STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (FIRE DEPARTMENT)
Public Employer-Respondent in MERC Case No. 19-I-1907-CE,

-and-

DETROIT FIRE FIGHTERS ASSOCIATION LOCAL 344
Labor Organization-Respondent in MERC Case No. 19-I-1880-CU,

-and-

BRYAN CLAYBORN,
An Individual Charging Party.
_____/

APPEARANCES:

City of Detroit Law Department, by Jason McFarlane, for the Public Employer

Legghio & Israel, P.C., by Christopher Legghio and Megan B. Boelstler, for the Labor Organization

Brian Clayborn, appearing on his own behalf

DECISION AND ORDER

On July 23, 2020, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above matter, finding that Respondents 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 against the Respondent City of Detroit (Fire Department) (Employer or Department) should be dismissed because Charging Party failed to make any factual allegations that, if proven true, could establish that he was restrained, coerced, and/or retaliated against with respect to his rights under PERA. With respect to the charge against the Respondent Detroit Fire Fighters Association Local 344 (Union), the ALJ found that the charge should be dismissed because Charging Party failed to make any specific claim as to what the Union may have done in violation of its duty of fair representation.

On September 16, 2020, Charging Party submitted exceptions to the ALJ's Decision and Recommended Order. Charging Party's exceptions, however, fail to comply with Rule 176 of the Commission's General Rules. Nonetheless, as we recently explained in *Grand Rapids Employees*

[1] MOAHR Hearing Docket Nos. 19-019114 & 19-019101

Independent Union, 34 MPER 26 (2020), we have previously considered non-compliant exceptions filed by pro se parties—at least "to the extent we were able to discern the issues on which the excepting party has requested review." Because Charging Party filed his exceptions without the benefit of counsel we have followed that practice here. But, in the future, we reserve the right to reject exceptions filed by a party where the exceptions fail to comply with the requirements of the rule, regardless of whether we are otherwise able to discern the issues on which review is requested. As we understand it, in his exceptions, Charging Party argues that the Employer engaged in an unfair labor practice by violating his HIPPA rights. Charging Party also alleges that his discharge was in retaliation for a charge he previously filed against the Employer and that the Union intentionally failed to represent him despite the fact that it knew that the Department was acting illegally.

On October 28, 2020, Respondent Union submitted a brief in support of the ALJ's Decision and Recommended Order. In its brief, the Union argues that Charging Party's exceptions should be disregarded for failure to comply with Rule 176 in that they fail to set forth objections or the questions to which exceptions are taken. The Union further argues that the ALJ properly concluded that the Charging Party failed to state a claim against it.

After reviewing Charging Party's exceptions, we find they are without merit and agree with the ALJ that the charges should be dismissed.

Factual Summary:

Charging Party Bryan Clayborn was employed as a firefighter with the Respondent City of Detroit Fire Department (Department) and was represented by Respondent Detroit Fire Fighters Association Local 344 (Union).

In November 2018, Clayborn suffered an injury while performing his duties as a firefighter. Following this, he filed for and received workers' compensation benefits.

In March 2019, Charging Party was examined by Dr. Jacek Brudzewski in relation to his workers' compensation claim. Clayborn claims that Brudzewski "fraudulently altered my medical records and documented false information thereby giving me a medical diagnosis of depression and anxiety." According to Charging Party, that diagnosis was used by LaWanda Wyatt, of York Risk Services, to deny and/or stop payments on his workers' compensation claim.

In his pleadings, Charging Party stated that he believed his "HIPPA" and "Workers Compensation Rights" had been violated and further believed that Brudzewski and York were engaging in "felonious fraudulent activity."

According to copies of documents provided by Charging Party, six disciplinary charges were filed against him by the Department during the period April 2019 through September 2019. The record indicates that Charging Party was accompanied by at least one Union representative at all meetings held regarding these charges. As a result of these charges, Charging Party was assessed five disciplinary suspensions.

