STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF BENTON HARBOR,
Public Employer-Respondent in Case No. C07 E-101,

-and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Respondent in Case No. CU07 E-024

-and-

DENNIE BROWN,
Individual-Charging Party.
_____/

Dennie Brown, *In Propria Persona*

DECISION AND ORDER

On July 20, 2007, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents 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

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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Individual-Charging Party.
_____/

Dennie Brown, appearing personally

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On May 14, 2007, Dennie Brown filed the above charges with the Michigan Employment Relations Commission against his former employer, the City of Benton Harbor (the Employer) and his collective bargaining representative, the Police Officers Labor Council (the Union) under Section 10 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of the Act, the charge was assigned to Administrative Law Judge Julia C. Stern.

The Unfair Labor Practice Charges:

Brown was employed by the Employer as a police officer. In his charges, Brown alleges that the Employer terminated him without just cause in December 2005. According to the charges, the Union filed a grievance over Brown's termination and the grievance was arbitrated. On November 15, 2006, the arbitrator denied the grievance. On November 17, 2006, the Union advised Brown that it would not appeal the arbitrator's award. Brown states in his charges:

> I feel as though the Employer and the Union violated my protected rights and protection under the Labor agreement because of a previous reports [sic] of violation on both there behalf.

Pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, on May 30, 2007, I issued an order to Brown to show cause why his charge against the Employer should not be dismissed as untimely filed under Section 16(a) of PERA and because it failed to state a claim upon which relief could be granted under PERA. I also ordered Brown to show cause why his charge against the Union should not be dismissed for failure to state a claim. Brown filed a response to my order on July 12, 2007.

Facts:

The facts as alleged by Brown in his charges and response to the order to show cause are as follows. Brown was initially terminated by the Employer on July 9, 2004. The Union proceeded to arbitration on a grievance over his termination. On July 18, 2005, an arbitrator ordered the Employer to reinstate Brown without back pay. The Employer delayed implementing the award, allegedly because it was considering whether to appeal. The Union urged the Employer to reinstate Brown, arguing that the Employer's delay constituted harassment. After a meeting attended by Brown, the Union, the Employer's mayor, and several city commissioners, Brown was reinstated effective November 22, 2005. During this meeting, Brown maintained that the Union should appeal the award because it did not award him back pay. Brown alleged that the facts in his case showed misconduct by the city manager, city attorney, and police chief. The commissioners told Brown at this meeting that after he was reinstated, they would consider his argument that he should be awarded back pay.

In December 2005, the Employer terminated Brown again, this time for alleged insubordination and failure to follow the chain of command. The Union filed a grievance over this second termination on December 22, 2005. On July 14, 2006, Brown filed unfair labor practice charges against the Employer and the Union (Case Nos. C06 G-165 and CU06 G-026). The charges alleged that Brown's termination in 2004 violated the collective bargaining agreement and that the Union violated its duty of fair representation by failing to appeal the arbitration award reinstating him without back pay. These charges were dismissed by the Commission as untimely filed on November 14, 2006. *City of Benton Harbor*, 20 MPER 40 (2006).

On July 19, 2006, while the unfair labor practice charges were pending, an arbitration hearing was held on the grievance filed over Brown's second termination. On November 15, 2006, the arbitrator issued his award denying the grievance. The arbitrator found that after Brown was reinstated in November 2005, the police chief told Brown that the arbitration award reinstating him had settled the issue of his back pay. The chief gave Brown a written order directing him to follow the chain of command and forbidding him from addressing the city commission or speaking to the city manager without written permission from the chief. The arbitrator found that sometime between receiving the written order and December 9, 2005, Brown gave a packet of documents to the city commission and attempted to speak to the city manager about his previous termination. At the arbitration hearing, Brown maintained that the police chief gave him oral permission to speak to the city manager and that the city manager had authorized him to speak to the commission. The arbitrator found Brown not to be credible. He concluded that Brown had deliberately and intentionally disobeyed a direct written order from the chief, and that the Employer had just cause to discharge him. The arbitrator denied the

grievance. On November 17, 2006, the Union informed Brown that it would not file an appeal of this award.

