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. 20-I-1440-CE,

-and-

DETROIT FIRE FIGHTERS ASSOCIATION LOCAL 344
Labor Organization-Respondent in MERC Case No. 20-I-1439-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 November 6, 2020, Administrative Law Judge David M. Peltz 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 Charging Party's failure to respond to a show cause order warranted dismissal of both the charge involved in Case No. 20-I-1440-CE and the charge involved in Case No. 20-I-1439-CU. The ALJ further found, with respect to Case No. 20-I-1440-CE, that the charge against Respondent City of Detroit (Fire Department) (Department or Employer) arising from Charging Party's termination, as well as his claims relating to the attempted procurement by the Employer and/or York of personal health information were previously raised by Charging Party in MERC Case No. 19-I-1907-CE; a case in which ALJ Calderwood concluded that such allegations failed to state a valid PERA claim. ALJ Peltz also found that the charges against the Employer were untimely. With regard to the charge in Case No. 20-I-1439-CU against Respondent Detroit Fire Fighters Association Local 344 (Union), the ALJ found that Charging Party failed to state a valid

[1] MOAHR Hearing Docket Nos. 20-019268 & 20-017960

PERA claim and that there was no assertion that the DFFA acted arbitrarily, discriminatorily or in bad faith in its representation of Charging Party.

On November 30, 2020, Charging Party submitted a document entitled "Oral Hearing Requested" to the Commission at MERC-LEO-ULPS and, by email dated December 7, 2020, Charging Party informed BER Staff that he intended the November 30, 2020 document to constitute his exceptions to the ALJ's Decision and Recommended Order. Charging Party's exceptions fail to comply with Rule 176 of the Commission's General Rules. Nonetheless, as we recently explained in *Grand Rapids Employees 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 will follow 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 maintains that the ALJ erred when he recommended the charges be dismissed without affording Charging Party an evidentiary hearing. Charging Party further contends that he should be allowed to submit certain additional information contained in his "Oral Hearing Requested" document.

On January 20, 2021, 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 Charging Party's failure to respond to the ALJ's show cause order warrants dismissal of his charges, and that the ALJ properly determined that the Charging Party failed to state a valid claim under PERA.

On January 15, 2021, Charging Party submitted a "Motion for Disclosure of Employment Records and Documents" requesting that a subpoena be issued to the Department to produce certain employee records and documents "pursuant to Rule 172, R 423.172 (2)(e), of the General Rules and Regulations of the Employment Relations Commission."

On January 21, 2021, Respondent Department submitted a response to Charging Party's "Motion for Disclosure of Employment Records and Documents" in which it argued that a subpoena should not be issued because the ALJ had already determined that the charges do not amount to violations of PERA and the request for a subpoena is untimely as the ALJ had already issued a recommended order and exceptions to that order have already been filed.

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 and Procedural Background:

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

On October 10, 2019, the Department discharged Charging Party and the Union filed a grievance on his behalf. The grievance was appealed through the contractual grievance procedure and an arbitration hearing was originally scheduled for June 3, 2020. Prior to the commencement of the hearing, however, Charging Party asked the Union to adjourn the proceeding. The arbitration hearing was ultimately rescheduled for September 14, 2020.

On September 11, 2020, Charging Party filed his charge against the Union in Case No. 20-I-1439-CU alleging that the Union breached its duty of fair representation by failing or refusing to present certain evidence at the arbitration hearing. Charging Party filed his second charge, Case No. Case No. 20-I-1440-CE, against the Department on September 14, 2020, alleging that the Department failed to provide certain employee documentation needed for arbitration. This charge was amended or corrected on or about September 18, 2020.

On September 29, 2020, the ALJ ordered Charging Party to show cause by October 13, 2020 as to why his charge against the Department should not be dismissed as untimely under Section 16(a) of PERA, and why both charges should not be dismissed for failure to state a claim under the Act. Charging Party failed to either file a response to the show cause order or request an extension of time in which to do so.

