STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent in Case No. C05 K-280,

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Respondent in Case No. CU05 K-056,

-and-

JAMES E. WHITE,
An Individual-Charging Party.
_____/

APPEARANCES:

Sharlena J. Chaney, Labor Relations Representative, City of Detroit, for the Respondent Employer

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Respondent Labor Organization

Harrison W. Munson, Esq., for the Charging Party

DECISION AND ORDER

On August 17, 2006, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motions for Summary Disposition finding that Respondents, City of Detroit (Employer) and Teamsters Local 214 (Union), did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ held that the charge filed by Charging Party James E. White failed to state a claim against the Employer under PERA and was untimely. She also held that the Union's decision not to proceed to arbitration was not arbitrary and the charge against the Union raised no genuine issue of material fact. Based on these conclusions, the ALJ recommended that the charges be dismissed.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On September 8, 2006, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. In his exceptions, Charging Party alleges that both Respondents interfered with, restrained, or coerced him in exercising his protected rights. He also alleges that his claim should not be time barred because the statute of limitation was tolled since the Union continued to represent him until "at least May 16, 2006."

The Union requested and was granted an extension of time until October 23, 2006, to file its response to the Charging Party's exceptions. On October 20, 2006, the Union filed cross-exceptions to the ALJ's Decision and Order. In its cross-exceptions, the Union alleges that the ALJ erred in failing to find that Charging Party's claim against it was barred by the statute of limitations. On October 24, 2006, the Union filed a motion to dismiss Charging Party's exceptions for failure to comply with the requirements of Rule 176 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176. On December 12, 2006, the Union filed a Supplemental Brief discussing the dismissal of Charging Party's claim in Wayne County Circuit Court and alleging that Charging Party's claims are now barred by res judicata.

While Charging Party's exceptions fail to comply with the requirements of Rule 176 for such filings, we will consider them to the extent that we are able to discern the issues on which Charging Party is requesting our review.[1] We have reviewed Charging Party exceptions and Respondent Union's cross-exceptions; we find them both to be without merit.

Factual Summary:

We adopt the findings of fact set forth in the ALJ's Decision and Recommended Order and repeat them here only as necessary. Charging Party James E. White was employed as a vehicle driver in the solid waste division of the Employer's public works department and was a member of the Union's bargaining unit. White was required to submit to a random drug test on May 27, 2004, and tested positive for cocaine. As a result, on June 7, 2004, White was suspended for twenty-two days with the recommendation that he be discharged. He was subsequently given the opportunity to submit a statement from his physician documenting the medication he was currently taking and did so. On July 2, the Union filed a grievance on White's behalf asserting that he did not use illegal drugs and that he was on medication prescribed by his physician at the time of the drug test. White was discharged effective July 9, 2004. At the third and fourth step meetings on White's grievance, held August 19, 2004 and September 8, 2004 respectively, the Employer explained that the medication prescribed by White's physician, Robitussin AC, would not cause the drug test to show a false positive result for cocaine. On March 8, 2005, the Employer again denied the grievance. The Union's grievance panel considered the matter, concluded that it would not proceed to arbitration, and notified White of its decision in a letter dated April 7, 2005. White appealed the grievance panel's decision to the Union's appeal board. The Union then gave White the opportunity to submit a statement from his physician indicating whether the medication that his doctor had prescribed would cause a false positive test result for cocaine. White's doctor wrote that the medication contains codeine and could cause a positive opiate test result. The Union found that the doctor's statement was not sufficient to establish that the medication could cause a false positive result for cocaine and gave White until the close of business on September 30, 2005 to submit additional documentation in support of his contention that his medication caused his positive test result. Other research by the Union indicated that the medication prescribed by White's physician would

[1] That these submissions were not rejected for failure to comply with our Rules should not be viewed as an indication that we will accept such submissions in the future.

not cause a false positive test result for cocaine, and White submitted nothing to contradict that. White filed both charges in this matter on November 29, 2005.

Discussion and Conclusions of Law:

Contrary to Rule 176 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176, Charging Party's exceptions do not expressly identify the error or errors alleged to have been made by the ALJ. Therefore, our discussion of Charging Party's exceptions is limited to the extent that we are able to identify the issues on which Charging Party is requesting our review.

