

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

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF WATER & SEWERAGE),
Respondent-Public Employer in MERC Case No. C16 H-091,
Hearing Docket No. 16-024902,

-and-

AFSCME COUNCIL 25, LOCAL 2920,
Respondent-Labor Organization in MERC Case No. CU16 H-052,
Hearing Docket No. 16-024903,

-and-

REGINA BRYANT-DANIELS,
An Individual Charging Party.

APPEARANCES:

Shawntane Williams, Staff Attorney, for the Labor Organization

Regina Bryant-Daniels, appearing on her own behalf

DECISION AND ORDER

On November 30, 2016, Administrative Law Judge Peltz issued his Decision and Recommended Order 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 Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

Pursuant to Rule 176, R423.176 of the General Rules of the Employment Relations Commission, exceptions to the Decision and Recommended Order were due on December 27, 2016. On December 9, 2016, Charging Party filed a request for a thirty-day extension of time in which to file her exceptions. However, her request initially failed to comply with Rule 176a of the Commission's General Rules, 2014 AACS, R 423.176a, which provides that any party requesting an extension of time to file exceptions to an administrative law judge's decision and recommended order, must serve a copy of the request on each of the other parties before the expiration of the filing deadline. Commission staff provided Charging Party with both verbal and written notice that she was required to provide a statement of service indicating that she had served her request for an extension of time on each of the other parties by December 27, 2016. Charging Party submitted a statement of service on December 27, 2016.

On December 28, 2016, we granted Charging Party's request for an extension of time and issued an order extending the time for filing exceptions to the Administrative Law Judge's decision to January 26, 2017. No exceptions were filed on or before the specified date. Rather, we received Charging Party's exceptions on January 27, 2016. Again, Charging Party failed to provide a statement of service indicating that she had served the documents on Respondents.

Commission Rule 176, 2014 AACCS, R 423.176 provides:

Copies of the exceptions and brief and a list of the other documents filed with 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.

Although the priority mail envelope in which the exceptions were mailed was postmarked on January 25, 2016, it is well established that the date of filing of exceptions is the date the document is received at the Commission's office, not the date posted. See e.g. *Amalgamated Transit Local 26*, 20 MPER 1 (2007) (exceptions postmarked on the due date, but received afterwards were disregarded as untimely); *Wayne Co Cmty College Dist*, 18 MPER 54 (2005) (exceptions delivered four days after the due date were disregarded for untimeliness); *Police Officers Ass'n of Michigan*, 18 MPER 14 (2005) (exceptions dated before the due date, but received the day after the due date, were disregarded as untimely); *City of Detroit (Dep't of Public Works)*, 17 MPER 5 (2004) (exceptions postmarked three days before the due date, received one day late, and failed to otherwise comply with the Commission Rules were disregarded).

Moreover, our order granting the thirty-day extension explicitly stated that the exceptions must be *received* at a Commission office by the close of business on Thursday, January 26, 2017. Although the untimeliness of Charging Party's exceptions requires that they be disregarded, Charging Party's failure to file a statement of service establishing that she served the exceptions on Respondents is further cause to disregard Charging Party's exceptions.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: February 16, 2017

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

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF WATER & SEWERAGE),
Respondent-Public Employer in Case No. C16 H-091; Docket No. 16-024902-MERC,

-and-

AFSCME COUNCIL 25, LOCAL 2920,
Respondent-Labor Organization in Case No. CU16 H-052; Docket No. 16-024903-MERC,

-and-

REGINA BRYANT-DANIELS,
An Individual Charging Party.

APPEARANCES:

Shawntane Williams, Staff Attorney, for the Labor Organization

Regina Bryant-Daniels, appearing on her own behalf

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE**

This case arises from unfair labor practice charges filed on August 30, 2016, by Regina Bryant-Daniels against her former employer, the City of Detroit, Department of Water & Sewerage, and her labor organization, American Federation of State, County and Municipal Employees (AFSCME) Council 25, Local 2920. 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 charge in Case No. C16 H-091; Docket No. 16-024902-MERC alleges that the City of Detroit, Department of Water and Sewerage violated PERA by terminating Daniels in February of 2010. In Case No. CU16 H-052; Docket No. 16-024903-MERC, Daniels asserts that AFSCME Council 25, Local 2920 acted unlawfully by failing or refusing to arbitrate a grievance challenging her termination. As a remedy in this matter, Charging Party seeks an order requiring the parties to proceed to arbitration on the grievance.

