STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY (DEPARTMENT OF PUBLIC SERVICES),
Public Employer-Respondent,

MERC Case No. 21-A-0017-CE

-and-

JAMES BERRY,
An Individual Charging Party.
_____/

APPEARANCES:

Wayne County, Office of Corporation Counsel, by Bruce Campbell and Jason Harrison, for Respondent

James Berry, appearing on his own behalf

DECISION AND ORDER

Charging Party filed an unfair labor practice charge against the Wayne County Department of Public Services (Respondent or Employer) alleging the disciplinary action he received for insubordination was issued in retaliation to a prior harassment complaint that he had filed against two co-workers. During the evidentiary hearing, the Administrative Law Judge (ALJ) Travis Calderwood moved *sua sponte* for summary disposition and issued a bench decision dismissing the charge. On June 29, 2021, the ALJ issued a written Decision and Recommended Order[1], confirming his bench ruling that Charging Party failed to provide evidence that the harassment complaint constituted activity protected by PERA, or that the Employer's disciplinary action was motivated by anti-union animus or was in retaliation for other activity protected by the Act. The ALJ recommended summary dismissal of the charge.

Following the ALJ's Decision and Recommended Order, Charging Party filed a document with the Commission requesting to "appeal" the ALJ's conclusions. A review of the "appeal" demonstrates that Charging Party has failed to fully comply with the requirements for filing exceptions as outlined under Rules 176 and 182 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R423.176 and R423.182. Charging Party's filing is severely deficient as described below. Accordingly, the filing is rejected pursuant to Rule 176.

[1] MOAHR Hearing Docket No. 21-000695

I. Factual Summary and Procedural Background:

We adopt the factual summary and conclusions set forth in ALJ Calderwood's Decision and Recommended Order, except as otherwise repeated or modified below.

Charging Party James Berry is employed by Respondent Wayne County Department of Public Services. Berry asserts that, at some point in early 2020, he filed a "harassment complaint or grievance" against co-worker Roy Gonzales, and James Hall, a co-worker who he also identified as his "foreman."

Later in 2020, Charging Party was suspended for insubordination based on action purportedly initiated by Hall. He (Berry) believes the accusations and later suspension were in reprisal to his earlier harassment complaint.

On January 4, 2021, Charging Party filed this charge alleging that he suffered harassment, retaliation and assault by Roy Gonzales and harassment, retaliation and "undue stress during a pandemic" from James Hall.

After affording Berry the opportunity to present evidence to support a claim under PERA, the ALJ concluded that Berry had failed to establish a prima facie basis sufficient to conclude that Respondent's actions violated Section 10(1)(c) of PERA, and recommended summary dismissal of the charge.

On August 18, 2021, Charging Party submitted an email to the Commission stating: "I formally request an appeal at the findings in the case matter of James Berry vs Wayne County." Subsequently, we requested that he submit a statement of service attesting that a copy of his "appeal" was provided to the Respondent as required by Rule 182. Charging Party did not respond to the request.

II. Discussion:

A. Charging Party's Exceptions Fail to Comply with Rule 176

The filing of exceptions to an ALJ's Decision and Recommended Order is governed by Rule 176. In accordance with the rule under subsection 4, exceptions must-- (a) Set forth specifically the question of procedure, fact, law, or policy to which exceptions are taken, (b) Identify that part of the administrative law judge's decision and recommended order to which objection is made, (c) Designate, by precise citation of page, the portions of the record relied on, and (d) State the grounds for the exceptions and include the citation of authorities, if any, unless set forth in a supporting brief. Additionally, "[c]opies of the exceptions . . . shall be served at the same time on each party to the proceedings, and a statement of service shall be filed under R 423.182...An exception that fails to comply with this rule may be disregarded."

