STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COMMUNITY COLLEGE
EDUCATION ASSOCIATION,
Labor Organization-Respondent,

Case No. CU12 B-005
Docket No. 12-000104-MERC

-and-

BELINDA G. McGUIRE
An Individual-Charging Party.
____/

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by William F. Young, for Respondent

Law Office of Eric I. Frankie PLC, by Eric I. Frankie, for Charging Party

DECISION AND ORDER

On January 4, 2013, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in this matter, finding that Respondent Washtenaw Community College Education Association (the Union) did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, and recommending the dismissal of Charging Party Belinda G. McGuire's unfair labor practice charge. The ALJ held that Charging Party failed to assert facts upon which relief can be granted when she alleged that the Union violated its duty of fair representation. The ALJ also found that Charging Party did not allege within the six-month statute of limitations period that the Union breached its duty of fair representation and that her employer committed a breach of the collective bargaining agreement. The ALJ further found that even if the Union's decision had been made within six months of the filing of the charge, the decision was a reasoned one, was well within the bounds of union discretion, and, thus, the Union did not breach its duty of fair representation.

The ALJ's Decision and Recommended Order was served on the parties in accordance with § 16 of PERA. Charging Party filed exceptions to the ALJ's Decision and Recommended Order on January 28, 2013. The Union filed a response to Charging Party's exceptions on February 6, 2013.

In her exceptions, Charging Party asserts that the ALJ erred by concluding that she did not allege an occurrence of breach of contract within the statute of limitations period and did not allege that her employer took adverse employment action within the statute of limitations period.

Factual Summary:

In early 2009, Charging Party was informed by her employer, Washtenaw Community College, that her department was being eliminated and that in order to teach in another department, she would have to obtain a master of fine arts degree (MFA) within five semesters or risk losing her job. In January 2010, when Charging Party realized she would not be able to obtain an MFA in five semesters, she asked the Union to file a grievance against the employer for requiring her to obtain the MFA in order to keep her job. The Union refused.

On December 6, 2011, at the end of five semesters, the employer demanded that Charging Party submit proof of having obtained the MFA and informed her that if she had not completed the degree, her employment would be terminated. On December 15, 2011, the Union president contacted Charging Party and offered to assist her. Charging Party chose instead to obtain the assistance of a private attorney and send the employer a letter alleging discrimination. On January 3, 2012, the employer responded that Charging Party would be permitted to maintain her job without proof of having obtained an MFA.

On February 3, 2012, Charging Party filed a charge alleging that the Union committed unfair labor practices by refusing to file a grievance on her behalf in January 2010. She alleged that the Union again committed unfair labor practices in December 2011, when it did not file a grievance based on the employer's threat to terminate her employment unless she produced proof of having complied with the MFA requirement.

Discussion and Conclusions of Law:

To prevail on a claim of breach of duty of fair representation involving a grievance, a charging party must allege that the union breached its duty of fair representation and allege that the employer breached the collective bargaining agreement. *Goolsby v City of Detroit*, 211 Mich App 214 (1995); *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993). Unless the union acted in bad faith, was grossly negligent, or its actions were arbitrary or capricious, an employee's dissatisfaction with her union's decisions does not establish a breach of the duty of fair representation. *Ann Arbor Pub Sch,* 16 MPER 15 (2003); *Michigan Council 25, AFSCME, Local 3308*, 1999 MERC Lab Op 132.

In addition, a charge must be filed within six months of the date of the action(s) alleged to be unfair labor practices. *Teamsters Local 214,* 25 MPER 72 (2012). Section 16 (a) of PERA states that "no complaint shall issue upon any unfair labor practice occurring more than 6 months prior to the filing of the charge…" The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch,* 1994 MERC Lab Op 582; *Washtenaw Cmty Mental Health,* 17 MPER 45 (2004); *Police Officers Labor Council Local 355,* 2002 MERC Lab Op 145.

We agree with the ALJ that the Union's decision not to pursue a grievance in January 2010 cannot support an unfair labor practice charge because the decision was made over two years before the charge was filed, well outside the six-month statute of limitations. The ALJ was also correct in concluding that Charging Party did not allege that the employer violated the contract within the six- month limitations period when it eliminated her department and demanded additional training in 2009.

The ALJ also determined that even had the charge been timely filed, it failed to state a claim upon which relief can be granted. We agree. Charging Party failed to allege facts sufficient to establish a breach of contract by the employer. She did not state which, if any, contractual provision she believed to have been violated by the employer's 2009 decision to eliminate her department and require additional education to teach in another department. Nor did she cite to any term in the contract which was allegedly violated by the employer's December 6, 2011 threat to terminate her employment unless she could prove that she had successfully obtained an MFA. She failed to meet her burden of setting forth specific facts to support her claim.

