STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent in Case No. C07 D-084,

-and-

LOCAL 2057, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES (AFSCME),
Labor Organization-Respondent in Case No. CU07 D-019,

-and-

TIMOTHY ZIOLKOWSKI,
An Individual-Charging Party.
_____/

APPEARANCES:

Ben K. Frimpong, Esq., Staff Attorney, for Respondent Union

Timothy Ziolkowski, *In Propria Persona*

DECISION AND ORDER

On May 30, 2007, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition finding that Charging Party Timothy Ziolkowski's allegations against Respondent Wayne County (the Employer) do not state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended. The ALJ also found that Charging Party failed to state a claim upon which relief can be granted against Respondent Local 2057, American Federation of State, County and Municipal Employees (AFSCME or the Union). In his charge against Respondent Wayne County, Charging Party alleged that the Employer violated PERA by improperly revoking his promotion in 2002. Charging Party alleged in his charge against Respondent AFSCME that the Union improperly refused to arbitrate his grievance over the Employer's action. The ALJ issued an Order to Show Cause to provide Charging Party with the opportunity to assert additional facts in support of his claims. Upon review of the charges and Charging Party's response to the Order to Show Cause, the ALJ found that Charging Party failed to allege facts in either case that could support a finding that the charge was filed within the six-month statute of limitations period.

Moreover, the ALJ concluded that the charge against the Employer did not assert facts that would indicate that the Employer was motivated by Charging Party's union or other protected activity when it took adverse action against him. With respect to the Charge against the Union, the ALJ found that Charging Party failed to allege that AFSCME was motivated by malice or other improper motive when it refused to arbitrate his grievance. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On June 5, 2007, Charging Party filed exceptions to ALJ's Decision and Recommended Order.[1] In his exceptions, Charging Party alleges that the Employer did not have a valid reason for revoking his promotion and that the Union had a duty to arbitrate his grievance. In addition, he asserts that the ALJ erred in failing to find an unfair labor practice. Upon review of Charging Party's exceptions, we find them to be without merit.

The Charge in Case No. C07 D-084 was filed on April 23, 2007, and asserts that the Employer treated Charging Party improperly or unfairly in revoking his promotion in 2002. The Charge in Case No. CU07 D-019, also filed on April 23, 2007, alleges that the Union pursued a grievance under the contract but that it refused to go to arbitration on that grievance, even though Charging Party was a dues paying member. Charging Party's allegations refer to events that occurred in 2002 or 2003, at the latest. As the ALJ explained in his Decision and Recommended Order, to be timely, a charge must be filed within six months of the conduct of which the charge complains. The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Communities Schs*, 1994 MERC Lab Op 582, 583. A claim accrues when the charging party knows, or should know, of the alleged unfair labor practice. *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836. Filing a grievance does not toll the statute. *Wayne Co*, 1993 MERC Lab Op 560; *Ann Arbor Pub Schs*, 1992 MERC Lab Op 257. In *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004), the Commission explained that when a charging party's complaint against his union is based on the union's inactivity, the statute of limitations begins to run at the point that the charging party reasonably should have realized that the union would take no further action on his behalf. See also *Pantoja v Holland Motor Express, Inc*, 965 F2d 323 (CA7, 1992); *Shapiro v Cook United, Inc*, 762 F2d 49 (CA6, 1985).

Here, the charged action of Respondent Employer and the charged inaction of Respondent Union occurred and were known by Charging Party several years before the Charges were filed. Charging Party did not allege facts in his response to the ALJ's Order to Show Cause or in his exceptions to the ALJ's Decision and Recommended Order that would indicate that either Respondent committed an unfair labor practice within six months prior to the date the Charge was filed.

