

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

INTERNATIONAL UNION, UNITED AUTO WORKERS,
REGION 1-A,
Labor Organization-Respondent,

MERC Case No. CU17 I-029

-and-

TRACY A. RUSH-BYERS,
An Individual Charging Party

APPEARANCES:

Tracy A. Rush-Byers, appearing on her own behalf

DECISION AND ORDER

On February 8, 2018, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order¹ in the above matter finding that Respondent 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 either 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: March 27, 2018

¹ MAHS Hearing Docket No. 17-019147

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

INTERNATIONAL UNION, UNITED AUTO WORKERS,
REGION 1-A,
Labor Organization-Respondent,

Case No. CU17 I-029
Docket No. 17-019147-MERC

-and-

TRACY A. RUSH-BYERS,
An Individual-Charging Party

APPEARANCES:

Tracy A. Rush-Byers, appearing for herself

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION**

On September 5, 2017, Tracy A. Rush-Byers, an employee of Eastern Michigan University (the Employer), filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against her collective bargaining representative, UAW Region 1-A, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

The charge, as filed, was simply a narrative of events before and after Rush-Byers' layoff from her employment on or about December 7, 2016. On September 19, 2017, pursuant to Rule 162 of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.162, I issued an order directing Rush-Byers to provide a more definite statement of her charge. The order stated that in her more definite statement, Rush-Byers was to specifically identify the actions of Respondent that violated PERA and explain why they violated the Act. Rush-Byers requested an extension of time to file her statement and was granted an extension to November 13, 2017, in order to find counsel to assist her in this matter. Rush-Byers did not file a more definite statement or request a second extension.

On December 8, 2017, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.165, I issued an order to Rush-Byers to show cause why her charge

should not be dismissed without a hearing for failure to state a timely claim upon which relief can be granted under PERA. Over Respondent's objection, Rush-Byers was granted an extension to January 16, 2018, to file her response to the order but was informed that no further extensions would be granted. Rush-Byers did not file a response to the order to show cause. Based on the facts set out in Rush-Byers charge, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Facts:

A union representing public employees owes those employees a legal duty of fair representation under Section 10(2)(a) of PERA. As noted above, Rush-Byers' charge is in the form of a narrative of facts, and Rush-Byers does not identify the specific actions by Respondent that she believes violated its duty of fair representation toward her.

The facts set out in the charge are as follows. Rush-Byers is an employee of Eastern Michigan University (the Employer) and a member of a bargaining unit represented by Respondent. Rush-Byers was an Associate Program Assistant in the Employer's College of Technology in 2011, when she was promoted to Program Associate. On or about September 26, 2016, she was transferred, under circumstances that are not made clear in the charge, to the Employer's Financial Aid Department as a Financial Aid Advisor. On November 4, 2016, she received a negative performance review of her work in that position and met with Employer and Respondent representatives to discuss her work performance. On December 7, 2016, she received a "Notice of Break-In Period Disqualification and Placement" from the Employer. The notice informed her that she had been "disqualified" from the Financial Aid Advisor position and that, due to a previous "disqualification," she would be laid off and placed on the recall list for a Program Associate position.

On or about December 12, 2016, Respondent filed a grievance challenging Rush-Byers' disqualification from the Financial Advisor position. A second step meeting on the grievance was held on December 22, 2016. On January 6, 2017, the Employer issued its second step answer denying the grievance. On January 23, 2017, Rush-Byers emailed to Respondent International Representative Joe Cardona, the union representative handling her grievance, a statement rebutting contentions made by the Employer in its grievance answer. On February 20, 2017, Rush-Byers received a letter from Cardona informing her that her grievance had been withdrawn. On March 2, 2017, Rush-Byers resent to Cardona the email she had sent him on January 23, 2017.

Around the end of January 2017, while her December grievance was still pending, Rush-Byers applied for two Academic Advisor positions for which she qualified due to her experience. Rush-Byers was not selected for either position. On March 21, 2017, Rush-Byers applied for a third position for which she was qualified, Clinical Coordinator, but was not selected for that position either.

