TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

YPSILANTI CHARTER TOWNSHIP,
Public Employer-Respondent, MERC Case No. 19-A-0020-CE

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO, LOCAL 3541
AND MYLA HARRIS, ITS AGENT,
Labor Organization-Respondent MERC Case No. 19-A-0065-CU

-and-

DAWN SCHEITZ,
An Individual-Charging Party.

_____/

APPEARANCES:

McLain &Winters, by Wm. Douglas Winters, for the Respondent Employer

Nicholas J. Caldwell, Staff Counsel, AFSCME Council 25, for the Respondent Labor Organization

Dawn Scheitz, appearing for herself

DECISION AND ORDER

On June 6, 2019, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

[1] MOAHR Hearing Docket Nos. 19-002298 & 19-002301

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: AUG 02 2019

TRUE COPY

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

In the Matter of:

YPSILANTI CHARTER TOWNSHIP,
Public Employer-Respondent in Case No. 19-A-0020-CE,
Docket No. 19-002298-MERC,

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO, LOCAL 3541
AND MYLA HARRIS, ITS AGENT,
Labor Organization-Respondent in Case No. 19-A-0065-CU,
Docket No. 19-002301-MERC,

-and-

DAWN SCHEITZ,
An Individual-Charging Party.
_____/

APPEARANCES:

McLain &Winters, by Wm. Douglas Winters, for the Respondent Employer

Nicholas J. Caldwell, Staff Counsel, AFSCME Council 25, for the Respondent Labor Organization

Dawn Scheitz, appearing for herself

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

On January 17, 2019, Dawn Scheitz filed unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against her former employer, Ypsilanti Charter Township (the Employer). her collective bargaining representative, Michigan AFSCME Council 25, AFL-CIO, Local 3541 (the Union), and Myla Harris, as an agent of the Union, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), as amended, MCL 423.210, MCL 423.216, and Section 15 of the Labor Relations and Mediation Act (LMA), MCL 423.215. Pursuant to Section 16 of PERA, the charges were assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (now the Michigan Office of Administrative Hearings and Rules).

Scheitz's charges were not consolidated when they were first assigned to me. On February 12, 2019, I issued an order to Scheitz, pursuant to Rule 165(2)(d) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.165(2)(d), to show cause why her charge against the Respondent Employer should not be dismissed because it did not allege a violation of PERA. Scheitz filed a response to my order on March 4, 2019.

On February 12, 2019, I also directed the Union to file a position statement responding to Scheitz's allegation that Harris, the chief Union steward for Scheitz's bargaining unit, breached the Union's duty of fair representation by disclosing to the Employer certain documents which Scheitz had entrusted to her and which were to be shown only to the Union's grievance arbitration panel. After the Union filed its position statement on March 12, 2019, I issued an order to Scheitz to provide a more definite statement of her allegations against the Union, which she did on April 1, 2019. Then, on April 5, 2019, I ordered Scheitz to show cause why her charge against the Union should not be dismissed on the grounds that it did not state a claim upon which relief could be granted under PERA. In this order I directed Scheitz to provide additional facts or an explanation of how Harris' actions impacted her employment status or terms and conditions of employment. Scheitz responded to my April 5, 2019, order on April 29, 2019.

As noted above, I did not initially consolidate Scheitz's charges, even though both involve the same incident. However, certain facts alleged by Scheitz in her pleadings are also clearly relevant to the allegations in both charges. I conclude that a just determination of the issues raised by Scheitz's charges requires that I consider all the facts alleged by Scheitz in her pleadings in both cases. I am, therefore, consolidating Scheitz's charge against the Employer with her charge against the Union.[1]

Based on facts alleged by Scheitz as set forth below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges and Pertinent Facts:

Scheitz was employed by the Employer in the office of its Township Assessor and was a member of a bargaining unit represented by the Union. On December 2, 2016, the Employer terminated Scheitz for alleged insubordination and alleged violations of the Employer's workplace violence policy and its work rule prohibiting the use of abusive, coercive or threatening language toward other employees. The Union filed a grievance over her discharge which it advanced to arbitration. Hearings were held before an

[1] Rule 164 of the Commission's General Rules, R 423.164, allows an administrative law judge, on his or her own motion, to consolidate or sever charges based on a determination that the consolidation or severance will promote the just, economical, and expeditious determination of the issues presented.

arbitrator on that grievance in October and November 2017 and the arbitrator issued his award on February 19, 2018.[2].

