

**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. 19-E-0968-CE,

-and-

MICHIGAN AFSCME COUNCIL 25, LOCAL 312,
Labor Organization-Respondent in MERC Case No. 19-E-0969-CU,

-and-

JERMAINE SMITH II,
An Individual Charging Party

_____ /

APPEARANCES:

Anita B. Ellsworth, City of Detroit Labor Relations, for the Public Employer

Angenique N. Smiley, for the Labor Organization

Jermaine Smith, appearing on this own behalf

DECISION AND ORDER

Jermaine Smith II, a Detroit Department of Transportation employee, brought unfair labor practice charges against his employer and the union that represents him (AFSCME Local 312). The charges against the employer alleged three acts of wrongful discipline, the last of which occurred in May 2018. The administrative law judge (Julia C. Stern) recommended dismissal of those charges, and Smith has not challenged that recommendation.¹ The charge against Local 312 alleged that the union failed to present certain evidence at an arbitration hearing challenging the May 2018 discipline. That hearing was held on November 7, 2018. Smith did not file his unfair labor practice charge until May 15, 2019. Because the Public Employment Relations Act imposes a six-month statute of limitations, and the charge here was not filed until after the statute had run, we dismiss it.

¹MOAHR Hearing Docket No. 19-011393

Factual Summary:

Jermaine Smith II is a Storekeeper for the City of Detroit Department of Transportation (DDOT). He is a member of a bargaining unit represented by AFSCME Council 25, Local 312. A collective bargaining agreement between DDOT and the union was in effect at all times material to this dispute.

Between April 2017 and May 2018, DDOT imposed an escalating series of disciplinary sanctions on Smith for alleged acts of misconduct. The first came on April 7, 2017, when the employer issued Smith a three-day suspension for “insubordination,” though it later revised the asserted reason for the sanction to “low productivity.” The second came on November 16, 2017, when the employer suspended Smith for five days for “insubordination/refusal to follow directions.”

The most serious disciplinary sanction, and the one that is the principal focus here, occurred in May 2018. The story began on March 27 of that year, when Smith’s Inventory Control Manager spotted him watching what appeared to be a video of animals on his computer during worktime. The employer took quick action. On April 2, it suspended Smith for 30 days pending discharge. The suspension notice gave two reasons: “using city tools for recreational purposes on the job,” and “low productivity.” The union filed a grievance over the April 2 suspension. After a Step 3 grievance hearing was unsuccessful, the employer discharged Smith on May 20.

The union pressed the grievance to arbitration. An arbitrator held a hearing on November 7. In a decision issued on November 12, 2018, the arbitrator found that Smith had been watching a video or pictures on a City computer for personal enjoyment, a Class II offense under the Employer’s disciplinary policy. The arbitrator noted that Smith’s prior three- and five-day suspensions were still on Smith’s record, and that therefore Smith was at the discharge level. But he also concluded that Smith had been denied due process with respect to the most recent disciplinary action. Noting that due process is an aspect of just cause, the arbitrator set aside Smith’s discharge and reduced it to a long-term suspension.

On May 15, 2019, Smith filed the unfair labor practice charges that are currently before us. As relevant here, he alleged that the union violated its duty of fair representation at his November 7 arbitration hearing by failing to present evidence concerning his prior two suspensions.

Discussion and Conclusions of Law:

Section 16(a) of PERA specifically provides that “[n]o complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission.” MCL 423.216(a). That statute of limitations “is jurisdictional and cannot be waived.” *Wayne County Sheriff and Police Officers Association of Michigan*, 33 MPER 25 (2019). The limitations period commences when the charging party “knows or should [know] of the acts constituting the unfair labor practice and has good reason to believe that the acts were improper or done in an improper manner.” *Id.* (citing *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983)).

If Local 312 breached its duty of fair representation, it did so no later than the arbitration hearing on November 7, 2018, when it failed to present the evidence Smith wanted it to. Smith attended that hearing. He knew what evidence the union presented and what arguments it made to the arbitrator. The statute of limitations thus began to run on the date of the hearing. Because Smith filed his charge with the commission more than six months later, Judge Stern properly concluded that it was not timely. Because the statute of limitations is jurisdictional, and because the untimeliness of Smith's charge was patent, we do not believe that it was necessary for the ALJ to hold a full hearing and issue a recommended decision on the merits of the alleged unfair labor practices.