Between March 2 and June 22, 2017, according to her charge, Rush-Byers sent eleven emails to four different Respondent representatives, including Cardona, requesting assistance. Rush-Byers asserts that she did not receive any "positive communication" from these individuals. According to Rush-Byers, she also spoke to Respondent representatives by phone on April 17, July 13, July 16, August 10, and August 11, 2017. Rush-Byers did not explain in her charge what she asked the

Respondent representatives to do in these emails and telephone conversations, or what their responses were, if any, to her requests. According to the charge, on August 11, 2017, Cardona told Rush-Byers that she should file a claim with the federal Equal Employment Opportunity Commission (EEOC) against the Employer and against Respondent for refusing to pursue her grievance based on her race. On August 24, 2017, Rush-Byers met with an EEOC investigator and filed a claim with that agency against the Employer. During that meeting, Rush-Byers was apparently advised to also file an unfair labor practice charge with the Commission. As noted above, Rush-Byers filed the instant charge against Respondent on September 5, 2017.

Discussion and Conclusions of Law:

Rule 165(1) of the Commission's General Rules, 2014 AACRS, R 423.165(1) states that the Commission or administrative law judge designated by the Commission may, on its own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party on grounds set forth in Rule 165. Such a motion, or order to show cause, may be made at any time before or during the hearing. Under Rule 165(2)(d), a charge may be summarily dismissed if it fails to state a claim upon which relief can be granted under the Act, and, under Rule 165(2)(c) if it is untimely filed. Under Rule 165(2)(h), a charge may be dismissed for failure to respond to a "dispositive motion or show cause order or other order." The failure of a charging party to file a timely response to an order to show cause may, in and of itself, warrant dismissal of the charge. See also *Detroit Federation of Teachers*, 21 MPER 3 (2008).

As stated previously, a union representing public employees in Michigan owes those employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty 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, 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." *Merritt v International Ass'n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass'n*, 156 F3d 120, 126 (CA 2, 1998). A union breaches its duty to avoid discriminatory conduct if it engages in discrimination that is "intentional, severe, and unrelated to legitimate union objectives." *Merritt*, at 617; *Vaca*, at 177.

"Arbitrary" conduct by a union was described by the Court in *Goolsby*, *supra*, as (a) impulsive, irrational or unreasoned conduct; (b) inept conduct undertaken with little care or with indifference to the interests of those affected; (c) the failure to exercise discretion; and (d) extreme recklessness or gross negligence.

Because a union's ultimate duty is to its membership as a whole, a union, as long as it acts in good faith, 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 and to weigh the likelihood of success against the burdens on the union of pursuing the grievance. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. In deciding whether a union is guilty of arbitrary conduct in its handling of a grievance,

the Commission does not substitute its judgment for that of the union. Rather, a union's decisions, if made in good faith, are held to be lawful as long as they are 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.

Pursuant to Section 16(a) of PERA, an unfair labor practice charge that is filed or served on the responding party more than six months after the commission of the alleged unfair labor practice is untimely. The limitation 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.

According to the facts as alleged in Rush-Byers's charge, Respondent filed, but then withdrew, a grievance challenging her disqualification from the position of Financial Aid Advisor and her layoff. However, according to Rush-Byers, Respondent notified her on February 20, 2017, that the grievance had been withdrawn. Rush-Byers' charge was not filed until September 4, 2017, more than six months after she was notified that Respondent had withdrawn her grievance. Therefore, to the extent that Rush-Byers alleges that Respondent violated its duty of fair representation by withdrawing that grievance, her charge is untimely under Section 16(a) of PERA.

After Respondent withdrew Rush-Byers' grievance, she sent Respondent representatives a series of emails, beginning on March 2, 2017, and had five telephone conversations with Respondent representatives, beginning in early April 2017. Rush-Byers asserts that she repeatedly asked Respondent for assistance but received no positive response. Rush-Byers, however, did not explain what type of assistance she sought from Respondent after her grievance was withdrawn. Other than her allegation that Respondent representative Cardona advised her to file a charge with the EEOC, Rush-Byers also did not provide specifics on how Respondent responded to these requests. It is well established that a union's failure to adequately communicate with a member about a grievance is not, in itself, a breach of its duty of fair representation. *Suburban Mobility Authority for Regional Transportation (SMART)* 19 MPER 39 (2006); *Wayne Co (Sheriff's Dep't)*, 1998 MERC Lab Op 101, 105 (no exceptions). In this case, Respondent had withdrawn Rush-Myers' grievance when she began emailing and telephoning Respondent as set out in her charge. As indicated above, despite being given several opportunities to do so, Rush-Byers did not clarify what she asked Respondent to do to assist her. I conclude that Rush-Byers has not stated a factually supported claim of breach of Respondent's duty of fair representation, or any other provision of PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 8, 2018