On September 25, 2019, another internal charge was filed against Charging Party alleging the following:

> FF Brian Clayborn has repeatedly made false statements regarding the [Fire Department] and York Risk Management in social media/Clayborn has continued to disregard the [Department] chain of command including the disobeying of department related direct orders from a superior. All of this activity culminated with the [Fire Department] learning on August 29, 2019 that FF Clayborn threatened Lawanda Wyatt (York Risk Management).

Although Charging Party did not appear at the meeting held to discuss this charge, his Union representatives did. Charging Party was found guilty of the charge and was ultimately terminated as a result, effective October 10, 2019.

Unfair Labor Practice Charges and Procedural Background:

On September 23, 2019, Charging Party filed his charge against the Union in Case No. 19-I-1880-CU. Charging Party filed his second charge, Case No. 19-I-1907-CE, against the Employer on September 27, 2019.

Both charges set forth a number of complaints against both Respondents in a manner and form that the ALJ found disorganized. As noted in the Decision and Recommended Order, however, the basis for Charging Party's complaints against both Respondents involved Charging Party's workers' compensation claim. More specifically, Charging Party alleged that the Department and/or its agent, York Risk Management Services (York), attempted to illegally obtain Protected Health Information (PHI) covering Charging Party and/or Charging Party's worker's compensation claim. Charging Party, in his initial filings against the Department, also claimed that it refused to pay benefits on his workers' compensation claim. With respect to the charge against the Union, Charging Party alleged that the Union acted improperly when it did not arbitrate two suspensions, one of which was assessed in July 2019 and the other in September 2019. Charging Party also claimed that the Union failed to address his claims that the Employer had been attempting to illegally obtain his PHI.

Pursuant to Rule 164 of the Commission's General Rules, the charges were consolidated and an evidentiary hearing was initially set for November 8, 2019, and later adjourned to November 25, 2019.

On November 15, 2019, the Employer filed a motion for summary disposition. Following receipt of the Employer's motion, the ALJ adjourned the November 25, 2019 hearing and instructed Charging Party to file his response to the motion by December 6, 2019. Charging Party was later granted an extension until December 16, 2019, in which to file his response.

On December 16, 2019, Charging Party filed an "Amendment to Original ULP Charge and Request for Continued Adjournment" in which he added an additional allegation relating to his October 10, 2019 termination. Among the information and allegations set forth in that pleading, Charging Party also indicated that he was searching for a lawyer.

On December 18, 2019, the Union filed a motion for summary disposition. The ALJ then held a telephone conference with the parties to discuss the pending motions. During this call, Charging Party again indicated that he was seeking legal representation but was having trouble securing it. At that point, the ALJ decided to continue to hold the two charges in abeyance pending Charging Party's ability to secure a lawyer.

On January 22, 2020, Charging Party submitted a "Brief to ALJ Calderwood" and responded to the Respondents' motions for summary disposition. The brief notes that Charging Party still had not secured legal representation.

On April 9, 2020, noting that no progress had been made by Charging Party to secure legal representation, the ALJ sent the parties a letter indicating that he would reactivate the matter and consider the two outstanding motions for summary disposition. The ALJ also noted that an evidentiary hearing would only be scheduled if Charging Party's charges survived the Respondents' motions.

As noted previously, ALJ Calderwood granted both Respondents' motions for summary disposition and dismissed the charges against the Employer and the Union.

Discussion and Conclusions of Law:

1. Case No. 19-I-1907-CE

In his exceptions, Charging Party continues to maintain that the Department engaged in an unfair labor practice by violating his HIPPA rights. Contrary to Charging Party's position, however, PERA does not authorize generalized claims of unfair treatment and the Commission's jurisdiction, is limited to determining whether a Respondent engaged in conduct that violated the Public Employment Relations Act. In *Detroit Retirement System*, 34 MPER 28 (2020), we recently held:

> The Commission's jurisdiction, however, is limited to determining whether the Respondent engaged in conduct that violated the Public Employment Relations Act. Consequently, a charge alleging a violation of the State Constitution, a statute other than PERA or a city charter is beyond the jurisdiction of the Commission. *Steffke v. Taylor Federation of Teachers, Local 1085,* 28 MPER 71 (2015); *Waverly Cmty Sch,* 26 MPER 34 (2012); *Michigan State Univ,* 17 MPER 75 (2004); *Detroit Public Schools,* 20 MPER 117 (2007) (no exceptions).