Moreover, Charging Party did not allege facts which indicate bad faith, gross negligence or arbitrary and capricious conduct by the Union based on its actions in 2011. The record reveals that when the Union offered to assist Charging Party within the six-month limitations period, she opted to ignore the Union's offer. The charge states that on December 15, 2011, the Union contacted her, after it learned of the employer's threat to terminate her, and offered to take action on her behalf. However, Charging Party evidently did not want to work with the same uni-serv director who had refused to file a grievance on her behalf in 2009. Because she believed that the Union would not act effectively on her behalf, she chose to proceed by obtaining the assistance of private counsel and responding directly to the employer. Charging Party thus deprived the Union of the opportunity to act on her behalf. Without the opportunity to represent her, the Union cannot be said to have violated its duty of fair representation.

Summary

For all of the above reasons, we agree with the ALJ that the charge was not filed in a timely manner. We also agree that even had the charge been timely filed, it failed to state a claim upon which relief can be granted. We have carefully examined all other issues raised by Charging Party and find they would not change the result. We, therefore, affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charge. Accordingly, we issue the following Order:

ORDER

The unfair labor practice charges are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Natalie P. Yaw, Commission Member

Dated: _______________________

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

WASHTENAW COMMUNITY COLLEGE
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- and - Case No. CU12 B-005
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BELINDA G. McGUIRE,
Individual Charging-Party.
_________________________/

APPEARANCES:

ERIC FRANKIE, for Charging Party

WILLIAM F. YOUNG, White, Schneider, Young & Chiodini, PC, for Respondent

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, MCL 423.201, *et seq*, as amended, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based upon the entire record:

The Unfair Labor Practice Charge:

On February 3, 2012, a Charge was filed in this matter by Belinda G. McGuire (Charging Party) asserting that the Washtenaw Community College (WCC) Education Association (the Union or Respondent) has violated its duty to fairly represent McGuire.

As alleged in the Charge, McGuire was employed as an instructor at Wayne County Community College and during the 2009/2010 academic year, the employer imposed a requirement that she seek a second Masters Degree more closely related to her teaching assignment.

In November and December of 2011, the issue of McGuire's compliance with the Employer's demand that she get the 2nd Masters degree arose. The Charge complains of allegedly disparaging statements made by the Union's chief negotiator regarding

McGuire's non-compliance and asserts that the Union exhibited improper hostility towards her. The Employer allegedly threatened the termination of McGuire's employment over its belief that she had not sufficiently complied with the Employer's instructions. However, that Charge also asserts that on December 15, 2011, the Union president called McGuire to offer help regarding the dispute, although it appears McGuire did not take up the offer. On December 22, 2011, McGuire responded to the Employer through a private attorney. The Charge asserts that McGuire presumed that the Union did not independently intercede on her behalf.

Again, according to the Charge, on January 3, 2012, the Employer dropped its demand that McGuire secure a second Masters degree. No formal discipline or any other adverse employment action was taken against McGuire.

The parties and counsel appeared for trial on July 10, 2012, and the Union moved for summary disposition. After considering the pleadings and extensive arguments by both counsel, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165. See also *Detroit Public Schools,* 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc,* 282 Mich App 266 (2009). Accordingly, I rendered a bench opinion, with the substantive portion of my findings of fact and conclusions of law issued from the bench set forth below:[1]

JUDGE O'CONNOR:

> I am prepared to issue a bench Opinion on this matter. The Union has moved for summary disposition, which I am treating as a motion under MERC Rule 423.165, asserting essentially that there is no material dispute of fact and that the Union is entitled to dismissal on that basis.
>
> **FINDINGS OF FACT:**
>
> There does not appear to be any material dispute of fact. The facts as asserted in the Charge are presumed to be true, for purposes of analysis of the motion.
>
> **CONCLUSIONS OF LAW:**
>
> The standard for litigation of a duty of fair representation claim is well established, and it is that to pursue such a claim, Charging Party must allege and be prepared to prove not only a breach of the duty of fair representation by the Union, but also allege and prove a breach of the collective bargaining

[1] The transcript excerpt reproduced herein contains typographical corrections and other non-substantive edits for clarity purposes. The complete unedited transcript is maintained within the Commission case file.

agreement by the Employer.

That standard was set both by MERC many, many years ago, decades ago, and was affirmed by the Michigan Court of Appeals in several cases: *Knoke v East Jackson Public School District*, reported at 201 Mich App 480 (1993), *Martin v East Lansing School District*, 193 Mich App 166 (1992).

The facial defect of the charge is that while it expresses and strongly articulates dissatisfaction with the position the Union officials took, it does not assert a legally cognizable claim.

The fact that people offend or disappoint us does not give rise legitimately to litigation. The fact that a [Union] member is dissatisfied with the Union's efforts is insufficient to constitute a proper charge of the breach of the duty of fair representation. See*, Eaton Rapids Education Association*, 2001 MERC Lab Op 131, *Wayne County DPW*, 1994 MERC Lab Op 855. [The Commission has steadfastly refused to interject itself in judgment over grievance handling decisions by unions where arguable tactical choices are made by the union. See, for example, *City of Flint*, 1996 MERC Lab Op 1. See also, *Detroit Federation of Teachers (Steward)* 21 MPER 15 (2008), holding that a reasonable good faith tactical choice by a Union is not a breach of the duty of fair representation.]

