STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

NORTHERN MICHIGAN UNIVERSITY,
Public Employer-Respondent in Case No. C14 L-140/Docket No. 14-034909-MERC,

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1094,
Labor Organization-Respondent in Case No. CU14 L-055/Docket No. 14-041470-MERC,

-and-

MARK DAVID KUGLER,
An Individual Charging Party.
_____/

APPEARANCES:

Miller, Canfield, Paddock & Stone, PLC, by Kurt P. McCamman and James D. Boufides, for Public Employer-Respondent

Tere M. McKinney, AFSCME Council 25, for Labor Organization-Respondent

Mark David Kugler, appearing for himself

DECISION AND ORDER

On May 13, 2015, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order 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.

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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: June 26, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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MARK DAVID KUGLER,
An Individual-Charging Party.
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APPEARANCES:

Miller, Canfield, Paddock & Stone, PLC, by Kurt P. McCamman and James D. Boufides, for the Respondent-Public Employer

Tere M. McKinney, AFSCME Council 25, for the Respondent-Labor Organization

Mark David Kugler, appearing for himself

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On December 9, 2014, Mark David Kugler filed an unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his employer, Northern Michigan University (the Employer), pursuant to §§10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and MCL 423.216. On December 16, 2014, Kugler filed a related charge against his collective bargaining representative, AFSCME Council 25 and its affiliated Local 1094 (the Union), under the same statute. The charges were consolidated, and, pursuant to Section 16 of PERA, assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On January 9, 2015, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, I issued an order directing Kugler to show cause in writing why his charge against the Employer should not be dismissed without a hearing because it was untimely filed and because it did not, as filed, state a claim upon which relief could be granted under PERA. I also directed the Union to

file a position statement responding to the allegations made by Kugler in his charge against it. On February 13, 2015, the Union filed a position statement and motion for summary dismissal. Kugler did not respond to my order to show cause and did not file a response to the Union's motion.

Based upon the facts asserted by Kugler in his charge and facts set forth in the Union's motion and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge Against the Employer and Facts:

Kugler is employed by the Employer as a boiler operator at its power plant and is part of a bargaining unit represented by the Union. For several years prior to filing the charge, Kugler had concerns, which he repeatedly voiced to his supervisors, about safety issues at the plant related to staffing. For example, Kugler asserted that the excessive overtime he was forced to work due to understaffing affected his health. He also asserted that the Employer created a dangerous workplace by failing to maintain two qualified boiler operators on staff at all times and by assigning unqualified grounds personnel to work at the plant.

In February 2013, Kugler received an unpaid disciplinary suspension from February 27, 2013, through March 8, 2013. The charge does not state why Kugler was suspended and Kugler does not specifically allege that this suspension was related to his complaints about working conditions. Kugler asserts that the Employer violated the collective bargaining agreement in issuing the 2013 suspension because it did not follow the steps of its progressive disciplinary policy. He also asserts that the Employer violated the collective bargaining agreement by failing to hold a meeting with Kugler and his steward before issuing that discipline. A grievance over the 2013 suspension was filed and heard by an arbitrator on September 30, 2013, but the Union was unsuccessful in having it overturned.

On April 17, 2014, Kugler wrote comments critical of his supervisors in the plant's daily logbook and was reprimanded by a supervisor for his comments and for "an outburst" toward the supervisor on the same date. On August 20, 2014, Kugler submitted an eleven-page complaint about his supervisors to upper management. On November 7, 2014, Kugler received a 15 calendar day disciplinary suspension from November 8 through November 22. Kugler's charge does not state why he was suspended and he does not specifically allege that this second suspension was related to his complaints about his working conditions.

Article 15, Section D of the Respondents' collective bargaining agreement states:

> If the fitness of an employee to continue in the employee's responsibilities becomes questionable for reasons of physical or mental health, the employee's supervisor shall discuss the matter with the employee and their steward, if requested, in a personal conference. If the problem cannot be resolved in such a conference, the Employer may require the employee to submit to a physical or psychiatric evaluation . . .