According to the arbitrator's award, during the arbitration hearing the Union disputed the Employer's claim that certain statements made by Scheitz in the workplace and on Facebook posts constituted threats or attempts to intimidate her co-workers. It also presented evidence of other incidents occurring in the workplace indicating that the Employer had not applied its rules evenhandedly when it discharged Scheitz for these statements. In his award, the arbitrator concluded that Scheitz was, in fact, guilty of the charged offenses and that the degree of discipline was reasonably related to the seriousness of the offenses. However, he concluded that Employer had not applied discipline evenhandedly and that Scheitz was not treated fairly in relationship to other employees. The arbitrator directed the Employer, within 10 days of the date of his award, to offer Scheitz the opportunity to submit her resignation retroactive to December 2, 2016. He held, however, that if Scheitz did not submit her resignation within fifteen days following the issuance of his award, her December 2, 2016 termination would remain in effect. Scheitz resigned and later found a position with another employer.

At the time Scheitz was discharged, Harris was the chief Union steward for Scheitz's bargaining unit. The arbitrator, in his award, reproduced a series of emails between Scheitz and Harris and another employee, Jennifer Shepherd, which he said provided a "sense of [the] relationships among some members of the Assessing Office and other employees." In these emails Scheitz criticizes Harris' performance of her duties as steward and accuses her of trying to keep a grievance settlement involving Shepherd secret, while Harris accuses Scheitz of being a "bully" and of deliberately making false statements about her. In one email, Harris tells Scheitz that she is "tired of this crap that you throw out." After Harris was replaced as Union steward in an election, Harris testified at Scheitz's arbitration hearing as a witness for the Employer.

Sometime during the period that the Union's arbitration panel was reviewing Scheitz's grievance to decide whether to accept it for arbitration, Scheitz gave Harris a sealed envelope and asked her to give it to the Union's grievance arbitration panel. The envelope was marked "For the arbitration panel only." Included in the envelope was a letter detailing information Scheitz had gathered about how the Employer had inconsistently administered discipline in the past, including instances where Scheitz believed a supervisor had played "favorites" and along with documents indicating that some supervisors were more lenient in administering discipline than others. Scheitz wanted the Union to review this information and determine whether it would be useful in her defense. According to Scheitz, Harris opened the envelope and showed the contents to Employer representatives. The Employer copied a letter drafted by Scheitz which was in the envelope and showed it to employees mentioned in the letter.

[2] The Union attached a copy of the arbitrator's award to its position statement. Scheitz does not dispute the authenticity of the document.

Harris informed Scheitz that she had opened the envelope, and Scheitz told Harris that she was very angry at her for doing so. Harris did not tell Scheitz, however, that she had shown the contents of the envelope to the Employer. In January 2017, after the incident with the envelope occurred, Harris was replaced as chief steward by Ron Whittenberg in a local union election. Shortly after becoming chief steward, Whittenberg had a conversation with a unit employee, Bill Elling, during which Elling said that Scheitz had "thrown him under the bus." Elling explained to Whittenberg that his supervisor had shown him a letter from Scheitz mentioning Elling which Elling interpreted as a betrayal of their friendship. Whittenberg did not mention this conversation to Scheitz because neither he nor Elling had a copy of the letter at that time.

