STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURON VALLEY SCHOOL DISTRICT,
Respondent-Public Employer in Case No. C02 F-123,

-and-

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
Respondent-Labor Organization in Case No. CU02 F-033,

-and-

RAYMOND PEREZ,
An Individual Charging Party.
_____/

APPEARANCES:

Grua, Jamo & Young, P.L.C., by James S. Jamo, Esq., and Abbott, Nicholson, Quilter, Esshaki & Youngblood, P.C., by James B. Perry, Esq., for the Public Employer

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq., and Bruce A. Miller, Esq., for the Labor Organization

Raymond Perez, In Propria Persona

DECISION AND ORDER

On September 21, 2004, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter dismissing Charging Party Raymond Perez's unfair labor practice charges. The ALJ found that Charging Party's claim against Respondent Huron Valley School District (the District) was untimely pursuant to Section 16(a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.216(a). He further held that Charging Party failed to show that Respondent American Federation of State, County and Municipal Employees (AFSCME) breached its duty of fair representation.

The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order on October 13, 2004. These exceptions did not comply with Rule 423.176 regarding service or form and could have been rejected on that basis.[1] In light of

[1] Both Respondents filed responses to the exceptions but also objected to the exceptions based on non-compliance with Rule 423.176.

the fact that Charging Party was not represented by counsel, we have nevertheless reviewed the record to determine if any violation of PERA has been demonstrated.

In his exceptions, Charging Party essentially reargues his claims that the District harassed him and that AFSCME failed to properly represent him in the grievance procedure. After reviewing the record carefully and thoroughly, we have decided to affirm the findings and conclusions of the ALJ and to adopt the recommended order.

We agree with the ALJ that Charging Party's unfair labor practice charge against Respondent Huron Valley School District must be dismissed as untimely under Section 16(a) of PERA. The last event that Charging Party cites involving the District occurred in October of 2001. Therefore, Charging Party's unfair labor practice charge regarding the District, filed on June 3, 2002, was untimely. As stated by the ALJ, the statute of limitations is jurisdictional and cannot be waived. We further note that Charging Party's charge against the Employer did not raise a statutory claim under PERA, but involved contractual matters subject to the grievance procedure.

We also agree with the ALJ that Charging Party has failed to demonstrate that AFSCME breached its duty of fair representation. In each instance that Charging Party protested AFSCME's handling of his grievances, AFSCME responded promptly, reiterated its rationale, and addressed his complaints. AFSCME's denial of Charging Party's request for arbitration on these issues does not establish that it acted arbitrarily, discriminatorily, or in bad faith. It is well established that an individual unit member cannot compel a union to advance a grievance to arbitration. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 146 (1973). A union must be allowed discretion over which grievances to advance to arbitration and may take into account the burden upon the contractual machinery, the amount at stake, and the likelihood of success. *Lowe*, *supra*; *East Jackson Pub Sch Dist*, 1991 MERC Lab Op 132, aff'd, 201 Mich App 480 (1993). AFSCME acted well within its discretion in declining to advance Charging Party's grievances to arbitration.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch, Commission Chairman

_____

Nino E. Green, Commission Member

Dated:_____

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APPEARANCES:

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

Raymond Perez, *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 and 423.216, this case was heard at Detroit, Michigan on December 20, 2002 and April 25, 2003, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties on or before June 23, 2003, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Background Matters:

Charging Party Raymond Perez is employed by the Huron Valley School District as a custodian at Brooks Elementary School and is a member of a bargaining unit represented by AFSCME Local 202. On June 3, 2002, Perez filed unfair labor practice charges against both the

school district and AFSCME. In Case No. C02 F-123, Perez alleges that the Respondent school district discriminated against him by violating its policy on harassment, and by conspiring with the staff of the Oakland County Medical Center to alter medical documents pertaining to treatment for an injury which he incurred while at work. The charge in Case No. CU02 F-033, as amended, alleges that Respondent AFSCME violated its duty of fair representation by failing to enforce the Employer's harassment policy, as well as contractual provisions pertaining to safety, leaves of absence and overtime, and by refusing to submit Perez's grievances to arbitration.

