**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, LOCAL 1346,
Labor Organization-Respondent,

Case No. CU03 B-012

-and-

JOHN LAKEY,
An Individual Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.C., by Richard G. Mack, Jr., Esq., for Respondent

John Lakey, in Propria Persona

## DECISION AND ORDER

On June 23, 2005, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order 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

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

Dated: _____

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In the Matter of:

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SUPPLEMENTAL DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
(ON REMAND)

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on April 8, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including the testimony and exhibits submitted at the hearing, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and its History:

John Lakey filed this charge against his collective bargaining representative, the American Federation of State, County and Municipal Employees (AFSCME), Local 1346, on February 6, 2003. Lakey alleged that the Respondent violated its duty of fair representation toward him under PERA by filing a grievance which caused him to be demoted and to lose his accumulated seniority in February 2001.

On November 20, 2003, I issued a decision recommending that Respondent's motion for summary disposition be granted on the grounds that Lakey's charge was untimely under Section 16(a) of PERA. I found, based on the facts as alleged in Lakey's charge, that he had exhausted his internal union appeal of Respondent's actions by July 2, 2002. I concluded, therefore, that his February 6, 2003 charge was

untimely even if his claim was tolled while his internal union appeal was pending. Lakey filed exceptions to my recommended order. On September 28, 2004, the Commission concluded that the record was inadequate to support summary dismissal of Lakey's charge, and remanded the case for additional evidence and findings of fact and conclusions of law.

Facts:

In early 2000, Lakey was employed as an HVAC technician/contract coordinator (leader) for the Warren Consolidated Schools (the school district). Lakey's position was part of a bargaining unit represented by Respondent Local 1346. On August 21, 2000, Lakey requested a one-year leave of absence to take a job with General Motors. On September 21, 2000, after the school district denied his request, Lakey resigned. According to Lakey, he soon realized he had made a mistake. On November 8, 2000, Lakey submitted a letter to the school district rescinding his resignation. On November 13, the school district returned Lakey to his former position of contract coordinator/leader. The school district retroactively granted him an unpaid leave of absence for the period he was gone, and Lakey was allowed to retain his original seniority date of April 1, 1985.

On November 16, 2000, Respondent filed a grievance with the school district asserting that Lakey lost his seniority when he resigned. The contract between Respondent and the school district contained a provision stating that employees lose their seniority when they quit. According to the steward who handled the November 16 grievance, Gary Vujinovich, Respondent concluded that the school district violated this provision when it granted Lakey a retroactive leave of absence. Vujinovich testified that Respondent believed that allowing Lakey to retain his seniority from 1985 would be unfair to other unit members who had quit and then been rehired. In its grievance, Respondent maintained that Lakey should be treated as a new hire. Respondent also asserted that Mike Nelson, a member of the unit who had been performing the contract coordinator/leader's duties while Lakey was gone, should be awarded the job. Respondent pointed out to the school district that under the contract, the contract coordinator position should have been posted for bid five working days after Lakey resigned. It argued that Nelson should have been awarded the job before Lakey returned since Nelson was the only other employee qualified for the position.

The school district maintained that it had the right to allow Lakey to rescind his resignation. It also asserted that consideration should be given to Lakey's exceptional work performance. Respondent and the school district reached a settlement, the terms of which were set out in a January 16, 2001 letter to Respondent from the school district. Under the settlement, Lakey had two seniority dates. One seniority date, reflecting Lakey's return to work date of November 13, 2000, was to be used for purposes of bumping, bidding, layoff, promotion and demotion. A second seniority date, reflecting Lakey's original hire date, would determine vacation time, longevity and sick day accumulation. The school district also agreed, as a term of the settlement, that Nelson would receive the coordinator/leader position. On February 13, 2001, Respondent sent the school district a letter finalizing the settlement, and Lakey was demoted to HVAC journeyman.

Respondent is an affiliate local of the American Federation of State, County and Municipal Employees, Council 25 (Council 25). On March 6, 2001, Lakey initiated a timely internal appeal of

Respondent's decision to accept the settlement under Article X of the Council 25 constitution. Article X allows any member of a bargaining unit represented by Council 25 or one of its affiliated locals or chapters to appeal the union's handling of grievances, arbitration, negotiations, or other proceedings on the basis that the member was unfairly represented. The first step of the internal appeal process consists of a written request for hearing sent by certified mail to the president of the local union of which the individual is a member. The local union executive board then conducts a hearing. On April 24, 2001, the AFSCME Local 1346 executive board found that Lakey's appeal had no merit.

