STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OTTAWA COUNTY ROAD COMMISSION,
Public Employer-Respondent in Case No. C01 G-146,

-and-

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 25 AND LOCAL 1063,
Labor Organization-Respondent in Case No. CU01 G-039

-and-

MICHAEL A. FAHLING,
Individual Charging Party

_____/

APPEARANCES:

Warner, Norcross & Judd, LLP, by Robert W. Sikkel, Esq., and Robert A. Dubault, Esq., for the Respondent Employer

Miller Cohen, P.C., by Richard G. Mack, Esq., for the Respondent Labor Organization

Schenk & Boncher, by Daniel L. Burns, Esq., for the Charging Party

DECISION AND ORDER

On June 26, 2002, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaints as being without merit.

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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated:

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OTTAWA COUNTY ROAD COMMISSION,
Public Employer-Respondent in Case No. C01 G-146,

-and-

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 25 AND LOCAL 1063,
Labor Organization-Respondent in Case No. CU01 G-039

-and-

MICHAEL A. FAHLING,
Individual Charging Party
_____/

APPEARANCES:

Warner, Norcross & Judd, LLP, by Robert W. Sikkel, Esq., and Robert A. Dubault, Esq., for the Respondent Employer

Miller Cohen, P.C., by Richard G. Mack, Esq., for the Respondent Labor Organization

Schenk & Boncher, by Daniel L. Burns, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Lansing, Michigan on November 16, 2001, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 4, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On July 27, 2002, Michael A. Fahling filed the charge in Case No. C01 G-146 against his former

employer, the Ottawa County Road Commission (the Employer), and the charge in Case No. CU01 G-039 against his former bargaining agent, AFSCME Council 25 and Local 1063 (the Union). The charges were served on both Respondents on August 10, 2001. On August 22, 2001, Fahling amended his charge against the Union. Fahling's charge against the Employer alleges that it violated Section 10(1)(a) of PERA by "interfering with his rights under the collective bargaining agreement."1 Fahling alleges that the Employer failed in its attempt to extend his probationary period because it did not comply with contractual notice requirements. He maintains that the Employer therefore violated the contract on February 2, 2002 when, without just cause, it forced him to resign or be fired. Fahling's charge against the Union alleges that it violated its duty of fair representation under Section 10(3)(a)(i) of PERA by refusing to file a grievance over his forced resignation. He also alleges that the Union violated its duty of fair representation by misrepresenting his right to file a grievance under Section 11 of PERA.

Facts:

Respondents are party to a contract covering the term April 25, 2000-April 26, 2004. Section 8.2(a) of this contract provides for a probationary period for new hires:

> During the first six (6) months of actual active employment an employee shall be on probation. The Employer will provide a probationary employee with a written evaluation after thirty (30) days, three (3) months and at six (6) months. The Employer shall have the right to extend the probationary period for up to an additional six (6) months. The employer will notify the Union at least one (1) week in advance if the probationary period is extended. Probationary employees may be terminated for any reason not prohibited by statute and there shall be no responsibility to reemploy any probationary employee who is discharged, or otherwise terminated during the probationary period. There shall be no seniority among probationary employees. The Union shall represent probationary employees for the purpose of collective bargaining in respect to rates of pay, wages, hours or employment and other conditions of employment as set forth in Article I of this Agreement.

Fahling was hired by the Employer on June 5, 2000. Fahling was rated satisfactory or above average in all categories in his first evaluation, on June 28, 2000. Between his first and second evaluations, Fahling had a conversation with his supervisor, John Spinner, about a relative of Fahling's whom the Employer had fired for stealing. Spinner told Fahling that if he had known Fahling was related to this individual it would have been hard for Spinner to hire him. When Fahling was evaluated again on September 5, he was rated satisfactory or above average in all categories except "takes initiative when supervisor is not available."

On or about Wednesday, November 22, 2000, the Employer's managing director phoned Local 1063 President Roger Olthof and told him that the Employer had some concerns about Fahling. He said that there was a possibility that Fahling's probation would be extended. Olthof replied that this was the

1 In his post-hearing brief, Fahling also alleged that he was discharged for talking to other employees about his rights under the contract. Fahling did not raise this argument in his charge or at the hearing, and there is no evidence that Fahling discussed contract rights with his fellow employees.

Employer's right. On Thursday, November 30, the managing director wrote Olthof a letter stating that the Employer was extending Fahling's probationary period by one month. Fahling was shown his six-month evaluation on Wednesday, December 6. Spinner rated him as unsatisfactory in four areas. These were: cooperates with other employees; assists others as required and does not disrupt their work; accepts suggestions cooperatively; learns new tasks quickly. Spinner told Fahling during the interview that Fahling couldn't get along with his co-workers, and that no one was willing to work with him. Fahling was told that his probationary period was being extended by a month.

On the morning of Wednesday, December 27, or Thursday, December 28, the managing director called Olthof to tell him that the Employer was still not satisfied with Fahling's performance. He told Olthof that the Employer was going to extend Fahling's probation for another month. Fahling was given another written evaluation on Friday, January 5, 2001. He was rated satisfactory in all areas except "cooperates with other employees" and "no complaints from other employees." Spinner told Fahling that the problem with co-workers still existed, but that he didn't want to get into particulars. Fahling was told that his probation was extended for another month.