In his exceptions, Charging Party contends that both Respondents violated his rights under Sections 9 and 10(1)(a) of PERA "to be represented by his union without interference, restraint or coercion by the City of Detroit." In his brief in support of the exceptions, Charging Party expands on that contention by asserting that on May 16, 2006, the attorney for the Union told him that the Union had continued to try to get White reinstated to his former employment but would no longer do so because White had hired his own attorney to represent him. Attached to the brief is an affidavit by Charging Party attesting to those assertions. The facts alleged in the brief in support of the exceptions are, in essence, a motion to reopen the record. However, nothing in the brief or the exceptions provides a basis for reopening the record pursuant to the rules governing this proceeding. See Rule 166. Charging Party's assertions involve an incident that occurred three months before the ALJ's decision was issued, and therefore, cannot be considered "newly discovered." Accordingly, we decline to consider the new facts asserted by Charging Party.

It appears that the assertions in Charging Party's exceptions and brief are in response to the ALJ's conclusion that the charge against the Employer failed to state a claim upon which relief can be granted because the charge fails to allege that the Employer discriminated against White because he engaged in conduct protected by Section 9. Charging Party failed to state any facts, which, taken in his favor, would establish that the Employer discharged him because he engaged in protected concerted activity. We agree with the ALJ that in the absence of such allegations of fact, Charging Party's contention that he was wrongfully discharged, by itself, does not state a claim upon which relief can be granted against the Employer under PERA.

By asserting that he was wrongfully discharged, Charging Party may also be contending that his discharge was in violation of the contract between the Union and the Employer. However, where a charging party alleges breach of contract by an employer and violation of the duty of fair representation by a union, the contract claim cannot be pursued unless the charging party is successful in his duty of fair representation claim. *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480 (1993); *City of Lansing (Bd of Water & Light)*, 20 MPER 33 (2007). The ALJ concluded that the facts in the record do not support a finding that the Union breached its duty of fair representation by failing to pursue Charging Party's grievance further, and Charging Party does not appear to contest this conclusion in his exceptions. Therefore, we agree with the ALJ's conclusion that the charge fails to state a claim upon which relief can be granted against the Employer.

In his exceptions, Charging Party also contends that the statute of limitations was tolled because the Union continued to represent Charging Party "until at least May 16, 2006." It is not clear from Charging Party's arguments on this issue whether he is claiming that the ALJ erred by finding that the charge against Respondent Employer is time barred or whether he is claiming that the ALJ correctly concluded that the charge against Respondent Union is timely. Inasmuch as Respondent Union's cross-exceptions also raise an issue under the statute of limitations, we will address this issue.

We find no error in the ALJ's conclusions that the charge against the Employer is time barred. A claim accrues when the charging party knows, or reasonably should know, of the alleged unfair labor practice. *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836. In the case of an unfair labor practice charge based on allegations of wrongful discharge, the statute of limitations begins to run on the effective date of the termination. See *Troy Sch Dist*, 16 MPER 34 (2003); *Kent Cmty Hosp*, 1987 MERC Lab Op 459 (no exceptions); *Superiorland Library Coop*, 1983 MERC Lab Op 140. Charging Party contends that the decision in *Silbert* v *Lakeview Ed Ass'n*, 187 Mich App 21; 446 NW2d 333 (1991) supports his argument that the statute of limitations is tolled for the period that the Union continued to represent him. In *Silbert*, the Court of Appeals held that the limitations period did not begin to run on the charging party's claim against the union for breach of the duty of fair representation until the internal union appeal procedure was complete. *Silbert*, at 24-25. In *Troy Sch Dist*, we rejected the charging party's efforts to expand this holding to a charge against an employer. In the matter before us, Charging Party was discharged by the Employer effective July 9, 2004. Therefore, the deadline for filing an unfair labor practice charge against the Employer, based on the contention that White's discharge unlawfully interfered with, restrained, coerced, or discriminated against him for exercising rights guaranteed by section 9 of PERA, was January 9, 2005. Accordingly, as the ALJ concluded, the charge filed November 29, 2005 was not timely with respect to the Employer.

