STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COUNTY,
Public Employer - Respondent in Case Nos. C04 H-213 and C04 I-228,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 25 AND LOCAL 2733,
Labor Organization - Respondent in Case Nos. CU04 I-042 and CU04 J-051,

-and-

MICHAEL SCHILS,
An Individual - Charging Party.
_____/

APPEARANCES:

Gallagher and Gallagher, P.C., by Paul T. Gallagher, Esq., for Respondent Employer

Miller Cohen, by Richard G. Mack, Jr., Esq., for Respondent Labor Organization

Michael Schils, *In Propria Persona*

DECISION AND ORDER

On September 2, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that neither Respondent Employer, Washtenaw County, nor Respondent Union, the American Federation of State, County and Municipal Employees (AFSCME) Council 25 and its affiliate, Local 2733, violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, as alleged in the charges, and recommending that all the charges be dismissed. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On September 22, 2005, Charging Party Michael Schils filed a timely request for an extension of time to file exceptions. Charging Party's request was granted and he was given until October 26, 2005 to file his exceptions. On October 26, 2005, Charging Party filed a request for a second extension of time to file his exceptions and asked that if the second extension was denied that his request be treated as his exceptions. The Commission reviewed Charging Party's request and, finding that he had not established good cause for a second extension, agreed to treat the October 26, 2005 request as timely exceptions to the ALJ's Decision and Recommended Order.

In his exceptions, Charging Party argues that the ALJ erred by recommending dismissal of the charges. After a careful and thorough review of the record, we find that the ALJ's findings of fact and conclusions of law must be affirmed.

The ALJ found, and we agree for the reasons stated in her Decision, that the charge in Case No. C04 H-213 was not timely. We also agree with the ALJ that the charge in Case No. CU04 J-051 merely restates a charge that was dismissed as untimely by this Commission in Case No. CU03 C-017 and, for that reason, fails to state a claim upon which relief can be granted. See *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004) aff'd, *Schils v Washtenaw Cmty Mental Health*, unpublished order of the Court of Appeals, entered January 5, 2005, reconsideration denied March 4, 2005 (Docket No. 259656). With regard to Case Nos. C04 I-228 and CU04 I-032, we also agree with the ALJ that the charges fail to state a claim upon which relief can be granted under PERA. Charging Party has failed to point to any case law or provision of PERA that would require either Respondent to provide Charging Party with the information he requested from them.

We have considered each of the arguments made in Charging Party's exceptions[1] and find them to be without merit. Accordingly, we adopt the findings and conclusions of the ALJ.

ORDER

The charges in Case Nos. C04 H-213, C04 I-228, CU04 I-042 and CU04 J-051 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

[1] In his exceptions, Charging Party contends that Respondent Employer violated his rights under PERA by having him forcibly removed from County property on October 14, 2005. Charging Party bases his claim of rights under PERA on his past employment with Respondent Washtenaw County, which ended on, or about, September 7, 2001. See *Washtenaw County*, 18 MPER 40 (2005) [Case Nos. C03 L-288 & C04 A-013]. Charging Party raised a similar claim in *Washtenaw County*, which we dismissed stating:

> At the time of the incidents challenged here, which occurred in 2003, Charging Party had not been a public employee for almost two years. Accordingly, Respondent's actions were not actions taken against a public employee and cannot give rise to a claim under PERA. We conclude that the Administrative Law Judge correctly determined that Charging Party had no standing to file charges regarding those incidents under Section 10(1)(a) and (d) of PERA.

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-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25 AND LOCAL 2733,
Labor Organization-Respondent in Case Nos. CU04 I-042 and CU04 J-051,

-and-

MICHAEL SCHILS,
An Individual-Charging Party.
_____/

APPEARANCES:

Gallagher and Gallagher, P.C., by Paul T. Gallagher, Esq., for the Respondent Employer

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

Michael Schils, in propria persona

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Michael Schils filed unfair labor practice charges against his former Employer, Washtenaw County (the Employer), on August 18 and September 9, 2004, and against his former labor organization, the American Federation of State, County and Municipal Employees (AFSCME) Council 25 and its affiliate, Local 2733 (the Union), on September 9 and October 5, 2004. The charges allege that the Respondents violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The Employer filed motions for summary disposition of the charges on October 21, 2004 and January 7, 2005, and the Union filed a motion for summary disposition on February 7, 2005. On March 7, 2005, oral argument was conducted at Detroit, Michigan before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based on the facts as alleged in the charges, the motions and argument, including an additional brief filed by Schils on May 24, 2005, I recommend that the charges be dismissed for the reasons set forth below.

