STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25, LOCAL 345,
Labor Organization-Respondent,

Case No. CU17 H-026

-and-

DANIEL WALLER, JR.,
An Individual Charging Party.

_____/

APPEARANCES:

Katherine L. DeLong, Staff Attorney, for Respondent

Daniel Waller, Jr., appearing on his own behalf

DECISION AND ORDER

On October 24, 2017, Administrative Law Judge (ALJ) Travis Calderwood issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that the charge was barred by PERA's statute of limitations and that it did not state a claim upon which relief can be granted under PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Charging Party, after requesting and receiving an extension of time, filed exceptions and a brief in support of his exceptions to the ALJ's Decision and Recommended Order on December 18, 2017. Although we do not believe that Charging Party's "exceptions" comply with Rule 176(4) of the Commission's General Rules, 2002 AACS R 423.176(4), we recognize that Charging Party is an individual not represented by counsel and, in this particular case, to the extent we are able, we will address Charging Party's "exceptions." As we interpret them, Charging Party's "exceptions" allege that the ALJ erred when he failed to grant Charging Party an evidentiary hearing and that the ALJ erred when he failed to find that Respondent breached its duty of fair representation.

Respondent did not respond to Charging Party's exceptions.

[1] MAHS Hearing Docket No. 17-015965

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

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. As noted by the ALJ, the following facts are taken from Charging Party's filings, including his unfair labor practice charge and his response to the ALJ's Order to Show Cause, as well as the facts set forth in Respondent's position statement, where not disputed by Charging Party.

Charging Party Daniel Waller is employed by the Detroit Public Schools (Employer) and is a member of a bargaining unit represented by Respondent AFSCME Council 25, Local 345 (Respondent or Union). On December 29, 2014, Charging Party was discharged by the Employer. The Respondent timely filed a grievance on his behalf, and the grievance was heard by Arbitrator George Roumell in December 2016.

On April 20, 2017, Arbitrator Roumell issued an Opinion and Award reinstating Charging Party without back pay.

On August 3, 2017, Charging Party filed the instant unfair labor charge against Respondent alleging that Respondent breached its duty of fair representation by failing to properly represent him at the arbitration hearing held in December 2016. According to Charging Party, Respondent acted improperly when it chose not to enter certain evidence that Charging Party believed should have been entered into the hearing. Charging Party further alleged that Respondent failed to properly represent him in connection with a payroll dispute that arose subsequent to his reinstatement.

On August 8, 2017, the ALJ directed the Respondent to file a position statement in answer to Charging Party's allegations. Respondent did so on August 29, 2017, and, on September 7, 2017, the ALJ wrote Charging Party and directed him to either withdraw the charge or to show cause why it should not be dismissed without a hearing. Charging Party responded on September 28, 2017 and filed an amended response on October 17, 2017.

On October 24, 2017, the ALJ issued his Decision and Recommended Order on Order to Show Cause in this matter finding that the unfair labor practice charge should be dismissed.

Discussion and Conclusions of Law:

In his exceptions, Charging Party contends that the ALJ erred by failing to conduct an evidentiary hearing before rendering his decision and requests that the Commission allow his case to "proceed forward." Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS R 423.165, however, authorized the ALJ to summarily dispose of the case. Additionally, *Smith v Lansing Sch Dist*, 428 Mich 248, 250-251, 255-259 (1987) provides guidance on the issue of whether the Administrative Procedures Act, MCL

24.201 - 24.328, requires an evidentiary hearing to be held. In *Smith*, at 257, the Supreme Court said:

> We agree with appellants that § 72(3) [of the APA] does not require a full evidentiary hearing when, for purposes of the proceeding in question, all alleged facts are taken as true. That is, we construe that portion of § 72(3) to require affording the opportunity to present evidence on issues of fact only when such issues exist.

In the present case, there are no material issues of fact in dispute and Charging Party has not alleged any material facts in dispute that were not considered by the ALJ. The decision in this matter depends purely on the resolution of issues of law. Therefore, an evidentiary hearing is neither necessary nor appropriate. See also, *Teamsters Local 214*, 29 MPER 47 (2016) and *Michigan State University Administrative-Professional Association, MEA/NEA*, 25 MPER 30 (2011).