In the present case, although Charging Party timely alleged that the Department violated his HIPPA rights, such is not sufficient to state a cause of action under PERA.

Charging Party further alleges that his October 10, 2019 discharge was in retaliation for the charge he filed against the Department on September 27, 2019. However, it does not appear that Charging Party made this argument before the ALJ or sought to amend his original charge to add an allegation regarding discrimination in violation of Section 10(1)(d). Although Charging

Party's "Amendment to Original ULP Charge and Request for Continued Adjournment" asserts that his termination was ultimately the result of retaliation from the City of Detroit due to complaints he tried to file with superiors, city departments and state departments, the "Brief to ALJ Calderwood" attached to Charging Party's January 22, 2020 email does not mention discrimination in violation of Section 10(1)(d). To the contrary, the only statute mentioned is the Workers Compensation Act. In *Birmingham Public Schools*, 33 MPER 12 (2019), we noted that we will not consider issues that have not been raised before the Administrative Law Judge:

> In accordance with our previous findings, we will not consider new issues that have not been raised before the Administrative Law Judge. *Pontiac Sch Dist*, 27 MPER 52 (2014); *City of Detroit*, 1993 MERC Lab Op 131, 132; *Teamsters Local 580,* 1991 MERC Labor Op 575, 576; *City of Detroit (Fire Department),* 1987 MERC Labor Op 417, 420; *SEMTA,* 1985 MERC Labor Op 316.

Consequently, Charging Party's contention that Respondent Department discharged him because he had instituted proceedings under PERA will not be considered by the Commission. See *Keego Harbor*, 28 MPER 24 (2014). However, even if we assume that Charging Party had alleged discrimination in violation of Section 10(1)(d) before the ALJ, none of his pleadings assert the requisite animus or hostility toward his protected activity necessary to survive summary disposition. See *Utica Community Schools and Utica Education Association*, 28 MPER 11 (2014); *City of Detroit (Department of Water & Sewerage)*, 25 MPER 10 (2011) (no exceptions); *Huron School District*, 3 MPER 21121 (1990). Contrary to Charging Party's contention in his exceptions, the record fails to provide any basis to support a determination that the Respondent discharged Charging Party in October 2019 for the purpose of retaliating against him for filing an earlier charge.

In view of the foregoing, we conclude that the ALJ properly found that Charging Party failed to make factual allegations that, if proven true, could establish that he was restrained, coerced, and/or retaliated against with respect to his rights under PERA and properly recommended that the Commission dismiss the charge.

2. Case No. 19-I-1880-CU

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 is not sufficient to establish a breach of the duty of fair 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. *AFSCME Council 25, Local 345,* 32 MPER 2 (2018); *Grand Rapids Education Assoc*, *MEA/NEA*, 30 MPER 72 (2017); *Detroit Dept of Trans*, 30 MPER 61 (2017); *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 present case, Charging Party alleged that the Union acted improperly when it did not arbitrate two suspensions occurring in July 2019 and September 2019 and when it failed to address his claims that the Employer had been attempting to illegally obtain his PHI. In recommending that the charge be dismissed, the ALJ found that Charging Party had not made any specific claim as to what the Union may have done in violation of its duty of fair representation and that, to the contrary, it appeared that the Union was taking an active role in his representation with respect to the various internal charges levied against him in 2019. Charging Party does not take exception to this finding.

In his exceptions, Charging Party alleges, for the first time, that the Union intentionally failed to defend him when they knew his October 10, 2019 discharge was illegal. As was the case with respect to the Section 10(1)(d) allegation made against the Department, however, this issue was not raised before the Administrative Law Judge and, therefore, will not be considered by the Commission. However, even if we were to consider this allegation; it is clear that, contrary to Charging Party's assertions, the Union did appeal his discharge and attempted to defend him during the grievance process.