The article further provides that if the medical examination results in a finding that the employee is unable to discharge the employee's duties in a competent manner, the employee will be placed on mandatory sick leave with entitlement to any applicable sick leave, short-term disability or long-term

disability payments. The contract also sets out a procedure for challenging the determination of the Employer designated physician.

According to facts set out in the Union's motion and not in dispute, on November 7, 2014, Kugler was asked to attend a meeting with the Employer and his Union representative to discuss his "erratic behavior." In addition to being told that he was being suspended for 15 calendar days, Kugler was also notified that he would be placed on paid administrative leave following the suspension and required to undergo a medical evaluation, and that he had the right to have a second medical examination if he desired one. The Union asserts, again without dispute from Kugler, that Kugler became upset during the conference, refused to discuss his behavior, and was escorted off the Employer's premises.

On November 21, 2014, Kugler received a letter from the Employer stating that he could not return to work until he underwent an examination by the Employer's doctor and was certified as fit to return to work. The Employer told Kugler that he had an appointment with the doctor on December 2, 2014.

On December 2, Kugler called the Employer's human resources office and left a message stating that he wanted to have a conference. The Employer did not call Kugler back, and no conference was scheduled. It is not clear from the charge whether Kugler kept the December 2 doctor's appointment. Kugler alleges that the Employer violated the collective bargaining agreement by requiring him to undergo a fitness for duty exam without first holding a conference.

Kugler's charge against the Employer does not set forth the section or sections of PERA that he alleges were violated.

The Unfair Labor Practice Charge Against the Union and Facts

Kugler alleges that the Union breached its duty of fair representation under PERA by failing to file a timely grievance over his November 2014 suspension.

The grievance procedure in Article 25 of the Respondents' collective bargaining agreement classifies all grievances as "employee" "group" or "union" grievances. Article 25(C) reads as follows:

> Employee Grievance
>
> A grievance is defined as a disagreement arising under and during the term of this Agreement between the employer and any employees concerning (1) his employment and (2) the interpretation and application of the provisions of this Agreement. *Such a grievance may be submitted only by the aggrieved employee in accordance with the procedure set forth in Section F; except that the Union President or the Union President's designated representative may submit a grievance on behalf of an aggrieved employee, beginning at Step 1 of the grievance procedure,* provided the grievance is submitted within ten (10) working days following the day on which the aggrieved employee had knowledge of the facts giving rise to the employee's grievance *and the aggrieved employee refuses to process his/her grievance. Such a grievance by the Union*

> *President must set forth the reasons the Union President is processing the grievance.* In proper cases exceptions may be made if mutually agreed upon by the Union President and the Director of Human Resources or their designees. [Emphasis added]

On November 10, 2014, Kugler called Union Local 1094 President Denise Hughes to ask her to file a grievance over his November 7, 2014, suspension. Between November 10 and November 17, Kugler left repeated messages for Hughes, but Hughes did not call him back.

On November 13, 2014, Shana Thornton, administrative director for AFSCME Council 25, wrote Kugler a letter and sent it to him by certified mail. The letter referenced discussions Thornton and Kugler allegedly had on November 7 and November 10 about the Union's representation of Kugler in the grievance it filed over his 2013 suspension and Kugler's safety complaints. In the letter, Thornton noted that Kugler had told her that he had just received another suspension. Thornton cited the article of the collective bargaining agreement covering safety complaints and told Kugler that he could contact Hughes regarding the process to submit a safety complaint. Thornton's letter also warned Kugler that he needed to follow the process for grieving his recent suspension and other contract violations set out in the collective bargaining agreement, and that he must adhere to the contractual time limits. The letter stated "You will need to contact your Union Steward and/or Local President to move your grievance forward." Finally, the letter suggested that Kugler call an AFSCME staff specialist for assistance, and provided a phone number for Kugler to call. The pleadings do not indicate when Kugler received this letter.