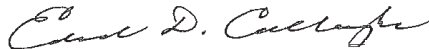
ORDER

The unfair labor practice charges are dismissed in their entirety.

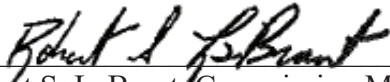
MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Samuel R. Bagenstos, Commission Chair



Edward D. Callaghan, Commission Member



Robert S. LaBrant, Commission Member

Issued: 7/21/20

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION),
Public Employer-Respondent in Case No. 19-E-0968-CE/Docket No. 19-011393-
MERC,

-and-

MICHIGAN AFSCME COUNCIL 25, LOCAL 312,
Labor Organization-Respondent in Case No. 19-E-0969-CU/Docket No. 19-
011393-MERC,

-and-

JERMAINE SMITH II,
Individual-Charging Party.

APPEARANCES:

Anita B. Ellsworth, City of Detroit Labor Relations, for the Public Employer-
Respondent

Angenique N. Smiley, for the Labor Organization-Respondent

Jermaine Smith, appearing on his own behalf

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

On May 15, 2019, Jermaine Smith II filed the above unfair labor practice charges with the Michigan Employer Relations Commission (the Commission) against his employer, the City of Detroit (Department of Transportation) and his collective bargaining representative, Michigan AFSCME Council 25 and its affiliated Local 312, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On August 13, 2019, in accord with Section 16 of PERA, the charges were heard by Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Office of Administrative Hearings and Rules. Based upon the entire record, including post-hearing briefs filed by the Respondent Union and by the Charging Party on or before September 26, 2019, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges and History:

On May 28, 2019, pursuant to Rules 152(c) and 167 of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.151(2), R 423.162, I issued an order to Smith to provide a more definite statement of both his charge against his employer and his charge against his collective bargaining representative. Smith submitted his statement of charges on June 19, 2019. I also directed the Respondent Union to file a position statement in response to Smith's allegations, which it did on July 2, 2019.

Smith's response to my order for more definite statement did not comply with my directive to supply the dates of all acts by the Respondent Employer that allegedly violated PERA and explain why these actions violated the Act. However, from the response it was clear that Smith was alleging that the Employer wrongfully disciplined him in April 2017, in November 2017, and again in May 2018.¹ At the hearing, Smith also alleged that the Employer violated Section 10(1)(e) of PERA by not giving the Union a copy of a December 1, 2016 email, discussed below, that played a role in Smith's April 2017 discipline and, possibly, in his November 2017 suspension. Finally, he alleged that the Employer violated Section 10(1)(b) of PERA by working with the Union to discipline him. After Smith completed his testimony, the Employer moved to dismiss Smith's charges against it on the basis that he had not stated a claim upon which relief could be granted under PERA. I stated at that time that it was my intent to grant the motion and that my reasons would be set forth in a written Decision and Recommended Order.

Smith is employed as a storekeeper in the Respondent Employer's Department of Transportation (DDOT). On April 7, 2017, Smith was issued a three-day suspension for "insubordination," later changed to "low productivity." On November 16, 2017, Smith was issued a five-day suspension for "insubordination/refusal to follow directions." Smith was discharged, after first being suspended, on May 21, 2018, for "low productivity/use of city tools for personal use on the clock." The Employer considered Smith's 2018 discipline to be a third offense under its progressive disciplinary policy and