Case No. C04 H-213:

Schils filed this charge against the Employer on August 18, 2004 and amended it on December 14, 2004. The charge, as amended, reads in pertinent part:

> 1. In January of 2000, the complainant filed a grievance regarding his termination.
>
> 2. In August of 2001, the complainant's bargained grievance procedure culminated in the complaint [sic] being re-instated to his prior position.
>
> 3. On his second day back to work, the complainant was ordered to submit to a drug test that was administered on the basis that it was a Federal CDL requirement, which was later shown to be false. Neither the CDL nor the drug testing had been bargained for. The drug test failed to comply with several federal regulations. The employer terminated the complainant based on the unverified results of the drug test. This was an action without precedent, since no other employee had ever been terminated on the basis of a drug test. The complainant filed another grievance regarding this second dismissal.
>
> 4. In April of 2002, the complainant was again awarded his job back through an arbitrator's decision, but this time the complainant was required to sign a Last Chance Agreement. The complainant refused to sign the LCA because it sought to force the complainant to forfeit his rights regarding the illegal drug test. Based on the complainant's refusal to sign the LCA, the arbitrator ruled that he was a "voluntary quit" in September of 2002.
>
> 5. In March of 2003, the complainant filed charged [sic] with MERC regarding his terminations.[2]
>
> 6. In the following months the complainant made several requests to the employer to remove the false drug test information from their records. In the continuing pattern of retaliation, these requests were either denied or ignored.
>
> The respondent employer continues to retain false information regarding the complainant, despite the complainant's insistence that this false information be removed. This is a continuation of a pattern of retaliation against the complainant for exercising his rights protected under the PERA. Through a response, dated June 28, 2002, received from the employer to a FOIA request, it was determined that the drug test which was used by the employer as the basis for the complainant's termination was not in compliance with the Federal regulations it

[2] On March 18, 2003, Schils filed unfair labor practice charges against the Respondent Employer and the Respondent Union. (Case Nos. C03 C-061 and CU03 C-017). Schils' allegations against the Employer included the claim that the Employer forced him to submit to a drug test in August 2001 to punish him for successfully pursuing a grievance over his January 7, 2000 discharge. On August 6, 2004, the Commission dismissed Schils' charges against both the Employer and the Union as untimely filed under Section 16(a) of PERA. *Washtenaw Community Mental Health*, 17 MPER 81 (2004).

was administered under. Another response from the employer to FOIA request, dated September 11, 2003, revealed that the respondent employer continues to retain the "MRO verified report," dated 8/31/01, despite its demonstrated falsity.

In its motions for summary disposition, the Employer asserts that Shils' charge should be dismissed as untimely. In considering whether to grant a motion for summary disposition based on a statute of limitations, the contents of the complaint or charge are accepted as true unless the moving party contradicts the plaintiff's or charging party's allegations and offers supporting documentation. *Pusakulich v City of Ironwood,* 247 Mich App 80 (2001).

Under Section 16(a) of PERA, a charge must be filed with the Commission within six months of the date of the alleged unfair labor practice. The statute of limitations under Section 16(a) is jurisdictional, and cannot be waived by a party's failure to raise it as a defense. *Walkerville Rural Community Schs*, 1994 MERC Lab Op 582, 583. The limitations period under Section 16(a) commences when the person knows or should know of the act which caused his injury and has good reason to believe that the act was improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

I find that alleged unfair labor practice in this case occurred when the Employer failed to remove Schils' drug test results from his file per his request. In accord with *Wines*, the statute of limitations began to run when Schils knew or should have known that the Employer did not intend to comply with his request and had a good reason to believe that the Employer's refusal was improper. According to the charge, in the months following March 2003, Schils made several requests to the Employer to have the drug test results removed from his file. The Employer did not respond to these requests. On September 11, 2003, Schils confirmed that the test results were still in his file. I find that by September 2003 Schils knew that the Employer was retaining the test results in his personnel file and that it did not intend to grant his request to remove them. [3] He also had good reason to believe that this was improper, since, according to Schils, he learned in June 2002 that the test had not been in compliance with federal regulations. I conclude that the statute of limitations under Section 16(a) began to run no later than September 2003 and that the charge filed in August 2004 was therefore untimely.

