

**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. 21-E-1017-CE,

-and-

AFSCME COUNCIL 25,
Labor Organization-Respondent in MERC Case No. 21-E-1077-CU,

-and-

KELLY KEY,
An Individual Charging Party.

APPEARANCES:

Kelly Key, appearing on his own behalf

DECISION AND ORDER

On June 22, 2021, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order¹ in the above matter finding that Respondents 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.

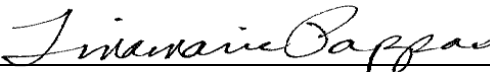
The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

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 any 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: August 13, 2021

¹ MOAHR Hearing Docket Nos. 21-008477 & 21-008880

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

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION),
Employer-Respondent in
Case No. 21-E-1017-CE; Docket No. 21-008477-MERC,

-and-

AFSCME COUNCIL 25,
Labor Organization-Respondent in
Case No. 21-E-1077-CU; Docket No. 21-008880-MERC,

-and-

KELLY KEY,
An Individual Charging Party.

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON
ORDER TO SHOW CAUSE**

On May 4, 2021, and May 6, 2021, Kelly Key (Charging Party) filed the above captioned unfair labor practice charges with the Michigan Employment Relations Commission (Commission) against the City of Detroit, Department of Transportation (Employer) and AFSCME Council 25(Union), collectively the Respondents. 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 Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, acting on behalf of the Commission. Pursuant to Rule 164 of the General Rules of the Employment Relations Commission, R 423.164, 2002 AACS; 2014 AACS, these cases were hereby consolidated.

Upon initial review of the charges, it appeared likely that dismissal of the same without a hearing is warranted under Rule 165(2)(d) of the Commission's General Rules, R. 423.165, because the charges failed to state a claim under PERA for which relief could be granted. On May 12, 2021, my office issued an Order to Show Cause directing Charging Party to respond in writing as to why his charges should not be dismissed without hearing for failing to state a claim. Charging Party timely filed his response to my order on May 26, 2021.

Charging Party's Pleadings:

Charging Party's initial filings against the Respondents did not provide any factual allegations regarding what was done, who may have done something, and/or when such acts may have occurred. Rather, those charge forms contained general allegations devoid of context and/or connection to Charging Party. For example, Charging Party's filing against the Employer made such statements as, "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership" and "discriminate against an employee because he has filed charges or given testimony." The filing against the Union contained similar types of statements.

Charging Party's response to my Order to Show Cause provided more detailed information beginning with Charging Party's date of hiring by the City, on or around August 18, 2018, and continuing through to his filing of a charge against his Union with the National Labor Relations Board on May 1, 2021. In his response, Charging Party provides a timeline narrative of his interactions with Barksdale and Mark, his supervisors, and other employees, Kenya, Anna, Mike and others. These interactions included issues regarding direction or work, uncomfortable situations between Charging Party and some of his co-workers, and issues involving FMLA forms and/or FMLA leave.

Discussion and Conclusions of Law

The Commission does not investigate charges filed with it. Charges filed with the Commission must comply with the Commission's General Rules. More specifically, Rule 151(2)(c), of the Commission's General Rules, 2002 AACs; 2014 MR 24, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include, "[a] clear and complete statement of the facts which allege a violation of [the Act]..." Only charges that are timely and properly allege a violation of PERA are set for hearing before an administrative law judge.¹

Paramount to understanding the Commission's jurisdiction, one must remain cognizant that not all unfair, or even unlawful, treatment of its employees by an employer violates PERA. Absent a factually supported allegation that the employer interfered with, restrained, and/or coerced an employee in the exercise of the rights guaranteed under PERA's Section 9, or otherwise retaliated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by the Act, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions. See, e.g., *City of Detroit (Fire Dep't)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524. While Charging Party's response to the Order to Show Cause appears to paint an uncomfortable, or even hostile, working environment, the pleadings do not allege any facts that, if proven true, could establish that Charging Party was restrained, coerced, and/or retaliated against with respect to the rights guaranteed to him under PERA.

¹ Section 16 of PERA requires that charges be filed with six months of the alleged unfair labor practice. MCL 423.216(a).

Addressing the charge against the Union, it is well established law that a union's obligation to its members is comprised of three responsibilities: (1) to serve the interest 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 City of Detroit*, 419 Mich 651 (1984). The *Goolsby* Court described “arbitrary” conduct by a union 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; and (d) extreme recklessness or gross negligence. *Id* at 679. Furthermore, a union's actions are lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Airline Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991).

Although a union owes a duty of fair representation to every employee it represents, the primary duty is to its bargaining unit's entire membership as a whole. *Lowe v Hotel Employees*, 389 Mich 123 (1973). In this regard, a union is not required to follow the dictates of any individual employee, but rather it may investigate and handle the situation and/or issue in the manner it determines to be best. See *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729. In other words, a union possesses 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*, supra. The Commission will not find an unfair labor practice on the mere fact that a member is dissatisfied with their union's efforts. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131. Here, Charging Party's filings fail to provide any allegation that, if proven true, could establish that the Union acted in a manner that was arbitrary under *Goolsby*, supra, or otherwise engaged in discriminatory and/or unlawful conduct as defined within *Vaca*, supra. Notably, Charging Party does not allege that he asked the Union to file a grievance on his behalf and that the request was refused.

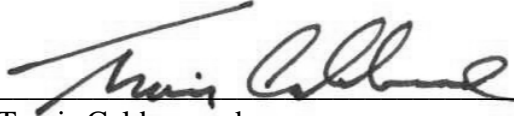
Charging Party's filings do not contain any factual allegations or provide any narrative to explain why he believes his Union committed an unfair labor practice violation under the Act. Moreover, and perhaps more importantly, the Commission has held that to prevail on a claim of unfair representation 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*, 30 MPER 12 (2016); *Goolsby*, supra; *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993). Here, no such allegation is made.

Despite having been given a fair and full opportunity to do so, Charging Party has failed to set forth any factually supported allegations which would state a claim for which relief could be available under PERA. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charges filed by Kelly Key against The City of Detroit (Department of Transportation) and AFSCME Council 25 are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Travis Calderwood", is written over a horizontal line.

Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: June 22, 2021