However, in the summer or early fall of 2018, after Scheitz had resigned, Whittenberg discovered a letter in Scheitz's file which he believed might have been the letter Elling had mentioned earlier. Whittenberg showed the letter to Elling who confirmed, in the presence of a witness, that this was the document that he considered a betrayal. On or about October 2, 2018, Whittenberg called Scheitz to tell her what he had found and what Elling had said. Until this conversation, Scheitz did not know that the Employer had seen her letter or shown it to other employees.

As noted above, Scheitz filed charges against both the Employer and the Union on January 17, 2019. In her charge against the Employer, Scheitz alleges that the Employer interfered with the exercise of her Section 9 rights under PERA, and the Section 9 rights of other employees, by accepting confidential information from a union representative, i.e. information entrusted by an employee to a union representative in the expectation that the employer would not see it. Scheitz also argues that the Employer violated Section 15 of the Labor Mediation Act by taking possession of Scheitz's property, her letter, against Scheitz's will.[3]

In her charge against the Union, Scheitz alleges that Harris violated the Union's duty of fair representation by opening a sealed confidential letter and showing it to the Employer. She asserts that these actions were dishonest and were not done in good faith. She also maintains that Harris' actions were arbitrary because Harris "forced her will on others without any regard to fairness or necessity" and her actions could have been expected to have an adverse effect on Scheitz and other union members. In response to my order for a more definite statement, Scheitz also complains about the Union's handling of her case at arbitration, including the fact that Harris testified against Scheitz at the arbitration hearing, and the fact that the Union did not call witnesses from Scheitz's other job to explain the meaning of a post Scheitz made on Facebook; the post was one of the reasons given by the Employer for Scheitz's discharge. Scheitz also asserts that the

[3] Section 15 of the LMA states:

It shall be unlawful for any person to enter or take part in entering upon, or take possession or control of, any property, or to withhold possession of property, against the will of the owner thereof, or other person in the rightful possession or use thereof, or to interfere with the free use thereof, whether the same be accomplished by force or unlawful threat. Violation of this provision shall be a misdemeanor and punishable as such.

arbitrator's decision showed that he was confused about when and what happened. However, Scheitz does not assert that the Union violated its duty of fair representation in presenting her case to the arbitrator.

Discussion and Conclusions of Law:

Charge Against the Employer

Section 9 of PERA protects the rights of public employees to organize together, form, join, or assist in labor organizations, engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid or protection; bargain collectively with their employers through representative of their own free choice; and refrain from engaging in any or all of these activities. Section 10(1)(a) of PERA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 9 rights.

Scheitz alleges that the Employer interfered with the exercise of her Section 9 rights, and the Section 9 rights of other employees, by accepting confidential information from a union representative. Scheitz argues that if an employer can lawfully obtain this type of information from a union representative, all union members will be deterred from seeking advice and representation from the union, thus seriously impeding their statutory rights to union representation and to participate in union activity. Scheitz draws an analogy between the Employer's conduct here and an employer's unlawful surveillance of its employees' union activities in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 USC 150 et seq, a statutory provision similar to Section 10(1)(a) of PERA. Under the NLRA, an employer's surveillance of its employees' union activities violates their rights under that statute even if the employees are not aware of the surveillance. See, e.g. *NLRB v. Grower-Shipper Vegetable Ass'n of Central California*, 122 F2d 368, 376 (CA 9, 1094).

For purposes of this motion I must assume that the Employer knew, when Harris showed it the contents of Scheitz's envelope, that Scheitz had given the envelope to Harris with the understanding that no one other than Union representatives would see the contents. However, according to the facts as alleged by Scheitz, Harris brought the envelope to the Employer of her own accord. That is, the Employer did not solicit the information or pressure Harris to provide it, but merely read and copied what Harris voluntarily gave it.