Moreover, as the ALJ concluded, the Charges do not state claims upon which relief can be granted under PERA against either Respondent. The Charge against the Union does not allege that the Union's action, or inaction, was arbitrary, capricious, or motivated by bad faith. Thus, it does not allege the necessary components of a claim asserting a breach of duty of fair representation. See *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Vaca v Sipes*, 386 US 171, 177 (1967). A union has considerable discretion in deciding whether to file a grievance and

[1] Neither Respondent filed a response to the exceptions.

whether to pursue it to arbitration. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 146 (1973). The Charge has failed to allege any fact that would support a conclusion that Respondent Union had abused its discretion in this matter.

The Charge against the Employer fails to allege that the Employer's action was motivated by Charging Party's union or other protected activity. Such allegations are necessary components of a claim by an individual charging party that adverse action taken by his or her employer was discriminatory in violation of PERA. *MESPA v Evart Pub Schs*, 125 Mich App 71 (1983). Where an individual has alleged both breach of contract by his employer and breach of the duty of fair representation by his union, the individual charging party cannot pursue the contract claim against the employer unless he is successful in his duty of fair representation claim against the union. *Knoke v East Jackson Sch Dist*, 201 Mich App 480, 485-486 (1993). Thus, the Charge in this case does not state a claim upon which relief can be granted against Respondent Employer.

Neither Charging Party's response to the ALJ's Order to Show Cause, nor his exceptions alleged additional facts that would be sufficient to state a claim under PERA against either Respondent. Consequently, for the reasons stated by the ALJ, we agree with the ALJ's conclusion that both charges are untimely and fail to state claims upon which relief can be granted under PERA.

ORDER

The unfair labor practice charges are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Respondent-Public Employer,
in Case No. C07 D-084,

Case No. C07 D-084 &
CU07 D-019

-and-

LOCAL 2057, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICPAL EMPLOYEES (AFSCME),
Respondent-Labor Organization,
in Case No. CU07 D-019,

-and-

TIMOTHY ZIOLKOWSKI,
An Individual Charging Party.
_____/

APPEARANCES:

Timothy Ziolkowski, Charging Party, appearing personally

Ben K. Frimpong, for the Respondent Union

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

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 assigned to Doyle O'Connor, Administrative Law Judge (ALJ) on behalf of the Michigan Employment Relations Commission.

On February 23, 2007, two related charges were filed in this matter. The charge in case CU07 D-019 asserted that Respondent AFSCME Local 2057 (the Union) violated its duty to fairly represent Timothy Ziolkowski (the Charging Party) by refusing to go to arbitration over a grievance. The second charge, filed against Respondent Wayne County (the Employer) in case C07 D-084 alleged that the Employer treated Ziolkowski unfairly regarding the revocation of a promotion in 2002. On May 1**,** 2007, pursuant to R 423.165(2)(d), the Charging Party was ordered to show cause within twenty-one days why the two charges should not be dismissed for failure to state claims upon which relief can be granted. A response was filed on May 23, 2007.

The Charge and Findings of Fact Regarding the Employer:

On February 23, 2007, the Charge in case no. C07 D-084 was filed, asserting that the Employer treated Charging Party improperly or unfairly in revoking his promotion in 2002. The cover letter submitted with the charge acknowledged that there had been considerable delay by Charging Party in filing the charge. The order to show cause advised Charging Party that to avoid dismissal of the Charge, any response must provide a factual basis establishing the existence of alleged discrimination in violation of PERA and establishing that it occurred within six months of filing the charge. The response to the order did not provide any information or allegation regarding any disputed events occurring within the statute of limitations period.

According to the charge, all of the events that lead to the filing of the charge occurred in 2002 and 2003.

Discussion and Conclusions of Law Regarding the Charge Against the Employer:

The Public Employment Relations Act (PERA) does not prohibit all types of discrimination or unfair treatment, nor is the Commission charged with interpreting a collective bargaining agreement to determine whether its provisions were followed. Absent a factually supported allegation that the Employer was motivated by union or other activity protected by Section 9 of PERA, the Commission is prohibited from making a judgment on the merits or fairness of the actions complained of by Charging Party in this matter. See e.g. *City of Detroit (Fire Department)*, 1988 MERC Lab Op 561, 563-564; *Detroit Board of Education*, 1987 MERC Lab Op 523, 524. Because there is no allegation suggesting that the Employer was motivated by union or other activity protected by PERA, the charge against the Employer fails to state a claim upon which relief can be granted.

