STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

POLICE OFFICERS LABOR COUNCIL,
LOCAL 355
Respondent- Labor Organization,

Case No. CU00 J-38

-and-

MORRIS COTTON,
An Individual Charging Party-
_____/

APPEARANCES:

John A. Lyons, Esq., for Respondent

Morris Cotton, in pro per

DECISION AND ORDER

On September 7, 2001, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent Police Officers Labor Council, Local 355, did not breach its duty of fair representation in violation of Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ recommended that the unfair labor practice charges be dismissed. On October 1, 2001, Charging Party Morris Cotton filed timely exceptions to the ALJ's Decision and Recommended Order. Respondent filed a timely memorandum in support of the ALJ's Decision and Recommended Order on October 3, 2001.

The facts of this case were set forth in detail in the ALJ's Decision and Recommended Order and only Charging Party's basic allegations need be repeated here. Charging Party is employed by the City of Highland Park (the City) as a Police Lieutenant. Respondent is Charging Party's bargaining representative. Charging Party alleges, in an unfair labor practice charge filed on October 23, 2000, that Respondent breached its duty of fair representation by not representing his interests in the arbitration of a grievance filed by his coworker Willie Taylor, and by failing to process grievances Charging Party submitted on February 24 and 29, 2000. The February 24 grievance alleged that the City improperly failed to pay Charging Party holiday pay for a period that Charging Party was off duty as the result of a work-related injury. The February 29 grievance complained that Willie Taylor was promoted to Lieutenant and was granted higher seniority in that rank than Charging Party. On January 12, 2001, Charging Party filed an amended charge complaining that he had been improperly removed from the Union negotiating team in retaliation for filing the unfair labor practice charge.

Charging Party filed a further amendment to the charge on March 9, 2001. That amendment complains that the Union breached its duty of fair representation when it objected to the City's use of an evidence technician to investigate the March 1, 2001 break-in of Charging Party's locker at the workplace.

At the beginning of the hearing, Respondent moved to dismiss the charges contained in the two amendments asserting that they involved internal union matters. Charging Party's exceptions assert that the ALJ dismissed the amendments to the charges, and deny that Charging Party stipulated to the dismissal. However, it is evident from the record that Charging Party did in fact agree that the charges contained in the amendments would be dismissed.

Charging Party also excepts to the ALJ's finding that the parties stipulated to the dismissal of the charge which alleged that Respondent failed to represent Charging Party's interests in the arbitration hearing on Willie Taylor's grievance. The record reflects that the ALJ dismissed that part of the charge because it was not timely. As the ALJ pointed out on the record, the Commission has no jurisdiction over a charge filed more than six months after the act that is the subject of the charge. See MCL 423.216

It is the Charging Party's contention that Respondent should have given him the opportunity to participate in the arbitration hearing as a witness and to attempt to persuade the arbitrator that the decision should not affect his own seniority status. The arbitration hearing on the Taylor grievance was held in December 1999. The arbitrator's decision was issued on February 14, 2000. It is evident that Charging Party knew of the arbitration decision and its effect on his seniority status soon after its issuance because he filed the February 29 grievance to challenge the City's implementation of the arbitration award. It is equally evident that Charging Party knew that Respondent had decided not to permit him to have the opportunity to address the arbitrator. Yet, Charging Party waited until October of 2000, past the six-month limitations period, to file an unfair labor practice charge based on that denial. The statute of limitation contained in Section 16 of PERA, MCL 423.216, cannot be waived; nor can it be tolled by the pursuit of other remedies. See *Walkerville Rural Communities Schools*, 1994 MERC Lab Op 582. The ALJ correctly dismissed that portion of the charge as untimely.

Charging Party contends that he had subpoenaed seven witnesses to testify to facts surrounding the Taylor grievance, but the ALJ refused to hear testimony from those witnesses. Since the charge regarding the Taylor grievance and Respondent's failure to permit Charging Party to participate in the hearing on that grievance was untimely, testimony regarding that grievance was irrelevant to the matter before the ALJ. Therefore, if the ALJ had indicated that he would not take testimony from such witnesses, we would find no fault in such a ruling. Nothing in the record indicates that the ALJ denied Charging Party the opportunity to call witnesses who could testify about the matters properly before the ALJ. On the contrary, the record reflects that after the examination of the two witnesses called by Charging Party, he announced that he had no more witnesses to call.