Discussion and Conclusions of Law:

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, however, a material factual dispute exists, summary disposition is not appropriate. *Saginaw Cnty Sheriff*, 1992 MERC Lab Op 639 (no exceptions).

Additionally, the Commission has repeatedly recognized that failure to respond to a show cause order may, in itself, warrant dismissal of the charge. *City of Detroit, Department of Transportation and Amalgamated Transit Union, Local 26*, 30 MPER 61 (2017); *City of Detroit*, 30 MPER 39 (2016); *AFSCME Council 25,* 22 MPER 87 (2009); *Detroit Federation of Teachers*, 21 MPER 3 (2008). In the present case, ALJ Peltz directed Charging Party to show cause why his charges should not be dismissed by October 13, 2020. There is no dispute that Charging Party never responded to the ALJ's order to show cause, and the lack of any response warrants dismissal of the charges.

However, even if all of the allegations in the charges are accepted as true, dismissal of the charges on summary disposition is nonetheless warranted because Charging Party failed to assert any claims that could establish a violation of his rights under PERA

Although Charging Party, as we understand it, contends that he should be allowed to submit certain additional information contained in his "Oral Hearing Requested" document (his exceptions) to the Commission, he is improperly seeking to assert facts and evidence that are not part of the record. In *American Federation of Teachers, Local 2000*, 22 MPER 21 (2009), the Commission held:

> We decide exceptions on the record made before the ALJ and do not consider factual assertions or exhibits that are not supported by the record created during proceedings before the ALJ. *See e.g. Garden City/Dearborn Pub. Sch. Adult Ed. Consortium,* 1994 MERC Lab Op 1. The facts and exhibits referred to by Charging Party in his exceptions should have been included in his charge or in his response to the ALJ's order for a more definite statement.

Charging Party could have requested an extension of time within which to respond to the ALJ's order to show cause but chose not to do so. Consequently, we will not consider any additional information or assertions contained in Charging Party's "Oral Hearing Requested" document.

Additionally, Charging Party's email dated December 7, 2020 cannot be properly construed as a request or motion to reopen the record under Rule 166 of the Commission's General Rules because, under Rule 166(1), a party to a proceeding may only move for reopening of the record following the close of a hearing conducted under Part 7 of the rules and, in the present case, no hearing under Part 7 was held.

Although Charging Party, on January 15, 2021, submitted a "Motion for Disclosure of Employment Records and Documents" requesting that a subpoena be issued to the Department to produce certain employee records and documents, there is no basis for granting Charging Party's request. Commission Rule 172, cited by Charging Party in his "Motion for Disclosure of Employment Records and Documents," provides, in relevant part:

> (2) An administrative law judge or fact finder has the power to do all of the following:
>
> ***
>
> (e) Grant applications for subpoenas, subpoena witnesses, administer oaths and affirmations, examine witnesses, receive relevant testimony and evidence, rule upon offers of proof, and introduce into the record documentary or other relevant evidence.

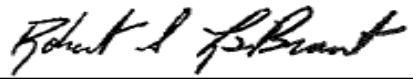
In the present case, Rule 172 does not provide a basis for Charging Party's request that the ALJ grant his application for a subpoena because the ALJ has already issued a Decision and Recommended Order and the case is no longer before him. Furthermore, Charging Party's pleadings do not establish how the records and documents would be relevant to his charges even if he made a timely request for a subpoena. See *Macomb County (Juvenile Justice Center)*, 28 MPER 4 (2014); *City of Livonia*, 22 MPER 40 (2009).

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

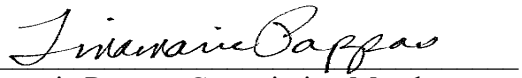
ORDER

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), Respondent-Public Employer,	Case No. 20-I-1440-CE; Docket No. 20-019268-MERC
-and-	
DETROIT FIRE FIGHTERS ASSOCIATION, Respondent-Labor Organization,	Case No. 20-I-1439-CU; Docket No. 20-017960-MERC
-and-	
BRIAN CLAYBORN, An Individual Charging Party.	