A public employer interferes with the exercise of its employees' protected rights under Section 9 of PERA either by keeping their protected activities under surveillance or giving them the impression that their protected activities are under surveillance. *Tillie's Restaurant,* 1972 MERC Lab Op 445; *Brighton Area Schs,* 1982 MERC Lab Op 1607 (no exceptions); *Bessemer Twp Sch Dist,* 1980 MERC Lab Op 1047 (no exceptions). However, none of these three cases involve the disclosure to an employer by a union representative of information entrusted to the union representative by a unit member. I note that the NLRB has held that the attendance of an employer representative at a union meeting at the invitation of an employee does not constitute unlawful surveillance. See,

e.g., *Donaldson Brothers Ready Mix, Inc,* 341 NLRB 958, 960–61 (2004), although the NLRB also noted in that case that the employees in attendance at the meeting were aware of the representative's presence. I reject the analogy between the Employer's acceptance of confidential documents from a union representative and unlawful surveillance by an employer of an employee's union activities. I conclude that the Employer did not unlawfully interfere with Scheitz's Section 9 rights in this case by looking at and copying a document that it was given by Scheitz's Union steward.

According to the facts as alleged by Scheitz, the Employer, after copying her letter, showed it to other unit employees. As with the Employer's acceptance of the document, I must assume, for purposes of this motion, that the Employer had no legitimate reason to show Scheitz's letter to employees. Even if the Employer's intent was to spread ill will toward Scheitz among other unit employees, however, I find that Scheitz has alleged no facts connecting this ill-natured action to Scheitz's protected activities, i.e. the filing or pursuit of her grievance over her discharge. I conclude, therefore, that Scheitz's allegation that the Employer showed her letter to other employees does not allege a claim against the Employer upon which relief can be granted under PERA.

Finally, I conclude that Scheitz's allegation that the Employer unlawfully took possession of her property against her will in violation of Section 15 of the LMA does not state a claim under which relief can be granted. The Commission's authority to find an unfair labor practice based on a violation of the LMA is set out in Section 23(2) of that statute and does not include violations of Section 15. Rather, as that section provides, violations of Section 15 are misdemeanors and punishable as such. I conclude that Scheitz has not stated a claim against her Employer upon which relief can be granted under either PERA or the LMA, and that her charge against the Employer should be dismissed on that basis.

Charge Against the Union

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty toward the employees it represents 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. *Goolsby v Detroit*, 419 Mich 651,679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. Also see *Vaca v Sipes*, 386 US 171 (1967). A union is guilty of bad faith when it acts with improper intent, purpose, or motive; this encompasses fraud, dishonesty, and other intentionally misleading conduct. *Spellacy v Airline Pilots Ass'n*, 156 F3d 120, 126 (CA 2, 1998). A union's conduct is "arbitrary" if it can fairly be characterized as so far outside a wide range of reasonableness that it is wholly irrational, or if the union fails to exercise its discretion or is guilty of gross negligence. *Merritt v Int'l Ass'n of Machinists & Aerospace Workers*, 613 F3d 609 (CA 6, 2010); *Goolsby.* A finding that a union has breached its duty to avoid discriminatory conduct requires evidence of discrimination by

the union that is "intentional, severe, and unrelated to legitimate union objectives." *Merritt,* at 617; *Vaca,* at 177.

Section 16(a) of PERA states, "No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge."

The statute of limitations contained in Section 16(a) of PERA is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health,* 17 MPER 45 (2004); *Police Officers Labor Council, Local 355,* 2002 MERC Lab Op 145; *Walkerville Rural Cmty Schs,* 1994 MERC Lab Op 582. The six-month period begins to run when the charging party knows, or should have known, of the alleged violation. *City of Detroit,* 18 MPER 73 (2005); *AFSCME Local 1583,* 18 MPER 42 (2005); *Huntington Woods v Wines,* 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836.