The second step of the internal appeals procedure is a hearing before Council 25's internal appeal tribunal. The tribunal consists of three Council 25 executive board members or other AFSCME members appointed by the president of Council 25. On or about May 8, 2001, Lakey filed a timely appeal to the tribunal. The tribunal heard his appeal on August 9 and September 17, 2001. On or about October 25, 2001, the tribunal issued a written decision concluding that Local 1346 had not breached its duty of fair representation.

After the tribunal's decision, Lakey's appeal proceeded directly to the fourth step of the appeal procedure. The fourth and final step of Council 25's internal appeal procedure is a hearing and decision by the Council 25 community review board. The community review board consists of impartial persons of good repute not working under the jurisdiction of AFSCME or employed by it. Panel members are appointed for fixed terms by ratification of the Council 25 convention on the recommendation of the Council 25 president. On January 22, 2002, panel chairman Thomas Gravelle and panel members David S. Tanzman and James T. Ellis heard Lakey's appeal. On February 15, the panel issued a written decision concluding that Lakey had not been unfairly represented.

On March 15, 2002, Lakey wrote a lengthy letter to AFSCME's international headquarters in Washington, D.C. In his letter, which was addressed to the chairperson of the judicial panel, Lakey asked to file an internal appeal under Article X of the international constitution. Lakey's letter referenced both the international's constitution and its members' bill of rights. On March 25, 2002, the judicial panel chairperson returned Lakey's letter, stating that the chairperson had carefully reviewed it and had found that the allegations Lakey made were not "chargeable offenses." The panel chairperson also sent Lakey a copy of the AFSCME international constitution and the rules of the international union's judicial panel.[1]

Lakey testified that after he received the March 25, 2002 letter, his only remaining appeal involved appearing in person at the AFSCME international convention in Las Vegas, Nevada in early July 2002. Lakey testified that, as he understood it, he was not required to file a notice of appeal indicating in advance his intention to appear at the convention. According to Lakey, he did not attend the convention because his

1 In its September 28, 2004 order, the Commission listed a number of documents to be included in the record made on remand. These included "the provisions of the Union's constitution and bylaws that set forth the internal union appeal process and time limits." At the April 8, 2005 hearing, Lakey and Respondent jointly submitted a copy of Council 25's constitution containing its internal appeal procedure. It is evident from the record that the AFSCME international constitution also contains some sort of internal appeal procedure. However, neither party brought to the hearing a copy of the international constitution, the international's internal appeal procedure, or the rules of its judicial panel.

wife was diagnosed with cancer and his stepfather with Alzheimer's disease.

On December 22, 2002, Lakey wrote a lengthy letter to the Commission stating that he "wish[ed] to appeal my union's treatment of me." This letter was sent to the Commission by certified mail and received on December 23. There is no evidence that Lakey sent a copy of this letter to Respondent. In his letter, Lakey asked the Commission to "hear his appeal even though there is a six month time limit." Lakey stated that he had not been properly advised of the "need for a timely appeal to MERC." According to Lakey, he believed when he sent this letter that he was filing a charge against Respondent. The Commission did not docket Lakey's letter as a charge. Instead, on January 28, 2003, the Bureau of Employment Relations wrote to Lakey informing him that he had a right to file an unfair labor practice charge, and enclosing a Commission charge form. Lakey filed his charge with the Commission on this form on February 6, 2003. Lakey did not send a copy of the charge to Respondent, and Respondent was not served with a copy of the charge until February 26, 2003.

Discussion and Conclusions of Law:

Section 16(a) of PERA states that no unfair labor practice complaint shall issue based upon an unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the party against which the charge is filed. The statute of limitations under Section 16(a) is jurisdictional, which means that the defense can be raised at any time during the proceeding and cannot be waived. *Troy Sch Dist*, 16 MPER 34 (2003); *Walkerville Rural Community Schs*, 1994 MERC Lab Op 582, 583.

In this case, the alleged unfair labor practice occurred either on November 16, 2000, when Respondent filed a grievance challenging the school district's decision to grant Lakey a retroactive leave of absence, or February 13, 2001, when Lakey was demoted and had his seniority adjusted pursuant to the terms of the grievance settlement. In the absence of a circumstance tolling the statute, Lakey's charge would have had to have been filed and served on Respondent no later than August 13, 2001.