On Wednesday, January 30 or Thursday, January 31, 2001, the Employer's operations director told Olthof that Fahling was going to be offered the option of resigning or being terminated. On Friday morning, February 2, Fahling was called to a meeting with several supervisors. Fahling's Union steward, Phil Jewell, was present at this meeting. The Employer told Fahling that he had to resign or be terminated, and that if he resigned he would get a month of medical insurance and would be paid for the day. Fahling signed a resignation form.

Before Fahling left the premises on February 2, Fahling asked Jewel if he could file a grievance. Jewell told him that he could not, because he was a probationary employee. Fahling and Jewell had the same conversation a day or two later. A few days later, Fahling had a phone conversation with Olthof in which Olthof told him the same thing. Around April 30, 2001, Fahling called Olthof again and asked him to send Fahling copies of "the two letters (the Union) had received from the county regarding my probation extensions." Olthof said that he had received one letter for sure, and would look for it. On May 10, Olthof told Fahling that he would send Fahling a copy of the November 30, 2000 letter. Olthof also told Fahling that he recalled talking to the managing director a day or two after Christmas about Fahling's probation being extended a second time. Three or four days later, Fahling received a copy of the November 30 letter and a letter from Olthof stating that he remembered getting a call from the Employer about his case about two weeks before the letter was sent.

Discussion and Conclusions of Law:

Fahling alleges that the Employer violated Section 10(1)(a) of PERA by discharging him without good cause in violation of the contract. Section 10(1)(a) prohibits an employer from interfering with,

restraining or coercing public employees in the exercise of rights guaranteed by Section 9.2 It is unlawful for an employer to retaliate against an employee for attempting in good faith to exercise a right claimed under a collective bargaining agreement. However, an employer's breach of contract is not in itself a violation of Section 10(1)(a). *MERC v Reeths-Puffer School Dist*., 391 Mich 253, 259, 261 (1974). Fahling has not alleged that he was terminated for exercising his rights under the contract, but simply that his discharge was a breach of contract. I conclude that Fahling has not alleged that the Employer engaged in any conduct that would violate PERA, and that therefore he has failed to state a claim against the Employer under that Act.

Fahling's principle charge against the Union is that the Union breached its duty of fair representation by refusing to file a grievance for him on the grounds that he was a probationary employee when he was forced to resign. The contract here clearly prohibits the Union from grieving the discharge of a probationary employee. Fahling argues, however, that he was no longer probationary because the Employer failed to provide the Union with proper notice that it was extending his probation.

The Union argues that Fahling's charge is untimely under Section 16(a) of PERA. The Union relies on the fact that the charge was not filed and served on the Union within six months of the date that Fahling was told that the Union would not file a grievance on his behalf. Fahling maintains that the statute did not begin to run until he learned, in early May 2001, that the Union had not received proper notice of the extension of his probationary period. The limitation period under PERA commences when the person knows or should have known of the alleged unfair labor practice, i.e., of the act which caused his injury and that the act was improper. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). Since Fahling's claim is premised on the Union's acceptance of an allegedly defective notice, I find that Fahling's charge is not untimely because the statute of limitations on his claim was tolled until Fahling knew or had reason to know how and when the Union had received this notice.

I conclude, however, that Fahling has failed to demonstrate that the Union violated its duty of fair representation by refusing to file a grievance on his behalf. A union's duty of fair representation under PERA consists 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. *Goolsby v Detroit*, 419 Mich 651,679(1984), citing *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903 (1967). See also *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. When the union acts in good faith, it has considerable discretion to decide whether to proceed with a grievance. *Lowe v Hotel Employees*, 389 Mich 124, 146 (1973); International *Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1.

According to Fahling, the Union acted arbitrarily in ignoring the "plain language" of the contract. He also asserts that its disregard of the contract language constituted "inept conduct undertaken with

---

2 "It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice."

indifference to his interests." *Goolsby, supra,* at 682.Fahling maintains that the managing director's conversation with Olthof on November 22 did not constitute proper oral notice that his probationary period was being extended because the managing director only said that there was a "possibility" that it would be extended. Fahling argues that the Employer's subsequent written notice wasn't adequate under the contract language because it was sent on November 30, less than a week before Fahling's probationary period was to expire. Fahling also maintains that the contract doesn't permit the Employer to extend a probationary period more than once. I find, however, that Olthof's acceptance of the Employer's November 22, 2000 statement as notice that Fahling's probationary period was extended was not so completely outside the range of reasonableness as to amount to "unreasoned conduct." According to Olthof, he interpreted the contract to allow multiple extensions of an employee's probationary period, as long as these extensions did not exceed six months. I find that Olthof's interpretation was not so unreasonable as to constitute a "disregard of the contract language." I conclude, therefore, that the Union did not act arbitrarily when it refused to file a grievance on the grounds that Fahling was a probationary employee at the time he was offered the choice of resigning or being terminated.

Fahling argues, in addition, that the Union violated its duty of fair representation by misrepresenting to Fahling that he had no right to file a grievance when he had this right under MCL 423.211:

> An individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the agreement is not inconsistent with the terms of the collective bargaining agreement then in effect, provided that the bargaining representative has been given an opportunity to be present at such adjustment.

Fahling could not file a grievance under the contractual grievance procedure because Section 8.2(a) of the contract prohibited challenges to the termination of probationary employees. Nothing in the record indicates that the Union told Fahling that he could not attempt to resolve his grievance with the Employer outside of this grievance procedure, as MCL 423.211 permits.

In accord with the findings of fact, discussion, and conclusions of law set forth above, I conclude that Fahling did not demonstrate that the Employer violated PERA or that the Union violated its duty of fair representation under Section 10(3)(1)(i) of that Act. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____