In his exceptions, Charging Party also contends the ALJ erred when he failed to find that the Union breached its duty of fair representation by representing him in a negligent manner at the arbitration hearing held regarding his discharge in December 2016.[2] Under § 16(a) of PERA, however, 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. It is undisputed 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, Charging Party's complaint over the representation provided by the Union at the December 2016 arbitration hearing alleges a violation that occurred more than six months prior to the filing of his charge. As such, Charging Party's claim is barred by § 16(a) of PERA.

Even if Charging Party had timely alleged that the Union breached its duty of fair representation, the Commission agrees with the ALJ that there is no factually supported allegation against the Union which, if proven, would establish that it violated PERA. 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 to proceed with a grievance. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *Int'l Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Mere negligence alone is not sufficient to establish a breach of the duty of fair

[2] Charging Party does not take exception to the ALJ's finding that Respondent did not fail to properly represent him in connection with a payroll dispute that arose subsequent to his reinstatement, and we will not address that issue here, in accordance with Rule 176(6) of the Commission's General Rules, 2002 AACS R 423.176(6).

representation, and a Union's decision on how to proceed with a grievance 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*, 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 does not allege that any failure to act by the Union was based on an unlawful motive or was otherwise arbitrary, discriminatory or outside the bounds of reasonableness. At most, the Union's actions may have constituted poor judgement or ordinary negligence, neither of which are sufficient to establish a violation of PERA. *AFSCME Council 25, Local 207*, 23 MPER 101 (2010). A union is not expected to always make the right or best decisions, so long as it acts in good faith and avoids being arbitrary. *Detroit Police Officers Ass'n*, 26 MPER 6 (2012); *City of Detroit*, 1997 MERC Lab Op 31. Additionally, Charging Party does not allege facts that, if proven true, would establish a breach of the collective bargaining agreement by the employer. Consequently, the Commission agrees that Charging Party has failed to state a claim, for which relief can be granted under PERA, that his Union violated its duty of fair representation.

We have also considered all other arguments submitted by Charging Party and conclude that they would not change the result in this case. Accordingly, we affirm the ALJ's decision.

ORDER.

IT IS HEREBY ORDERED that the order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: June 13, 2018

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

AFSCME COUNCIL 25, LOCAL 345,
Labor Organization-Respondent,

Case No. CU17 H-026
-and- Docket No. 17-015965-MERC

DANIEL WALLER, JR.,
An Individual Charging Party.
_____/

APPEARANCES:

Katherine L. DeLong, Staff Attorney, for Respondent

Daniel Waller, Jr., appearing on his own behalf

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

On August 3, 2017, Charging Party Daniel Waller Jr., filed the present unfair labor practice charge against AFSCME Council 25, Local 345 (Respondent or Union). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

Charging Party, an employee of Detroit Public Schools (Employer), appears to allege in his initial filing with the Commission that the Union failed in its duty to fairly represent him during an arbitration challenging his termination and that, while he was eventually reinstated, the Union's failure prevented his reinstatement to be made with back-pay. Charging Party also claims that Respondent failed to assist him with respect to a payroll issue following his reinstatement.

On August 8, 2017, I directed the Union to file a position statement responding to the specific allegations as put forth by Charging Party; that response was received timely on August 29, 2017. Upon receipt and review of that filing, together with Charging Party's initial unfair labor practice charge, I concluded that dismissal of the charge might be warranted as Charging Party failed to state a claim against the Union for which relief could be granted. Accordingly, on September 7, 2017, I directed Charging Party to show cause in writing why his charge should not

be dismissed without hearing for failing to state a claim under PERA upon which relief could be granted. Charging Party's timely response was received on September 28, 2017. Charging Party filed an amended response on October 17, 2017.

Background:

The following facts are taken from Charging Party's filings, inclusive of his unfair labor practice charge and his response to my order to show cause, as well as Respondent's position statement where not disputed by Charging Party.

Sometime in late December of 2016, an arbitration hearing was held before Arbitrator George Roumell challenging Charging Party's prior termination. Representing the Union, and by extension Charging Party, was AFSCME Council 25 Staff Attorney Shawntane Williams. As part of that hearing process, Charging Party provided Williams with large amounts of evidence and information that he sought to have entered into the record. Williams chose not to enter most of the evidence suggested by Charging Party. The information and evidence that Charging Party sought to be introduced, as identified in his filings, consisted of allegations of misconduct by other employees, allegations of an improper relationship between one employee and a member of the Employer's administration, allegations that the Employer violated its own work rules, alleged violations of Charging Party's 1st Amendment Rights, and various other assertions.