_____/

APPEARANCES:

Brian Clayborn, appearing on his own behalf

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from unfair labor practice charges filed by Brian Clayborn against his former Employer, the City of Detroit (Fire Department), and his Union, the Detroit Fire Fighters Association (DFFA). 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 charges were assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). The cases were subsequently consolidated pursuant to Rule 164, R 423.164, of the General Rules and Regulations of the Employment Relations Commission.

Facts and Procedural Background:

The following facts are derived from the unfair labor practice charges and amended charge, with all of the allegations set forth by Charging Party accepted as true for purposes of this Decision and Recommended Order on Summary Disposition. Charging Party was employed by the City of Detroit as a fire fighter until he was terminated on October 10, 2019, for allegedly

making false statements on social media pertaining to his Workers' Compensation Claim. The DFFA filed a grievance on Charging Party's behalf which it advanced through the contractual grievance process. An arbitration hearing was originally scheduled for June 3, 2020. Just before the arbitration was scheduled to commence, Charging Party asked the Union to adjourn the proceeding because he was not satisfied with the Union's strategy and on the ground that he was having trouble obtaining documents from the City of Detroit which he believed were vital to his defense. The arbitration hearing was ultimately rescheduled for September 14, 2020.

On September 11, 2020, Clayborn filed an unfair labor practice charge against the DFFA. The charge, which was assigned Case No. 20-I-1439-CU; Docket No. 20-017960-MERC, alleges that the Union breached its duty of fair representation by failing or refusing to present certain evidence at the arbitration hearing. Three days later, on September 14, 2020, Clayborn filed a charge against the City of Detroit. Case No. 20-I-1440-CE; Docket No. 20-019268-MERC. That charge, as amended on September 18, 2020, asserts that the City and/or its agent, York Risk Management Services (York), violated PERA by illegally attempting to obtain Protected Health Information (PHI) unrelated to his workers' compensation claim, and by negligently placing PHI pertaining to Clayborn into the personnel file of another employee. Charging Party further contends that the City acted unlawfully by refusing to provide him with copies of his disciplinary records and other documentation related to his employment. Finally, Clayborn asserts that the City intentionally delayed conducting "any investigations that [he] demanded" due to the pendency of the arbitration hearing.

In a pretrial order issued on September 29, 2020, I directed Charging Party to show cause why his charge against the City should not be dismissed as untimely under Section 16(a) of PERA and why both charges should not be dismissed for failure to state a claim under the Act. The order specified that to avoid dismissal of the charges, Clayborn's written response must assert facts that establish violations of the Act. Charging Party was directed to "describe who did what and when they did it, and explain why such actions constitute a violation of the Act, with consideration given to the legal principles" set forth in the order.

Charging Party's response was due by the close of business on October 13, 2020. To date, Charging Party has not filed a response to the order to show cause or requested an extension of time in which to do so.

Prior Related Proceeding:

Approximately one year prior to filing the instant charges, Clayborn raised similar claims against both the City of Detroit and the DFFA in consolidated cases assigned to ALJ Travis Calderwood. In Case No. 19-I-1907-CE; Docket No. 19-019114-MERC, filed on September 27, 2019, Clayborn asserted that the City refused to pay benefits owed to him on his workers' compensation claim and that the Employer and/or York attempted to illegally obtain PHI relating to that claim. Clayborn asserted that such conduct violated the Health Insurance Portability and Accountability Act and the state's workers' compensation laws. On December 16, 2019, Clayborn amended his charge against the City to add an additional allegation pertaining to his October 10, 2019, termination. The charge in Case No. 19-I-1880-CU; Docket No. 19-019101-MERC, filed on September 23, 2019, alleged that the DFFA breached its duty of fair

representation by not arbitrating grievances challenging discipline which Clayborn received in July and September of 2019. Charging Party further asserted that the Union violated PERA by failing to address his claims that the City had been illegally attempting to obtain his PHI.

