STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COMMUNITY COLLEGE
Public Employer-Respondent in MERC Case No. 20-B-0421-CE,
-and-

WASHTENAW COMMUNITY COLLEGE EDUCATION ASSOCIATION,
Labor Organization-Respondent in MERC Case No. 20-B-0409-CU,

-and-

ALICE GANNON-BOSS
An Individual Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Reardon, by Fillipe S. Iorio, appearing on behalf of the Labor Organization

Alice Gannon-Boss, appearing on her own behalf

DECISION AND ORDER

On July 9, 2020, Administrative Law Judge David M. Peltz 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

Samuel R. Bagenstos, Commission Chair

Robert S. LaBrant, Commission Member

Issued: October 30, 2020

Tinamarie Pappas, Commission Member

[1] MOAHR Hearing Docket Nos. 20-004513 & 20-004514

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

In the Matter of:

WASHTENAW COMMUNITY COLLEGE,
Respondent-Public Employer in Case No. 20-B-0421-CE;
Docket No. 20-004513-MERC,

-and-

WASHTENAW COMMUNITY COLLEGE EDUCATION ASSOCIATION,
Respondent-Labor Organization in Case No. 20-B-0409-CU;
Docket No. 20-004514-MERC,

-and-

ALICE GANNON-BOSS,
An Individual Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Reardon, by Fillipe S. Iorio, appearing on behalf of the Labor Organization

Alice Gannon-Boss, appearing on her own behalf

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from unfair labor practice charges filed by Alice Gannon-Boss against her Employer, Washtenaw Community College (WCC), and her Union, the Washtenaw Community College Education Association (WCCEA). 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 consolidated and 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).

Background and Facts:

Charging Party started working for WCC as a full-time professional faculty member in August of 2010. Due to a medical condition, Charging Party stopped teaching in the fall of 2017. She initially went on Short Term Disability (STD). After an unsuccessful attempt at returning to

work, Charging Party began using sick days on August 26, 2019. Her employment status was changed to Long Term Disability (LTD) effective September 24, 2019. In October of 2019, she applied for disability retirement.

On February 26, 2020, Gannon-Boss filed the instant charges against the WCC and her Union. In the charge against the Employer, Case No. 20-B-0421-CE; Docket No. 20-004513-MERC, Gannon-Boss asserts that the WCC failed to comply with the terms of the collective bargaining agreement, treated her differently than other employees and created a hostile work environment. The charge alleges that the College took these actions against Gannon-Boss because members of the administration personally disliked her. In an attachment to the charge, Gannon-Boss describes numerous incidents and events beginning in 2013, including a claim that Eva Samulski, the Dean of Business and Computer Technologies, repeatedly interfered with her ability to teach by adding equipment to her classroom and pressuring her into performing extra duties.

The charge in Case No. 20-B-0409-CU; Docket No. 20-004514-MERC, asserts that the President of the WCCEA, David Fitzpatrick, failed or refused to fairly represent Gannon-Boss because he harbors personal animus towards her. According to the charge, Fitzpatrick is "sympathetic" towards management, has attempted to intimidate Gannon-Boss and has refused to process grievances on her behalf. Finally, Gannon-Boss contends that Fitzpatrick failed to inform her of her right to "grieve matters beyond the college's jurisdiction." Attached to the charge is a list of instances and events involving the WCCEA, the last of which occurred on August 25, 2019, when Fitzpatrick allegedly made disparaging remarks about Charging Party and erroneously informed the College that Gannon-Boss intended to use sick time instead of returning to the classroom. Charging Party asserts that Fitzpatrick's conduct has impacted her employment with the WCC and her personal health.

In an order issued on April 1, 2020, I directed Gannon-Boss to show cause why her unfair labor practice charge against Respondent WCC in Case No. 20-B-0421-CE; Docket No. 20-004513-MERC should not be dismissed for failure to state a claim under PERA because the charge did not provide a factual basis which would support a finding that Charging Party was subjected to discrimination or retaliation for engaging in, or refusing to engage in, protected activities under the Act. With respect to the charge in Case No. 20-B-0409-CU; Docket No. 20-004514-MERC, I directed the WCCEA to file a position statement addressing the allegations set forth by Charging Party against the Union. Responses to the order were to be filed by April 16, 2020. I subsequently granted a request from Charging Party to extend the deadline for filing a response to the order by thirty days. As a courtesy, the Union was granted the same extension for filing its position statement.