In view of the foregoing, we conclude that the ALJ properly found that Charging Party failed to make any specific claim as to what action or inaction by the Union may have violated its duty of fair representation, and, as such, properly recommended that the Commission dismiss the charge.

We have carefully examined all other issues raised by Charging Party in his exceptions and find they would not change the result. Accordingly, we affirm the ALJ' s recommended dismissal of Charging Party's unfair labor practice charges in both of these cases.

ORDER

The unfair labor practice charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Robert S. LaBrant, Commission Member

Tinamarie Pappas, Commission Member

Issued: March 9, 2021

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

In the Matter of:

CITY OF DETROIT (FIRE DEPARTMENT),
Public Employer-Respondent in
Case No. 19-I-1907-CE; Docket No. 19-019114-MERC,

-and-

DETROIT FIRE FIGHTERS ASSOCIATION LOCAL 344,
Labor Organization-Respondent in
Case No. 19-I-1880-CU; Docket No. 19-019101-MERC,

-and-

BRYAN CLAYBORN,
An Individual Charging Party.
_____ /

APPEARANCES:

City of Detroit Law Department, by Jason McFarlane, for the Public Employer

Legghio & Israel, P.C., by Christopher Legghio and Megan B. Boelstler, for the Labor Organization

Brian Clayborn appearing on his own behalf

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

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 above captioned unfair labor practice charges, each filed by Bryan Clayborn against the City of Detroit (Fire Department) (Employer) and his bargaining representative, Detroit Fire Fighters Association Local 344 (Union) were assigned to Administrative Law Judge Travis Calderwood, of the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (Commission). Pursuant to Rule 164 of the Commission's General Rules, R 423.164, 2002 AACS; 2014 AACS, these matters were consolidated.

Unfair Labor Practice Charges and Procedural Background:

Charging Party filed his charge against the Union, No. 19-I-1880-CU, on September 23, 2019. Charging Party filed his second charge, Case No. 19-I-1907-CE, against the Employer on September 27, 2019. Both filings set forth a litany of complaints and grievances against both Respondents in a manner and form that is disorganized, thereby making it difficult to discern what exactly Charging Party is seeking to remedy. The proceeding notwithstanding, the recurring theme throughout the pleadings clearly indicates that the nexus of Charging Party's complaints against both Respondents pertains to a workers' compensation claim filed by Charging Party. More specifically, Charging Party complains that the Employer and/or its agent, York Risk Management Services (York), attempted to illegally obtain Protected Health Information (PHI) covering Charging Party and/or Charging Party's worker's compensation claim.[1] Charging Party, in his initial filings against the Employer also claims that the Employer refused to pay benefits on his workers' compensation claim. With respect to the Union, it appears that Charging Party is upset that the Union did not arbitrate two suspensions occurring in July 2019 and September 2019. Charging Party also claims that the Union failed to address his claims that the Employer had been attempting to illegally obtain his PHI.

An evidentiary hearing was initially set for November 8, 2019, and later adjourned to November 25, 2019, per the parties' agreement. On November 15, 2019, the Employer filed a motion for summary disposition under Rule 165(2)(b), (c), and (d) of the Commission's General Rules, R 423.165(2)(b)(c)(d). Following receipt of the Employer's motion, I adjourned the November 25, 2019, hearing and instructed Charging Party to file his response to the motion by December 6, 2019. Charging Party was later granted an extension to December 16, 2019, in which to file his response. On December 16, 2019, Charging Party filed what was titled "Amendment to Original ULP Charge and Request for Continued Adjournment" in which he added the additional allegation covering his October 10, 2019, termination. Among the other information and allegations set forth in that pleading, and which will be discussed more fully below to the extent relevant, Charging Party also indicated that he was searching for a lawyer.

On December 18, 2019, the Union filed its own motion for summary disposition seeking dismissal of the charge against it also pursuant to Rule 165(2)(b), (c) and (d). On December 20, 2019, I convened a telephone conference with the parties in which we discussed the charges and pending motions. During that call, Charging Party again indicated that he was seeking legal representation but thus far was having trouble securing the same. At that point, the decision was made to continue to hold the two charges in abeyance pending Charging Party's ability to secure a lawyer. I instructed Charging Party to contact my office by January 20, 2020, and update me regarding his search for a lawyer.

