STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT ASSOCIATION OF EDUCATIONAL OFFICE EMPLOYEES,
Labor Organization-Respondent,

MERC Case No. 21-K-2140-CU

-and-

CHERYL CONWAY,
An Individual Charging Party.
_____/

APPEARANCES:

Mark H. Cousens, for Respondent

Lucious Conway, for Charging Party

DECISION AND ORDER

On May 16, 2022, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: July 5, 2022

[1] MOAHR Hearing Docket No. 21-031636

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

In the Matter of:

Case No. 21-K-2140-CU
Docket No. 21-031636-MERC

DETROIT ASSOCIATION OF EDUCATIONAL OFFICE EMPLOYEES,
Respondent-Labor Organization,

-and-

CHERYL CONWAY,
An Individual Charging Party.
_____/

APPEARANCES:

Mark H. Cousens, for the Labor Organization

Lucious Conway, for the Individual Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed on November 29, 2021, by Cheryl Conway against the Detroit Association of Educational Office Employees (DAEOE) 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 charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (Commission).

Background and Procedural History:

Cheryl Conway was employed by the Detroit Public Schools Community District (DPSCD) as a full-time clerical employee and was a member of a bargaining unit represented by the DAEOE, Local 4168. She was diagnosed with COVID-19 on January 29, 2021. As a result, she was not permitted to return to work in-person and her request for leave under the Family Medical Leave Act (FMLA) was denied. She was notified on March 15, 2021, that her employment would be terminated on the ground that she had abandoned her position. The charge alleges that the school district discriminated against Conway because of her positive COVID-19 test and that the DAEOE breached its duty of fair representation by failing or refusing to take

action on her behalf with respect to violations of "Michigan COVID-19 Law," the denial of her FMLA request and her subsequent termination.

An evidentiary hearing in this matter was scheduled for January 18, 2022. On January 7, 2022, Respondent filed a motion for summary disposition asserting that the charge should be dismissed for failure to state a claim under PERA because decisions by the school district which implicate FMLA and other laws are outside of the Union's authority to challenge. In addition, the DAEOE argued that the charge must be dismissed as untimely because it was filed on November 29, 2021, more than six months after Charging Party was terminated.

The hearing was adjourned in order to give Charging Party an opportunity to file a written response to the motion, which she did on January 24, 2022. In her response, Conway argued that the Detroit Financial Review Commission passed a resolution on October 26, 2020, approving a Letter of Agreement (LOA) which required the school district to abide by federal and state laws relating to COVID-19 mitigation and prohibited the district from discharging, disciplining or otherwise retaliating against any member of the DAEOE bargaining unit who does not report to work under circumstances related to the virus. Conway asserted that the statute of limitations should be tolled because she did not become aware of the existence of that resolution until September 12, 2021.

On February 3, 2022, I issued an order denying the Union's motion on the basis that material questions of fact existed which warranted the holding of an evidentiary hearing. The hearing was initially set for March 1, 2022, but was rescheduled at the request of the Respondent.

The parties appeared for hearing on March 7, 2022. Charging Party was represented by her brother, Lucious Conway. At the start of the proceeding, Lucious Conway indicated that he did not intend to call his sister to testify and that he would in fact be the sole witness to take the stand on her behalf. Shortly after Lucious Conway began his testimony, it became clear that the LOA relied upon by Charging Party did not support her claim and that the charge was not timely filed under Section 16(a) of the Act. At that point, the proceeding essentially transitioned from an evidentiary hearing to oral argument, at the conclusion of which I reconsidered my earlier decision and indicated that I would be granting the Union's motion for summary disposition, with a written order to follow.

Facts:

The following facts are based on the arguments set forth by Charging Party in her response to the Union's motion for summary disposition, including the attachments thereto, the assertions set forth by Lucious Conway on Charging Party's behalf at the hearing on March 7, 2022, and the exhibits agreed to by the parties on that date.