Despite the Union's decision not to include the above items into the record, on April 20, 2017, the arbitrator issued his Opinion and Award reinstating Charging Party, albeit without back pay. [3]

Following his reinstatement, Charging Party sought the assistance of Williams to resolve an alleged issue regarding his hours and credit of hours of work. Charging Party sent emails to Williams through both her AFSCME and personal email addresses. Charging Party makes no allegations or claims that he sought assistance from anyone with Local 345 or that he requested Williams, or any other person affiliated with either AFSCME Council 25 or Local 345, to file a grievance on his behalf regarding the alleged pay issue.

Discussion:

Rule 151(2)(c), of the Commission's General Rules, 2002 AACS; 2014 AACS, R 423.151(2)(c), requires that an unfair labor practice charge filed with the Commission include:

[3] Although the arbitration Award and Order was not included with Respondent's Position Statement, the Union did provide the following treatment with respect to Charging Party's reinstatement without back pay:

> The Award and Opinion of Arbitrator Roumell reinstated Charging Party to the classification he held at the School District of the City of Detroit, but denied Charging Party back pay or benefits. Arbitrator Roumell pointed out that, although Charging Party had been suspended for similar behavior in the past, he had not changed his conduct. Arbitrator Roumell reasoned that had [Charging Party] corrected his conduct at the time of suspension, he may not have faced termination. Arbitrator Roumell stated that "[Charging Party] cannot expect to be rewarded for his continued insubordination ... " and that " ... it was Charging Party's own doing that prevents this Arbitrator from awarding any back pay or benefits."

> A clear and complete statement of the facts which allege a violation of LMA or PERA, including the date of occurrence of each particular act, the names of the agents of the charged party who engaged therein, and the sections of LMA or PERA alleged to have been violated.

Section 16 of PERA requires that charges be filed within six months of the alleged unfair labor practice. Only charges that are both timely and properly allege a violation of PERA are set for hearing before an administrative law judge.

Rule 165 of the Commission's General Rules, R 423.165, 2002 AACS; 2014 AACS, 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 barred by PERA's statute of limitations or that it 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); *MAPE v MERC*, 153 Mich App 536, 549 (1986).

A union's duty of fair representation extends to all bargaining unit members regardless of their membership or affiliation status with the union. See *Lansing School District*, 1989 MERC Lab Op 210. That duty extends to union conduct in representing employees in their relationship with their employer, but does not embrace matters involving the internal structure and affairs of labor organizations that do not impact upon the relationship of bargaining unit members to their employer. *West Branch-Rose City Education Ass' n*, 17 MPER 25 (2004); *SEIU, Local 586*, 1986 MERC Lab Op 149.

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 Michigan 651 (1984). 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). Commission case law is clear that a member's dissatisfaction with their union's effort, with the union's ultimate decision or with the outcome of those decisions, is insufficient to constitute a proper charge of a breach of the duty of fair representation. See *Eaton Rapids Education Association*, 2001 MERC Lab Op 131. A union does not owe an employee a duty under PERA to pursue a grievance unless the employee files a grievance or requests that the union file one on their behalf. *Lansing Education Association*, 2000 MERC Lab Op 30 (2000).

It is clear from a careful review of the pleadings as submitted by Charging Party that his complaints over the representation provided by Williams at the December 2016 arbitration hearings, allege violations that occurred more than six months prior to the filing of his instant charge. As such it is my finding that Charging Party's claims thereto are barred by PERA's statute of limitations.

The preceding notwithstanding, even if Charging Party were to have timely filed his charge, in order to state a claim under PERA, Charging Party would have to allege facts, that if proven true, would establish that the Union's actions during the arbitration hearing were either arbitrary, discriminatory or outside the bounds of reasonableness, something which, despite being given the opportunity to do so, Charging Party failed to do.

Furthermore, to the extent that Charging Party complains of Williams' efforts to, or lack thereof, help with resolving an alleged issue regarding his pay following his reinstatement, Charging Party has failed to allege that he requested that the Union file a grievance on his behalf or that the Union has failed to do so. Moreover, it is my finding that Charging Party's failure to request any assistance with respect to his alleged payroll issue with someone from Local 345 prior to emailing a staff attorney with AFSCME Council 25, precludes his current claim that Respondent failed in its duty to fairly represent him under PERA.

I have considered all other arguments as set forth by the parties and conclude that such does not justify a change in my conclusion. Accordingly, for the reasons set forth above, I recommend that the Commission issue the following Order:

Recommended Order:

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 24, 2017