Charging Party sent my office an email on January 22, 2020, in which he indicated that he was still having trouble securing legal representation. Attached to that email was a document entitled, "Brief to ALJ Calderwood" which will be discussed in more detail below.

[1] Upon information and belief, York Risk Management Services is a third party benefit claims manager and would act as the claims manager on behalf of the City with respect to workers' compensation claims.

In a letter sent to the parties on January 30, 2020, I indicated that I would continue to hold these matters in abeyance in order to allow Charging Party more time to find an attorney, stating in part the following:

> At this time, absent compelling objection from any party, it is my intention that these matters remain adjourned without date to provide Charging Party more time in which to find an attorney. At such time that Charging Party does so, or upon the request of either Respondent accompanied by good cause, I will re-activate these cases and we can proceed accordingly. Please note, that independent of any action or request of the parties, I may re-activate these proceedings on my own initiative.

A second letter expressing the same message as set forth in the January 30, 2020, letter was sent to the parties on February 21, 2020.

On March 10, 2020, Governor Whitmer declared a State of Emergency in response to the novel coronavirus (COVID-19). As a result of the Governor's initial guidance regarding COVID-19 and its community mitigation strategies, MOAHR, effective March 16, 2020, suspended all in-person administrative hearings until at least April 20, 2020. That suspension has been extended several times and remains still in effect at the time of this Decision and Recommended Order. Beginning with the week of March 16, 2020, all MOAHR staff involved with Commission matters were directed to begin working remotely and off-site.

Pursuant to Executive Order (EO) 2020-23, issued by the Governor on March 25, 2020, all service and filing of documents was to be effectuated by electronic means, including email. By letter dated April 2, 2020, I notified the parties of that requirement.

On April 9, 2020, noting that no progress had been made by Charging Party to secure legal representation, I sent the parties another letter indicating my desire to reactivate this matter and consider the two outstanding motions for summary disposition. That letter stated in the relevant portion the following:

> Following up on my February 21, 2020, letter, I think a more than reasonable amount of time has elapsed to allow Charging Party to secure counsel. As such, it is my desire to activate this case and go forward with addressing the outstanding motions filed by the Respondents seeking dismissal of charges – the City's November 15, 2019, motion and the Union's December 18, 2019, motion.
>
> Absent objection from the parties, it is my intention to consider Charging Party's December 16, 2019, First Amended Charge and his January 22, 2020, email and attached brief, as his responses to the two motions. Please note that an evidentiary hearing will only be scheduled if Charging Party's charges successfully survive the Respondents' motions. I ask that the parties provide any objection to the above course of action by email by April 15, 2020.

Following no response from the parties on my April 9, 2020, letter, my office resent the letter again by email and requested a confirmation of receipt from the parties. Representatives from both the Employer and Union confirmed receipt; Charging Party did not confirm his receipt.[2]

Charging Party continued to copy my office on various emails unrelated to the charges pending in Case Nos. 19-I-1880-CU and 19-I-1907-CE, but as of the beginning of June 2020, he had still not confirmed receipt of the April 9, 2020, letter sent to him twice. As such, on June 25, 2020, I emailed Charging Party, copying the Employer and Union, and requested that he confirm receipt of my April 9, 2020, letter; Charging Party confirmed receipt later that same day.

Charging Party has continued to copy my office on emails between himself, Employer representatives, Union representatives, representatives from York, and various other individuals, including members of the State's Office of Attorney General and the Department of Licensing and Regulatory Affairs. As best can be discerned, these emails did not have any impact or direct relation to any actionable claim under PERA and, as such, have been largely ignored.

Relevant Background Facts:

The following factual background is derived from Charging Party's initial unfair labor practice charge filings, the December 16, 2019, filing, the January 22, 2020, filing and the various attachments attached to each. All well-plead and relevant allegations set forth therein are presumed true for purposes of considering the two outstanding motions for summary disposition. I note for purposes of this order that Charging Party's January 22, 2020, pleading was 260 pages of emails, medical bills, several narratives presumably authored by Charging Party, and various other documents and correspondence.