¹ On June 9, 2017, Smith filed unfair labor practice charges against both Respondents (Case Nos. C17 F-053/17-012668-MERC and CU17 F-021/17-012669-MERC) alleging that the Union did not properly represent him in its handling of the grievance it filed over the April 2017 three-day suspension and that the discipline was not in accord with the contract. The charges also alleged that the Employer and the Union conspired against him because Smith had criticized a Union representative at Union meetings. On January 23, 2018, after conducting an evidentiary hearing on these and other charges filed by Smith, ALJ David Peltz recommended dismissal of the charges. The Commission adopted the ALJ's recommendations when no exceptions were filed. *City of Detroit*, 31 MPER 47 (2018). On November 16, 2017, Smith filed another set of charge against the Employer (Case Nos. C17 K-094/17-025824-MERC and C17 K-095/17-025825-MERC), alleging "breach of contract failure to follow grievance procedure" and "unfair labor practice-retaliation" respectively. On January 5, 2018, after Smith failed to respond to an order to show cause why the charges should not be dismissed, ALJ Travis Calderwood recommended that the charges be dismissed for failure to state a claim. The Commission adopted his recommendation after no exceptions were filed. *City of Detroit*, 31 MPER 48 (2018).

therefore grounds for discharge. The Respondent Union filed a grievance over Smith's discharge. The grievance was heard by an arbitrator on November 7, 2018, and on November 12, 2018, the arbitrator ordered Smith returned to work but without backpay.

Smith's charge against the Union alleges that it violated its duty of fair representation by failing to collect and present certain evidence, as discussed below, at his arbitration hearing. This evidence included, but was not limited to, evidence related to his two previous suspensions.

Findings of Fact:

Smith began working for the Employer in 2000 and for DDOT in 2011. Smith's primary responsibility as a storekeeper in DDOT's Shoemaker maintenance garage is to keep track of the garage's stock of parts though the DDOT's computerized inventory control system.

Smith's April 2017 Suspension

On December 1, 2016, Alicia Miller, materials manager in the DDOT's inventory control division and one of Smith's supervisors, sent an email to stores operation staff with instructions relating to the creation of parts requisitions, including a directive to call or email Miller before creating new requisitions. The email was sent to 19 persons, including Smith. On April 7, 2017, Felton Mack, the supervisor in charge of the Employer's Shoemaker garage, gave Smith a three-day suspension for "insubordination" for failing to follow the instructions in Miller's December 1, 2016, email not to order parts without first checking with Miller. During a meeting between Smith and his Union representative and Mack, Smith and the Union representative asked Mack for a copy of the December 1, 2016, email and copies of the photographs Mack claimed to have that supported the insubordination claim, but Mack refused to provide them.

The Union filed a grievance over the suspension. On April 27, 2017, a Step 3 hearing was held on the grievance. According to testimony from Union Grievance Committeeman Karl Graham in both this case and at the hearing in Case Nos. C17 F-053 and CU17 F-021, the Employer showed a copy of Miller's December 1, 2016, email to Union representatives and to Smith himself at the Step 3 hearing. The Employer also claimed that evidence from its email system indicated that Smith had read the email at the time that it was sent. According to Graham, Smith himself had a copy of Miller's email. At the hearing in this case, Graham testified that he argued at Step 3 that Smith should not be written up for insubordination based on email instructions only. He testified that the Employer responded that supervisors had also talked to Smith in person about not following the directions in the email about ordering parts.

Smith's testimony directly contradicted Graham's on several points. First, Smith testified that he did not receive a copy of Miller's December 1, 2016, email when it was sent and that he told the Union that he had not received it. Second, he testified that the Employer did not show him or Graham the email at the April 27, 2017, meeting. Third,

he testified that neither Graham nor any other Union representative ever told him that they (the Union representatives) had seen an email from Miller with instructions on ordering parts. After the Step 3 meeting, on May 9, 2017, Smith requested to see a copy of his personnel file. According to Smith, he did this in order to see the email, but there was no email from Miller in his file. Smith testified that he never saw Miller's December 1, 2016, email until July 2019, when the Employer's counsel sent him a copy after he filed a complaint with the Michigan Occupational Safety and Health Agency (MIOSHA) asserting that his May 21, 2018, discharge constituted retaliation for filing a MIOSHA complaint.

The Employer provided the Union with its Step 3 answer on July 5, 2017. The answer stated:

The Union contents [sic] that Jermaine Smith was issued a three-day suspension for insubordination, unjustly. It is the belief of the employee that instructions on ordering supplies is unclear and no supervisor has given proper instructions as it relates to this matter.