On September 12, 2016, I issued a pretrial order requiring Daniels to show cause why her charge against the City of Detroit, Department of Water and Sewerage should not be dismissed on summary disposition as untimely and for failure to state a claim under PERA. At the same time, I

directed AFSCME Council 25, Local 2920 to file a position statement addressing the allegations set forth by Charging Party against the Union. Responses were due by the close of business on October 3, 2016. Charging Party filed a timely response in opposition to summary dismissal of the charge against the Employer on September 30, 2016. The Union did not file a position statement.¹

In an interim order issued on October 5, 2016, I indicated that I would be recommending dismissal of the charge against the City of Detroit, Department of Water and Sewerage in Case No. C16 H-091; Docket No. 16-024902-MERC on the ground that the charge was not timely filed and because Daniels had alleged no facts from which it could be concluded that the Employer violated PERA. With respect to the charge against AFSCME Council 25, Local 2920, an evidentiary hearing was scheduled for November 10, 2016. That date was later rescheduled at the request of the Union. The hearing was held in Detroit, Michigan on November 16, 2016. At the conclusion of the hearing, the parties each presented closing arguments in lieu of filing written briefs.

Findings of Fact:

Charging Party was an employee of the City of Detroit assigned to a position in the Department of Water and Sewerage (DWSD). In 2010, she was terminated for conduct unbecoming a City employee. The Union filed a grievance on her behalf challenging the termination and an arbitration hearing was scheduled for December 4, 2012. The hearing was cancelled when the AFSCME representative, Tere McKinney fell ill. Daniels contacted the Union's administrative director, Herb Sanders, and asked if there was another representative who could be sent in McKinney's place. Sanders told Daniels that there was nothing that could be done.

Sometime in 2012 or 2013, the Union notified Charging Party that the City had presented a last chance offer of \$20,000. Daniels rejected the offer after learning that it would require her to repay unemployment benefits which she had received since her termination. In March of 2013, the City made another last chance offer which Daniels similarly rejected.

By letter dated July 16, 2013, the Union notified Daniels that the grievance arbitration hearing had been rescheduled for September 3, 2013. Before the hearing could occur, however, the City of Detroit filed a bankruptcy petition in federal court and an automatic stay was issued governing all claims against the City. Based upon the issuance of the stay, the Union understood that no pending grievances against the City could go forward.

Judge Victoria Roberts was assigned to serve as mediator in the City of Detroit bankruptcy case. At the end of 2013, Roberts summoned representatives of the City and the Union to her courtroom and advised the parties that any outstanding grievances which arose between 2008 and 2013 must be mediated rather than arbitrated. Thereafter, Kevin Orr, the emergency financial manager appointed by the Governor under 1990 PA 72 advised the parties that there would be a \$1,000 cap on all mediation settlements.

There were between 700-800 outstanding grievances which required mediation. Grievances involving employees in City positions were mediated first, with that process running from the end of 2013 through the beginning of 2014. The City was not prepared to immediately start mediating

¹ By email dated October 11, 2016, AFSCME Council 25 requested an extension of time to file its position statement until October 28, 2016. That request was denied as untimely.

cases involving employees in DWSD positions. That process did not commence until the fall of 2014, when the parties began discussing grievances filed by AFSCME Local 2920.

On or about November 12, 2015, Charging Party wrote to Sanders requesting information regarding the status of her grievance. Sanders responded by letter dated December 10, 2015. Sanders wrote, “We are currently attempting to negotiate resolutions to all pre-bankruptcy arbitration cases.” [Emphasis in original.] Sanders instructed Daniels to contact AFSCME staff representative Catherine Phillips for more information.

Ultimately, the mediation process resulted in settlement agreements being reached between the City and the Union on all grievances involving members of Local 2920, including the grievance challenging Charging Party’s termination. Although that process concluded at the end of 2015, the agreements were not immediately reduced to writing because the individuals who were responsible for doing so abruptly left City employment.