Charging Party was employed as a firefighter with the City of Detroit Fire Department (DFD or Department) and was a member of the Union's bargaining unit. Sometime in 2018, Charging Party suffered an injury while in the performance of his duties as a firefighter. Following that incident, Charging Party filed for workers' compensation benefits and for some period of time presumably received said benefits. Sometime in March of 2019, Charging Party was examined by Dr. Jacek Brudzewski, identified by Charging Party as the "department's physician", in relation to his workers' compensation claim. Charging Party claims that Brudzewski "fraudulently altered my medical records and documented false information thereby giving me a medical diagnosis of depression and anxiety." According to Charging Party, that diagnosis was used by LaWanda Wyatt, of York Risk Services, to deny and/or stop payments on his workers' compensation claim.

Sometime thereafter, Charging Party claims he began posting on social media that the Employer was not paying his medical bills. With respect to this, Charging Party stated in his pleadings that he believed his "HIPPA" and "Workers Compensation Rights" had been violated and further that Brudzewski and York were engaging in "felonious fraudulent activity."

[2] It was later learned that Charging Party had begun to utilize a new email address but failed to notify my office of the change.

According to copies of documents provided by Charging Party, from April 2019 through September of 2019, several internal DFD disciplinary charges had been filed against him. The first charge, dated April 3, 2019, alleged:

> On April 3, 2019, the DFD was made aware of false statements made by FF Clayborn by way of Instagram posts regarding his duty relayed injury medical care. Clayborn was being treated for his work injury until he failed to comply with city of Detroit and York requirements.

That charge form indicated that Charging Party was accompanied by at least one Union representative to a disciplinary meeting. The charge form further indicated that Charging Party was found guilty of the allegation and that a three-day suspension was recommended as discipline. According to that form, the suspension would be held in abeyance pending his removal of the above offending posts by April 30, 2019. It is unclear if, and when, Charging Party removed those posts.

On July 3, 2019, two additional internal DFD charges were levied against Charging Party. The first charge stated as its allegations:

> On June 12, 2019 FF Brian Clayborn failed to report to the Training Academy as ordered to do so by Senior Chief Mark Rebain.

The second charge stated:

> On July 1, 2019 at approximately 0230 hrs. FF Brian Clayborn conducted a Facebook video where he appeared to be seeking out any Detroit firefighter to perform a sex act with a random female.

The charge forms indicate that again Charging Party was accompanied by at least one Union representative to a disciplinary meeting. The charge forms further indicate that Charging Party was found not-guilty of the first charge but guilty of the second. The recommended discipline for the second charge was a six-day suspension.

On September 6, 2019, three more internal DFD charges were filed against Charging Party. The first charge alleged the following:

> On August 29, 2019 FF Brian Clayborn sent an email to Deputy Chief Shinske that was threatening and disrespectful.

The second charge stated:

> On August 29, 2019 FF Brian Clayborn sent two emails directly to DC Shinske violating Number 1.5 Email/Electronic Notifications Policy.

The third charge stated:

> On August 29, 2019 and September 6, 2019 FF Brian Clayborn [sent] emails to Chief Distelrath in direct contradiction to the order given by Chief Distelrath on 7/25/2019 to refrain from such action.

All three of the charge forms indicated that Clayborn was again accompanied by Union representation at the disciplinary meetings. Charging Party was found guilty of all three charges with recommend discipline of 1-day, 1-day, and 3-day suspensions, respectively.

On September 25, 2019, another internal DFD charge was brought against Charging Party. That charge contained the following allegations:

> FF Brian Clayborn has repeatedly made false statements regarding the [Fire Department] and York Risk Management in social media/ Clayborn has continued to disregard the [Department] chain of command including the disobeying of department related direct orders from a superior. All of this activity culminated with the [Fire Department] learning on August 29, 2019 that FF Clayborn threatened Lawanda Wyatt (York Risk Management).[3]

The charge form indicated that while Charging Party did not appear at the meeting to discuss the above charge, Union representatives did. Charging Party was found guilty with dismissal being the recommended discipline. Charging Party was ultimately terminated as a result of this charge effective October 10, 2019.