On December 17, 2002, Respondent Huron Valley School District filed a motion to dismiss the charge in Case No. C02 F-123. The school district argued that the allegations against it failed to state a claim upon which relief could be granted, and that the charge was time-barred pursuant to Section 16(a) of PERA, MCL 423.216(a).

At the start of the hearing in this matter, Charging Party raised several allegations which had not been set forth in his original charge against the school district. Perez asserted for the first time that the Employer breached provisions in the collective bargaining agreement pertaining to safety, leaves of absence and overtime. In addition, Perez asserted that the school district violated unspecified federal and state laws regarding health and safety. The school district objected to Charging Party's attempt to expand the scope of the proceedings and renewed its motion to dismiss the charge on statute of limitations grounds. Following oral argument on the matter, I granted the Employer's motion to dismiss, with a written order to follow.

Findings of Fact:

Harassment/Leave of Absence/Safety Violations

In the fall of 2001, Charging Party went to his Union complaining that representatives of the school district were harassing him. Specifically, Perez alleged that the principal of the school to which he was assigned, Kathy Svoboda, was addressing him in a condescending manner and treating him differently than other employees with respect to work assignments. In addition, Perez claimed that Svoboda was asking teachers to write negative letters about his conduct in order to get him terminated. On October 5, 2001, the Union filed a grievance on Charging Party's behalf alleging "harassment."

Around the same time, Charging Party complained to his Union representative that Svoboda was violating the collective bargaining agreement between the school district and AFSCME by requiring him to move heavy office furniture. Specifically, Perez cited Article 22 of the contract, which prohibits the school district from requiring an employee to perform "work involving dangerous equipment, or in violation of an applicable statute, court order, or governmental regulation relating to safety of person or equipment."[2]

[2] The Union ultimately determined that the tasks assigned to Perez did not constitute a violation of Article 22 and did not file a grievance concerning this allegation. However, the dispute between Svoboda and Perez over work assignments was discussed by the parties at the third step grievance hearing concerning the harassment allegations, as described below.

On October 16, 2001, Charging Party met with his supervisor, Randy Westerman, and his principal, Svoboda, to discuss the harassment allegations. Charging Party was represented at that meeting by his union steward. Following the meeting, the Employer denied the harassment grievance and a third-step hearing was scheduled.

On October 25, 2001, Charging Party injured his back while at work. He went to see his personal physician, who wrote a note recommending that he remain off for several days. A physician designated by the school board also examined Perez and ordered him back to work with restrictions. Initially, the Employer accepted the recommendations of Charging Party's physician over those of its own doctor and allowed Perez to remain off work. After several days, Perez turned in another note from his personal physician recommending that he remain off. This time, the Employer refused to accept the note and instructed Perez to report back to work.

Charging Party contacted his Union representative and requested that a grievance be filed. Perez alleged that the Employer's decision to require him to return to work violated the "Leaves of Absence" provision of the collective bargaining agreement between the parties. That provision, Article 16, provides, in pertinent part:

> Protracted Illness or Disability. All employees with nine (9) months length of seniority with the Employer will be granted a leave of absence in cases of protracted illness or disability provided that the employee shall be required to provide certification from a competent physician verifying the need for such leave of absence. The Board shall maintain the right to have any employee examined by a Board-designated physician at its expense at any time such examination is deemed necessary. In the event a difference of opinion persists between the employee's physician and the Board's designated physician, the matter shall be referred to an appropriate specialist in the area of controversy at the Ford Hospital, or the University of Michigan Hospital at Ann Arbor for final determination in the matter which shall be binding on all parties.

Leaves of absence under Article 16 of the contract are unpaid.