The department's position is Mr. Smith failed to follow a directive given by supervision to refrain from ordering supplies. Clear instructions were sent via email by Alicia Miller. According to the time stamp in Groupwise the employee read the email. If the employee was unclear about the process at no time did he reach out to his supervisor nor the garage supervisor for clarity.

As noted in fn 1 above, on June 7, 2017, Smith filed unfair labor practice charges, C17 F-053/17-012668-MERC and CU17 F-021/17-012669-MERC, related to his three-day suspension and the Union's handling of his grievance.

Meanwhile, on May 5, 2017, Smith was issued a two-week suspension for attendance violations. Attendance violations and insubordination are separate chains of discipline under the Employer's progressive disciplinary system, and Smith's two-week suspension was for attendance only. However, on May 12, 2017, the Union and the Employer agreed to rescind the attendance suspension and allow Smith to serve only the three days required by his insubordination discipline. Smith served the three-day suspension from May 23 to May 26, 2017.

The Union advanced the grievance over Smith's three-day suspension to Step 4 of the grievance procedure, a pre-arbitration panel consisting of representatives of both Respondents. The panel reviewed the case and the grievance was again denied in writing on December 27, 2017. It is not clear from the record whether the Union subsequently made a demand to arbitrate.

Smith's November 2017 Suspension

On November 15, 2017, while the grievance over his three-day suspension was pending at Step 4, Smith was issued a notice of five-day suspension for faulty workmanship. On November 16, 2017, the reason was changed to insubordination. The suspension was issued by Darrell Ragland, who had replaced Alicia Miller as one of Smith's supervisors. Part of Smith's job as storekeeper is to periodically check the stock bins and compare what is there with what the inventory control system says the Employer has on hand. If they are not the same, Smith is to do what is called a parts adjustment in the system. For at least some parts, the system automatically reorders the part if the number of parts falls below a minimum. Ragland claimed that on October 30, 2017, and again on November 12, 2017, Ragland reviewed seven parts adjustments done by Smith in the inventory control system in which Smith had changed the number of parts on hand to zero, thereby causing DDOT to order more of these parts. According to Ragland, he inspected the inventory on those dates and found that there were parts on the shelves for each of the items for which Smith had done a parts adjustment. Either Ragland or his supervisor, Michael Eason, or both also claimed in July 2017 they had admonished Smith for incorrectly adjusting the number of parts in the system and causing it to order unneeded parts.

The Union filed a grievance over the five-day suspension. A Step 3 hearing on the grievance was held on January 25, 2018. Ragland had photographs taken on the dates he checked the inventory which showed items in the bins for the parts Smith had adjusted. Smith denied that there were parts on the shelves when he did the parts adjustments. He claimed that after receiving the suspension notice, he took Ragland to the stockroom and showed him the empty parts bins. Smith had his own photos of empty bins. Smith also brought reports from the inventory control system showing what time he did the adjustments and comments on why he did so, and a "part journal query report" that Smith said showed that there were no parts in the bins when Smith did the parts adjustments.² According to Larry Carter, the Union grievance committeeman who attended that Step 3 hearing, the Union argued that the items in Ragland's photographs were items that were improperly placed in those bins. The Employer rejected that argument. On or about March 8, 2018, the Employer issued its Step 3 answer denying the grievance. The answer stated:

The department's position is Mr. Smith failed to follow a directive given by supervision to refrain from adjusting parts in the [inventory control] system. In addition, this is Mr. Smith's second discipline for the same behavior. Clear instructions were sent via email by Alicia Miller (former

² Smith later filed a complaint with the Office of the Inspector General for the City of Detroit asking it to conduct an audit of the number of parts in the bins to confirm his claim that Ragland had lied about there being parts in the bins. During the investigation of this complaint, both Ragland and Smith submitted photos of parts bins, but from different dates. The Inspector General concluded that it was not possible to determine from these photographs, or from an audit, whether there were parts in the bins on the dates Smith made the adjustments.

Manager) in the past with the process for ordering parts and making adjustments in the system. Mr. Smith continuously fails to follow the instructions.

