STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT, DEPARTMENT OF TRANSPORTATION,
Public Employer-Respondent in MERC Case No. C16 G-072
Hearing Docket No. 16-019710,

-and-

AMALGAMATED TRANSIT UNION, LOCAL 26,
Labor Organization-Respondent in MERC Case No. CU16 G-040
Hearing Docket No. 16-019851,

-and-

CAROLYN HOWARD,
An Individual Charging Party.
_____/

APPEARANCES:

Law Office of Mark H. Cousens, by John E. Eaton, for the Labor Organization

Ledermanlaw, P.C., by Howard Yale Lederman, for Charging Party

DECISION AND ORDER

On September 16, 2016, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order on Summary Disposition in the above matter finding that Respondents did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ initially found that Charging Party failed to respond to a show cause order. Additionally, the ALJ found that both charges were untimely under Section 16(a) of PERA and that neither charge stated a claim under PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Charging Party filed exceptions, a brief in support of her exceptions to the ALJ's Decision and Recommended Order on Summary Disposition, and a request for oral argument on November 9, 2016. Respondent filed its brief in support of the ALJ's Decision and Recommended Order on Summary Disposition on November 28, 2016.

In her exceptions, Charging Party contends that the ALJ erred in concluding that dismissal of the charge on summary disposition was warranted. Charging Party notes that her charges were timely because neither Respondent informed her of her right to ask MERC for relief. Charging Party further argues, with respect to the merits of this dispute, that she was unable to work due to a disability and, as a result, her second termination for an alleged last chance agreement violation was a virtual certainty. Additionally, Charging Party maintains that Respondent Amalgamated Transit Union Local 26 (ATU) breached its duty of fair representation by refusing to inform her of her right to present a grievance to the membership for action, by refusing to permit her to speak at a January 23, 2016 meeting, and by refusing to consider her grievance on its merits.

In its brief in support of the ALJ's Decision and Recommended Order on Summary Disposition, Respondent ATU contends that the ALJ's findings were based on applicable law and should be affirmed.

Although Charging Party has requested oral argument in this matter, we find that oral argument would not materially assist us in deciding this case, and therefore, deny the request.

We have reviewed the exceptions filed by Charging Party, and find them to be without merit.

Factual Summary:

Charging Party Howard was employed by the City of Detroit's Department of Transportation (DDOT) as a bus operator and was a member of a bargaining unit represented by Respondent ATU. Charging Party was discharged on June 2, 2015, and reinstated after signing a last chance agreement on or about August 29, 2015. Charging Party was again discharged on November 23, 2015 for violating this last chance agreement.

On July 7, 2016, Charging Party filed the instant charges against the DDOT and ATU alleging that Respondent DDOT violated the "Elliot Larsen Civil Rights Act, Title 7 and the ADA" by discharging her on June 2, 2015 and alleging that Respondent ATU breached its duty of fair representation by failing to process a grievance challenging her discharge.

In an order issued on July 26, 2016, ALJ Peltz directed Howard to show cause why her charges should not be dismissed as untimely and for failure to state a claim upon which relief could be granted under PERA. Although Charging Party's response to the Show Cause Order was initially due by August 16, 2016, she was granted an extension of time until August 30, 2016, and another extension until September 13, 2016 for filing a response.

On September 16, 2016, hearing nothing further from Charging Party, ALJ Peltz issued his Decision and Recommended Order on Summary Disposition and recommended that both unfair labor practice charges be dismissed.

Discussion and Conclusions of Law:

Under Commission Rule 165(2), summary disposition is appropriate where a charge fails to state a valid claim under PERA or where there is no genuine issue of material fact. In such instances, the ALJ is authorized to issue an order requiring a party to assert facts and arguments of law in support of its contention to avoid the grant of summary disposition in the opposing party's favor. *ATU Local 26*, 30 MPER 22 (2016); *Wayne Cnty*, 24 MPER 25 (2011). Relying on *Smith v Lansing Sch Dist*, 428 Mich 248 (1987), we have consistently held that an evidentiary hearing is not warranted where no material factual dispute exists. *AFSCME Council 25, Local 207*, 23 MPER 101 (2010); *Muskegon Hts Pub Sch Dist*, 1993 MERC Lab Op 869, 870; *Police Officers Labor Council*, 25 MPER 57 (2012). Where, however, a material factual dispute exists, summary disposition is not appropriate. *Saginaw Cnty Sheriff*, 1992 MERC Lab Op 639 (no exceptions).

Additionally, the Commission has repeatedly recognized that failure to respond to a Show Cause Order may, in itself, warrant dismissal of the charge. *City of Detroit*, 30 MPER 39 (2016); *AFSCME Council 25*, 22 MPER 87 (2009); *Detroit Federation of Teachers*, 21 MPER 3 (2008). In the present case, ALJ Peltz directed Charging Party Howard to show cause why her charges should not be dismissed by September 13, 2016. Although Charging Party alleges in her Brief that a response to the ALJ's Order to Show Cause was prepared, she further admits that "it did not arrive at the Administrative Law Judge's office within the designated time frame."[1] Charging Party's failure to respond in a timely fashion to the ALJ's Show Cause Order warrants dismissal of the charges. Notwithstanding this, the Commission agrees with the ALJ that, even if all of the allegations in the charges are accepted as true, dismissal of the charges on summary disposition is nonetheless warranted.

