STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT TRANSPORTATION CORPORATION,
Public Employer-Respondent in MERC Case No. C18 C-014,

-and-

FRATERNAL ORDER OF POLICE LABOR COUNCIL,
Labor Organization-Respondent in MERC Case No. CU18 C-004,

-and-

DETROIT TRANSIT POLICE OFFICERS ASSOCIATION,
Charging Party.
_____/

Appearances:

Pepper Hamilton LLP, by Robert C. Ludolph, for the Public Employer-Respondent

Mark A. Porter & Associates PLLC, by Mark A. Porter, for the Labor Organization-Respondent

DuJuan Brown, for the Charging Party

DECISION AND ORDER

On September 13, 2018, Administrative Law Judge Travis Calderwood 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 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 26, 2018

[1] MAHS Hearing Docket Nos. 18-004361 & 18-004362

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT TRANSPORTATION CORPORATION,
Public Employer-Respondent in Case No. C18 C-014; Docket No. 18-004361-MERC,

-and-

FRATERNAL ORDER OF POLICE LABOR COUNCIL,
Labor Organization-Respondent in Case No. CU18 C-004; Docket No. 18-004362-MERC,

-and-

DETROIT TRANSIT POLICE OFFICERS ASSOCIATION,
Charging Party.
_____/

Appearances:

Pepper Hamilton LLP, by Robert C. Ludolph, for the Public Employer-Respondent

Mark A. Porter & Associates PLLC, by Mark A. Porter, for the Labor Organization-Respondent

DuJuan Brown for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On March 2, 2018, DuJuan Brown, on behalf of an entity identified as the Detroit Transit Police Officers Association (Charging Party), filed the above captioned unfair labor practice charges against both the Detroit Transit Corporation (DTC) and the Fraternal Order of Police Labor Council (FOPLC). 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, acting on behalf of the Michigan Employment Relations Commission (Commission).

Charging Party's filings with the Commission were, except as indicated below, identical in nature, including both the Commission approved charge form and a typed attachment alleging the nature of the allegations being made. The charge form for Case No. CU18 C-004 was signed by "DuJuan Brown Union President." The charge form for Case No. C18 C-014 was signed by "DuJuan Brown." The attachments to the respective forms, with the exception of the designation of the individual Respondent respectively, were identical, alleging that since April of 2017 the DTC had hired approximately eleven (11) new transit officers and provided said new hires with "vouchers" for equipment despite an agreement between the DTC and the FOPLC that new hires were to receive a "uniform allowance" in the amount of a "lump sum [sic] payment of $825.00." Charging Party further

claims that on September 4, 2017, the FOPLC provided notice that it would not grieve the change, despite requests to do so. The respective charge forms and attachments were attached to a Complaint and were sent to Respondents by this office on March 23, 2018.

On April 4, 2018, Respondent FOPLC filed a Motion to Strike the Filings and for Summary Disposition. FOPLC, in its motion to strike, indicated that the unfair labor practice charge served on it by Charging Party was different from the unfair labor practice charge filed with the Commission and which had been attached to the Complaint issued by this office on March 23, 2018. The FOPLC asserted that the charge it had been served by the Charging Party, while generally addressing the same factual allegations, was nonetheless markedly different than the charge that had been filed on March 2, 2018, with the Commission. Moreover, in the motion seeking dismissal of the charge, the FOPLC argued that Charging Party had no standing to file its claim, since at the time of the alleged violations the FOPLC was the authorized bargaining representative for the transit officers.2 The FOPLC also argued that the claim was barred by PERA's six-month statute of limitations and/or Charging Party failed to state a claim upon which relief could be granted under PERA. Attached to the FOPLC's motion, among other items, were: (1) a July 1, 2014, Certification of Representation, Case No. R14 E-037, in which the FOPLC was certified by the Commission as the representative for purposes of collective bargaining for transit officers employed by the DTC; (2) excerpts of a collective bargaining agreement between the DTC and FOPLC effective July 1, 2014, through June 30, 2017, inclusive of a memorandum of understanding providing for the $825.00 lump-sum payment to new-hires; (3) a letter dated August 9, 2017, from DTC Human Resources Manager Parnell Williams to Brown in which Williams indicates that the DTC recognizes the FOPLC as the exclusive bargaining representative for transit officers; and, (4) an Affidavit of David A. Willis, Executive Director of the FOPLC, in which Willis attests, among other things, that the FOPLC and DTC had agreed to allow the DTC to issue vouchers and that Detroit Transit Police Officers Association was an "organization for social activities" for transit officers created by the FOPLC.