Schils argues that his charge was not untimely because the Employer still had his test results in its file when he filed the charge. According to Schils, under Section 16(a) he could have filed the charge at any time because the Employer is continuing to commit an unfair labor practice by retaining the test results. The Commission, however, has rejected this sort of "continuing violation" argument. See *Detroit Bd of Ed*, 16 MPER 29 (2003) (charging party's claim that the employer unlawfully forced him to sign a last chance agreement was not a continuing violation, even though the agreement remained in effect within the statutory limitations period); *City of Adrian*, 1970 MERC Lab Op 579 (employer's alleged refusal to bargain with the union by negotiating wage rates individually with employees not a continuing violation, even though the employer continued to pay these rates). I find that the Employer's continued retention of Schils' test results in its files is not a continuing violation. I conclude that

[3] During oral argument, Schils maintained that he did not know that the Employer continued to retain the test results until March 2004, when the Employer sent him a letter explicitly refusing his request to have them removed. This contradicts the facts as Schils set them out in the charge.

the Employer's motion for summary disposition should be granted and the charge in Case No. C04 H-21 should be dismissed as untimely.

Case No. CU04 J-051:

Schils filed this charge against the Union on October 5, 2004. It reads, in pertinent part:

> The respondent union, AFSCME Council 25, allowed the respondent Employer, Washtenaw County, to impose their CDL and drug testing policy without checking the facts used by the employer to justify these new policies. This failure on the part of the union became evident when the complainant received the letter from FMSCA official Greg Roling, dated November 21, 2003. Roling confirmed that his agency has no record of the communication described by Washtenaw County's Donna Sabourin in her July 7, 2000 memo to staff. Roling confirmed that there was no change in the vehicle description that requires a CDL and that vehicles that seat 9-15 passengers DO NOT require a CDL to operate.
>
> In the months following the implementation of these policies, employees made several inquiries regarding the source of this claim but were effectively misled by false assurances from the union that this matter was being looked into. The fact that these inquiries have been deflected for over 4 years reveals an egregious failure on the part of the union to protect the rights of its members.
>
> Neither the current union contract nor the contract that was in effect in July 2000, when these CDL and drug testing policies were implemented, contains any indication that a bargaining agreement was reached between the employer and union regarding these policies. The union has always maintained the claim that because these policies were federally mandated, they were exempt from bargaining. This claims that these policies were federally mandated is now shown to be false by the FMCSA letter. These policies were misrepresented as being federally required to the employees that were affected by them.
>
> The implications of this new charge, along with the inferences that can be drawn paint a clear picture of employer domination. The Union has failed in its most basic duty to protect the rights of its members. Not only did the union fail to check the false facts asserted by the employer to implement these policies, but then the union also served to deflect any inquiry that was made regarding these false facts. No attempt has been made by either the employer or union to include these mandatory subjects in the bargaining agreement.

In its February 7, 2005, motion for summary disposition, the Union argues that Schils' claim that the Union unlawfully failed to challenge the CDL and drug testing policies implemented by the Employer in 2000 was previously raised in Case No. CU03 C-017 and dismissed by the Commission as untimely in its August 6, 2004 decision in that case.[4]

[4] See FN 1.

In Case No. CU03 C-017, Schils alleged that the Union:

> Refused to acknowledge that Ford F350s do not require a CDL to operate, despite the many times staff attempted to bring it to AFSCME's attention (letter 1-19-02, email 1-31-02, 5-13-02, 7-19-02, 9-30-02 and numerous verbal exchanges going back over two years). AFSCME's standard reply has been, "the CDL issue is being taken care of, "(6-12, 13-02 [sic]) or the CDL Policy and Bargaining Agreement are not part of the grievance. (5-16-02).

The Commission concluded that this allegation was untimely. It held that the statute of limitations began to run when Schils should have reasonably realized that the Union would not act on his complaints. It noted that Schils acknowledged that he had complained to the Union regarding this matter for over two years prior to the filing of his charge on March 18, 2003, and that he never received a satisfactory response.

I agree with the Union that the allegations in Case No. C04 J-051 are simply restatements of allegations which were made and dismissed by the Commission as untimely, in Case No. CU03 C-017. I conclude that a charge that simply restates allegations that have already been litigated does not state a claim upon which relief can be granted under PERA, and I recommend that the Commission dismiss the charge in Case No. C04 J-051 for that reason.

Case Nos. C04 I-228 and CU04 I-042:

Schils filed the charge in Case No. C04 I-228 against the Employer on September 9, 2004. The charge states:

> Individual Charging Party Michael Schils files this attachment to the unfair labor practice charge. The complainant understands the PERA to require the disclosure of documents pertaining to pending and possible future Unfair Labor Practice charges. Based on this understanding, the Charging Party alleges that Respondent Washtenaw County continues to violate the Public Employment Relations Act (PERA) in the following manner:
>
> Respondent Washtenaw County continues to deny the complainant's request for documents critical to support the complainant's pending Unfair Labor charges. The denial of information also prevents the complainant from discovering possible future causes of action, violations of the PERA against his employer. The complainant has made these requests under the authority of both the PERA and the FOIA.
>
> 1. The respondent refuses to provide password access to the respondent's policies and procedures available to employees on the internet.
>
> 2. The respondent refuses to provide documentation pertaining to the Recipient Rights investigation that resulted in the complainant's first termination. The complainant needs this material to support a charge that this investigation violated

many aspects of the Mental Health Code. If substantiated, this will show a repudiation of the bargaining agreement done with full cooperation of the union.