In this case, we find that Charging Party's "appeal" fails to comply with the requirements set forth in Rule 176 (4) (a-d), as well as the requirement to file a statement of service under Rule 182 confirming that his "appeal" was served on Respondent. Most critically, Charging Party fails to indicate with any specificity, which conclusions or findings contained in the ALJ's Decision and Recommended Order are those to which he takes exception. Although we have recognized in prior cases, primarily involving laypersons acting *pro se,* that we would consider non-compliant exceptions to the extent we were able to discern the issues on which the excepting party had requested review, here we are unable to discern any issues on which Charging Party has requested our review. Consequently, we cannot conclude that Charging Party's August 18, 2021 email document constitutes proper exceptions to the ALJ's Decision and Recommended Order under Rule 176. See *Healthsource Saginaw, LLC (Sodexo Management Team)*, 32 MPER 16 (2018); *Detroit Public Schools and AFSCME Local 345*, 30 MPER 32 (2016); *Wayne State University*, 29 MPER 22 (2015); and *Tuscola County Medical Care Facility*, 27 MPER 9 (2013). Therefore, we reject Charging Party's "exceptions" and affirm the ALJ's decision.

B. Charging Party Failed to Present Evidence Sufficient to Support a Prima Facie Case of Discrimination under PERA

Alternatively, even if the "appeal" had been accepted as properly filed exceptions, a review of the record establishes that the evidence presented by Charging Party was insufficient to establish a prima facie case and, as such failed to state a valid claim under PERA.

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 a material factual dispute exists, however, summary disposition is inappropriate. *Saginaw Cnty Sheriff*, 1992 MERC Lab Op 639 (no exceptions).

Section 10(1)(c) of PERA makes it unlawful for a public employer to "discriminate with regard to hire, terms, or other conditions of employment to encourage or discourage union membership." The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory action. *Taylor Sch Dist v. Rhatigan*, 318 Mich App 617, 636 (2016); *Saginaw Valley State Univ*, 30 MPER 6 (2016); *Utica Community Schs*, 28 MPER 11 (2014); *Grandvue Medical Care Facility*, 27 MPER 37 (2013); *City of Detroit*, 24 MPER 11 (2011); *Grand Valley State Univ*, 23 MPER 70 (2011); *Univ of Michigan,* 2001 MERC

Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep ' t),* 1998 MERC Lab Op 703, 707. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v* Evart Pub Sch, 125 Mich App 71, 74 (1983); *Birmingham Public Schools*, 33 MPER 12 (2019).

In the instant case, Charging Party contends that he was disciplined in retaliation to a harassment complaint that he had previously filed. However, he does not provide any facts to support a nexus between the filing of the harassment complaint and the discipline that he received, or the existence of any retaliatory conduct, or anti-union animus by Respondent's agents stemming from the harassment complaints or other protected activity. Despite repeated opportunities afforded by the ALJ, Charging Party was unable to establish that his "harassment complaint" constituted protected activity under the Act, or that the Employer's disciplinary action was motivated by anti-union animus or other protected activity. (Tr. 58). Accordingly, we concur with the ALJ that dismissal of the charge is warranted.

Due to Charging Party's failure to comply with Rules 176 and 182 in filing his "appeal," as well as for the reasons articulated above and by the ALJ, we reject Charging Party's appeal, and adopt the conclusions and recommended order of the Administrative Law Judge as our final decision and order.

ORDER

IT IS HEREBY ORDERED that the unfair labor practice charge is dismissed in its entirety and that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: November 12, 2021

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

In the Matter of:

WAYNE COUNTY (DEPARTMENT OF PUBLIC SERVICES),

Case No. 21-A-0017-CE
-and- Docket No. 21-000695-MERC

JAMES BERRY,
An Individual Charging Party.
_____/

Appearances:

Wayne County Office of Corporation Counsel, by Bruce Campbell and Jason Harrison, for the Public Employer

James Berry appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On January 4, 2021, James Berry (Charging Party) filed the above captioned unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against Wayne County, Department of Public Services (Employer).[1] 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 Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission (Commission). Based upon the entire record, including the testimony provided at the June 24, 2021, hearing, I make the following findings of fact, conclusions of law, and recommended order.

Unfair Labor Practice Charge and Procedural History:

Charging Party's initial filing sets forth two distinct set of allegations against two individuals, Roy Gonzales and James Hall. Charging Party claimed he suffered harassment, retaliation and assault at the hands of Roy Gonzales and harassment, retaliation and "undue stress during a pandemic" from James Hall.

[1] Charging Party identified fellow Wayne County employees, Roy Gonzales and James Hall, as the intended Respondents. However, in materials prepared by Bureau of Employment Relations staff, on behalf of the Commission, and dated October 1, 2020, the Commission identified Wayne County, Department of Public Services as the appropriate Employer Respondent.