As stated above, Charging Party provided a litany of various documentary evidence. Examples of such included complaints made to the City of Detroit, the Department of Licensing and Regulatory Affairs and Blue Cross and Blue Shield of Michigan. It is without question that the overwhelming majority of the materials provided by the Charging Party are not relevant to any actionable charge under PERA and as such will not be discussed any further herein.

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 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.

[3] Also included with the materials submitted by Charging Party are several emails and/or letters in which the Charging Party recounts a situation where a Farmington Hills Detective contacted him to investigate claims that he was threatening and/or harassing Wyatt. It is not known whether any further action was taken with respect to that investigation.

Charges which comply with the Commission's rules, are timely filed, and allege a violation of PERA are set for hearing before an administrative law judge. In order to be timely filed, the charge must be filed within six months of the alleged unfair labor practice. MCL 423.216(a).

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 is untimely, there are no issues of material fact and one party is entitled to judgment as a matter of law, and/or that the charge does not state a claim upon which relief can be granted under PERA. See R 423.165; See also *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).

First off, to the extent that Charging Party has made allegations or alluded to claims or events that occurred more than six-months prior to the filing of his charges against the Respondents, those claims and allegations are untimely under the Act and as such have not been either detailed or considered as part of this order.

Generally, with respect to public employers, PERA does not prohibit all types of discrimination or unfair treatment. The Commission's jurisdiction with respect to claims brought by individual employees against public 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.

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. The authority of the Commission is limited to the enforcement of the rights guaranteed under Section 9 of the Act. 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 Acts, 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.

Here, the only discernible claims levied by the Charging Party against the Employer stem directly from his claims that it either encouraged or was complicit in actions that violated his rights under the Health Insurance Portability and Accountability Act or the state's workers' compensation laws. At no point has Charging Party made any factual allegations 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. As such, summary disposition in favor of the Employer is required.

Addressing next 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). 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. Moreover, in order to survive a motion for summary disposition predicated on the premise that Charging Party has failed to state a claim of a breach of the duty of fair representation, Charging Party's allegations "must contain more than conclusory statements alleging improper representation." *AFSCME, Local 2074*, 22 MPER 83 (2009), citing *Martin v Shiawassee County Bd of Commrs*, 109 Mich App 166, 181 (1981).

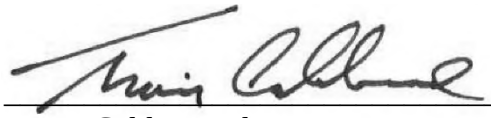
Here, Charging Party has not made any specific claim as to what the Union may have done in violation of its duty of fair representation. On the contrary, it appears, at least from the documents provided by Charging Party that the Union was taking an active role in his representation with respect to the various internal charges levied against him in 2019. Moreover, to whatever extent Charging Party may believe the Union owed a duty to assist him in his workers' compensation claims, he has not alleged that its failure to do so, should there even exist such a duty, was arbitrary under *Goolsby*, supra, or otherwise discriminatory and/or unlawful as defined within *Vaca*, supra. Additionally, to the extent that Charging Party's initial filing against the Union appeared to complain that the Union violated its duty for not taking some of his suspensions to arbitration, it is unclear whether he sought the same from the Union. Furthermore, even if Charging Party did request the same, he has provided no facts that, if proven true, could establish that any decision by the Union to not pursue arbitration was arbitrary under *Goolsby*, supra, or otherwise discriminatory and/or unlawful as defined within *Vaca*, supra. For this reason, summary disposition in favor of the Union is also required.

I have thoroughly reviewed all pleadings and their respective attachments as provided by the parties. Having considered all arguments set forth by the parties and concluding such do not warrant a change in my conclusion, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges filed by Brian Clayborn against the City of Detroit and Detroit Fire Fighters Association, Local 344, are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISION



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

Dated: July 23, 2020