Now part of the reason for those holdings is that unions have considerable discretion to decide how and even whether or not to pursue and present particular grievances. That has been the law clearly enunciated at the very least since *Lowe v Hotel Restaurant Employees Union*, 389 Mich 123 (1973).

Simply, it is the Union's job to figure out what it thinks is the right course to pursue. That doesn't always satisfy everybody. In fact, it frequently leaves somebody very unhappy.

Unions frequently are in the position of sorting out disputes over who has got the most seniority, who gets laid off, who doesn't get laid off. These are very weighty decisions, and a union is not only entitled but legally obliged to make them.

One of the issues raised in the charge is the assertion that certain events happened in mid-December. Particularly the charge asserts that the letter from the Employer was sent to Charging Party on December 6th.

The charge asserts the Union President reached out to the Charging Party on December 15th to offer assistance, albeit from someone who the Charging Party didn't much trust, and I understand that. It happens sometimes. You might have very good reasons for not trusting a person, or

bad reasons. I don't know, but then on December 22, the Charging Party took it upon herself with the help of a private attorney to respond to the Employer, and the Employer backed off on January 3, 2012. [Charging Party's resort to self-help pursuant to her stated belief that the Union would do nothing effectively precluded the Union from making a decision on how to proceed. That fact alone would warrant dismissal of the Charge that the Union failed to act on her behalf where she gave the Union no opportunity to act.]

The charge recites that the Charging Party is unaware of whether or not the Union did anything. It may have done something. It may not have done anything. It may have said to the Employer, "Don't do this stupid thing," or it may have said to the Employer, "We think your letter of December 6th was right."

The charge asserts that you don't know [if the Union took prompt action], but it warrants my noting that a mere delay by a union in taking requested action is not a violation of its duty of fair representation. See, *Service Employees International*, 2002 MERC Lab. Op. 185.

The case law is also clear that the Union's decision on how to proceed in a grievance dispute such as this is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. For that proposition I would rely on the United States Supreme Court decision in *Airline Pilots Association v O'Neill*, 499 US 65 (1991), and *City of Detroit Fire Department*, 1997 MERC Lab Op 31. [In analyzing the National Labor Relations Act (NLRA), on which PERA was premised, the United States Supreme Court held in *Airline Pilots* that "*Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," that it is wholly "irrational" or "arbitrary."* (Citations omitted)."]

Now accepting as fact the assertion in the Charge that at least one of the Union officers acted out of hostility towards Charging Party--I'm not finding that as fact, I'm just assuming it for purposes of this motion--that could establish one prong of the two-pronged test.

What is not asserted is anything which could establish the second prong. That is, that there was a breach of contract [or any adverse

employment action] occurring within six months of the filing of the charge.

I'm not making any finding as to whether what the Employer did in 2009 in insisting the Charging Party get another Master's degree to hold her then-current position was right or wrong. That is not before me, and it can't be before me because of the statute of limitations.

I'm making no finding as to it, but I assume to be true for purposes of this motion that the Employer threatened the termination of Charging Party on December 6, 2011, but they did not do it. Had they done it, this might be a very, very different case. It's fortunate that they didn't. I don't know why they didn't, but they didn't.

Again, to prevail or even to present a charge that a union breached its duty of fair representation, the Charging Party must be able to show that there was an underlying breach of contract and that the Union had breached its duty to do something about the breach of contract. There are no material facts that have been asserted that would if proved establish such a breach of contract, and therefore there can be no breach of the duty of fair representation.

I will note that in this regard, even if I were to find that the Union reached the wrong conclusion as to whether or not to pursue a grievance over the threatened termination it wouldn't alter the outcome because the Union is entitled actually to be wrong.

[While] it is probably irrelevant in this case, I'm accepting as fact for purposes of the motion that [the Union] acted with hostility. That doesn't mean they did. It just means for purposes of this motion I have to presume that.

I should note as part of this decision that based on a discussion on the record with Counsel, Charging Party withdrew any claims as to relief for the events occurring in 2009 and 2010 which would otherwise be barred by the statute of limitations, which is six months, which is jurisdictional, and which cannot be waived. See *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582. Dismissal of a charge is required, and would have occurred, as to the earlier events where a charge is not timely or properly filed or served. See *City of Dearborn*, 1994 MERC Lab Op 413.

There also was asserted a “continuing violation” theory as to the events of 2009, 2010, [including] an assertion first made today that part of the remedy would be to seek recoupment of the costs either of seeking the Master's degree or the lost teaching opportunities that occurred following 2009. Such a theory of a continuing violation--that is, that they did a bad thing and until they fix it the statute of limitations doesn't start to run--was rejected

by MERC in *City of Adrian*, 1970 MERC Lab Op 579, in which the Commission adopted the holding of the United States Supreme Court in *Local Lodge 142 v NLRB*, 362 US 411 (1960). That "continuing violation" theory has been dead since 1970, and I am obliged to not accept a claim premised on a theory that the Commission--which would overrule me--and the US Supreme Court have already rejected.

Based on all of the above, I will be issuing a written decision incorporating what I have said here today and recommending the dismissal of the charge without relief.

Conclusion:

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 4, 2013