On April 21, 2020, the WCCEA filed a motion to dismiss the unfair labor practice charge or, in the alternative for a more definite statement of the charge. In the motion, the Union first asserted that the charge in Case No. 20-B-0409-CU; Docket No. 20-004514-MERC was untimely under Section 16(b) of PERA with respect to any alleged violations of the Act which occurred on or before August 25, 2019. In addition, the Union argued that the charge fails to state a claim under PERA due to the fact that Gannon-Boss had not alleged that the Union acted with an improper intent, purpose or motive encompassing fraud, dishonesty or other potentially

misleading conduct, and because the charge did not assert any breach of the collective bargaining agreement by the College.

On May 1, 2020, Charging Party filed her response to the Order to Show Cause in Case No. 20-B-0421-CE; Docket No. 20-004513-MERC. In the response, Charging Party alleged that the College's motivation for discriminating against her was, in part, retaliation for the fact that she was an active union member. In addition, Gannon-Boss asserted that the WCC had violated PERA by failing to "perform the duties contractually owed" to her. The response lists numerous incidents and events in support of these claims, beginning with an incident in July of 2012 when the College removed Charging Party from her position as co-chair of the culinary department.

On May 22, 2020, the WCCEA filed a position statement denying each of the allegations set forth by Gannon-Boss in Case No. 20-B-0409-CU; Docket No. 20-004514-MERC. In its position statement, the Union asserts that Charging Party repeatedly misstated the record and mischaracterized communications between WCCEA representatives and Gannon-Boss. The Union also denies Charging Party's claims that the College violated the terms of the collective bargaining agreement.

On June 11, 2020, Charging Party filed her response to the Union's motion to dismiss the charge or, in the alternative for a more definite statement, along with more than 250 pages of attachments consisting primarily of emails. On page two of the response, Gannon-Boss indicates that the charges relate to events occurring January 8, 2016, through August 25, 2019. Charging Party once again asserts she was singled out by the Union and the WCC administration because of personal animus towards her and contends that the WCCEA breached its duty of fair representation by failing to enforce the terms of the collective bargaining agreement. The response further alleges that the Union "failed in its duty to keep membership well-informed of actions to which could be pursued beyond the jurisdiction of the school, or actions informing membership of the issues the Union would not, or could not pursue, without reason or full disclosure or rights to due process allowable under contract terms." Finally, Charging Party asserts that the Union violated PERA by failing to enforce her rights under the Americans With Disabilities Act (ADA).

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 under PERA by MOAHR, the ALJ may "on [his or her] own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." Accepting all of the allegations set forth by Gannon-Boss as true, dismissal of the charge against the WCC in Case No. 20-B-0421-CE; Docket No. 20-004513-MERC and the charge against the WCCEA in Case No. 20-B-0409-CU; Docket No. 20-004514-MERC is warranted on the ground that the charges were not timely filed and because none of the allegations set forth by Gannon-Boss state a claim for which relief can be granted under the Act.

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. In the instant case, the allegations relate to events occurring on or before August 25, 2019.[1] However, the charges were not filed until February 26, 2020, more than six months later. Gannon-Boss asserts that the charges should be considered timely because she did not become aware of PERA or the existence of MERC until November of 2019. Even if true, that fact would not render the charges timely under the Act. With respect to determining when a person discovers, or knows or has reason to know of, her cause of action so as to commence the running of the limitation period, it is not necessary that the person recognize that she has suffered invasion of a legal right. Rather, 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). Accordingly, I conclude that the charges filed by Gannon-Boss against the WCC and the WCCEA must be dismissed as untimely under Section 16(a) of the Act.

Charging Party further contends that her allegations against both the College and the Union were timely brought before the Commission because she filed her charges on February 20, 2020. That assertion is apparently based upon the date that Gannon-Boss prepared the charges and deposited them in the mail. However, the filing of an unfair labor practice charge is not considered complete until "the date it is delivered to any office of the commission *and received* by the commission, administrative law judge or other agent designed to receive the document." Rule 181, R 423.181 of the General Rules and Regulations of the Employment Relations Commission (emphasis supplied). In the instant case, the charges were received by the Commission on February 26, 2020, as evidenced by the time and date stamped on those documents by the MERC staff. Accordingly, February 26, 2020, is the date that filing occurred for purposes of the Act. Had the charges been hand delivered rather than mailed on February 20, 2020, they would have been timely with respect to allegations involving events occurring on August 25, 2019. They were not and, for that reason, are barred by the statute of limitations and must be dismissed on that basis. *Police Officers Ass'n of Mich*, 27 MPER 46 (2014) (no exceptions). Even if the charges, in whole or in part, had been timely filed, dismissal is nonetheless appropriate on the ground that Charging Party has failed to state claims against either of the Respondents.