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. White knew or reasonably should have known that the Union would take no further steps to pursue his grievance when, by September 30, 2005, he failed to submit documentation that would support his contention that his medically prescribed medication caused his positive drug test result. The Union ceased pursuing Charging Party's grievance on, or about, September 30, 2005. Therefore, the deadline for filing the charge against Union was approximately March 30, 2006, and the charge filed against the Union was timely.

In its Supplemental Brief filed December 12, 2006, the Union has also argued that the charge is barred by res judicata. With that brief, the Union has submitted various documents that were not part of the record before the ALJ. The attachments include an order by the Wayne County Circuit Court dismissing Charging Party's complaint in Case No. 06-620692-CZ, Charging Party's summons and complaint in that case, Charging Party's answer to the Union's motion for summary disposition of the circuit court case, and Charging Party's brief in support of its answer to the Union's circuit court motion. In order to consider the Union's Supplemental

Brief and the attached documents, we must treat the brief as a motion to reopen the record. Under Commission Rule 166, a motion to reopen the record will only be granted upon a showing of all of the following:

> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
>
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
>
> (c) The additional evidence, if adduced and credited, would require a different result.

See *Wayne Co Airport Auth*, 20 MPER 34 (2007). Inasmuch as the documents that the Union wishes us to consider were not in existence until after the ALJ's decision was issued, we would find that they meet the first two requirements. However, the third requirement has not been met. The ALJ has already recommended that the charges be dismissed. Respondent Teamsters Supplemental Brief and its attachments do not seek to change the recommendation of dismissal; indeed, Respondent's brief seeks to provide further support for that recommendation. Thus, even if we were to consider and give weight to the circuit court's order, it would not change the result in this matter and Respondent Union's motion for reconsideration must be denied.

We have considered each of Charging Party's and Respondent Union's arguments and, for the reasons set forth above, we adopt the Administrative Law Judge's findings of fact and conclusions of law.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION[2]

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

[2] Commission Chair Christine A. Derdarian was unable to participate in the decision in this matter.

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APPEARANCES:

Sharlena J. Chaney, Labor Relations Representative, City of Detroit, for the Respondent Employer

Wayne A. Rudell, Esq., for the Respondent Labor Organization

Harrison W. Munson, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTIONS FOR SUMMARY DISPOSITION

On November 29, 2005, James W. White filed the unfair labor practice charge in Case No. C05 K-280 against his former employer, the City of Detroit (the Employer), alleging that it violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, when it discharged him in June 2004 and thereafter refused to reinstate him. On this same date, White filed the charge in Case No. CU05 K-056 against his bargaining representative, Teamsters Local 214 (the Union), alleging that it violated its duty of fair representation under Section 10 of PERA. The charges were consolidated for hearing before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission.

At the beginning of the scheduled hearing on May 16, 2006, White moved for an adjournment and both Respondents made motions for summary disposition asserting that White's charges failed to state claims upon which relief could be granted. On the record on May

16, I granted White's motion for an adjournment, took the motions for summary disposition under advisement, and gave White the opportunity to file a written response to the motions. On June 27, 2006, the Union filed a supplemental motion accompanied by documents and affidavits. White did not file a response to either motion.

Case No. C05 K-280

White's charge against the Employer alleges that he was "wrongfully discharged." The facts as set out in his charge are as follows. White was employed by the Employer's department of public works in its solid waste division. In March 2004, White attended a meeting for employees on the Employer's drug and alcohol policies conducted by Renee Shelton from the Employer's human resources department. In the presence of his supervisor, Dennis Wheeler, White told Shelton that he was attending therapy sessions for a drug problem at a local nonprofit organization. White gave Shelton his drug counselor's business card and she told him that she would contact the counselor and help him get assistance through the Employer's programs.

As a vehicle driver, White was subject to random drug tests. On May 27, 2004, he was administered a drug test by the Employer's clinic. The clinic did not ask him for identification and the nurse who gave him the test did not ask him about any current medications he was taking. White's drug test was positive for cocaine. On June 7, 2004, he met with Shelton to discuss the test results. Apparently White was advised on this date that he would be discharged. Shelton gave him the phone number of a Ms. Shaw.[3] Shaw advised White to start attending drug rehabilitation classes and to "have the union get my job back." White also mentioned to Shelton or to Shaw that he was taking prescribed medication for emphysema. He was told to submit a statement from his doctor indicating what medication he was taking, and he did so.