I. Charging Party's COVID-19 Diagnosis and Aftermath

Charging Party was diagnosed with COVID-19 in December of 2020 and took paid sick leave to cover her absence from work. At that time, she and other staff members were working

remotely due to the pandemic. She was diagnosed once again with the virus on January 29, 2021, and continued to work from home through February 12, 2021, when the district went on winter break. She then took unpaid sick leave from February 22, 2021, through February 26, 2021. On or about that time, the staff was ordered to return to in-person work. The school district would not permit Charging Party to continue to perform her duties from home and it prohibited her from returning to work in-person until she could produce a negative COVID-19 test. She submitted a request for FMLA leave which the school district denied on March 3, 2021. On that same date, she provided the Employer with a statement from her physician which authorized her to stay home for an additional two weeks. Charging Party continued to test positive for COVID-19 and remained off work. On or about March 3, 2021, she asked the Union to take action on her behalf with respect to the denial of her FMLA leave request. Stephanie Carreker, president of the DAEOE, repeatedly told Charging Party that there was nothing the Union could do to assist her.

On March 8, 2021, the school district notified Charging Party that because she had been absent from work without authorization for a period exceeding five consecutive work days, she would be required to take one of the following actions: (1) contact the medical department to obtain clearance to return to work; (2) contact the medical department to submit applicable medical documentation for leave of absence approval; or (3) resign or retire by completing a separation of service form. The notice warned Charging Party that if she failed to comply with its directive by March 15, 2021, she would be considered to have voluntary quit and that a recommendation to terminate her employment for job abandonment would be presented to the DPSCD for approval.

On March 15, 2021, the school district notified Charging Party that because she had not responded to the earlier communication, she was being charged with failure to return to her position in violation of school district policy and Work Rule A, which provides that "all employees are expected to report for duty every working day; excessive tardiness or absenteeism will not be condoned." According to the notice, a recommendation to terminate Charging Party's employment for "job abandonment" would be presented to the Board at its meeting on April 13, 2021.

On April 9, 2021, Charging Party sent an email to Carreker regarding payment of Union dues. That same day, Carreker responded to Charging Party, writing, "PLEASE don't try to turn this around and play the victim. I told you on several occasions to return to work or file for a Covid-FMLA to which your reply was 'I don't have any sick days' and my answer was 'It's not about you having sick days it was about saving your job' (I have the emails)." Approximately one month later, on or about May 4, 2021, Charging Party sent an email to Carreker in which she indicated that she had not heard anything about the grievance that she had asked the Union to file on her behalf.

II. DPSCD Resolution 2020-22 and LOA

At the time of the events giving rise to the instant dispute, the Detroit Financial Review Commission was responsible for oversight of the DPSCD. At its public meeting on October 26, 2020, the Detroit Financial Review Commission passed Resolution 2020-22 approving various "Return to Work" Letters of Agreement entered into between the DPSCD and bargaining units

representing employees of the school district, including a LOA between the DPSCD and the Respondent labor organization. Although the specific terms of the various Letters of Agreement are not set forth within the resolution, the document includes an attachment which states that the Letters of Agreement pertained to "working conditions in relation to providing Face to Face and remotely learning during COVID-19." According to the attachment, all members of the DAEOE bargaining unit who performed in-person work were eligible for two "hazard" payments of $1,500 each pursuant to the LOA with Respondent.

Approximately one year after the Detroit Financial Review Commission issued Resolution 2020-22, the DPSCD and the Respondent labor organization entered into a Letter of Agreement captioned, "2021-22 Full Reopening of Schools." The LOA, which was signed by representatives of the DAEOE on September 10, 2021, and by school district representatives on September 11, 2021, sets forth various terms and conditions of employment for the "2021-2022 academic year." Pursuant to the agreement, bargaining unit members who mainly perform their job duties in-person during the 2021-22 academic year are to receive a "COVID-19 supplement" of up to $2,000. In addition, school-based and eligible central office members who perform their job duties "through an in-person modality" for the entire 2021-22 school year shall receive an additional $1,000 in the form of a Hazard Pay Differential Bonus.