On October 30, 2001, the Union filed a grievance alleging that the school district violated the leave of absence provision of the contract. However, the leave of absence issue was never formally pursued by AFSCME because, subsequent to the filing of the grievance, the Employer decided to place Charging Party on paid workers' compensation leave, thereby rendering the issue moot in the opinion of the Union.

A third-step grievance meeting was held on November 20, 2001. Perez was represented at that meeting by his union steward, the chapter chairperson of Local 202, and AFSCME Council 25 staff representative Sharon Thacker. Charging Party came to the meeting with a list of approximately 30 to 40 issues which he wanted the Union to bring up on his behalf. Although Charging Party claims that his complaints were never meaningfully addressed during the course of that meeting, Thacker testified credibly that the Union attempted to raise as many issues as possible, and that there was a discussion between the parties concerning Svoboda's

alleged harassment of Charging Party, including the dispute over work assignments which formed the basis for Perez's safety complaints referred to above.

Following the third-step meeting, which lasted approximately three hours, the Employer notified Charging Party that the grievance had been denied. Thacker asked the school district to extend the deadline for submission of the grievance to arbitration so that another meeting could be scheduled between the Union and the Employer in an attempt to settle the dispute. When the Employer denied the extension request, Thacker submitted the harassment grievance to AFSCME's arbitration review committee.

Thacker spoke to Charging Party by telephone in late January or early February of 2002. At that time, Perez expressed his opinion that the Union had not sufficiently addressed his complaints. Following that discussion, Thacker sent Charging Party a letter dated February 4, 2002, in which she requested that Perez submit a list of the specific issues which he believed had not been dealt with so that the Union could attempt to set up another meeting with the school district. Charging Party never responded to Thacker's request.

In a letter dated February 7, 2002, AFSCME's arbitration director notified Perez that the Union had decided not to process his grievance to arbitration. The letter explained the Union's rationale for withdrawing the grievance as follows:

> It is apparent, from reading this file and the other grievances filed by the grievant, that he does not accept direction from the Employer well. The underlying issue centers on whether or not the Employer has the contractual right to direct the workflow of the grievant. The answer is yes, they do. The second issue is one of whether or not, in doing so, they violated the contract. The second response is that they have not. The grievant has a history of not being responsive to supervision. He was removed from one building to attempt to stabilize this situation. Things immediately began to escalate in this new building.
>
> There is no evidence of harassment in this case. The employer was well within their right to question the extent of that injury and to make a determination relative to whether or not they wished to take the risk of working the grievant with restrictions. They opted to place him on leave status. Again, there is no violation of the contract.

During the early part of February of 2002, Charging Party wrote to the Union and expressed his displeasure as to the manner in which his grievance had been handled. He also made several telephone calls to the Union to discuss the situation. On February 14, 2002, the Union's arbitration director wrote a letter to Charging Party summarizing the actions taken by AFSCME on his behalf and reiterating the Union's reasons for rejecting the grievance. The letter provided, in pertinent part:

> 7. You question the use of the Arbitration Review Committee or "just one person." Each of your grievances has been reviewed on one or more occasions by the Arbitration Review Committee. As I explained to you on

the telephone, they meet here in Lansing each Monday. They review each incoming file in addition to each appeal request. In this case, as with other appeals you have made, your files were reviewed an additional time by me personally. This was done based upon statements you have made that you somehow felt that you were not being treated fairly. I made a review of each file, independent of the Local, the Staff, and the Arbitration Review Committee; and I conducted that review impartially and based upon the record. This additional review was an "independent decision based on all of the facts of the case." It was not done with the intention of "just agreeing with the reasons of the Board Office."

8. You question the conclusions reached in the 2/7/02 response relative to the merits of your worker's compensation/harassment grievance. You did assert that you had been injured on the job. The Employer's actions did not violate the contract nor did they constitute any form of harassment. You assert that the Employer was guilty of "endangerment of your health." They reacted to your claim of endangerment. They attempted to work you on restrictions. By your own admission, you could not do the assignment and [they] placed you on leave status. There remains nothing within the file or your latest letter to support an assertion that this was in any way harassment. [Emphasis In Original.]

