STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

DETROIT BOARD OF EDUCATION,
Respondent-Public Employer in Case No. C02 D-077,

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 547,
Respondent-Labor Organization in Case No. CU02 D-017,

-and-

GERALD DANTZLER,
Individual Charging Party.
_____/

APPEARANCES:

Riley Roumell & Connolly, by William F. Dennis, Esq., for the Respondent Public Employer

Korney & Heldt, by J. Douglas Korney, Esq., for the Respondent Labor Organization

Madeline L. Jennings, Esq., for Individual Charging Party

DECISION AND ORDER

On September 30, 2002, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matters, finding in each case that the charges should be dismissed. In Case No. C02 D-077, the ALJ found that Charging Party failed to state a claim for which relief could be granted under Section 10(1)(a) or (c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) or (c), and recommended that the motion for summary disposition filed by Respondent Detroit Board Of Education (Employer) be granted. In Case No. CU02 D-017, the ALJ concluded that the facts do not support the allegation that Respondent International Union of Operating Engineers, Local 547 (Labor-Organization or Union) violated its duty to fairly represent Charging Party Gerald Dantzler.

Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order on November 20, 2002. On November 26, 2002, the Employer filed a brief in support of the Decision and Recommended Order of the ALJ, as it related to Case No. C02 D-077.

Facts:

The facts in this case are not materially in dispute. Charging Party was employed by Respondent Employer for approximately 23 years and was a member of the bargaining unit represented by Respondent Labor Organization. In January of 2001, he was suspended, without pay, for allegedly being intoxicated on the job. As a condition of reinstatement, he voluntarily entered into a "last chance agreement" with the Employer and the Union. The terms of that agreement included requirements for random medical screenings for chemical dependency and included the following clause:

> Employee understands that reinstatement and continued employment depends on him/her. Employee must satisfactorily meet all the above terms of this condition of employment. **Any failure to do so forfeits all defenses on the part of the employee and subjects employee to immediate termination of employment with the Board of Education of the School District of the City of Detroit.**
>
> **Therefore, if the determination is to terminate, it will be without benefit of a grievance appeal. (**Emphasis in original)

In September of 2001, Charging Party tested positive for alcohol. The Employer scheduled a "due process" hearing for the purpose of allowing Charging Party to respond to the allegation that he violated the last chance agreement. Charging Party notified the Union business agent that the hearing would be on October 5, 2001, at the School Center Building (SCB), but he did not know the time. The business agent told Charging Party that he would be at the SCB on October 5, and asked Charging Party to page him when he knew what time the hearing was to start.

On October 5, the business agent was at the SCB when he received a telephone message that the hearing was about to begin. When the business agent arrived, the hearing was almost over. The business agent met briefly with Charging Party and his attorney to discuss the options that might be available to Charging Party. They subsequently made a proposal to the hearing officer to allow Charging Party to keep his job, transfer to a different job location and extend the terms of the last chance agreement for two years. The hearing officer advised the parties that she did not have authority to set the agreement aside, but would communicate the proposal to the assistant superintendent. The assistant superintendent rejected the proposal and gave Charging Party the choice of resigning or being discharged. Charging Party elected to resign.

Charging Party filed the charges in these matters on April 1, 2002, alleging that the Employer had discriminated against him and had committed an unfair labor practice in violation of Section 10 of PERA. Charging Party also charged that the Union had breached its duty of fair representation.

On June 7, 2002, the Employer filed a motion for summary disposition, asserting that the Commission lacked jurisdiction because the charge failed to state an actionable claim and

in part was based upon the meaning of the provisions of a "last chance agreement" which was subject to the contractual grievance procedure of the collective bargaining agreement between the Respondent-Employer and Respondent-Labor Organization. Moreover, the Employer claims that the Commission lacks jurisdiction to consider that portion of the charge relating to events occurring more than six months before the filing of the charge. On June 18, 2002, Charging Party filed a response to the Employer's motion, and filed a motion for default judgment against both Respondents for failure to file answers within ten days after service of the Charge. The Employer responded to Charging Party's motion and response on June 27, 2002.

Discussion and Conclusions of Law:

The ALJ concluded that Charging Party's motion for default judgment relied upon former Commission Rule 423.433, which dealt only with a party's obligation to file an answer to a fact-finding application pursuant to Section 25 of the Labor Mediation Act, MCL 423.25 and not to unfair labor practice charges filed pursuant to Section 16 of PERA. Further, former rules R 423.401 to R 423.494, were rescinded on February 1, 2002, and replaced by rules R 423.101 to 423.194. Rule 423.155 relates to answers to unfair labor practice charges and provides that a party **may** file an answer within ten days after a charge is served. We find Charging Party's motion for default judgment to be without merit.