The LOA contains the following terms applicable to bargaining unit members who become ill or are exposed to COVID-19 during the 2021-22 academic year:

> 15. DAEOE bargaining unit members who experience difficulties related to COVID-19 are encouraged to apply for leave or reasonable accommodations afforded through the Family and Medical Leave Act and/or Americans with Disabilities Act.
>
> 16. Any DAEOE bargaining unit member who performs work in-person and contracts COVID-19 during the 2021-22 school year due to in-person activities will be entitled to paid sick leave, without any loss of his or her sick bank time, until he or she is medically cleared to return to work either in-person or online/remotely. Medical clearance shall consist of a note from unit members' treating physician(s).
>
> 17. If a DAEOE bargaining unit member is sent home from an in-person assignment by the District to self-quarantine due to potential or actual COVID-19 exposure and is asymptomatic, the member shall work remotely to the extent possible.

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 under PERA by MOAHR, 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." Such a motion may be made at any time before or during a hearing. Among the various grounds for

summary disposition of a charge is a finding that the allegations are barred because of the expiration of the applicable period of limitations, Rule 165(2)(c), and a failure by the charging party to state a claim upon which relief can be granted. Rule 165(2)(d). I find that summary disposition is appropriate in the instant case.

Charging Party contends that the DAEOE breached its duty of fair representation by failing or refusing to take action on her behalf with respect to issues arising from her COVID-19 diagnosis and subsequent termination from employment with the DPSCD. 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). 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. A labor organization has the legal discretion to make judgments about the general good of the membership and to proceed on such judgments, despite the fact that they may conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218, citing *Lowe v Hotel and Restaurant Employees Union, Local 705*, 389 Mich 123 (1973). The mere fact that a member is dissatisfied with their union's efforts is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855.

Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Comm 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), aff'g 1981 MERC Lab Op 836. 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.

Charging Party was diagnosed with COVID-19 for the second time on January 29, 2021. She was subsequently forced to take time off without pay after the school district refused to allow her to work from home. Her request for FMLA was denied on March 3, 2021. That same day, she asked the Union to take action on her behalf with respect to her employment situation. No grievance was ever filed. In her response to the Union's motion for summary disposition, Charging Party concedes that Carreker, president of the DAEOE, repeatedly told her that there was nothing the Union could do for her. On March 15, 2021, she learned that the superintendent was recommending that she be terminated and that such recommendation would be presented to the school board at its meeting on April 13, 2021. Yet, Conway did not file her charge against the DAEOE until November 29, 2021, more than seven months after she learned she was being discharged. Based upon these facts, I conclude that the charge must be dismissed as untimely under Section 16(a) of the Act. It is well established that where a complaint against a union is

based upon the union's inaction, the statute of limitations begins to run when the charging party knew or should have reasonably realized that the union would not act on his or her behalf. *Washtenaw Cmty Mental Health*, 17 MPERA 45 (2004); *Huntington Woods, supra*. See also *Pantoja v. Holland Motor Express*, 965 F2d 323 (CA 7, 1992); *Shapiro v. Cook United*, 762 F2d 49 (CA 6, 1985).

Notably, in her response to the DAEOE's motion for summary disposition, Charging Party did not dispute the fact that she knew or should have known of the Union's decision not to pursue a grievance in April of 2021.[1] Rather, Conway asserted that the statute of limitations should be tolled until September 12, 2021, the date upon which she learned of the existence of Resolution 2020-22. According to Conway, that resolution constituted formal approval of the LOA between Respondent and the school district entitled "2021-22 Full Reopening of Schools." That LOA sets forth terms and conditions of employment which apply when a bargaining unit member becomes ill or is exposed to COVID-19, including a provision which entitles employees who contract the virus at work to be paid sick leave without loss of sick bank time. The LOA also requires the school district to allow employees to work remotely "to the extent possible" if they are required to quarantine due to possible or actual exposure to COVID-19. Charging Party contends that it was not until she learned of the existence of Resolution 2020-22 that she realized the Union had a valid basis upon which to file a grievance. Such an argument does not establish the existence of a timely claim for breach of the duty of fair representation.