On November 17 or 18, Kugler spoke to Union steward James McCorcle and asked him to start a grievance by speaking to Kugler's supervisor. On December 4, 2014, McCorcle told Kugler that he had not spoken to either the Employer or other Union representatives about Kugler's case and had not initiated a grievance because he was new and did not know how to do so. The Union did, at some point, file a grievance over Kugler's November 7 suspension. However, the grievance was rejected by the Employer for reasons that are not explained in the pleadings.

Kugler also alleges that the Union breached its duty of fair representation by failing to follow up on his request that the Employer hold a conference before requiring him to undergo a fitness for duty exam. On the same day that Kugler called the Employer's human resources office to ask for a conference, Kugler also spoke to Union representative Rich Schwemin, who confirmed that Kugler had the right to a conference. Schwemin told Kugler that he would call him back but, as of the date that Kugler filed the charge, had not done so.

Finally, Kugler alleges that the Union breached its duty of fair representation under PERA by failing to properly prepare for the September 2013 arbitration hearing and, as a result, failed to challenge or counter damaging testimony presented by Employer witnesses at the arbitration hearing.

Discussion and Conclusions of Law:

The Charge Against the Employer

Kugler failed to respond to my order to show cause why his charge against the Employer should not be dismissed. The failure of a charging party to respond to an order to show cause may warrant dismissal of the charge. *Detroit Federation of Teachers,* 21 MPER 3 (2008).

Under §16(a) of PERA, the Commission is prohibited from finding an unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the party against whom the charge is made. An unfair labor practice charge that is filed more than six months after the alleged unfair labor practice is untimely and must be dismissed. The limitation contained in §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 statute of limitations period begins to run when the charging party knows of the act which caused his injury and has good reason to believe that the act was improper. It is not necessary that the charging party know that the act violated his legal rights. *Huntington Woods v Wines, 122* Mich App 650 (1982).

Kugler filed his charge against the Employer on December 9, 2014. His 2013 suspension and the reprimand he received in April 2014 occurred more than six months prior to the date he filed the charge. I conclude, therefore, that his charge is untimely as to any allegation that the Employer violated PERA by these actions.

I also conclude that the other allegations contained in Kugler's charge against the Employer fail to state a claim upon which relief can be granted under PERA. 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. Section 10(1)(a) of PERA makes it unlawful for a public employer to retaliate against employees for exercising their rights protected by this law, and a public employer violates §10(1)(c) of PERA if it discriminates against employees for engaging, or refusing to engage in, union activity.

The types of activities protected by PERA include filing or pursuing a grievance under a union contract or otherwise seeking to enforce a right provided by the contract. PERA also protects public employees from retaliation by their employers because they, *with or on the authority of other employees*, complain about or protest working conditions even when a union is not involved. In addition, employees are also protected from retaliation when they seek to persuade other employees to participate in group action to protest working conditions. However, activity engaged in solely by a single employee on his own behalf is not the "concerted" activity protected by the statute. That is, complaints made by one individual do not fall within the protection of the statute, even if action on his complaints might benefit other employees, unless the individual is bringing "truly group complaints" to the attention of management. Individual action is concerted if the concerns expressed by the individual are a logical outgrowth of the concerns expressed by the group. *City of Bay City*, 20 MPERA 96 (2007) and *City of Detroit(Water and Sewerage Dept)*, 17 MPER 79 (2004)(no exceptions), citing *Meyers Indus, Inc v Prill*, 268 NLRB 493 (1984) (Meyers I), rev' d sub nom *Prill v NLRB*, 755 F2d 941 (DC Cir), cert, den, 487 US 948 (1985), on remand, *Meyers Indus, Inc v Prill*, 281 NLRB 882 (1986) (Meyers II).