Case No. C02 D-077

Charging Party takes exception to the ALJ's finding that Charging Party failed to state a claim under Section 10(1)(c) of PERA. That section of PERA makes it unlawful for public employers to discriminate against public employees regarding their hire and other terms of employment to encourage or discourage membership in a labor organization. In the case against the Employer, the ALJ concluded that the only thing Charging Party alleges is that he was improperly forced to execute a last chance agreement and was wrongfully forced to resign for violating it. The ALJ found that these allegations do not state a claim for relief under Section 10(1)(a)[1] or (c).

Charging Party contends that the Employer forced him to sign a last chance agreement on January 25, 2001, failed to follow its own procedures regarding the administration of the agreement, and that other unnamed employees similarly situated to Charging Party were treated differently. Charging Party argues that these actions violate Section 10(1)(c). However, Charging Party's allegations of disparate treatment are insufficient to state a claim for relief under PERA.

Section 10(1)(c) of PERA provides that a public employer shall not discriminate in regard to hire, terms or other conditions of employment **in order to encourage or**

[1] We note that Charging Party does not take exception to the ALJ's decision that Charging Party failed to state a claim under Section 10(1)(a) of PERA. Consequently, the right to present such an exception is waived under R 423.176(5).

discourage membership in a labor organization. Thus, the necessary elements of a *prima facie* case of unlawful discrimination under Section 10(1)(c) are: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity, (3) union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. *Grandvue Medical Care Facility*, 1997 MERC Lab Op 14; *City of Detroit*, 1997 MERC Lab Op 31; *Sanilac County Circuit Court*, 1997 MERC Lab Op 89.

The record in this case is devoid of any evidence that Charging Party was engaged in any protected union or concerted activity. Charging Party does not even claim that he was engaged in any protected activity or that the Employer had any animus towards the union or was in any way motivated by hostility towards Charging Party's protected rights under PERA. Even if the employee has engaged in extensive union activities, a *prima facie* case is not established unless there is evidence of a connection or link between the activities and the alleged discrimination. *North Central Community Mental Health Services*, 1998 MERC Lab Op 427, 437; *City of Detroit (Community Economic Development Dept)*, 1981 MERC Lab Op 585, 588. We conclude that the ALJ correctly applied the law in finding that Charging Party failed to state a claim of unlawful discrimination under Section 10(1)(c).

Charging Party takes exception to the ALJ's finding that if Charging Party's allegation that he was improperly forced to execute the January 25, 2001 last chance agreement stated a claim for relief, the claim would be barred by the statute of limitations pursuant to Section 16 of PERA. The charge was filed April 1, 2002, more than six months from the date Charging Party signed the last chance agreement. Charging Party argues that the events that occurred before the date that he elected to voluntarily resign in lieu of discharge (October 28, 2001) should be viewed as a continuous flow of the ultimate transaction that occurred in January of 2001.

We reject Charging Party's theory of a continuous violation. The Commission adopted the holding of the U.S. Supreme Court in the matter of *Local Lodge 1424* v *NLRB (Bryan Mfg Co)* 362 US 411, 45 LRRM 3212, (1960), which rejected the doctrine of the continuing violation if the inception of the violation occurred more than six months prior to the filing of the charge. *City of Adrian*, 1970 MERC Lab Op 579, 581. The six-month limitation period under Section 16(a) begins to run when the person knows or has reason to know of the alleged unfair labor practice. *Huntington Woods v Wines*, 122 Mich App 650 (1983); *Wines v Huntington Woods*, 97 Mich App 86 (1980). Charging Party signed the last chance agreement on January 25, 2001, but did not file the charge until April 1, 2002, well past the six-month limitation of Section 16(a) of PERA. We conclude that the ALJ correctly applied the law when he found that the charge was barred by the six-month limitation under Section 16(a) of PERA.

Based upon our findings and conclusions set forth above we adopt the recommendation of the ALJ, grant Respondent-Public Employer's motion for summary disposition and dismiss the charges in Case No. C02 D-077.

Case No. CU02 D-017

Charging Party takes exception to the ALJ's ruling permitting testimony regarding discussion during a caucus or private meeting between Charging Party's attorney and the Union's business agent outside the "due process" hearing. Although Charging Party's attorney did object at the beginning of the witness's testimony about the meeting, she did not state the grounds for her objection and then withdrew the objection after the ALJ assured her that she would get the opportunity to cross-examine the witness. She subsequently cross-examined the witness about the meeting, but did not contend that the discussion was privileged until the assertion was made in Charging Party's exceptions.

The failure to raise a timely objection constitutes a waiver of that objection. See *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 540. See also *Plymouth-Canton Community Schs*, 1998 MERC Lab Op 545, 554. Thus, Charging Party's withdrawal of the objection bars him from filing an exception on that basis. Moreover, the testimony that Charging Party wishes to exclude was not germane to the ALJ's recommended decision and order and is not germane to our decision. Accordingly, the admission of the evidence is harmless and the exception is without merit.