The letter concluded with an offer by the AFSCME arbitration director to facilitate a meeting with the arbitration review committee to discuss Perez's concerns. This meeting apparently did not occur.

Denial of Overtime

On Saturday, September 22, 2001, the school district needed a custodian to perform 10 and 1/2 hours of overtime work. Pursuant to the collective bargaining agreement, the work should have been offered first to Charging Party. However, the school district erroneously gave the work to another bargaining unit employee. The Employer became aware of its mistake two days later and, in an attempt to rectify the situation, immediately apologized to Perez and offered him the opportunity to perform 10 and 1/2 hours of overtime work on either Saturday, September 29, 2001 or Saturday, October 6, 2001.

Charging Party did not accept the Employer's offer. Instead, he asked the Union to file a grievance seeking monetary compensation for the missed overtime. Although the collective bargaining agreement between the parties does not provide for monetary compensation under such circumstances, the Union nonetheless filed a grievance on Charging Party's behalf on September 26, 2001, and it raised the issue at the third-step grievance meeting referred to above. During that meeting, there was reference made to two prior incidents in which the Employer had allegedly provided monetary compensation to employees for missed overtime; however, it was unclear who those employees were and when the incidents occurred. The Union did not believe that there was sufficient evidence to establish the existence of a past practice and urged Perez to consider the Employer's proposal. Perez refused to accept the offer.

In a letter dated November 20, 2001, the Employer denied the overtime grievance based upon its conclusion that "management . . . made every effort to provide Mr. Perez with work he feels was due." Thereafter, representatives from AFSCME Local 202 served a letter of intent to arbitrate upon the Employer and forwarded the grievance and supporting materials to the Union's arbitration review committee in Lansing.

In a letter dated January 17, 2002, the Union notified Perez that its arbitration review committee had decided not to process the overtime grievance to arbitration:

> In reviewing the Collective Bargaining Agreement and the documents provided, it is noted that the Employer discovered their oversite [sic] of the greivant [sic] and offered to rectify the oversite [sic] by offereing [sic] the griegvant [sic] an equal amount of time and pay. The Employer's last answer indicated that the offer was still available and the Collective Bargaining Agreement does not make provisions for payment for overlooked overtime, but through equalization it does allow for make-up.

Charging Party sought reconsideration of the Union's decision to withdraw the grievance, arguing that he was entitled to monetary compensation since the Employer had previously granted similar relief to two other similarly situated employees. In a letter dated February 14, 2002, the Union notified Perez of its decision to sustain the rejection of the grievance. In the letter, the Union indicated that Charging Party had failed to provide any documentation to support his assertion of a past practice:

> The grievant indicates that two other employees were denied overtime and paid. There is no documentation supplied that would establish the facts in those other cases. In this case, the Employer did not deny their error. They attempted to rectify that error immediately. The entire purpose of bringing errors to the Employer's attention is to afford them the opportunity to settle the matter at the earliest step. In this case, they attempted to do that and the grievant rejected their attempts.
>
> Based upon the above, this rejection is sustained and the file will be processed to closure in 10 days.

Discussion and Conclusions of Law:

Respondent Huron Valley School District argues that the unfair labor charge in Case No. C02 F-123 should be dismissed as untimely. I agree. Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The six months limitation period is a jurisdictional prerequisite to the consideration of a charge and may not be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583; *Detroit Federation of Teachers, Local 231*, 1986 MERC Lab Op 477. With respect to the school district, the most recent events about

which Charging Party complains allegedly occurred in October of 2001.[3] However, Perez did not file his charge against the school district until June 3, 2002, approximately eight months after the alleged violations. The fact that the Union was processing grievances on Charging Party's behalf during that time period does not toll the statute of limitations as to claims against the Employer. See e.g. *Troy School District*, 2003 MERC Lab Op ___; *Wayne County (Public Service Dept)*, 1993 MERC Lab Op 560. I, therefore, recommend that the school district's motion to dismiss be granted.