When Smith read the Employer's answer, he asked Union representative Larry Carter to provide him with a copy of Miller's December 1, 2016, email, but Carter did not give him a copy. The Union continued to move the five-day suspension grievance through the grievance procedure. A pre-arbitration committee hearing was held on this grievance on April 19, 2018, the grievance was denied at Step 4 on April 20, 2018, and the Union made a demand to arbitrate on July 18, 2018.

Smith's April 2018 Suspension and Discharge

On April 2, 2018, while the five-day suspension grievance was pending at Step 4, Smith was suspended for 30 days pending discharge for "using city tools for recreational purposes on the job" and "low productivity." Per the Employer's progressive disciplinary policy, this was a dischargeable offense because of Smith's previous suspensions. On March 27, 2018, Ragland spotted Smith watching what appeared to be a video of animals on his computer screen during worktime while apparently moving his computer mouse. Ragland, unseen, watched Smith for several minutes and took photos on his phone. Ragland did not say anything to Smith before preparing the notice of suspension. At the pre-disciplinary meeting on April 2, 2018, Ragland accused Smith of watching something on his computer screen. However, he did not show Smith or his Union representative the pictures from the phone or mention that there were pictures. Smith said at this meeting that he had been watching screen savers. Later, however, Smith told the Union that what he was watching was a sample video included as part of the Windows Media Player installed on his computer.

On April 3, 2018, Smith and Carter had a conversation about the most recent disciplinary action. Carter told Smith that the Union would work on the three-day and five-day suspensions after the new grievance. The Union then filed a grievance over the latest suspension seeking removal of the discipline from Smith's record and asking that he be made whole for any monetary loss. A Step 3 grievance hearing was held on April 12, 2018, which Smith did not attend. During this meeting, the Employer showed Ragland's photos to the Union for the first time. The photos show Smith from the back sitting at a desk and a computer screen with what appears to be pictures of wildlife. Although not discernible from the photos, Ragland asserted that the animals in the pictures were moving – which would not be compatible with them being screen savers – and that Smith appeared to be moving his mouse. The Employer issued its Step 3 answer denying the grievance on April 20, 2018, stating that management had presented documentation that Smith was viewing material that was not work-related on his desktop computer. On May 20, 2018, Smith was discharged.

The grievance over Smith's discharge was heard by a pre-arbitration panel at Step 4. After attempts to settle the grievance failed, the grievance was heard by an arbitrator on November 7, 2018. The Union's arguments to the arbitrator focused on the events of

March 27, 2018. The Union did not present evidence or arguments pertaining to Smith's April 2017 or November 2017 suspensions, although it appears, from the arbitrator's award, that Smith himself tried to do so. The Employer called a witness from its information technology department who testified that the screen savers on DDOT's computers are preloaded and cannot be changed and that the screen saver images do not move. Although Smith asked it to do so, the Union did not present the arbitrator with the sample video that Smith told the Union he had been watching.

The Union argued at the arbitration hearing that Smith had finished his work for the day when Ragland took the photos. The arbitrator accepted that argument and found that the Employer's charge of low productivity had not been sustained. However, he concluded that the evidence established that on March 27, 2018, Smith was watching a video or pictures on a City computer for personal enjoyment, which was a Class II offense under the Employer's disciplinary rules and policy. The arbitrator noted that Smith's three and five-day suspensions, even though they had been grieved, were still on Smith's record, and that therefore Smith was at the discharge level. However, he concluded that Smith had not been accorded due process with respect to the most recent disciplinary action. The arbitrator held that Ragland should have shown the photos Ragland took of Smith to Smith and his Union representatives at the April 2, 2018 disciplinary meeting so that Smith could explain his position in detail, and perhaps provide an explanation, while the matters were fresh in his mind and before the discipline was actually issued. Noting that due process is an aspect of just cause, the arbitrator set aside Smith's discharge and reduced it to a long-term suspension, i.e. Smith would not receive backpay for the time he was off.

After the arbitration award was issued and Smith was reinstated, Smith did not hear anything from the Union about the fate of the grievances over his three-day and five-day suspensions. During her opening statement, the Union's counsel stated that these two grievances had been closed prior to the arbitration, but there was no testimony from Union witnesses about when those grievances were closed or why.