PERA is only one of a number of state and federal statutes that provide protection to public employees in Michigan. State and federal statutes administered by other agencies, for example, prohibit discrimination based on race and gender. Another Michigan agency, the Michigan Occupational Safety and Health Administration (MIOSHA), sets and enforces workplace safety standards. In addition, unionized public employees may have rights under their collective bargaining agreements, such as the

right not to be disciplined except for just cause. These are contractual and not statutory rights, however, and an unfair labor practice charge is not the appropriate forum for enforcing these rights.

The Commission's jurisdiction is limited to enforcing PERA and two other collective bargaining statutes, one that applies to private sector employees and another that applies to public safety employees. Absent an allegation that a public 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.

I find that Kugler's claims that the Employer acted unfairly or in violation of the collective bargaining agreement by suspending him in November 2014 and by requiring him to undergo a fitness for duty exam before holding a conference do not allege a violation of PERA. As noted above, Kugler does not allege that his November 2014 suspension or the Employer's refusal to allow him to return to work constituted retaliation against him for activity protected by PERA. In any case, although Kugler asserts that he repeatedly complained about unsafe working conditions during his employment, he does not assert he made these complaints with other employees or sought their participation, and does not assert that any other employee had made similar complaints or discussed them with him. I conclude, therefore, that Kugler did not provide factual support for a claim that his complaints constituted concerted activity protected by PERA. I conclude that Kugler's allegations that the Employer violated PERA by suspending him in November 2014 and by requiring him to undergo a fitness for duty exam to return to work without first holding a conference should be dismissed because these allegations fail to state a claim upon which relief can be granted under PERA.

The Charge Against the Union

As indicated in the discussion of Kugler's charge against the Employer, the Commission has no jurisdiction to find an unfair labor practice based on conduct occurring more than six months prior to the filing of the charge. Kugler alleges here that the Union violated its duty of fair representation by failing to properly prepare for the arbitration hearing for the grievance filed over his February 2013 suspension and, as a result, failed to challenge or counter damaging testimony presented by Employer witnesses at the hearing. However, this hearing took place on September 30, 2013, and Kugler did not file his charge until December 16, 2014, more than fourteen months later. I conclude that Kugler's allegation that the Union violated its duty of fair representation by mishandling the September 2013 arbitration hearing was untimely filed.

Kugler also alleges that the Union violated its duty of fair representation by failing to file a timely grievance over his November 2014 suspension and by failing to follow up on his request that the Employer hold a conference before requiring him to undergo a fitness for duty exam.

A union representing public employees owes these employees a duty of fair representation under §10(2)(a) of PERA. The union's legal duty under this section 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. See *Vaca*

v Sipes, 386 US 171, 177 (1967). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct," while "discrimination" under this standard is limited to "intentional and severe discrimination unrelated to legitimate union objectives." *Merritt v International Ass ' n of Machinists and Aerospace Workers*, 613 F3d 609, (CA 6, 2010), citing *Spellacy v Airline Pilots Ass ' n*, 156 F3d 120, 126 (CA 2, 1998). In *Goolsby*, at 679, the Michigan Supreme Court described "arbitrary conduct" under this standard as follows:

> In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected. We think the latter proscription includes, but is not limited to, the following circumstances: (1) the failure to exercise discretion when that failure can reasonably be expected to have an adverse effect on any or all union members, and (2) extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members.

Because a union's ultimate duty is toward its membership as a whole, a union does not have the duty to file a grievance or take a grievance to arbitration whenever an individual member asks it to do so. Rather, a union has considerable discretion to decide how or whether to proceed with a grievance and is permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A union's good faith, nondiscriminatory, decision not to proceed with a grievance is not arbitrary unless it falls so far outside a broad range of reasonableness as to be considered irrational. *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35, citing *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991). The fact that an individual member is dissatisfied with the union's decision, or its efforts on his behalf, does not establish that the union has breached its duty of fair representation. *Eaton Rapids EA*, supra.

In *Goolsby*, a union was held to have engaged in "arbitrary" conduct when, after determining that grievances had merit and processing them through the first three steps of the grievance procedure, it failed to process them in a timely manner to the next step. The union's only explanation was that the union agents responsible for moving the grievances forward did not receive them from the local union.