The Court of Appeals has held that the filing of an internal union appeal tolls the statute of limitations on a claim alleging a breach of the duty of fair representation under PERA, at least when the claim is pursued in a judicial proceeding. *Silbert v Lakeview Ed Ass'n*, 187 Mich App 14 (1991) and *Leider v Fitzgerald Ed Ass'n*, 167 Mich App 210 (1988). However, the Commission has not to date applied this rule to claims brought as unfair labor practice charges. See *Nursing and Convalescent Employees Division of Local 79, SEIU*, 1991 MERC Lab Op 178; *Michigan Council 25, AFSCME*, 1995 MERC Lab Op 147 (no exceptions).

Lakey exhausted his appeals under Council 25's internal appeal procedure on February 15, 2002. Insofar as this record discloses, Lakey had no further recourse within AFSCME after he failed to attend the AFSCME international convention in early July 2002. If the statute was tolled while Lakey pursued his internal appeal and did not begin to run until early July 2002, Lakey had until sometime in early January

2003 to file his charge and serve it on Respondent.2 Lakey did not file his charge on a Commission form until February 6, 2003, and this charge was not served on Respondent until February 26, 2003.

Lakey argues that the date he filed his charge for statute of limitations purposes was December 23, 2002, the day that the Commission received his December 22 letter. R 423.151(1) states that a charge shall be prepared on a form furnished by the Commission, "except for good cause shown." There is no indication in the record that anything but Lakey's unfamiliarity with Commission procedures prevented him from filing his charge on a Commission form in December 2002. I find that Lakey failed to show good cause within the meaning of Rule 423.151, and that his December 22 letter was not a "charge" under the Commission's rules. I also note that Lakey failed to show that this "charge" was served on Respondent within the applicable limitations period, or that Respondent ever received a copy of this document. In sum, I find no theory under which Lakey's charge could be deemed timely under Section 16(a) of PERA.

I also find that the charge should be dismissed on its merits. A union's duty of fair representation under PERA 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. *Goolsby v Detroit*, 419 Mich 651,679 (1984); *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131,134. See also *Vaca v Sipes*, 386 US 171(1967). In *Goolsby*, the court defined "arbitrary" as conduct that is "impulsive, irrational, or unreasoned," or "undertaken with little care or with indifference to the interests of those affected," or "extreme recklessness or gross negligence." *Goolsby* at 679.

A bargaining representative has a duty to serve the interests of the unit as a whole, even if individuals within the unit are adversely affected by its decisions. *Lowe v. Hotel & Restaurant Employees, Local 705,* 389 Mich 123, 145 (1973); *Lansing Sch Dist*, 1989 MERC Lab Op 210, 216; *Wayne Co*, 1999 MERC Lab Op 533, 540 (no exceptions). When a union makes a decision that adversely affects a unit member, the decision is not arbitrary as long as it falls within a wide range of reasonableness. *City of Detroit,* 1997 MERC Lab Op 31, 34-35; *Airline Pilots Ass'n v O'Neill*, 499 US 65 (1991).

In September 2003, Lakey resigned his employment with the school district. About six weeks later, Lakey sought to return to his former position. The collective bargaining agreement stated that an employee who quit lost his or her seniority. After the school district granted Lakey a retroactive leave of absence that allowed him to return to his former position and retain his original seniority, Respondent filed a grievance. Respondent took the position that Lakey had to be treated as a new hire. It asserted that the school district was violating the contract by allowing Lakey to retain his seniority when other employees who had quit and returned had lost theirs. In keeping with its position that Lakey should be treated as a new hire and that his position should have been posted for bid in his absence, Respondent argued that another employee, Nelson, had a right to Lakey's old position. Lakey did not present any evidence that Respondent's agents were personally hostile toward him, and he did not allege that Respondent's actions were discriminatory. Rather, he asserted that by enforcing a strict interpretation of the contract, Respondent acted unreasonably and was

2 A charging party is responsible for the timely and proper service of a copy of the charge upon the party or parties against whom it is made, and both filing and service of the charge must be effected within the applicable period of limitations. R 423.151(4) and (5).

"mean-spirited." As discussed above, the Commission's role is not to decide whether Lakey's interpretation of the contract was more reasonable than Respondent's, but whether Respondent's conduct was "unreasoned," or "irrational," i.e. arbitrary. I find that Respondent's decision to file the grievance that resulted in Lakey's demotion was based on its interpretation of the contract, that this decision fell within the range of reasonableness, and that filing the grievance was a lawful exercise of Respondent's discretion. I conclude that Lakey failed to establish that Respondent violated its duty of fair representation, and I recommend that the Commission issue the following order.

## RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____