Discussion and Conclusions of Law:

Smith's Charge Against the Employer

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 under 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 PERA 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 protected by PERA. For example, an employer who disciplines or discharges an employee because the

employee has filed a grievance under a union contract violates PERA. Section 10(1)(d) prohibits an employer from discriminating against an employee because he or she has given testimony or instituted proceedings under the Act.

However, PERA does not prohibit all types of discrimination or unfair treatment by a public employer. *Detroit Pub Sch*, 22 MPER 16 (2009). PERA is intended to prohibit an employer from engaging in actions that would interfere with or restrain an employee's right to engage in lawful concerted activity, as set forth in Section 9 of PERA. Absent evidence that an employer engaged in such actions, the Commission is foreclosed from passing judgment on whether the employer's actions were fair. *Great Lakes Water Auth*, 33 MPER 20 (2019), citing *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974).

Pursuant to Section 16(a) of PERA, an unfair labor practice charge that is filed 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 of the act which caused his injury and has good reason to believe that the act was improper. *City of Detroit*, 18 MPER 73 (2005); *AFSCME Local 1583*, 18 MPER 42 (2005); *Huntington Woods v Wines*, 122 Mich App 650, 651-52 (1983), aff'g 1981 MERC Lab Op 836.

Smith filed his unfair labor practice charges on May 15, 2019. All three of the disciplinary actions that Smith alleges were wrongful, including his May 21, 2018, discharge, occurred more than six months prior to the date Smith filed his charge. The Commission has consistently held that the filing of a grievance over a particular action does not toll the statute of limitations. *Troy Sch Dist*, 16 MPER 34 (2003); *City of Detroit*, 23 MPER 10 (2010). Since Smith's charge against the Employer was untimely filed, the Commission lacks jurisdiction under Section 16(a) to find the Employer acts of which he complains to be unfair labor practices under PERA.

In addition, as I stated on the record at the hearing, Smith's charge against the Employer does not state a claim upon which relief can be granted under PERA. Smith engaged in activity protected by the Act when he filed the several grievances mentioned in this decision, and his filing of previous unfair labor practice charges against the Employer was protected by Section 10(1)(d). However, Smith did not allege that the disciplinary actions constituted retaliation against him by the Employer for his protected activities. Nor did Smith present any evidence that would support such a finding. Smith has also failed to state a proper claim under Section 10(1)(e) of PERA. The obligation to bargain in good faith under PERA runs between the employer and the bargaining representative, and not between individual employees and the employer. Because the employer's obligation is toward the union, and not its employees as individuals, an individual employee does not have standing to assert that an employer has violated that obligation. *Great Lakes Water Authority*, 33 MPER 20 (2019) *City of Detroit (Wastewater Plant)*, 1994 MERC Lab Op 884. Here, the Union denies that the Employer refused to provide it with a copy of the December 1, 2016, email used to discipline

Smith. Even if the Employer had refused to provide the Union with the email, however, Smith as an individual lack standing to assert that the refusal violated PERA. Because I find that Smith's charge against the Employer was untimely filed and failed to state a claim upon which relief can be granted under PERA, I recommend that the charge be dismissed.

Smith's Charge Against the Union

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty toward the employees it represents 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 (1967). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . ." *Merritt v International Assn of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Assn*, 156 F3d 120, 126 (CA 2, 1998). "Arbitrary" conduct by a union was described by the Court in *Goolsby*, at 679, 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; or (d) extreme recklessness or gross negligence.

Although the union owes a duty of fair representation to every employee it represents, its primary duty is to its entire membership as a whole. *Lowe v Hotel Employees*, 389 Mich 123 (1973). If it acts in good faith and not from improper motives, e.g., personal hostility toward the member that has nothing to do with the merits of the dispute, a union has considerable discretion to decide how to handle and how far to proceed with a grievance. That is, it does not have to arbitrate every grievance but can weigh the likelihood of the grievance succeeding against the costs of the arbitration. See, e.g., *Ann Arbor Pub Schs*, 16 MPER 15 (2003). If it does not fall so far outside the range of reasonableness that it can fairly be characterized as irrational, a union's good faith decision about how to handle a grievance does not breach its duty of fair representation. *Air Line Pilots Int'l Assn v O'Neill*, 499 US 65, 66 (1991). Moreover, a decision made by a union with respect to the handling of a grievance is not irrational simply because it turns out in retrospect to have been the wrong decision or a mistake. *O'Neill*, at 77; *City of Detroit (Fire Dept)*, 1997 MERC Lab Op 31, 34.

