultimately proved, in the opinion of the investigators, as unsubstantiated, were

extremely egregious. Moreover, more than one witness commented on how those allegations could have resulted in improper criminal prosecution or otherwise harm the reputations of those individuals identified by the Charging Party.

On March 26, 2018, Charging Party appealed the expulsion to the Executive Board pursuant to the Union's Constitution. By letter dated April 6, 2018, Charging Party was notified that the Executive Board would consider her appeal on April 18, 2018, and that she would have fifteen (15) minutes to present her appeal. On April 18, 2018, the Executive Board met to consider Charging Party's appeal of her expulsion; Charging Party was not present. The Executive Board voted to uphold the Hearing Panel's decision.

Discussion and Conclusions of Law:

Under well-established Commission law, a union's duty of fair representation is comprised of three responsibilities: (1) to serve the interest 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), also *Goolsby v City of Detroit*, 419 Michigan 651 (1984). In *Goolsby*, at 682, the Court gave the following examples of "arbitrary" conduct by a union:

> The conduct prohibited by the duty of fair representation includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence.

The United States Supreme Court has held that a union's actions are lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Airline Pilots Association v O'Neill*, 499 US 65, 67 (1991).

A union's duty of fair representation extends to union conduct in representing employees in their relationship with their employer, but does not embrace matters involving the internal structure and affairs of labor organizations that do not impact upon the relationship of bargaining unit members to their employer. *West Branch-Rose City Education Ass'n*, 17 MPER 25 (2004). The preceding notwithstanding, the Commission, in *Amalgamated Transit Union, Local 26,* 30 MPER 22 (2016), did find that a Union violates PERA when it restrains and/or retaliates against an individual for instituting proceedings under the Act. The Commission, in explaining this position, stated:

> It is a violation of § 10(2)(a) of PERA for a labor organization or its agents to restrain or coerce public employees in the exercise of the rights guaranteed by Section 9 of PERA. Section 9 gives public employees the right to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid or protection, and to negotiate or bargaining collectively with their public employers through representatives of their own free choice. Section 16 of PERA grants the Commission the exclusive authority to prevent and remedy unfair labor practices and gives any person covered by the Act the right to file an unfair labor practice charge. The right to file a charge is indispensable to the administration of the Act

> because the Commission cannot initiate its own processes. As such, an individual's right under § 9 of PERA to give testimony or institute proceedings has long been recognized. *Lake Erie Transportation Commission*, 17 MPER 50 (2004); *Huron County Road Commission*, 1994 MERC Lab Op 407 (no exceptions); *Antrim/Kalkaska Community Mental Health*, 1995 MERC Lab Op 121 (no exceptions). Consequently, a labor organization that resorts to restraint and coercion to restrict the right of an employee to file a charge, restrains or coerces the employee in the exercise of a § 9 right in violation of § 10(2)(a).

The Commission went on to discuss several cases brought under the National Labor Relations Act (NLRA), noting that the National Labor Relations Board has repeatedly held that a union violates the Act when it takes coercive actions designed either to prevent a member from filing a charge with the Board or to retaliate against a member for filing such a charge. See *Graphic Communications Local 22 (Rocky Mountain News),* 338 NLRB 130, 130-131 (2002), in which the Board found coercive and unlawful the union's filing of an internal charge against a union member in retaliation for his filing of a charge with the Board against the union. The Commission noted that while it was not bound by decisions interpreting the NLRA, it nonetheless agreed with the NLRB that "a union may not take coercive actions designed either to prevent a member from filing an unfair labor practice charge or to retaliate against a member for filing such a charge."

While the language discussed above does articulate the Commission's position as to its jurisdiction to consider whether a union violates the Act if it retaliates against an individual for instituting an action under the Act, it did not articulate the method by which such allegations are to be analyzed. The preceding notwithstanding, the Commission has addressed that scenario from the perspective of a public employer retaliating against a public employee for that sort of an action. See MCL 423.210(1)(d). When considering an alleged Section 10(1)(d) violation the Commission had determined that the analysis used is the same as is used when considering a Section 10(1)(c) violation. See *Innovative Teaching Solutions, Inc*, 22 MPER 12 (2009). Accordingly, it would stand to reason that the same analysis would be appropriate in the present proceeding.

A charging party, in order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act must show, in addition to an adverse employment action: (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. See *Eaton Co Transp Auth*. 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.

In the present proceeding, Charging Party alleges that her expulsion was a result of her filing the two earlier unfair labor practice charges heard by ALJ Peltz, Case Nos. CU16 J-054 and CU16 J-055. In support of this allegation Charging Party relies on the discussion of those cases and the ALJ's written Decision and Recommended Order at the Union's February 1, 2018,

meeting and the close temporal proximity to her expulsion in late March of 2018. However, this narrative, as plead in her initial unfair labor practice charge, conveniently leaves out the interceding events that occurred, i.e., the Union's receipt of the Case Report and subsequent internal union charges. The temporal proximity between the discussion of ALJ Peltz's decision in Case Nos. CU16 J-054 and CU16 J-055, and expulsion notwithstanding, Charging Party, despite being given every opportunity to do so during the hearing before the undersigned on October 22, 2018, failed to present relevant and admissible evidence that could support a finding that her expulsion was in retaliation for her filing of the prior unfair labor practice charges under the Act. See *Southfield Pub Sch*, 22 MPER 26 (2009) (A temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation). Moreover, even if Charging Party were able to establish a prima facie case under the above framework, shifting the burden to the Union clearly establishes in the opinion of the undersigned that the Charging Party was expelled due to the seriousness of the allegations made against her.

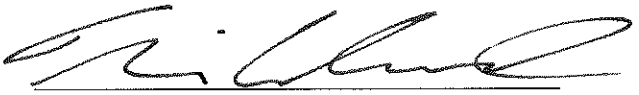
Lastly, although Charging Party alleges that the Union failed to comply with its Constitution, insofar as it relates to the timing of the charges relative to when the Union knew or should have known that Charging Party had made the embezzlement complaint, the Commission recognizes that it does not have jurisdiction to enforce internal union matters such as union bylaws and constitutions. *City of Detroit*, 30 MPER 61 (2017); *ATU Local 26*, 30 MPER 22 (2016). Additionally, I would note that it appears from the record that in October of 2017, when the first internal charges were levied against Charging Party as a result of Godwin being questioned by investigators, Charging Party's involvement in the incident was only suspected. Moreover, it was not until early February of 2018, that the Union, through its receipt of the Case Report, learned of Charging Party's actual involvement and scope of the such involvement.

I have considered all other arguments as put forth by the parties and conclude such does not warrant a change in my findings. As such I recommend that the Commission issue the following order:

Recommended Order

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 18, 2019