Under 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 long held that PERA's 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 this case, as noted by the ALJ, the charges and supporting documentation indicate that Charging Party was initially discharged on June 2, 2015, and then reinstated after signing a last chance agreement on or about August 29, 2015. Charging Party was again discharged on November 23, 2015. In December of 2015, the ATU notified Charging Party that it would not be filing a grievance on her behalf. All of these events occurred more than six-months prior to the filing of the charges in this matter on July 7, 2016. Consequently, any allegations against the DDOT or the ATU arising from these events are untimely under the Act.

Although Charging Party contends that she was never informed of her right to ask MERC for relief by either Respondent and that, therefore, Respondents caused an "equitable tolling" of the statute of limitations, the Commission has repeatedly indicated that the limitations period

[1] According to Charging Party's attorney, he emailed the response to ALJ Peltz on October 19, 2016.

cannot be waived by the parties and is not tolled by physical disability, personal hardship, or the pursuit of other remedies. *Washtenaw Cnty*, 1992 MERC Lab Op 471 (claim pending in circuit court); *Int'l Assoc of Firefighters, Local 352*, 1989 MERC Lab Op 522 (civil service proceedings); *Detroit Fed of Teachers Local 231, AFT, AFL-CIO*, 1989 MERC Lab Op 882 (pendency of union appeal process); *Detroit Public Schools*, 1982 MERC Lab Op 1058 (state tenure commission proceedings); *Livonia Public Schools*, 1975 MERC Lab Op 1010 (settlement efforts). The statute of limitations is, therefore, not an affirmative defense which can be waived; it prohibits the Commission from issuing a complaint regarding an action taken more than six months prior to the filing and service of a charge. That prohibition is a direct restriction on the Commission and deprives the Commission of jurisdiction to act. *Traverse Area District Library*, 25 MPER 82 (2012).

Moreover, the Commission has previously rejected the theory that a "continuing violation" arises where a wrong has gone uncorrected. In *City of Adrian*, 1970 MERC Lab Op 579, the Commission adopted the holding of the U.S. Supreme Court in *Local Lodge 142 v NLRB (Bryan Mfg* Co), 362 US 411 (1960), which rejected the doctrine of a continuing violation if the commencement of the violation occurred more than six months prior to the filing of the charge. See also, *Traverse Area District Library*, 25 MPER 82 (2012). Consequently, the ALJ properly concluded that the instant charges are untimely because they are based upon allegations that occurred more than six months prior to the filing of the charges.

With respect to the merits of this dispute, the Commission agrees with the ALJ that, even if the charges had been timely filed, dismissal would be appropriate because Charging Party failed to state a claim against either Respondent upon which relief can be granted under PERA. With respect to the charge against DDOT, §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. PERA does not, however, prohibit all types of discrimination, and it is not the Commission'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.

In the instant case, Charging Party filed the charge against the DDOT alleging that it violated the "Elliot Larsen Civil Rights Act, Title 7 and the ADA" by discharging her on June 7, 2015. In her appeal, Charging Party contends that her second termination was a virtual certainty and that, in imposing the last chance agreement on her under these conditions, Respondent DDOT committed an unfair labor practice.

Contrary to Charging party's contention, however, 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 refuse to engage in, union or other concerted

activities protected by PERA. The charge in this dispute against DDOT does not provide a factual basis which would support a finding that Howard was subjected to discrimination or retaliation for engaging in, or refusing to engage in, protected activities in violation of the Act. Accordingly, summary dismissal of the charge against the City of Detroit's Department of Transportation in Case No. C16 G-072 is warranted.

Similarly, with respect to the charge against the ATU, there is no factually supported allegation against it which, if proven, would establish that the Union violated PERA with respect to Howard. 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. 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.

Moreover, the Commission has held that 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. *Macomb Cnty & AFSCME*, 30 MPER 12 (2016); *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 ATU violated PERA when it refused to process a grievance challenging her discharge from employment on November 23, 2015. Documentation attached to the charges, however, does not allege a breach of the collective bargaining agreement by the employer. To the contrary, Charging Party admits that she was "[u]nable to perform my duties." Under such circumstances, no PERA claim can be established based upon the Union's subsequent refusal to process a grievance on Howard's behalf.