In a decision issued on July 23, 2020, ALJ Calderwood recommended that the Commission dismiss both charges in their entirety. The ALJ concluded that the allegations set forth by Clayborn pertaining to claims or events that occurred more than six months prior to the charges were untimely under Section 16(a) of the Act. With respect to Clayborn's assertions concerning his workers' compensation claim and the City's alleged attempt to obtain PHI covering that claim, the ALJ found that Clayborn had failed to set forth any factual allegations which, if proven true, could establish that he was restrained, coerced or retaliated against with respect to the rights guaranteed to him under PERA. Similarly, the ALJ concluded that Clayborn's charge against the DFFA should also be dismissed on summary disposition for failure to state a claim under the Act. ALJ Calderwood held that Clayborn had not made any specific claim as to what the Union may have done in violation of its duty of fair representation and that the charges set forth no facts that, if proven, could establish that any decision by the DFFA was arbitrary, discriminatory or unlawful.[1]

Discussion and Conclusions of Law:

Pursuant to Rule 165(1), R 423.165(1), of the General Rules and Regulations of the Employment Relations Commission, which govern practice and procedure in administrative hearings conducted by MOAHR, the ALJ may "on [his] own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." Among the various grounds for summary dismissal of a charge is the failure by the charging party to "respond to a dispositive motion or a show cause order." Rule 165(2)(h). See also *Detroit Federation of Teachers*, 21 MPER 3 (2008), in which the Commission recognized that the failure of a charging party to respond to an order to show cause may, in and of itself, warrant dismissal of the charge. In any event, accepting all of the allegations set forth by Clayborn as true, dismissal of the charges is warranted.

First, allegations against the City of Detroit arising from Charging Party's termination, as well as claims relating to the attempted procurement by the City and/or York of personal health information were previously raised by Clayborn in Case No. 19-I-1907-CE; Docket No. 19-019114-MERC. As noted, ALJ Calderwood issued a decision in that matter in which he concluded that such allegations failed to state a claim under PERA and recommended dismissal of the charge against the Employer. Clayborn now suggests that he has obtained new evidence pertaining to those allegations. If true, the proper recourse would be to raise that issue in the context of a motion to reopen the record in the prior proceeding. Pursuant to Rule 166 of the Commission's rules, R 423.166, such a motion must be filed either with the ALJ, if before the issuance of a decision and recommended order, or thereafter with the Commission. It is not appropriate to assert a claim based on newly discovered evidence by filing a new unfair labor practice charge.

[1] On September 16, 2020, Charging Party filed exceptions to the Decision and Recommended Order which remain pending as of this writing.

Allegations relating to the attempt by the City and/or York to procure PHI, as well as claims arising from Charging Party's termination, must also be dismissed as untimely. Section 16(a) of PERA provides that 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 the respondent. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community 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). Based upon the charges filed in the prior matter before ALJ Calderwood, Clayborn became aware of the alleged attempt to obtain PHI sometime during the spring of 2019. As noted, he was terminated by the City on October 10, 2019. However, he did not file the instant charge against the City until September 14, 2020, more than six months after those events transpired. Accordingly, any allegations arising from his termination or pertaining to the City's alleged attempt to obtain PHI must be dismissed as untimely under the Act.

Finally, none of the allegations set forth by Charging Party against the City state a claim under PERA. Section 9 of PERA protects the rights of public employees to form, join or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. The types of activities protected by the Act include filing or pursuing a grievance pursuant to the terms of a union contract, participating in union activities, joining or refusing to join a union, and joining with other employees to protest or complain about working conditions. Sections 10(1)(a) and (c) of the Act prohibit a public employer from interfering with the Section 9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities described above. PERA does not, however, prohibit all types of discrimination or unfair treatment by a public employer, nor does the Act provide a remedy for a breach of contract claim asserted by an individual employee. 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, or refusal to engage in, union or other concerted activities protected by PERA.