In the fall of 2004, when White had not been returned to work, he wrote to Detroit city councilpersons and other public officials about his case. One of them contacted the director of the department of public works, James Jackson, on his behalf. A city council staff person later told White that Jackson objected to his letters.

Section 10(1)(a) of PERA makes it unlawful for a public employer to "interfere, restrain or coerce" public employees in the exercise of their rights guaranteed by Section 9 of that Act. Section 10(1)(c) of PERA makes it unlawful for an employer to discriminate in regard to hiring or other terms or conditions of employment in order to encourage or discourage membership in a labor organization. PERA does not provide a cause of action for "wrongful discharge" per se. Absent an allegation that the Employer discriminated against a charging party because of his union activity or lack of it, or interfered with, restrained, coerced or retaliated against a charging party because he engaged in conduct protected by Section 9, the Commission has no authority to determine the fairness of a employer's discharge decision. *City of Pontiac,* 17 MPER 66 (2004) (no exceptions); *Detroit Sch Dist,* 1995 MERC Lab Op 75. White has not alleged that the Employer either discharged or refused to reinstate him because he engaged in union or any other conduct protected by Section 9 of PERA. I conclude that White failed to state a claim against the Employer under PERA and that the Employer's motion for summary disposition should be granted on those grounds.

[3] Shaw is not otherwise identified in the charge.

White's claim also appears to be untimely filed under Section 16(a) of PERA. That section requires that a charge be filed within six months of the date of the alleged unfair labor practice. A claim accrues under Section 16(a) when the charging party knows, or should know, of the alleged violation. *Huntington Woods v Wines,* 122 Mich App 650 (1983). White was discharged in the summer of 2004. I find that by the end of 2004, White knew or should have known that the Employer did not plan to reinstate him.

Case No. CU05 K-056

In his charge and in a supplementary statement filed on January 27, 2006, White alleges as follows:

> I am filing charges against Teamsters Local 214 for poor representation.
>
> My counselor from the program I was attending submitted a written statement to the union that I was enrolled in a program for help with my illness at the time of testing. I was taking medication for my emphysema which is a prescription drug. Instead of asking for my test result from my counselor, the union wanted the [drug test] results from the City of Detroit.
>
> Teamsters 214 failed to represent me and protect my job with the City of Detroit when all of my paper from my family physician was submitted showing that I am under his care for treatment of emphysema. Also, after submitting all my paperwork from my physician to the Labor Relations Department, they admitted to losing all my paperwork.

In support of its motion for summary disposition, the Union submitted an affidavit from White's steward, Derrick Reeves, and documents tracing the progress of a grievance it filed on White's behalf. White did not contest the accuracy of the Union's facts. According to these documents, on June 7, 2004, White was suspended for twenty-two days with a recommendation that he be discharged for "a positive random controlled substance test results in violation of the City of Detroit policies and procedures for employees holding commercial driver licenses." On July 2, 2004, Reeves prepared and submitted a grievance on White's behalf. Before he prepared the grievance, Reeves asked White about the drug test and his suspension. In accord with what White told him, Reeves wrote in the grievance that White did not use illegal drugs and that he was on medication prescribed by his physician when he was tested. White did not suggest to Reeves that there were any other arguments to be made.

White was officially discharged effective July 9, 2004. A third step meeting on White's grievance was held on August 19, 2004. At this meeting, the Union argued that White did not use illegal drugs and that he was on medicine prescribed by his physician. The Employer responded that White had been given the opportunity to discuss his medication and test results with its medical review officer, and that the medication White was taking had no impact on the positive test results. The Union received a slip signed by White's doctor stating that White was under his

care for emphysema and was occasionally prescribed Robitussin AC when his symptoms got worse.

