STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

MERC Case No. C16 E-049
-and- Hearing Docket No. 16-014507

AFSCME LOCAL 345,
Labor Organization-Respondent,

MERC Case No. CU16 E-031
-and- Hearing Docket No. 16-014508

DANIEL C. WALLER, JR.,
An Individual Charging Party.
_____/

APPEARANCES:

Daniel C. Waller, Jr., appearing on his own behalf

DECISION AND ORDER

On June 30, 2016, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges. The ALJ's Decision and Recommended Order was served on the interested parties in accord with Section 16 of the Act. Pursuant to Rule 176, R 423.176, of the General Rules of the Employment Relations Commission, exceptions to the Decision and Recommended Order were due on July 19, 2016.

No exceptions were filed on or before the due date. Rather, on July 21, 2016, Charging Party faxed a letter to the Commission's Detroit office. In the letter, he noted that he had audio, video and text documentation that he would like to present as evidence. It was not clear from Charging Party's letter whether he was attempting to file exceptions to the ALJ's Decision and Recommended Order or attempting to file a motion for the reopening of the record. Consequently, on September 8, 2016, the Commission's staff wrote Charging Party to inform him:

> …if you wish to file exceptions or move for a reopening of the record, you need to do so as soon as possible and must also file a Motion for Retroactive Extension showing good cause as to why your exceptions or motion for reopening were not filed within 20 days.

The Commission's staff further informed Charging Party that "[i]f we hear nothing further from you by September 21, 2016, we will close your case."

Charging Party did not respond to the Commission's September 8, 2016 letter.

The filing of exceptions with the Commission is governed by Rule 176, R 423.176, of the General Rules of the Michigan Employment Relations Commission. In accordance with Rule 176, exceptions must be filed within twenty days of service of the ALJ's Decision and Recommended Order, and "[c]opies of the exceptions . . . shall be served at the same time on each party to the proceedings, and a statement of service shall be filed under R 423.182 . . . . An exception that fails to comply with this rule may be disregarded."

Additionally, in accordance with Rule 166 of the Commission's General Rules, R 423.166, a party to a proceeding may move for the reopening of the record following the close of a hearing. A motion for reopening of the record, however, may be granted only upon a showing of all of the following:

> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
> (c) The additional evidence, if adduced and credited, would require a different result.

In this case, Charging Party failed to respond to the Commission's September 8, 2016 letter. Consequently, the July 21, 2016 letter he faxed to the Commission's Detroit office will not be considered an attempt to file exceptions to the ALJ's Decision and Recommended Order under Rule 176. Additionally, Charging Party's July 21 letter does not establish a basis for the reopening of a record under Rule 166. Finally, notwithstanding Charging Party's failure to file exceptions, a review of the pleadings submitted by Charging Party in response to the ALJ's show cause order establishes that Charging Party failed to state a claim under PERA.

Accordingly, we hereby adopt the recommended order of the Administrative Law Judge as our final order and dismiss the charges.

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: November 16, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Respondent-Public Employer in Case No. C16 E-049; Docket No. 16-014507-MERC,

-and-

AFSCME LOCAL 345,
Respondent-Labor Organization in Case No. CU16 E-031; Docket No. 16-014508-MERC,

-and-

DANIEL C. WALLER, JR.,
An Individual Charging Party.
_____/

APPEARANCES:

Daniel C. Waller, Jr., appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

This case arises from unfair labor practice charges filed on May 17, 2016, by Daniel C. Waller, Jr., against his employer, Detroit Public Schools, and his labor organization, AFSCME Local 345. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charges were assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The identically worded charges alleged that Respondents violated PERA by "Delaying Grievance Process Step II." In an order issued on May 25, 2016, I directed Charging Party to show cause why the charges should not be dismissed for failure to state claims upon which relief could be granted under PERA. The order specified that to avoid dismissal of the charges, Waller's written response must assert facts that establish a violation of the Act. Charging Party was directed to "clearly describe who did what and when they did it, and explain why such actions constitute a violation of the Act, with consideration given to the legal principles" set forth in the order. Waller filed his response on June 14, 2016.

Charge Against the Labor Organization:

A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. To this end, the union is not required to follow the dictates of any individual employee, but rather it may investigate and handle the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. Poor judgment, or ordinary negligence, on the union's part, is not sufficient to support a claim of unfair representation. *Goolsby* at 672; *Whitten v Anchor Motor Freight, Inc*, 521 F 2nd 1335 (CA 6 1975). See also *Detroit Fed of Teachers*, 21 MPER 5 (2008) (no exceptions); *Wayne Co Cmty College*, 19 MPER 25 (2006) (no exceptions); *Wayne Co Sheriff Dept*, 1998 MERC Lab Op 101 (no exceptions).

The Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. The Union's decision on how to proceed is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35. The mere fact that a member is dissatisfied with their union's efforts or ultimate decision is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Assoc*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855. To prevail on a claim of unfair representation in a case involving the handling of a grievance, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993).

In the instant case, Waller asserts that AFSCME Local 345 violated PERA by delaying the processing of a grievance at Step II of the contractual grievance procedure. It is well-established that a union does not breach its duty of fair representation merely by a delay in the processing of a grievance as long as the delay does not cause the grievance to be denied. *Service Employees International Union (SEIU), Local 502*, 2002 MERC Lab Op 185. In the order to show cause, Waller was directed to provide more detail considering the alleged delay in grievance processing and to explain how that delay constituted a violation of PERA. Not only did Waller fail to elaborate on the allegation, his response to the order to show cause made no reference at all to the assertion that the

Union delayed processing his grievance at Step II.[1] Rather, the sixteen-page response primarily concerns a promotion which Waller was passed over for at some point prior to 2010. Although the allegations are rambling and often difficult to follow, there is no factually supported allegation which, if true, would establish that AFSCME was hostile to Waller, that it treated him differently than other similarly situated bargaining unit members or that it in any manner acted arbitrarily, discriminatorily or in bad faith in connection with the grievance.

Even if Waller had stated a claim against the Union, the allegations set forth in the response to the order to show cause must be dismissed as untimely. Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). The statute of limitations is not tolled by the attempts of an employee or a union to seek a remedy elsewhere, including the filing of a grievance, or while another proceeding involving the dispute is pending. See e.g. *Univ Of Michigan*, 23 MPER 6 (2010); *Wayne County*, 1998 MERC Lab Op 560. In the instant case, all of the events described by Waller in his response to the order to show cause occurred more than six months prior to the filing of the charge on May 17, 2016.[2] Accordingly, I conclude that the charge filed by Waller against AFSCME Local 345 in Case No. CU16 E-031; Docket No. 16-014508-MERC must be dismissed on summary disposition.

Charge Against the School District:

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

PERA does not, however, prohibit all types of discrimination or unfair treatment, nor does the Act provide a remedy for a breach of contract claim asserted by an individual employee. See e.g. *Ann Arbor Sch*, 16 MPER 15 (2003); *Detroit Bd of Ed*, 1995 MERC Lab Op 75. The Commission's

1 In fact, a document submitted by Waller as part of his response to the order to show cause suggests that a Step II hearing was held on September 29, 2015.

2 The only event referenced by Waller which occurred within six months of the filing of the charge is his alleged discovery of "new evidence" on April 15, 2016. The mere existence of newly discovered evidence is not sufficient to toll the statute of limitations. See *Michigan State University*, 20 MPER 103 (2007).

jurisdiction with respect to claims brought by individual employees against public employers is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in, or refusal to engage in, union or other concerted activities protected by PERA. In the instant case, neither the charge nor the response to the order to show cause provide a factual basis which would support a finding that Waller was subjected to discrimination or retaliation for engaging in, or refusing to engage in, protected activities in violation of the Act. Moreover, as with the charge against the Union, the allegations set forth against the school district all relate to events which occurred more than six-months prior to the filing of the charge and, therefore, the charge against the Detroit Public Schools in Case No. C16 E-049; Docket No. 16-014507-MERC must be dismissed as untimely.

Conclusion:

Despite having been given a full and fair opportunity to do so, Charging Party has failed to set forth any factually supported allegation which, if true, would establish that AFSCME Local 345 acted arbitrarily, discriminatorily or in bad faith in connection with this matter or that the Detroit Public Schools discriminated or retaliated against Waller for engaging in, or refusing to engage in, protected activities in violation of the Act. Moreover, none of the allegations set forth by Waller in his response to the order to show cause were timely filed under Section 16(a) of PERA. Accordingly, I conclude that the charges must be dismissed without a hearing and recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charges filed by Daniel C. Waller, Jr., against the Detroit Public Schools and AFSCME Local 345 in Case Nos. C16 E-049; Docket No. 16-014507-MERC and Case No. CU16 E-031; Docket No. 16-014508-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 30, 2016