The Union argues that Scheitz's charge against it was untimely filed. It maintains that while Scheitz alleges that she did not become aware that the contents of her envelope was provided to the Employer until sometime in October 2018, Scheitz either knew, or should have known, by the time her arbitration concluded in November 2017 that the Employer possessed the information in the envelope. It asserts that since the charge was filed more than six months after November 2017, Scheitz's allegations are untimely. However, Scheitz has not alleged in her pleadings that the Employer used the information in the arbitration hearings or that Harris failed to pass along the envelope to the intended recipients after showing it to the Employer. None of the facts alleged by Scheitz suggest that she knew or had a reason to suspect that Harris had shown the envelope to the Employer before her conversation with Whittenberg in October 2018. I find, therefore, that Scheitz charge was not untimely under Section 16(a) of PERA.

I agree, however, that Scheitz has not alleged a breach of the Union's duty of fair representation. While an exclusive representative is obligated to serve the interests of the employees, it is well settled that the duty of fair representation is confined to matters of employment and its terms and conditions. As the National Labor Relations Board stated in its seminal decision on the duty of fair representation, *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), enf denied 326 F2d 172 (CA 2 1963), the duty of fair representation gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent *in matters affecting their employment.*" [Emphasis added.] See also *Int'l Longshoreman's Ass'n, Local 1575,* 332 NLRB 1336 (2000).

In *Detroit Police Officers Ass'n,* 1999 MERC Lab Op 227, the Commission rejected a union member's claim that an inaccurate, and allegedly libelous, remark made by a union grievance chairman about the member at a union meeting violated the union's duty of fair representation. The Commission held that while the remark may have caused her embarrassment, the union member had not established that it affected her relationship with her employer or her terms and conditions of employment. Similarly, in *Mt Clemens*

Cmty Schs, 1998 MERC Lab Op 623, the Commission held that neither a union's refusal to give a member a copy of an arbitration award or its refusal to allow her to speak at a union meeting affected her terms and conditions of employment or her relationship with her employer.

Scheitz alleges Harris gave the Employer an envelope containing a letter drafted by Scheitz detailing how the Employer had been inconsistent in the enforcement of its disciplinary rules. The letter mentioned other unit employees and was intended to be read only by the Union's arbitration panel. According to Scheitz, the Employer showed the letter to other unit employees, at least one of whom felt betrayed by Scheitz's comments about him. Harris and Scheitz clearly did not like each other, and the facts as alleged by Scheitz suggest that Harris' motive for showing the Employer the letter may have been malicious. However, while the disclosure of her letter to other employees may have embarrassed Scheitz, nothing in the facts as alleged by Scheitz indicate that Harris' action affected the outcome of Scheitz's arbitration or otherwise impacted her relationship with her Employer. When Harris showed the Employer the envelope, Scheitz had already been discharged. Scheitz has not asserted that Harris prevented the information Scheitz intended for the Union's grievance panel from reaching it or the Union representative assigned to handle her arbitration. In fact, according to the arbitration award, the Union did present evidence at the hearing that the Employer had inconsistently applied its workplace violence policy and the arbitrator agreed that the Employer had not treated Scheitz evenhandedly in disciplining her. However, he concluded that the seriousness of Scheitz's offenses justified her discipline. In her response to my order to show cause, Scheitz emphasizes that she is not seeking to overturn the arbitration award or to return to work for the Employer. Rather, Scheitz wants to punish the Union for allegedly turning a blind eye to Harris' malicious and deceitful treatment of Scheitz and other unit employees during the period Harris was chief steward. However, as stated above, I conclude that Scheitz has failed to allege facts which would support a claim that Harris' action, *in this particular case,* affected Scheitz's relationship with her Employer or terms and conditions of employment. I conclude, therefore, that Scheitz has not stated a claim against the Union for breach of its duty of fair representation under Section 10(2)(a) of PERA.

Based on the facts as alleged by Scheitz and the conclusions of law set forth above, I conclude that Scheitz failed to state claim upon which relief could be granted against either the Employer or the Union. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charges in Case No. 19-A-0020-CE/Docket No. 19-002298-MERC and Case No.19-A-0065-CU/Docket No. 19-002301-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: June 6, 2019