Charging Party also excepts to the ALJ's finding that Respondent's failure to file a petition to arbitrate the February 24 and 29 grievances was not a breach of Respondent's duty

of fair representation. By the time of the hearing in this case, Respondent had not received a step four response from the City on either grievance though almost fourteen months had passed since Charging Party filed the two grievances. Nevertheless, Respondent asserted that it was ready to file a petition for arbitration once such response was received.

The Michigan Supreme Court noted in *Goolsby* v *Detroit*, 419 Mich 651, 661 (1984), that "a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith." Charging Party has not offered any evidence that would tend to establish that Respondent's actions in processing his grievances falls into either of those categories as Respondent adhered to the procedures it normally followed. As noted by the ALJ, the evidence in the record establishes that the City had a practice of delaying six months to a year before responding to step four grievances and, with the exception of grievances involving an employee discharge, Respondent typically does not file a petition for arbitration until after it has received the City's step four response. Thus, Respondent's actions in this matter are consistent with its usual practices at this stage of the grievance process.

Although the collective bargaining agreement provides that the City is to respond to a grievance within ten days when it reaches step four, the City's failure to respond within that ten-day period does not obligate Respondent to take any action to keep the grievance active. Respondent has fourteen days after receipt of the City's step four response to file a petition for arbitration. Inasmuch as the City has not given Respondent a step four response for either grievance, Respondent may still file a petition for arbitration. The fact that the Respondent could file a petition for arbitration before receiving a response from the City does not obligate it to do so when, as here, there is an established practice of waiting for the employer's response. An individual union member does not have the right to demand that his grievance be pressed to arbitration. The union must first be permitted to assess each grievance with a view to individual merit and determine whether to take the grievance to arbitration. The union has considerable discretion to decide which grievances shall be pressed and which shall be settled. In this case, we see no abuse of that discretion. See *Lowe* v *Hotel Employee's Union,* 389 Mich 123, 146 (1973). See also *Teamsters State, County and Municipal Workers, Local 214*, 1995 MERC Lab Op 185, 189.

Charging Party alleges in his exceptions that, as a result of Respondent's actions in not processing the grievances, they were subsequently denied. The record does not support Charging Party's assertions, as the grievances were still pending when the record closed. Moreover, Charging Party does not allege that the grievances were denied after the record was closed. Charging Party also asserts that Respondent has still not forwarded his grievances to arbitration, but he does not allege that the City issued a step four response. Therefore, it appears that Respondent, consistent with its usual practices, is still waiting for the City to issue a step four response.

We have reviewed all of Charging Party's exceptions and find them to be without merit. The evidence in the record does not establish a breach of the duty of fair representation. Accordingly, we adopt the ALJ's Decision and Recommended Order as our order in this case.

ORDER

It is hereby ordered that the unfair labor practice charges filed by Morris Cotton against Police Officers Labor Council, Local 355, are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION[1]

_____
Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Dated:_____

[1] Commission Chair Maris Stella Swift did not participate in this case.

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MORRIS COTTON,
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APPEARANCES:

Timothy J. Dlugos, Esq., for Respondent

Morris Cotton, in pro per

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, MSA 17.455(10) *et seq*., this case was heard in Detroit, Michigan on April 20, 2001, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. The proceedings were based upon an unfair labor practice charge filed by Morris Cotton against the Police Officers Labor Council, Local 355 on October 23, 2000. The charge was amended on January 11 and March 7, 2001. Based upon the record and briefs filed by June 21, 2001. I make the following findings of fact and conclusions of law and issue the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

On October 23, 2000, Charging Party filed an unfair labor practice charge which alleged that Respondent breached its duty of fair representation by not representing him during a December 16, 1999, arbitration hearing and by failing to process grievances he submitted on February 24 and 29, 2000. In its November 22, 2000, answer, Respondent denied that it committed an unfair labor practice and asserted that the Commission lacked jurisdiction because the charge was filed more than six months after the grievances were filed in violation of Section 16(a) of PERA, MCL 423.216(a), and should therefore be dismissed. In a November 30, 2000, order, I found that the

statute of limitations did not begin to run until August 22, 2000, when Charging Party inquired about the status of his grievances and, therefore, the October 23, 2000 charge was timely. During the hearing, the parties stipulated to the dismissal of amended charges filed on January 12 and March 1, 2000, and to Charging Party's claim that Respondent did not represent him at an arbitration hearing.