3. The respondent refuses to provide the identities of the individuals on the Recipient Rights Appeals Committee, which is also a violation of the Mental Health Code. The complainant only discovered this right to appeal and other documentation required by the Mental Health Code when he received the Recipient Rights handbook from the respondent.

4. The respondent also continues to deny the complainant documents pertaining to the arbitrator selection procedure. The Bargaining Agreement explicitly states that the arbitrator shall be selected on a rotating basis. The complainant seeks documentation that verifies that the respondent complied with the procedure set forth in the Bargaining Agreement.

5. The complainant also seeks documents pertaining to the CDL and drug testing procedures of the respondent. The respondent refuses to provide records of how these policies have been applied to other employees. The respondent also refuses to provide information regarding the "random" selection procedure employed. The complainant seeks this documentation to support his allegation that the respondent's application of these policies to him was grossly arbitrary and retaliatory, and in violation of the PERA.

Schils filed the charge in Case No. CU04 I-042 against the Union on September 9, 2004. The charge reads:

Individual Charging Party Michael Schils files this attachment to the Unfair Labor Charge against the respondent union AFSCME Council 25. The complainant understands the PERA to require the disclosure of documents pertaining to pending and possible future Unfair Labor charges. Charging Party alleges that Respondent AFSCME Council 25 continues to violate the Public Employment Relations Act (PERA) in the following manner.

Respondent AFSCME Council 25 continues to deny the complainant's request for documents critical to support the complainant's pending Unfair Labor charges. This also prevents the complainant from discovering possible future causes of action, violations of the PERA against the respondent. The complainant has made these requests under the authority of both the PERA and the FOIA:

1. November 1, 2001 letter from Paul Gallagher to AFSCME's Dennis Nauss.
2. January 7, 2002 letter from arbitrator George Roumell, Jr. to Gallagher.
3. Any material relation to Roumell/Gaston/Gallagher conference call referred to in Roumell's May 2002 ruling.
4. October 30, 2001 letter from Ruth Montgomery to George Roumell, Jr., referred to in Roumell's May 2002 ruling.

5. July 11, 2002 letter fro Betty Gaston to George Roumell, Jr, referred to in Roumell's Sep 2002 ruling.
6. All documents relating to the meeting that was held on 1-7-02 by the Arbitration Review Panel of Council 25 regarding the complainant's situation.
7. All remaining documents regarding the complainant currently in the possession of AFSCME Council 25 and Local 2733.

The respondent claims they have no obligation under PERA to provide these documents. The complainant seeks an order compelling disclosure from the Commission.

On October 11, 2004, Schils filed motions for summary judgment on both charges. On November 30, 2004, I denied these motion on the grounds that Schils had failed to explain how the Respondents had violated PERA by refusing to provide him with the information he requested.

In its motions for summary disposition, the Employer asserts that both Schils' charge in Case No. C04 H-213 and the charge in Case No. C04 I-228 are untimely. However, the Employer's motions do not specifically address the allegations contained in Case No. C04 I-228. Since summary disposition must be based on the facts as alleged by the charging party, and the charge in Case No. C04 I-228 does not state when Schils requested the information set out the charge, I find that summary dismissal of this charge as untimely is not appropriate.

In its motion for summary disposition, the Union asserts that the charge in Case No. CU04 I-042 should be dismissed because Schils made these same allegations in a previous charge, Case No. CU03 C-017, where the Commission found them to be untimely.[5] In Case No. CU03 C-017, Schils alleged that in July and September 2001, he brought the Employer's failure to respond to an earlier FOIA request to the Union's attention. In that charge, Schils claimed that the Union violated its duty of fair representation by failing or refusing to address the Employer's failure to respond to his FOIA request. In the instant case, Schils claims that the Union has violated its duty of fair representation by refusing to provide him with certain documents within the Union's possession. I find that this allegation was not part of the charge in Case No. CU03 C-017.

The Union also asserts that the charge in Case No. CU04 I-042 does not allege any unfair labor practices by the Union occurring within six months of the date the charge was filed, and that the charge is untimely under Section 16(a). However, since the charge does not state when Schils requested these documents from the Union, summary dismissal on the basis that the charge is untimely is not appropriate.