In the instant case, Charging Party has not set forth any factually supported claim which, if true, would support a finding that the City interfered with Clayborn's ability to engage in protected concerted activities or that it subjected him to discrimination or retaliation for engaging in such activities in violation of the Act. The "new" allegations primarily pertain to Charging Party's attempt to procure employment records and other documentation from the City of Detroit. Although PERA requires a public employer to provide certain information to the bargaining representative of its employees upon request, there is no analogous requirement under the Act that an employer disclose information to an individual employee. Similarly, Charging Party's contention that the City placed PHI pertaining to Clayborn into the personnel file of another employee, standing alone, does not set forth a valid claim under PERA. Lastly, none of the investigations referenced by Clayborn in his amended charge appear to implicate any rights

arising under PERA. For example, the amended charge asserts that the City's Civil Rights, Inclusion & Opportunity Department and the Office of Inspector General both refused to conduct investigations at his request, but Clayborn fails to explain how those decisions implicated his ability or refusal to engage in protected activity under the Act. For these reasons, I find that the charge against the City in Case No. 20-I-1440-CE; Docket No. 20-019268-MERC must be dismissed on summary disposition.

After careful consideration of the allegations set forth by Clayborn against the Union, I conclude that the charge in Case No. 20-I-1439-CU; Docket No. 20-017960-MERC also fails to state a claim under the Act. 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). The Commission has "steadfastly refused to interject itself in judgment" over grievances and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. A labor organization has the legal discretion to make judgments about what will serve 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 v Hotel and Restaurant Employees Union, Local 705*, 389 Mich 123 (1973). The mere fact that a member is dissatisfied with their union's efforts is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855. To prevail on a claim of unfair representation, 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. *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, there has been no assertion that the DFFA acted arbitrarily, discriminatorily or in bad faith in its representation of Clayborn. Based upon the allegations in the charge, it appears that the DFFA filed a grievance on Charging Party's behalf challenging his termination and that the Union advanced that grievance through the contractual machinery. Notably, the arbitration hearing had not yet commenced at the time the charge was filed and no decision had been issued by the arbitrator. Thus, it appears that Charging Party is merely dissatisfied with the Union's pre-litigation strategy. A determination by the Union regarding what evidence to present and which witnesses to call at an arbitration hearing constitutes a tactical decision which the Commission will not second-guess absent a factually supported allegation that the decision was arbitrary or made in bad faith. *Oakland County Deputy Sheriff's Ass'n*, 20 MPER 77 (2007) (no exceptions); *Bellevue Cmty Sch*, 4 MPER 13 (1982) (no exceptions). As noted above, a union has broad discretion to decide how best to proceed with the representation of its member in a given case. For these reasons, the charge filed against the Union in Case No. 20-I-1439-CU; Docket No. 20-017960-MERC must also be dismissed without a hearing.

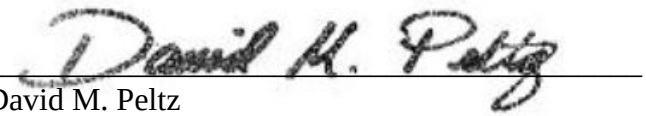
Despite having been given a full and fair opportunity to do so, Charging Party has failed to set forth any factually supported claims which, if true would establish a violation of PERA by

either of the Respondents within six months of the filing of the charges. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Brian Clayborn against the City of Detroit (Fire Department) in Case No. 20-I-1440-CE; Docket No. 20-019268-MERC, and his charge against the Detroit Fire Fighters Association in Case No. 20-I-1439-CU; Docket No. 20-017960-MERC, are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: November 6, 2020