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

[1] In her response to the Order to Show Cause, Charging Party references a single incident occurring after August 25, 2019. Charging Party contends that in September of 2019, the WCC notified her that she was being placed on LTD status and required her to submit to an independent medical examination. Charging Party complains that the College relied upon an "undefined contract sentence" to justify such actions. However, Charging Party does not indicate whether this allegation was intended to be part of the charge or explain why she considers such actions to be unlawful. To the extent that Charging Party is asserting a breach of contract by the College, it is well-established that an individual employee has no standing to raise such a claim, as the duty to bargain runs from the employer to the recognized bargaining agent. See e.g. *City of Detroit (Bld & Safety Engineering)*, 1998 MERC Lab Op 359, 366; *Detroit Fire Dep't*, 1995 MERC Lab Op 604, 613-615.

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 her unfair labor practice charge in Case No. 20-B-0421-CE; Docket No. 20-004513-MERC, Gannon-Boss alleged that Respondent WCC discriminated against her in violation of the Act because members of the administration personally disliked her. I issued an order requiring Charging Party to show cause why her charge against the College should not be dismissed. In that order, I explained that to establish a valid claim under PERA against the WCC, Charging Party must demonstrate that the Employer took action against her because she had engaged in, or refused to engage in, protected activities under the Act. In her response to that order, Charging Party alleged, for the first time, that the College discriminated against her because she was an active union member and that the administration was anti-union. Other than those conclusory assertions, however, Charging Party has not set forth any factually supported allegations which, if true, would establish that the College violated Section 10 of PERA. Charging Party does not explain or identify the basis for her claim that she was an active union member. In fact, other than reference to a grievance filed by the Union on Charging Party's behalf, there is nothing in the charge or response which would indicate that Gannon-Boss engaged in any protected concerted activities of which Respondent was aware, or that union activity was a motivating factor in any adverse employment action affecting Charging Party. For this reason, I conclude that the charge filed by Gannon-Boss against the WCC fails to state a claim under the Act.

Similarly, the charge against the Union in Case No. 20-B-0409-CU; Docket No. 20-004514-MERC also fails to state a claim under PERA. A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). 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.

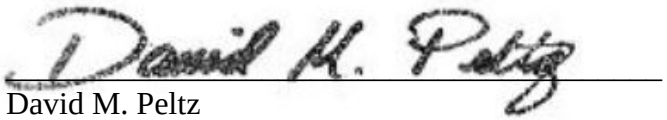
To prevail on a claim of unfair representation, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public Sch Dist*, 201 Mich App 480, 488 (1993). Although Charging Party repeatedly asserts in her pleadings that the Union failed or refused to enforce the terms of the collective bargaining agreement with the College, she does not explain how the actions of the administration constituted a violation of the contract language. In fact, the only specific contract provision cited by Charging Party in her response to the Union's motion to dismiss is a section of the collective bargaining agreement purportedly mandating that the grievance process must be completed within 45 days of the initiation of the dispute. According to Charging Party, it took the WCCEA and the College more than two years to complete a settlement of her grievance. Such a fact, standing alone, would not establish a breach of the duty of fair representation particularly where, as here, the delay ultimately resulted in a resolution of the dispute. Notably, Charging Party does not allege that the Union acted improperly in pursuing a settlement of the grievance, nor does Gannon-Boss contend that she was prejudiced in any manner by the delay. Accordingly, the charge in Case No. 20-B-0409-CU; Docket No. 20-004514-MERC must be dismissed on summary disposition.

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 Alice Gannon-Boss against her Employer, Washtenaw Community College, in Case No. 20-B-0421-CE; Docket No. 20-004513-MERC, and her charge against her Union, Washtenaw Community College Education Association, in Case No. 20-B-0409-CU; Docket No. 20-004514-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: July 9, 2020