Upon initial review of the charge, it appeared likely that dismissal of the same without a hearing was warranted. Rule 165 of the Commission's General Rules, R. 423.165, states that the Commission or an administrative law judge designated by the Commission may, on their own motion or on a motion by any party, order dismissal of a charge without a hearing for the grounds set out in that rule, including that the charge is untimely or that the charge fails to state a claim. See R. 423.165(2)(c) and (d). Accordingly, I issued an Order to Show Cause on January 11, 2021, instructing Charging Party to show cause in writing why his charge should not be dismissed prior to a hearing. Charging Party timely filed a response. In an Interim Order dated May 13, 2021, I concluded that Charging Party's response had identified certain material issues of fact that required a hearing to be held.

During the hearing of June 24, 2021, Charging Party appeared and testified in the narrative describing what actions he claimed had occurred that gave rise to the present charge. Charging Party did not call any other witnesses, nor did he seek to introduce any documents into evidence. Following Charging Party's direct testimony and cross examination by the County's attorney, I moved for summary disposition of the charge under Rule 165 for the reason that Charging Party had failed to articulate a prima facie case under Section 10(1)(c) of the Act. After allowing Charging Party the opportunity to argue why his charge should not be dismissed, I rendered a bench decision, finding that Charging Party had failed to establish that Respondent's actions violated Section 10(1)(c) of the Act. I informed the parties that following the receipt of the transcript, I would issue a written decision and recommended order.

Findings of Fact:

Charging Party is employed by the County's Department of Public Works (Department). It is not clear what Charging Party's actual role is within the Department. Charging Party described several interactions with two individuals, Roy Gonzales and James Hall. Charging Party identified the two men as co-workers and stated that Hall was a "foreman" and acted as his supervisor. According to Charging Party, he believed both men were members of his union.

Charging Party's direct testimony painted a very clear picture of a hostile work environment as it related to the interaction between himself and Gonzales. Charging Party claims that at some point in early 2020 he filed a "harassment grievance" against Gonzales and/or Hall. Moreover, Charging Party asserts that initially the Employer did not take any action relative to that complaint.

Sometime later, Charging Party was written up for insubordination by Hall. Charging Party testified that he believed the insubordination charge was in retaliation for his harassment complaint. Eventually, in October of 2020, the Employer issued a several-day suspension to Charging Party in response to the insubordination charge. It is clear from the record that while Hall filed the initial insubordination charge against Charging Party, he did not in fact issue the discipline as that was issued by a another induvial following an investigation of the charge.

Discussion and Conclusions of Law:

The Commission does not investigate charges filed with it. Rule 165 of the Commission's General Rules, states that the Commission or an administrative law judge designated by the Commission may, on their own motion or on a motion by any party, order dismissal of a charge without a hearing for the grounds set out in that rule, including that the charge does not state a claim upon which relief can be granted under PERA. See, *Oakland County and Sheriff*, 20 MPER 63 (2007); aff ' d 282 Mich App 266 (2009); aff ' d 483 Mich 1133 (2009).

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.

Section 10(1)(c) of PERA makes it unlawful for a public employer to "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*, 2000 MERC Lab Op 38, 42. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id* at 74; *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 706.

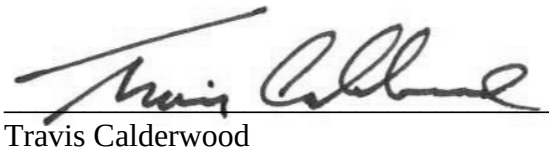
Accepting Charging Party's testimony as true, it is clear to the undersigned that a hostile work environment clearly existed relative to Gonzales and Hall. However, such hostility or conflict, by itself, does not violate PERA. Despite repeated opportunities, Charging Party was not able to articulate a prima facie case under Section 10(1)(c) of the Act. Ignoring for a moment the lack of foundation to conclude that Charging Party's filing of the "harassment grievance" was a protected activity under the Act, Charging Party was not able to provide any evidence that would allow the undersigned to conclude the Respondent's animus toward that conduct is what prompted the October 2020 suspension.

Having considered Charging Party's arguments and allegations in total, I conclude such does not warrant any change to my conclusion. As such, and for the reasons set forth above, I recommend that the Commission issue the following recommended order.

RECOMMENDED ORDER

The unfair labor practice charge filed by James Berry against Wayne County (Department of Public Works) is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: June 29, 2021