On September 8, 2004, the Union moved White's grievance to the fourth step. The Union and the Employer held a "prearbitration panel meeting." Present were Union representatives, a representative from the department of public works, and a representative from the human resources department. The Union representatives presented the note from White's doctor, and the Employer stated that its investigation had revealed that Robitussin AC would not result in a positive test result for cocaine. The Employer stated that per its CDL drug testing policy, White had been appropriately discharged for testing positive for use of a controlled substance. On March 8, 2005, the Employer reiterated its denial of the grievance. Thereafter, the Union's grievance panel met and concluded that White's grievance should not be taken to arbitration. On April 7, 2005, the grievance panel wrote to White as follows:

> According to information presented to the panel, you have a very bad past record for things ranging from failure to report for work to unsatisfactory job performance, failure to complete work assignments, etc. While you claim that you are not on drugs and that the doctor's prescription caused the false positive for cocaine, there is nothing in the PDR (Physician's Desk Reference) that indicates that this is a side effect of the medication you are on.[4] We have nothing to substantiate your story. Your record would indicate someone who is very troubled and should seek help. Because of the foregoing and your apparent refusal to avail yourself of the opportunities offered you by the employer to help yourself, this grievance must be denied.

The grievance panel's letter informed White of his right to appeal its decision to the Teamsters Local 214 appeal board. He did so. On July 13, the appeal board wrote to White's doctor asking for his opinion on whether the medication he had prescribed would cause a false positive for cocaine. On July 15, the doctor wrote that the cough medicine White had been prescribed contained codeine and could cause a positive opiate test result. The Union subsequently notified White that his doctor had not substantiated his claim that his prescription medication caused his positive test result. It told White that if he did not provide medical verification by the close of business on September 30, 2005 the Union would withdraw his grievance.

On September 27, White gave the Union a note indicating that when he was given the random drug test he was in an outpatient treatment program for cocaine abuse. White included a "status report" from the program indicating he had been attending the program at the time of the random drug test and that the counselor reported his prognosis as "good." White also gave the Union a letter from his supervisor stating that he had overheard White tell Employer human resources representative Shelton that he was in the program in March 2004. The Union did not take any further action on White's grievance after receiving these documents.

[4] The Union's file on White's grievance includes several pages from the PDR indicating that while codeine could cause a positive test result for various types of opiates, there are no known drugs that cause a false positive for cocaine.

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 EA*, 2001 MERC Lab Op 131, 134. See also *Vaca v Sipes*, 386 US 171, 177 (1967). In the area of grievances, a union has considerable latitude to determine which grievances should be pressed and which should be settled, and an individual member does not have the right to demand that the union take his grievance to arbitration. In exercising its discretion, the union may consider the burden upon contractual grievance machinery, the amount at stake, and the likelihood of success. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973); *Huron Valley Sch Dist,* 18 MPER 69 (2005). A union's decision not to proceed with a grievance is not arbitrary if it falls within a broad range of reasonableness. *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35, *citing Air Line Pilots Ass'n v O'Neill,* 499 US 65, 67 (1991).

Here, the Union filed a grievance over White's suspension and discharge. Based on what White told his steward, the grievance asserted that White was not using cocaine when he was tested but that medicine his doctor had prescribed had caused a false positive drug screen result. The Union processed White's grievance to the fourth step of the grievance procedure on this theory, even though the Employer maintained that the prescribed medicine could not have caused a false positive and the Union's research did not contradict the Employer's position. Based on this critical fact, and White's poor disciplinary record, the Union made the decision not to proceed to arbitration. After White appealed this decision, the Union gave him another opportunity to show that his prescription medication had caused a false positive, but he could not do so. I find that the Union's decision not to proceed to arbitration was not arbitrary, and there is no indication that it was made in bad faith.

After it was clear that the facts would not support his initial claim that he had not used illegal drugs, White argued to the Union that the Employer should not have tested him, or discharged him after he was tested, because it knew that he was undergoing treatment for cocaine addiction. Assuming arguendo that this argument might have garnered White a lesser penalty had it been made in a timely fashion – despite the Employer's policy against the use of controlled substances – I find that the Union's refusal to reconsider its decision not to arbitrate White's grievance based on this new theory was "within the range of reasonableness." I find that that there are no genuine issues of material fact in White's charge against the Union and that the Union's motion for summary disposition should be granted. I recommend that the Commission grant both motions for summary disposition and that it issue the following order.

RECOMMENDED ORDER

The charges in Case Nos. C05 K-280 and CU05 K-056 are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____