Additionally, although Charging Party alleges in her Brief that ATU violated its constitution by refusing to inform her of her right to present a grievance to the membership for action and by refusing to permit her to speak at a January 23, 2016 meeting, the Commission has long recognized that it does not have jurisdiction to enforce union bylaws and constitutions. *ATU Local 26*, 30 MPER 22 (2016); *City of Battle Creek*, 1974 MERC Lab Op 698 (no exceptions); *Wayne County Road Commission*, 1974 MERC Lab Op 698 (no exceptions). Consequently, even if Charging Party's rights under the ATU constitution were violated, this is solely an internal union matter and would not state a claim upon which relief could be granted under PERA. Consequently, the Commission agrees with the ALJ that the charge filed by Howard against Amalgamated Transit Union Local 26 in Case No. CU16 G-040 should also be dismissed for failure to state a claim under PERA.

ORDER

The unfair labor practice charges against both Respondents are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: March 24, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT, DEPARTMENT OF TRANSPORTATION,
Respondent-Public Employer in Case No. C16 G-072; Docket No. 16-019710-MERC,

-and-

AMALGAMATED TRANSIT UNION, LOCAL 26,
Respondent-Labor Organization in Case No. CU16 G-040; Docket No. 16-019851-MERC,

-and-

CAROLYN HOWARD,
An Individual Charging Party.
_____/

APPEARANCES:

Law Office of Mark H. Cousens, by John E. Eaton, for the Labor Organization

Ledermanlaw, P.C., by Howard Yale Lederman, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

These cases arise from unfair labor practice charges filed on July 7, 2016, by Carolyn Howard against her employer, City of Detroit, Department of Transportation, and her labor organization, Amalgamated Transit Union, Local 26. 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).

In an order issued on July 26, 2016, I directed Howard to show cause why her charges should not be dismissed as untimely and for failure to state a claim under PERA. Pursuant to that order, Charging Party's response was due in a Commission office by no later than the close of business on August 16, 2016. Charging Party was subsequently granted an extension of time until August 30, 2016, for the filing of a response.

On August 30, 2016, attorney Howard Lederman filed an appearance on Howard's behalf, along with a request for a second extension to September 13, 2016. I granted the request. To date, however, Charging Party has not filed a response to the order to show cause or requested an additional extension of time in which to do so.

Discussion and Conclusions of Law:

Pursuant to Rule 165(1), R 423.165(1), of the General Rules and Regulations of the Employment Relations Commission, which govern practice and procedure in administrative hearings conducted by MAHS, the ALJ may "on [his] own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." See Rule 1501, R 792.11501, of the MAHS Administrative Hearing Rules. Among the various grounds for summary dismissal of a charge is the failure by the charging party to "respond to a dispositive motion or a show cause order." Rule 165(h). See also *Detroit Federation of Teachers*, 21 MPER 3 (2008), in which the Commission recognized that the failure of a charging party to respond to an order to show cause may, in and of itself, warrant dismissal of the charge. In any event, accepting all of the allegations in the charges as true, dismissal of theses consolidated cases on summary disposition is warranted.

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, the charges and supporting documentation indicate that Charging Party was discharged on June 2, 2015, and then reinstated after signing a last chance agreement on or about August 29, 2015. Charging Party was once again discharged on November 23, 2015. In December of 2015, the Union notified Charging Party that it would not be filing a grievance on her behalf. All of the above events occurred more than six-months prior to the filing of the charges in this matter. Accordingly, any allegations against the Employer or the Union arising from these events must be dismissed as untimely under the Act.

Even if the charges had been timely filed, however, it appears that dismissal would nonetheless be appropriate on the ground that Charging Party has failed to state a claim against either Respondent 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, the charge against the City of Detroit, Department of Transportation does not provide a factual basis which would support a finding that Howard was subjected to discrimination or retaliation for engaging in, or refusing to engage in, protected activities in violation of the Act. Accordingly, it appears that summary dismissal of the charge in Case No. C16 G-072; Docket No. 16-019710-MERC is warranted.

Similarly, there is no factually supported allegation against Amalgamated Transit Union, Local 26 in Case No CU16 G-040; Docket No. 019851-MERC which, if proven, would establish that the Union violated PERA with respect to Howard. 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 Amalgamated Transit Union, Local 26 violated PERA by failing or refusing to process a grievance challenging her discharge from employment on November 23, 2015. Documentation attached to the charges, however, indicates that Howard engaged in conduct which violated the terms of the last chance agreement which she signed on or about August 29, 2015. Under such circumstances, her subsequent discharge could not constitute a breach of contract and, therefore, no PERA claim can be established based upon the Union's subsequent refusal to process a grievance on Howard's behalf. Accordingly, I conclude that the charge filed by Howard against Amalgamated Transit Union, Local 26 in Case No. CU16 G-040; Docket No. 16-019851-MERC must also be dismissed on summary disposition for failure to state a claim under PERA.

RECOMMENDED ORDER

The unfair labor practice charges filed by Carolyn Howard against the City of Detroit, Department of Transportation and Amalgamated Transit Union, Local 26 in Case No. C16 G-072; Docket No. 16-019710-MERC and Case No. CU16 G-040; Docket No. 16-019851-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: September 16, 2016