Additionally, under PERA, there is a strict six month statute of limitations for the filing and service of charges and a charge alleging an unfair labor practice occurring more than six months prior to the filing and service of the charge is untimely. The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. Dismissal is required when a charge is not timely or properly served. See *City of Dearborn,* 1994 MERC Lab Op 413, 415. The events that lead to the filing of the charge all occurred in 2002 or 2003 and therefore the charge is untimely.

Taking each factual allegation in the charge and in the response to the order in the light most favorable to Charging Party, the allegations in C07 D-084 do not state a claim against the Employer under the PERA, the statute that this agency enforces, and the charge is therefore subject to summary dismissal.

The Charge and Findings of Fact Regarding the Union:

The charge in case no. CU07 D-019 alleges that the Union pursued a grievance under the contract but that it refused to go to arbitration on that grievance, even though Charging Party Ziolkowski is a dues paying member. As set forth in the documents supplied by Ziolkowski, the Union pursued a grievance on his behalf at step 3 and at step 4 in the grievance procedure, where

it was denied on February 24, 2003. As alleged by Ziolkowski, the Union then made a decision not to take that case to arbitration.

The order to show cause advised Charging Party that to avoid dismissal of the Charge, any response must provide a factual basis to proceed that establishes the existence of alleged improper conduct by the Union in violation of PERA and establishes that it occurred within six months of filing the charge. The response to the order did not provide any further information or allegations regarding the claim against the Union.

Discussion and Conclusions of Law Regarding the Charge Against the Union:

Ziolkowski alleges no facts indicating malice or improper motive on the part of the Union officials. The facts alleged show only that there is a dispute between Ziolkowski and the Union over the viability of the grievance. The elected officials of a union have the right, and the obligation, to reach a good faith conclusion as to the proper interpretation of the collective bargaining agreement in a particular situation, and are expected, and entitled, to act on behalf of the greater good of the bargaining unit, even to the disadvantage of certain employees. *City of Flint,* 1996 MERC Lab Op 1.

The fact that Ziolkowski is dissatisfied with his union's efforts or ultimate decision is insufficient to constitute a proper charge of a breach of the Union's duty. *Eaton Rapids Ed Assoc,* 2001 MERC Lab Op 131; *Wayne County DPW,* 1994 MERC Lab Op 855. Because a union's ultimate duty is to the membership as a whole, the Respondent Union has considerable discretion to decide how, or as here whether or not, to pursue and present particular grievances. *Lowe v Hotel & Restaurant Employees Union, Local 705,* 389 Mich 123, 145-146. The Union's decision on how to proceed in a grievance case is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill,* 499 US 65, 67 (1991); *City of Detroit (Fire Dep't),* 1997 MERC Lab Op 31, 34-35.

Moreover, despite the order to show cause, Ziolkowski has not offered any assertion that any of the complained of conduct by the Union occurred within six months of his filing of the charge. To the contrary, the documents submitted by Ziolkowski establish that all the disputed conduct, including the Union decision to not proceed to arbitration on the grievance took place in 2003, which is significantly more than six months before the filing of the charge. As with the charge against the Employer, the six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. Dismissal is required when a charge is not timely or properly served. See *City of Dearborn*, 1994 MERC Lab Op 413, 415. Since the events that lead to the filing of the charge all occurred in 2002 or 2003, the charge is untimely.

Taking each factual allegation in the charge and in the response to the order in the light most favorable to Charging Party, the allegations in case no. CU07 D-019 do not state a claim against the Union under PERA, the statute that this agency enforces, and the charge is therefore subject to summary dismissal.

RECOMMENDED ORDER

The unfair labor practice charges are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Doyle O'Connor
Administrative Law Judge

Dated:_____