However, R 423.165(1) gives an administrative law judge the authority to dismiss a charge on his or her own motion for any of the reasons set forth in subsection 2 of that rule.[6] R 423.165(2) (d) provides that a charge may be dismissed because the charging party has failed to

[5] See FN. 1

[6] These include lack of jurisdiction over a party or subject matter, the statute of limitations, failure to state a claim upon which relief can be granted, and the absence of a genuine issue of material fact.

state a claim upon which relief can be granted. In deciding whether Schils has stated a claim on which relief may be granted under PERA, I must accept all factual allegations in the charge as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construe those facts in the light most favorable to the nonmoving party. See *Alan Custom Homes, Inc v Krol*, 256 Mich App. 505, 507-508 (2003); *Maiden v Rozwood*, 461 Mich. 109, 119 (1999).

In both Case No. C04 I-228 and CU04 I-042, Schils states that he "understands the PERA to require the disclosure of documents pertaining to pending and possible future Unfair Labor Practice charges." However, Schils has not cited any case law in support of his claim that the Respondents have violated PERA by failing to provide him with these documents, nor has he even cited the sections of PERA that he believes the Respondents to have violated. I find that Schils has failed to allege in either Case No. C04 I-228 or CU04 I-042 that the Respondents engaged in any conduct that would violate PERA.

Section 9 of PERA gives public employees only certain specific rights: the right to organize together and 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, and to negotiate and bargain collectively with their public employers through representatives of their own free choice. An employer violates Section 10(1) (a) of PERA by actions that interfere with, restrain or coerce public employees in the exercise of their Section 9 rights, Section 10(1) (b) of PERA prohibits an employer from initiating, creating, dominating, contributing to or interfering with the formation or administration of a labor organization, and Section 10(1) (c) prohibits an employer from discriminating against employees to encourage or discourage union membership. None these sections require an employer to provide or even respond to requests for information from current or former employees, even if the information might be relevant to the employees' unfair labor practice claims.[7] Schils' claim that the Employer violated the Michigan Freedom of Information Act (FOIA), MCL 15.231 et seq, is not a claim under PERA. I conclude that the charge in Case No. C04 I-228 should be dismissed for failure to state a claim against the Employer upon which relief can be granted under PERA.

I also find that Schils has failed to allege in Case No. CU04 I-032 that the Union engaged in any conduct that would violate PERA. A union violates Section 10(3) (a) (i) of PERA when it breaches its duty of fair representation toward the employees it represents. 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. *Detroit Bd of Ed*, 16 MPER 29 at 87; *Goolsby v Detroit*, 419 Mich 651, 679 (1984). See *Vaca v Sipes*, 386 US 171, 177 (1967). Schils states in this charge that he wants the Union to provide him with documents that might support his current claims against it or provide him grounds for new ones.

[7] Under Section 15 of PERA, a public employer has a duty to bargain collectively with the representatives of its employees, and an employer's refusal to bargain violates Section 10(1) (e) of the Act. An employer's duty to bargain in good faith requires it to supply a union that represents its employees with requested information that will permit the union to engage in collective bargaining and to police the administration of the contract. See, e.g., *Wayne Co*, 1997 MERC Lab Op 679, 683; *Ecorse Pub Schs*, 1995 MERC Lab Op 384, 387. However, the duty to bargain runs between the union and the employer, and an individual employee cannot assert the rights of the union under Section 15. *Michigan Council 25 AFSCME*, 1994 MERC Lab Op 195,199; *City of Hazel Park*, 1979 MERC Lab Op 177, 181.

However, Schils has not explained why the Union violated its responsibilities toward him by refusing to provide these documents. I conclude that the charge in Case No. CU04 I-042 should be dismissed for failure to state a claim against the Union upon which relief can be granted under PERA.

For the reasons set out above, I conclude that Schils' charge against the Employer in Case No. C04 H-213 was not timely filed under Section 16(a) of PERA. I recommend that the Commission grant the Employer's motion for summary disposition and dismiss this charge on that basis. I conclude that Schils' charge against the Union in Case No. CU04 J-051 should be dismissed because the allegations contained in that charge were made in a previous charge, Case No. CU03 C-017, and dismissed by the Commission as untimely in that case. Finally, I conclude that the charges in Case Nos. C04 I-228 and CU04 J-051 should be dismissed because they fail to state a claim against either Respondent upon which relief could be granted under PERA. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges in Case Nos. C04 H-213, C04 I-228, CU04 I-042 and CU04 J-051 are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern, Administrative Law Judge

Dated: _____