On April 9, 2018, Respondent DTC filed a motion seeking joinder with the FOPLC's April 4, 2018, motion. On April 11, 2018, I directed Charging Party to respond in writing to Respondent(s) motion by April 25, 2018. In so directing Charging Party, I noted that dismissal of the charges "may be appropriate for some or all of the reasons identified by Respondents." Charging Party never responded to my directive nor did it contact my office to request an extension by which to do so.

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, R 423.151(2)(c), 2002 AACS; 2014 AACS 24, 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 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.

Charges under PERA must be filed within six months of the alleged unfair labor practice. MCL 423.216(a). The Commission has consistently held that the statute of limitations is jurisdictional and

2 The FOPLC attached to its motion(s) a March 13, 2018, letter it sent to the Bureau of Employment Relations Director, Ruthanne Okun, in which it disclaimed "all interest regarding collective bargaining representation" for the unit in question.

cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. Under Section 16(a) of the Act, the six-month period begins to run when the charging party "knows of the act which caused [the] injury, and has good reason to believe that the act was improper or done in an improper manner," even if the person does not realize that they have suffered an invasion of a legal right. *City of Huntington Woods v Wine*, 122 Mich App 650, 652 (1983).

Rule 165 of the Commission's General Rules, R423.165, 2002 AACS; 2014 AACS 24, 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 was untimely filed and/or 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), lv den 428 Mich 856 (1987).

The failure to respond to an order to show cause may, in itself, warrant dismissal of an unfair labor practice charge. *Detroit Dept of Trans and ATU*, 30 MPER 61 (2016); *City of Detroit*, 30 MPER 39 (2016); *AFSCME Council 25*, 22 MPER 87 (2009); *Detroit Federation of Teachers*, 21 MPER 3 (2008).

Charging Party's failure to respond and possible issues with service on the FOPLC notwithstanding, dismissal of the charges are nonetheless appropriate. The allegations levied against both Respondents arise out of an agreement between the two to substitute vouchers for the lump-sum payment that, according to Charging Party's filings, began with new-hires in April of 2017.3 Accordingly, to the extent that Charging Party is alleging the agreement between the Respondents was somehow violative of PERA, such argument is untimely as to both the FOPLC and DTC. Moreover, while some of the new-hires may have been hired in the six months immediately preceding the filing of these charges, the Commission has steadfastly rejected attempts by charging parties to revive otherwise untimely claims based upon a continuing violation theory. See e.g. *City of Adrian*, 1970 MERC Lab Op 579, 581, adopting the U.S. Supreme Court ruling in *Local Lodge 1424, Machinists v NLRB (Bryan Mfg Co)*, 362 US 411 (1960).

Furthermore, while it appears that Charging Party's claims regarding the FOLPC refusal to grieve the change appear timely, Charging Party has not pled a claim under PERA for which relief could be granted. Here the affidavit by Willis clearly and unequivocally claims that that decision to substitute vouchers for the lump-sum payment was agreed to by both Respondents, the proper parties to the collective bargaining agreement covering the transit officers. A collective bargaining agreement is an agreement between an employer and a union, and a union does not breach its duty of fair representation simply by agreeing to modify that agreement. See *Macomb Twp*, 20 MPER 116 (2007) (no exceptions). As such, Charging Party's displeasure with the FOPLC is predicated on the latter's refusal to process a grievance challenging something that it explicitly agreed to. 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.

For the reasons set forth above it is the decision of the undersigned that both the allegations as set forth by the Charging Party are either time-barred by PERA's six-month statute of limitations or

3 I note that the affidavit attested to by Willis corroborates the timing of the agreement and, absent a response from Charging Party supported by affidavits contradicting the same, there is no basis for the undersign to conclude otherwise.

otherwise failed to state a claim under PERA for which relief could be granted. As such I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 13, 2018