I note, first, that Smith's charge against the Union, like his charge against the Employer, was untimely filed on May 15, 2019. Smith alleges that the Union violated its duty of fair representation by failing and/or refusing to gather and present certain evidence and make certain arguments at his arbitration hearing. This hearing took place on November 7, 2018, more than six months before Smith filed his charge. Smith was present at the hearing and therefore knew what evidence was presented and what arguments were made to the arbitrator. At the hearing and in his post-hearing briefs, Smith took issue with other actions the Union took or did not take in the course of processing his grievance(s), including its alleged failure to collect evidence to challenge

claims made by his supervisors to support his prior suspensions. However, all these actions, or failures to act, took place before November 7, 2018, and, therefore, are outside the six-month window. Even the issuance of the arbitration award on November 12, 2018, took place more than six months prior to filing of the charge. I conclude that the statute of limitations under PERA for Smith's allegations against the Union began to run on November 7, 2018, because as of that date Smith knew of the Union's alleged breach of its duty of fair representation. I conclude, therefore, that Smith's charge against the Union should be dismissed as untimely.

I also find that Smith failed to show that the Union breached its duty of fair representation in its handling of the arbitration. I note that there is no evidence here that the Union missed a deadline for advancing Smith's grievance or that it unintentionally did or failed to do anything in connection with this grievance. The Union refused to introduce at the arbitration the sample video from his computer that Ragland observed Smith watching on March 27, 2018. However, as the Union points out, since Smith had previously said he was watching a screen saver, the introduction of this video might have prejudiced the arbitrator against him. Moreover, the arbitrator concluded on the evidence before him that Smith committed a Class II offense by "watching a video or pictures for *personal entertainment* on City time and a City computer without permission" [Emphasis added]. Thus, the arbitrator's conclusion would have been the same whether Smith was watching a preinstalled sample video or a DVD he had inserted into the computer. I find that the Union's decision not to introduce the video was not so outside the range of reasonableness that it can be considered irrational and did not violate its duty of fair representation.

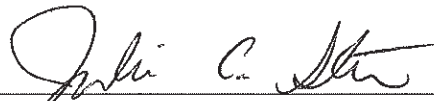
As Union Grievance Committeeman Carter explained to Smith, the Union also made a conscious decision to proceed separately on the grievance over Smith's April 2018 discipline, rather than attempting to consolidate it with the grievances it had filed over his previous suspensions for insubordination. An argument could be made that at least one of these other grievances should also have been arbitrated, since Smith would not have been subject to discharge for watching a video on his City computer during worktime after he had completed his duties had these two other suspensions not been on his record. The Union did not give a reason for not arbitrating these other grievances. However, Smith's third offense was clearly a trivial one, and thus there was some possibility that as a result an arbitrator would find that the Employer lacked good cause to discharge him as a result of that offense. The allegations that Smith refused to follow instructions and ordered unnecessary supplies were more serious. The facts surrounding these allegations were also murky. While Miller's December 1, 2016, email clearly existed, it appears that an arbitrator's decision as to whether Smith violated the instructions in that email, or any instructions from his supervisors, may have come down to whose word the arbitrator chose to believe. There was also a possibility that an arbitrator would be influenced by these earlier charges to uphold Smith's discharge. I conclude that the Union's decision not to arbitrate Smith's other grievance(s) was not so unreasonable that it could be considered irrational, and that it did not violate its duty of fair representation toward Smith. Because I find that Smith's charge against the Union was untimely, and because he failed to show that the Union breached its duty of fair

representation in this case, I recommend that this charge also be dismissed. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges against the City of Detroit (Department of Transportation) and Michigan AFSCME Council 25 and its affiliated Local 312 are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern

Administrative Law Judge

Michigan Office of Administrative Hearings and Rules

Dated: October 18, 2019