With respect to the charge against Respondent AFSCME, Charging Party failed to present any evidence that would establish a breach of the duty of fair representation. 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, 177; 87 S Ct 903; (1967); *Goolsby v Detroit*, 419 Mich 651(1984). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe*, *supra*. A union satisfies the duty of fair representation as long as its decision was within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67; 136 LRRM 2721 (1991); *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

In the instant case, Charging Party asserts that AFSCME failed to take action on his behalf in response to a breach of the school district's harassment policy, as well as violations by the Employer of contractual provisions related to safety, leaves of absence and overtime. With respect to the harassment allegations, the record indicates that the Union filed a grievance on Charging Party's behalf and represented Perez at a meeting with his supervisors to discuss the matter. The Union later filed grievances concerning the denial of overtime and leave of absence allegations. The harassment and overtime issues were advanced by the Union to the third step of the contractual grievance procedure, and AFSCME representatives participated in a third step meeting on Charging Party's behalf. Perez came to that meeting with a list of approximately 30 to 40 complaints which he wanted to have addressed, and the Union attempted to raise those issues which it felt were most pertinent.

The record does not support Charging Party's contention that his complaints were ignored at the third-step meeting. The November 20, 2001, meeting lasted for approximately

[3] After the first day of hearing in this case, Charging Party filed a motion to amend his charge against Respondent Huron Valley School District to include an allegation that the Employer had unlawfully terminated his workers' compensation benefits. Since this allegation was raised subsequent to my decision to recommend dismissal of the charge against the school district, and because the Commission has no jurisdiction over disputes pertaining to workers' compensation benefits, Charging Party's motion to amend the charge in Case No. C02 F-123 is denied.

three hours, and the Union's staff representative, Sharon Thacker, testified credibly that the harassment and overtime allegations were, in fact, discussed. Although a grievance alleging a violation of Article 22 of the contract was never filed, the dispute between Perez and the principal concerning work assignments was also brought as part of the harassment discussion. Following the third step meeting, when Charging Party complained to the Union that it had not addressed all of his complaints, Thacker immediately responded to his concerns by asking that he provide her with a list of the omitted items so that the Union could set up another meeting with the school district. However, Perez never replied to Thacker's letter.

Finally, Charging Party failed to prove that AFSCME's decision to withdraw his grievances was unlawful. The Union determined that the leave of absence issue had been rendered moot as a result of the school district's decision to place Perez on paid workers' compensation leave. The Union reviewed the harassment and safety allegations and determined that none of the actions complained of by Perez constituted a violation of the contract. AFSCME decided to withdraw the overtime grievance because it was persuaded that the Employer made an honest mistake and that its attempt to rectify that error was reasonable. With respect to Charging Party's assertion that the Employer had previously compensated two other employees for lost overtime, AFSCME determined that there was insufficient evidence to establish the existence of a past practice. A union has no duty to pursue a grievance which has no merit or which would be futile to pursue, nor does an individual member have the right to demand that a grievance be filed or processed to arbitration. See *Wayne County Comm Coll*, 2002 MERC Lab Op 379, 381; *SEMTA*, 1988 MERC Lab Op 191, 195; *Grosse Ile Office & Clerical Ass'n*, 1996 MERC Lab Op 155. Although Charging Party disagrees with the positions taken by the Union in this matter, he has not established that AFSCME acted arbitrarily, discriminatorily or in bad faith in refusing to process his grievances to arbitration.

I have carefully considered all other issues raised by Charging Party and conclude that they do not warrant a change in the result. Based upon the above discussion, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

It is hereby ordered that the unfair labor practice charges be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____