STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY (DEPARTMENT OF PUBLIC SERVICES),
Public Employer-Respondent in MERC Case No. 20-I-1540-CE

-and-

AFSCME COUNCIL 25, LOCAL 101,
Labor Organization-Respondent in MERC Case No. 20-I-1541-CU,

-and-

ALFRED WASHINGTON,
An Individual Charging Party.
_____/

APPEARANCES:

Alfred Washington, appearing on his own behalf

DECISION AND ORDER

On November 25, 2020, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] 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

Robert S. LaBrant, Commission Member

Tinamarie Pappas, Commission Member

Issued: February 12, 2021

[1] MOAHR Hearing Docket Nos. 20-020248 & 20-020253

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

In the Matter of:

WAYNE COUNTY (DEPARTMENT OF PUBLIC SERVICES),
Employer-Respondent in
Case No. 20-I-1540-CE; Docket No. 20-020248-MERC,

-and-

AFSCME COUNCIL 25, LOCAL 101,
Labor Organization-Respondent in
Case No. 20-I-1541-CU; Docket No. 20-020253-MERC,

-and-

ALFRED WASHINGTON,
An Individual Charging Party.

_____/

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

On September 29, 2020, Alfred Washington (Charging Party) filed the above captioned unfair labor practice charges with the Michigan Employment Relations Commission (Commission) against Wayne County, Department of Public Services (Employer) and AFSCME Council 25, Local 101 (Union).[1] The charge was 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 are hereby consolidated.

Charging Party's factual allegations, as set forth in his initial filings, are identical against both Respondents and provides a narrative detailing a series of events that began in the late evening on January 12, 2020, when Charging Party, a snow plow operator, was called into work for "snow and ice control." At some point after beginning his shift, Charging Party was in an accident where the truck he was driving was struck by another car. Charging Party was issued a citation relative to accident. Following the accident Charging Party was administered a drug and

[1] In Charging Party's initial filings with the Commission, he listed several named individuals within the County's organization as opposed to the County itself. 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.

alcohol test where it was determined that his blood alcohol limit level was .08 percent. Initially Charging Party was terminated on January 13, 2020. On February 5, 2020, Charging Party was notified that his termination was being changed to a 30-day suspension subject to the completion of an alcohol substance abuse program. On February 21, 2020, Charging Party was subjected to another drug and alcohol test. This time he failed the drug portion of the test. On February 28, 2020, Charging Party was terminated as result of the failed drug test. On May 1, 2020, Charging Party claims he contacted Union Representative Richard Johnson and appears to have challenged the Employer's decision to administer the February 21, 2020, drug test prior to the completion of his 30-day suspension. According to Charging Party, Johnson told him that he had heard about the suspension and that he would contact the Employer. Charging Party claims he never heard back from Johnson.

Upon initial review of the allegations as set forth above, it appeared likely that dismissal of both charges without a hearing was warranted for the reasons that the allegations were untimely and/or failed to state a claim under PERA. See R. 423.165(2)(c) and (d). Accordingly, I issued an Order to Show Cause on October 29, 2020. Charging Party's response was originally due by November 13, 2020.

On November 4, 2020, Charging Party requested, and was granted, an extension by which to file his response. On November 24, 2020, Charging Party sent an email responding to my Order to Show Cause. That email stated in the relevant part the following:

> On the day of January 13[,] I was called to the office for a hearing for the accident on January 12th. [I]n the hearing was Mrs[.] Rivers director of roads[,] Mrs[.] Lewis[,] committee[e] person of [Local]101[,] Marlene [the] vice president of [Local] 101[,] and Eddie Bagassarian [the] president of AFSCEM local 101[.] [A]s I told my story to Mrs[.] Rivers[,] my union Representatives said nothing. After the meeting Eddie asked me did I know anybody from downtown. I assume to help me with my getting my job back. There was no talk about arbitration. About two days later and [sic] outside entity named Randall [S]harpshire said he heard about the incident and will talk to Mrs[.] Rivers. A week or two later I was called back to the office, for to take a ASAP test [sic]. I took the course and finished in 3 weeks[.] I was called to take a call and drug test. Which as I stated was too early. My 30 days was not up. On my suspension. In the meeting was Eddie Bagassarian [the] president of [L]ocal 101[,] vice president Marlene and committee[e] person Mrs[.] Lewis. After the hearing when I was terminated. As [Eddie] and I walked outside he mentioned he could find me another job and nothing was said about arbitration. [On] May 1st[,] I talked to Richard Johnson of [C]ouncil 25. He said he had heard about my case and will talk to Ms[.] Rivers but nothing about arbitration.

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.[2] Accepting the allegations as set forth by the Charging Party both in his initial filings and his November 24, 2020, response, dismissal of both charges is required under PERA and existing Commission case law.

Addressing first the allegations against the Employer, it appears that any actionable claim under PERA would have occurred on February 28, 2020, when he was terminated. Accordingly, PERA's six-month statute of limitations would have expired on August 28, 2020. As such Charging Party's allegations against the Employer are clearly time barred.

Timeliness issues aside, it appears dismissal is nonetheless appropriate. PERA does not prohibit all types of discrimination or unfair treatment. The Commission's jurisdiction with respect to claims brought by individual employees against their employers is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in union or other protected concerted activities as guaranteed under Section 9 of PERA.

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. Charging Party's charge against his Employer does not allege any facts that, if proven true, could establish that he was restrained, coerced, and/or retaliated against with respect to the rights guaranteed to him under PERA.

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 Michigan 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).

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

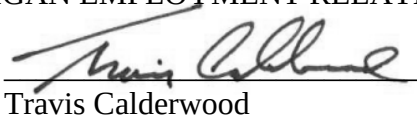
Although a union owes a duty of fair representation to every employee it represents, the primary duty is to its bargaining unit's entire membership as a whole. *Lowe v Hotel Employees*, 389 Mich 123 (1973). In this regard, a union is not required to follow the dictates of any individual employee, but 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. 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.[3]

Accordingly, for the reasons stated herein, I recommend that the Commission issue the following order dismissing the charges in their entirety.

RECOMMENDED ORDER

It is hereby ordered that the unfair labor practice charge filed against the Wayne County, Department of Public Services and the charge filed against the AFSCME Council 25, Local 101 be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: November 25, 2020

[3] Charging Party also appears to focus on the fact that various members of his Union failed to get back to him regarding certain things. However, as stated above, there is no indication that Charging Party requested that his Union filed a grievance over his termination. The lack of a grievance notwithstanding, it is well established that a union's failure to adequately communicate with a member about a grievance is not, in itself, a breach of its duty of fair representation. *Suburban Mobility Authority for Regional Transportation (SMART)* 19 MPER 39 (2006); *Wayne Co (Sheriff 's Dep 't)*, 1998 MERC Lab Op 101, 105 (no exceptions).