On November 4, 2016, just prior to the hearing in this matter, representatives of the City and the Union formally signed an agreement settling Charging Party’s grievance. The agreement provides that the City will pay Daniels \$1,000, less applicable taxes and withholdings, in exchange for withdrawal of the grievance by the Union.

Discussion and Conclusions of Law:

I. Charge Against the Employer

Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of the charge upon each of the named respondents. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Cmty 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).

In the instant case, Daniels was terminated on February 27, 2010. However, she did not file her charge against the City of Detroit until August 30, 2016, more than six years later. Although Charging Party suggests that there was no reason for her to file her charge any earlier given that her grievance remained pending, it is well-settled that 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. Accordingly, I conclude that the charge filed by Daniels against the Employer must be dismissed on summary disposition as untimely under Section 16(a) of the Act.

Even if the charge had been timely filed, however, dismissal is nonetheless appropriate on the ground that Charging Party has failed to state a claim against the City upon which relief can be granted under PERA. Section 9 of the Act 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 by a public employer, nor does the Act provide a remedy for a breach of contract claim asserted by an individual employee. Furthermore, it is not MERC's role to hear allegations of discrimination on the basis of race, age, gender, religion, disability, national origin, or other generalized claims of unfair treatment. See e.g. *Ann Arbor Sch*, 16 MPER 15 (2003); *Detroit Bd of Ed*, 1995 MERC Lab Op 75. The Commission's 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 in the charge nor in her response to the order to show cause did Daniels provide a factual basis which would support a finding that she was subjected to discrimination or retaliation for engaging in, or refusing to engage in, protected activities in violation of the Act. Accordingly, I recommend that the charge in Case No. C16 H-091; Docket No. 16-024902-MERC be dismissed on summary disposition.

II. Charge Against the Union

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, Charging Party asserts that AFSCME Council 25, Local 2920 violated its duty of fair representation by failing or refusing to arbitrate her grievance. Having carefully reviewed the record in this matter, I find no evidence that the Union acted arbitrarily, discriminatorily or in bad faith with respect to its representation of Daniels. The Union filed a grievance challenging Charging Party's termination and advanced the matter through the parties' contractual grievance process. Arbitration was scheduled, but the hearing was adjourned when the AFSCME representative scheduled to appear on Charging Party's behalf became ill. The hearing was rescheduled, but before the grievance could be heard the City filed for bankruptcy and an automatic stay was issued. Thereafter, the federal court issued an order requiring that all grievances which were pending at the time of the bankruptcy filing be mediated rather than arbitrated. As a result of that order, the Union was prohibited from attempting to arbitrate Charging Party's grievance. Ultimately, the Union settled Daniels' grievance for \$1,000, the maximum amount allowable pursuant to a directive issued by the City's emergency financial manager. Under such circumstances, I conclude that Charging Party has failed to establish that the Union violated PERA in connection with this matter.

Charging Party also alleges that the Union breached its duty of fair representation by failing to keep her abreast as to the status of her grievance. The Commission has consistently held that a union's failure to communicate with a member about even the member's own grievance is not in itself a breach of the union's duty of fair representation. See e.g. *Wayne Co (Sheriffs Dep't)*, 1998 MERC Lab Op 101, 105 (no exceptions); *Southeastern Mich Transp Auth*, 1988 MERC Lab Op 191, 196 (no exceptions); *AFSCME Local 1600*, 1981 MERC Lab Op 522, 527 (no exceptions). Although the Union did not inform Charging Party that her grievance had been settled on or around the date it was mediated, this failure did not result in any harm to her substantive or procedural rights.

Accordingly, I conclude that the charge filed by Daniels against AFSCME Council 25, Local 2920 in Case No. CU16 H-052; Docket No. 16-024903-MERC must be dismissed for failure to state a claim under PERA.

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

RECOMMENDED ORDER

The unfair labor practice charges filed by Regina Bryant-Daniels against the City of Detroit, Department of Water and Sewerage and AFSCME Council 25, Local 2920 in Case Nos. C16 H-091 and CU16 H-052; Docket Nos. 16-024902-MERC and 16-024903-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 30, 2016