Discussion and Conclusions of Law:

Under Section 16(a) of PERA, the Commission lacks authority to remedy unfair labor practice occurring more than six months before the date that the charge is filed and served on the Respondent. The statute of limitations in Section 16(a) is jurisdictional and is not waived by a respondent's failure to raise the issue. *Walkerville Rural Cmty Schs,* 1994 MERC Lab Op 582, 583.

Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, negotiate or bargain with their public employers through representatives of their own free choice, and engage in other lawful concerted activities for mutual aid or protection. Section 10 of PERA makes it unlawful for an employer to interfere with, restrain or coerce employees in the exercise of these rights, and to discriminate against them because of their union activities. PERA does not prohibit all types of discrimination or unfair treatment by employer, and employer actions which violate the terms of a collective bargaining agreement do not necessarily violate an employee's Section 9 rights. PERA does not provide an independent cause of action for an employer's breach of contract or violation of an employee's constitutional rights. See, e.g., *City of East Grand Rapids,* 20 MPER 10 (2007); *Wayne Co,* 20 MPER 27 (2007); *Ann Arbor Pub Schs,* 16 MPER 15 (2003). Absent an allegation that the Employer retaliated against Brown because of his union or other activities protected by PERA or that it engaged in other action that violated his Section 9 rights, the Commission has no authority to make a judgment on the merits or fairness of the Employer's action. *City of Detroit (Fire Dep't),* 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

In his response to the order to show cause, Brown alleges the Employer violated the collective bargaining agreement by terminating him in December 2005 without just cause and in violation of his constitutional rights.[1] Brown points to various errors allegedly made by the arbitrator in his November 2006 award upholding Brown's discharge. Brown does not allege that his termination resulted from his union or other protected activity, or that the Employer engaged in other conduct that violated his Section 9 rights. I find that Brown has failed to state a claim against the Employer upon which relief can be granted under PERA. I also find Brown's charge against the Employer to be untimely filed under Section 16(a) of PERA, since the alleged unfair labor practice, his termination, took place in December 2005 and Brown did not file his charge until May 14, 2007. I recommend that Brown's charge against the Employer be dismissed pursuant to Commission Rules 165(1) and (2) (c) and (d).

To establish a violation of the Union's duty of fair representation, Brown must demonstrate that the union's conduct toward him was arbitrary, discriminatory or in bad faith. *Goolsby v Detroit,* 419 Mich 651, 679 (1984); *Vaca v Sipes,* 386 US 171, 177 (1967). In this

[1] Brown argues that the hearing he was given prior to his termination was not adequate under *Cleveland Bd of Ed v Loudermill,* 470 US 532 (1985) because the police chief had already made up his mind. The arbitrator considered and rejected that argument in his November 2006 award.

case, the Union filed a grievance on Brown's behalf after he was terminated in December 2005 and that grievance was arbitrated. Brown asserts in his response to the order to show cause that the Union failed to represent him properly at the arbitration hearing because he had filed a previous unfair labor practice charge against it. However, Brown does not allege any facts supporting this assertion. Brown also asserts that the Union acted in bad faith by refusing to appeal the November 2006 arbitration award, but, similarly does not allege any facts to support this claim. [2] I find that Brown's charge against the Union does not state a claim upon which relief can be granted under PERA, and I recommend that it be dismissed pursuant to Rule 165(1) and (2) and (d).

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

[2] A union or employer can file a court action seeking to overturn an arbitrator's award. However, judicial review of an arbitrator's decision is very limited. *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; (2002). A court may not review an arbitrator's factual findings or decision on the merits. *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4 (1989). The inquiry for the reviewing court is whether the award was beyond the contractual authority of the arbitrator. If, in granting the award, the arbitrator did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases. *Manistee*, at 343