Charging Party also takes exception to the ALJ's finding that the facts did not support the charge of failure to fairly represent Charging Party. The ALJ found that Charging Party failed to offer evidence that the late arrival of the union business agent at the "due process" hearing was a factor in the Employer's decision to terminate his employment. Charging Party offers several examples of potential issues that he contends could have been argued had the union representative prepared for the hearing and attended in a timely fashion. According to Charging Party, the failure of the union business agent to appear on time for the start of the "due process" hearing left the Charging Party effectively without union representation thereby diminishing his defense at a critical stage of the hearing wherein the decision to terminate his employment was at issue.

Charging Party argues that the ALJ failed to consider the facts with respect to this issue in the light most favorable to the non-moving party on a motion for summary disposition. However, the Union did not move for summary disposition, nor did the ALJ recommend that we grant summary disposition of the charge against the Union. The ALJ's Recommended Decision and Order were issued after an evidentiary hearing with respect to this case. Thus, the standard for summary disposition does not apply.

The ALJ properly found that the record established that Charging Party's employment was terminated because he violated the terms of his January 25, 2001 last chance agreement. There is no dispute that Charging Party was required to take a drug/alcohol test in September of 2001, and that he tested positive. Charging Party suggests that the union business agent could have launched an attack on the validity of the last chance agreement, test procedures and whether or not Charging Party consumed alcohol prior to coming to work or at work as well as possible disparate treatment arguments. None of these arguments is particularly relevant to the issue in this case.

Respondent-Labor Organization correctly argues that in order to prevail on a claim of breach of the duty of fair representation, Charging Party must establish not only a breach of the duty of fair representation but also a breach of the collective bargaining agreement. *Martin* v *East Lansing Sch Dist*, 193 Mich App 166, 181 (1992). In this case, the record is clear that in December of 2000, Charging Party tested positive for alcohol, entered into a last chance agreement on January 25, 2001, and again tested positive on a drug/alcohol test in September 2001. Charging Party was given the option of having his employment terminated or resigning and he elected to resign. There is nothing in the record that establishes a breach of the collective bargaining agreement.

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. Simple negligence does not constitute a violation. *Vaca* v *Sipes*, 386 US 171, 177; 87 S Ct 903; (1967); *Goolsby* v *Detroit*, 419 Mich 651 (1984). Charging Party did not establish that the Employer's decision to terminate him was in any way influenced by the late arrival of the business agent at the hearing. We agree with the finding of the ALJ that the facts of this case do not support the allegation that the Union violated its duty of fair representation.

For the reason cited above and after careful consideration of the pleadings of the parties we adopt the findings and recommendations of the ALJ in these cases.

ORDER

The unfair labor practice charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated:_____

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Riley Roumell & Connolly, by William F. Dennis, Esq., for the Respondent Public Employer

Korney & Heldt, by J. Douglas Korney, Esq., for the Respondent Labor Organization

Madeline L. Jennings, Esq., for Individual Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This proceeding was held pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10) *et seq*., based upon unfair labor practice charges filed on April 1, 2002, by Gerald Dantzler, an individual Charging Party, against Respondents Detroit Board of Education and the International Union of Operating Engineers, Local 547. Roy L. Roulhac, an Administrative Law Judge for the Michigan Employment Relations Commission, held a hearing on the charge against the Union on August 9, 2002. Based upon the record, the pleadings, and a post-hearing brief filed by the Union on September 6, 2002, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charges:

In his eight-page charge against the Employer, Charging Party states that in January 2001, while fulfilling his duties as chief engineer, he was discriminated against when he was suspended, rather than being allowed to enter an employee assistance program, after he took breathalyzer and blood tests. Charging Party also claims that in October 2001, after he violated a last chance agreement, the Employer forced him to resign although other employees who had less impeccable records have been allowed to continue their employment. He claims that the Union violated its duty

of fair representation because the business agent was late for his October 5, 2001 "due process" hearing.

On June 7, 2002, the Employer filed a motion for summary disposition. It alleged that the Commission lacks jurisdiction to the extent that the charge relates to events that occurred more than six months before the charge was filed. The Employer also claims that the Commission lacks jurisdiction because the charge is based upon the meaning of provisions in a last chance agreement. Charging Party responded to the motion on June 18, 2002, and also filed a motion for default judgment against the Employer and the Union. On June 27, 2002, the Employer responded to Charging Party's default judgment motion and to his response to summary disposition motion.

Findings of Fact:

Charging Party was employed by the Employer for approximately twenty-three years and was a Union member. In January 2001, he was suspended, without pay, for allegedly being intoxicated on the job. As a condition of reinstatement, the Employer, the Union and Charging Party executed a last chance agreement. It provided that for one year, Charging Party would be subject to random medical screens for chemical dependency and he would be immediately terminated if he violated the agreement. It also provided that the Employer's termination decision would be without the benefit of a grievance appeal.