In the instant case, Respondents' collective bargaining agreement clearly provides that "employee" grievances, which under the contract would include a grievance over Kugler's suspension, be submitted by the aggrieved employee. The Union president may submit an "employee" grievance only if the aggrieved employee refuses to file. In such cases, the Union president must provide an explanation for why the Union is processing the grievance. The Union argues that under this contract language, it was Kugler's responsibility, and not that of the Union, to submit a grievance over his suspension. It also argues that Kugler must have been familiar with the requirements of the grievance procedure since he had filed a grievance over his February 2013 suspension.

The Union is correct that under Respondents' collective bargaining agreement, Kugler was responsible for submitting a grievance over his suspension. In this case, Kugler was suspended on November 7, 2014 and was not to return to work until November 24, 2014, or later, by which time the time limit for filing a grievance over his suspension would have expired. Between November 10 and

November 17, Kugler repeatedly left messages for Union president Denise Hughes asking her to file a grievance on his behalf, but Hughes did not call him back. On November 13, 2014, Union representative Shana Thornton sent Kugler a letter reminding him that needed to follow the process for grieving his recent suspension and that he must adhere to the contractual time limits. However, the letter did not explicitly remind him that if he wished to grieve his suspension he needed to submit the grievance personally. In addition, it is not clear from the pleadings whether Thornton's letter reached Kugler before the time limit for filing the grievance expired. On November 17 or 18, Kugler asked his Union steward to start the grievance process by speaking to his supervisor.

However, whether the Union could have done more to assist Kugler in filing a timely grievance over his suspension is not the issue here. Unless the Union's failure to take affirmative steps to ensure that a grievance was timely filed constituted "arbitrary conduct" under the legal definitions of that term, it did not violate its duty of fair representation toward Kugler. As discussed above, in context of the duty of fair representation, "arbitrary" conduct is "impulsive, irrational, or unreasoned conduct," "inept conduct undertaken with little care or with indifference to the interests of those affected," or "extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members." In the instant case, the collective bargaining agreement clearly places the responsibility for submitting an "employee" grievance on the aggrieved employee. As Union representatives were aware, Kugler was not new to the grievance process. Moreover, while Union president Hughes did not respond to Kugler's repeated phone messages asking her to file the grievance, Hughes was not the only Union representative with whom Kugler had had contact. I conclude that the failure of Union representatives in this case to take affirmative action to ensure that Kugler had timely submitted a grievance over his suspension does not qualify as "arbitrary" conduct under any established definitions of that term. I find that the Union did not breach its duty of fair representation by failing to file a timely grievance over Kugler's November 2014 suspension and I also find that it did not breach its duty of fair representation by failing to take affirmative steps to ensure that Kugler had timely submitted the grievance on his own.

Kugler also claims that the Union breached its duty of fair representation by failing to follow up on his request that the Employer be made to hold a conference with him and his union representative before requiring him to undergo a fitness for duty exam in order to return to work. The collective bargaining agreement clearly mandates that the Employer, if requested, hold a conference with the employee and his union representative if the Employer questions the employee's fitness to perform his job duties. However, at a meeting on November 7, 2014, Kugler was told both of his suspension and of the fact that, after the suspension, he would be placed on administrative leave until he underwent a fitness for duty exam. According to the Union, the contractual requirement was met since Kugler was given the opportunity at that meeting to discuss the Employer's concerns about his fitness for duty in the presence of his union representatives. The Union's decision not to insist that another conference be held was not, I conclude, so far outside the realm of reasonableness that it could be considered arbitrary. I find that the Union did not breach its duty of fair representation by failing to press the Employer to hold another conference to discuss its concerns over Kugler's fitness to continue his job duties.

In accord with the facts and discussion and conclusions of law set forth above, I recommend summary dismissal of both Kugler's charge against the Employer and his charge against the Union. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 13, 2015