First, even assuming arguendo that Resolution 2020-22 provided the Union with grounds upon which to file a grievance on Charging Party's behalf and that she in fact did not learn of the existence of that document until September 12, 2021, the charge was nevertheless untimely filed under Section 16(a) of PERA. As noted, Charging Party knew or should have known that the DAEOE had taken no action on her behalf more than six months prior to the filing of the charge. The limitations period begins to run when the charging party knows, or should have known, of the act which caused her injury, and had good reason to believe that the act was improper or done in any improper manner. It is not necessary that the charging party recognize at that time that she had suffered an invasion of a specific legal right. *Huntington Woods*, at 652 (1983). Moreover, newly acquired evidence does not toll the statute of limitations. *Michigan State Univ v Moralez*, unpublished opinion of the Court of Appeals (Docket No. 281588, issued April 14, 2009). Rather, the only statutory tolling of the six-month statute of limitations period is for military service. *Fire Fighters, Local 352*, 1989 MERC Lab Op 522, 525.

In any event, the documents relied upon by Charging Party do not establish the existence of any contractual violation which the Union could have sought to remedy by filing a grievance. Although Resolution 2020-22 constitutes approval by the Detroit Financial Review Commission of various Letters of Agreement between the DPSCD and the labor organizations representing its employees, the only terms of employment specifically set forth within that resolution relate to hazard pay. The attachment to the resolution states that eligible members of the DAEOE bargaining unit who performed in-person work are entitled to two "hazard" payments of $1,500. Although the "2021-22 Full Reopening of Schools" LOA does in fact include protections for

[1] When asked why Charging Party waited until November 29, 2021, to file her charge, Lucious Conway asserted that his sister was unaware of MERC and that she did not know how to take action against the Union.

employees who become ill or are exposed to COVID-19, that document explicitly states that the terms and conditions of employment set forth therein are applicable to the 2021-2022 school year. The actions complained of by Charging Party, including her termination, occurred during the 2020-2021 academic year.

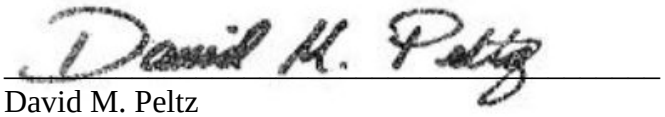
Charging Party argues that because the resolution is captioned "Resolution 2020-22," it must refer to letters of agreement which were in effect during the period from 2020 through 2022 and, therefore, establishes that the LOA relating to the reopening of schools was in effect when she was terminated -- regardless of the date it was signed or the terms set forth therein. However, the title of such a resolution is normally indicative of the year it was adopted and the number of resolutions passed within that year. Thus, the resolution relied upon by Charging Party was likely the 22nd resolution approved by the Detroit Financial Review Commission during the 2020 calendar year. In any event, the fact that the financial terms set forth in the 2021-2022 LOA are markedly different than those contained within the attachment to Resolution 2020-2022 establishes that the resolution was referring to some agreement other than document entitled, "2021-22 Full Reopening of Schools." Accordingly, Charging Party's reliance on the resolution and the 2021-2022 LOA to establish a breach of the duty of fair representation by Respondent must be rejected.

For the above reasons, I conclude that the charge must be dismissed without a hearing and recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Cheryl Conway against the Detroit Association of Educational Office Employees in Case No. 21-K-2140-CU; Docket No. 21-031636-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: May 16, 2022