Findings of Fact:

The City of Highland Park and Respondent are parties to a collective bargaining agreement that governs the terms and conditions of employment for certain public safety officers. The contract contains a five-step grievance procedure that ends in binding arbitration. It sets forth time limits for responding to grievances and for advancing them between steps. It also provides that the time limits may be extended by mutual consent. The City has a practice of not responding to step-four grievances within the contract's ten-day time limit. However, according to Eric Holloway, Respondent's president, who was called as a witness by Charging Party, grievances remain active until the City provides an answer. After Respondent receives a step-four answer, it files a petition for arbitration, but a decision on whether to actually arbitrate grievances is made by a grievance review committee. Holloway testified that "it is common practice to file a grievance and perhaps maybe wait for arbitration for six months to a year." He explained that Respondent has the option of waiting for a step-four answer or advancing the grievance to the next step after the time limit has expired, but that the latter option has only been used when a bargaining unit member has been terminated.

In February 2000, Respondent filed two grievances on Charging Party's behalf. The first one alleged that the City violated the contract by not paying Charging Party for four holidays - Veteran's Day, Christmas, New Year's, and Martin Luther King's Day - during his three-month, duty-related leave of absence. In the second grievance, filed on February 29, 2000, Respondent alleged that the City violated the contract by promoting safety officer Willie Taylor to lieutenant and granting him greater seniority than Charging Party. Incongruently, Respondent's February 29 grievance challenged the City's compliance with a February 2000 arbitration decision which upheld a January 1999 grievance filed on Taylor's behalf that alleged that the City's promotion of Charging Party to lieutenant improperly denied Taylor a promotion and violated his rights under the contract.

Both grievances were denied by the City at steps one, two, and three and were advanced to step-four by Respondent. Richard Berninger, Respondent's liaison from the Police Officers Labor Council, Respondent's parent organization, was also called as a witness by Charging Party. Berninger testified that between August 2000, when Charging Party inquired about the status of his grievances, and January 2001, he made phone calls and sent a letter to the human resources director requesting step-four answers to the grievances filed on behalf of Charging Party and other bargaining unit members. As of the date of the hearing, the City had not provided step-four answers nor had Respondent filed a petition to arbitrate grievances filed on Charging Party's behalf.

Conclusions of Law:

Charging Party claims that Respondent committed an unfair labor practice by failing to timely process his grievances. Respondent claims that Charging Party has not been adversely affected by the delay in processing his grievances because they are considered active until the City provides a step-four answer. A union's duty of fair representation comprises 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, 177 (1967). "Arbitrary conduct," includes (a) impulsive, irrational, or unseasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* v *Detroit*, 419 Mich 651, 679 (1984); *Detroit Fire Fighters Ass'n*, 1995 MERC Lab Op 633, 637-638. A union's conduct, even if inept, must manifest "indifference to the interests of those affected" to establish a violation of PERA. Further, a union's failure to properly exercise its discretion must be accompanied by a showing that this failure could reasonably have been expected to have an adverse effect on a member or members.

There is insufficient evidence on the record to establish that Respondent violated its duty to fairly represent Charging Party. The record establishes that the City has an ongoing practice of failing to timely answer step-four grievances and with the exception of grievances involving a discharged employee, Respondent has a practice of waiting until the City provides an answer before filing a petition for arbitration. According to Charging Party's witness, it is not uncommon for Respondent to wait from six months to a year for the City to provide a step four answer. In this case, I find that Respondent took reasonable steps to process Charging Party's grievances. No evidence has been presented to establish that Respondent acted with indifference to Charging Party's interest or with an expectation that he would be adversely effected. A union does not breach its duty of fair representation merely by a delay in processing a grievance if the delay does not result in the denial of the grievance. *Teamsters State, County and Municipal Workers, Local 214*, 1995 MERC Lab Op 185, 189.

Even if Respondent's delay results in the denial of the February 29, 2000, grievance, Charging Party would not be prejudiced. The City promoted Taylor and granted him greater seniority than Charging Party to comply with a February 14, 2000, arbitration award that upheld Respondent's contention that Charging Party's promotion to lieutenant a year earlier violated the contract and Taylor's rights. Since arbitration awards are final and binding on all parties, Respondent is not required to revisit the issue of Taylor's promotion simply because Charging Party disagrees with the outcome. *City of Detroit Fire Dept.*, 1995 MERC Lab Op 604, 615; *Lake Orion Board of Education*, 1983 MERC Lab Op 172, 177. All other arguments raised by the parties have been carefully considered and I conclude that they do not warrant a change in the result. I, therefore, recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____