In September 2001, Charging Party violated the terms of his last chance agreement by testing positive for alcohol. Thereafter, Charging Party notified the Union's business agent that the Employer had scheduled a "due process" hearing for him on October 5, 2001, at the School Center Building (SCB), but he did not know the time. During an October 3 telephone conversation, the business agent informed Charging Party that he would be in the SCB on October 5, and asked Charging Party to page him when he knew what time the hearing would start.

On October 5, the business agent received a telephone call advising him that the hearing was about to begin. According to Charging Party, the business agent arrived five minutes before the 1½-hour hearing ended. During a caucus, Charging Party, his attorney, and the business agent discussed options that might be available to Charging Party. They proposed to the Employer that Charging Party be allowed to change his job location and extend the last chance agreement for two years. The Employer's representative informed Charging Party that she did not have the authority to set aside the terms of the last chance agreement, but she would present their recommendation to the assistant superintendent. Thereafter, the assistant superintendent rejected Charging Party's proposal and gave him two options – resign or be terminated. Charging Party elected to resign.

Conclusions of Law:

Charging Party's Motion for Default Judgment

In his June 18, 2002 motion, Charging Party claims that a default judgment should be entered against Respondents for their failure to file an answer within ten days after service of the charge. He relies on former Commission Rule 423.433. However, former rules R 423.401 to R 423.494, including R 423.433, were rescinded on February 1, 2002, and replaced by rules R 423.101 to R 423.194. Moreover, former R 423.433 only dealt with a party's obligation to file an answer to a fact-finding application pursuant to Section 25 of the Labor Mediation Act, MCL

423.25, and not to unfair labor practice charges filed pursuant to Section 16 of PERA, MCL 423.216. Current rule R 423.155 relates to answers to unfair labor practice charges. It provides that a party *may* file an answer within ten days after a charge is served.

Even if PERA or the Commission's administrative rules obligated a party to file an answer, they contain nothing that authorizes the Commission to entertain motions for default judgment or to grant the extraordinary relief - $80,000 plus loss of benefits or an economic assessment of the same, costs, and attorney fees – that Charging Party seeks. I, therefore, recommend that the Commission deny Charging Party's motion for default judgment.

Charging Party's Charge Against the Union

Charging Party claims that the Union violated its duty of fairly represent him because the business agent was late for his October 5, 2001 "due process" hearing. A breach of a union's duty of fair representation occurs when its conduct toward a bargaining unit member is arbitrary, discriminatory, or in bad faith. *Goolsby* v *Detroit*, 419 Mich 651 (1984). Charging Party offered no evidence to satisfy this test or to establish that the business agent's late arrival was a factor in the Employer's decision to terminate him.

The record shows that Charging Party was employment was terminated because he violated the terms of his January 25, 2001, last chance agreement that clearly states that he would be terminated, without the benefit of a grievance appeal, if he violated its terms. After the business agent arrived at the hearing, he participated with Charging Party and his attorney in formulating a recommendation that the assistant superintendent considered and rejected. These facts do not support an allegation that the Union violated its duty to fairly represent Charging Party.

The Employer's Motion for Summary Disposition

In a June 7, 2002 motion, the Employer asserts that the Commission lacks jurisdiction to consider that portion of the charge that relates to events that occurred more than six months before it was filed. The Employer also claims that the Commission lacks jurisdiction because the charge is based on the meaning of a last chance agreement that was executed in accordance with conduct prohibited by the collective bargaining agreement. In response to the motion, Charging Party argues that the January 2001, last chance agreement that he was forced to sign is null and void because it was not in accordance with the employee assistance program nor were procedures properly followed prior to its execution. According to Charging Party, he had an impeccable twenty-three year-record and his placement on a last chance agreement was ludicrous, capricious and arbitrary. He contends that his forced resignation based on the agreement was wrong.

There is nothing in Charging Party's charge or his response to the summary disposition motion that remotely states a claim for which relief can be granted under PERA. Section 10(1)(a) prohibits public employers from interfering with, restraining, or coercing public employees in their right to organize, form, or join labor organizations; to engage in concerted activities; and to collectively bargain. Section 10(1)(c) makes it unlawful for public employers to discriminate against public employees regarding their hire and other terms and conditions of employment. The only thing Charging Party alleges is that he was improperly forced to execute a last chance agreement and was wrongly forced to resign for violating it. These allegations do not state a claim for relief under Section 10(1)(a) or (c).

Even if Charging Party's allegation that he was improperly forced to execute the January 2001 last chance agreement stated a claim for relief, it would be barred because it was not filed within six months of the alleged violation as required by Section 16. I, therefore, recommend that Respondent's motion for summary disposition be granted and the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____