STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GROSSE ILE TOWNSHIP,
Public Employer - Respondent,

Case No. C08 A-021

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO, AND LOCAL 292
Labor Organization - Charging Party.
_____/

APPEARANCES:

Cassandra D. Harmon-Higgins, Esq., for Charging Party

DECISION AND ORDER

On March 24, 2008, Administrative Law Judge Doyle O'Connor issued his 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

_____
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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Charging Party-Labor Organization.
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APPEARANCES:

Cassandra D. Harmon-Higgins, for Charging Party-Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY JUDGMENT

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) for the Michigan Employment Relations Commission. This matter is being decided pursuant to an order to show cause why the charge should not be dismissed for failure to state a claim and as barred by the statute of limitations.

Findings of Fact on the Failure to State a Claim Issue:

A charge was filed in this matter asserting that the Employer, Grosse Ile Township, violated the Act by changing its hours of operation, allegedly in repudiation of the collective bargaining agreement between the parties. The basis of the charge is that the Employer changed the shift starting and ending times. That factual allegation was supported by the *pro forma* conclusory allegation that this singular alleged contract violation was in some unspecified way related to a substantial part of the contract, had a significant but unspecified impact on the bargaining unit, that there was no *bona fide* dispute as to the meaning of the contract language, and that the change in schedule was therefore a repudiation of the contract in violation of the Act.

Despite the *pro forma* assertion that there was no *bona fide* dispute as to the meaning of the contract language, attached to the charge was a copy of the Employer's letter setting forth its substantive contractual defense that particular articles of the contract expressly granted the Employer the right to change the schedule. Indeed, both the charge and the

response to the order to show cause concede that contract Article 22.2(I) states that the Employer has the right to "Determine lunch periods, rest periods, the starting and quitting time, the number of hours to be worked except as such are expressly limited by express provisions contained within the collective bargaining agreement", while contract Article 22.2(J) states that the Employer has the right to "Establish work schedules". The Union points to no conflicting express contractual limitation on the Employer's claimed right to alter the starting and quitting times. Contract Article 18 provides a grievance procedure culminating in binding arbitration and no claim is made that the Employer has refused to comply with that procedure.

Pursuant to Commission Rule 423.165(2)(d), the Charging Party was ordered to show cause why the charge, which appeared to raise only a breach of contract dispute, should not be dismissed for failure to state a claim upon which relief can be granted. The Charging Party's timely response on this issue merely reiterated the assertions made in the charge.

Findings of Fact on the Statute of Limitations Issue:

The charge asserted that the Employer announced the purported unilateral change on July 25, 2007, with the charge filed by fax on February 11, 2008, and with the original received by the Commission on February 14, 2008. Because the charge appeared to have been filed more than six months after the allegedly unlawful acts, Charging Party was therefore additionally ordered to show cause why the charge should not be dismissed as barred by the statute of limitations.

The Union's timely response to the order to show cause was supported by affidavit and by the assertion that the Union "*cannot be held responsible for the Commission's or the Respondent's subsequent misplacement of documents*". The affidavit is troublingly incomplete and regardless conflicts with the documentary trail created by the Union's several attempted filings.

On Friday, January 25, 2008, after five o'clock in the evening, five pages were faxed to the Commission by the Union, as reflected by the Union's own cover sheet, which was inaccurately dated January 24, 2008, and by the Commission's fax record. That fax submission did not include an actual charge, rather the charge form merely said "See attached pleading", with no attachment. That submission did not constitute a proper filing as it could not have put the Employer on notice of the nature of the dispute. The Union's affidavit asserts that the same documents were also sent to both the Commission and the respondent by certified mail.1 Regardless, under Commission rules a fax submission is improper and ineffective if not followed by actual receipt within five days of the original and copies of the charge, which did not occur. Those same rules expressly and appropriately

1 Even if the charge had been complete and sent by certified mail after hours on Friday January 25, it is unlikely to have been received by the Respondent by mail by Monday January 27, which is the outer most deadline for timely service asserted by the Union. Regardless, the Union has not shown, nor even asserted, actual timely receipt by the Respondent.

caution fax senders that the burden remains on the filer to make sure that the original documents are actually received, and caution that a failure to timely file or serve a document will not be excused due to a claimed fax transmission failure. No certified mail return receipts, which would exist if the affidavit were accurate, were submitted in support of that claimed January 25th mailing.

On January 30, 2008, as reflected by the Union's own fax cover sheet and by the Commission's fax record, the Union faxed three (3) pages, again not including an actual charge. The Union's affidavit asserts, vaguely and implausibly, that on that date, thirty-three (33) pages were forwarded, by unspecified means, to the Commission and to the Respondent.

While the affidavit asserts that all three submissions were done by the same staff person, the fax cover sheets of January 25 and 30 and the two proofs of service appear to contradict this assertion. Neither the January 25 five page packet nor the January 30, 2008 three page packet were ever received by the Commission by mail.

On February 11, 2008 the Union submitted by fax the actual charge, which, with attachments, totaled thirty-three (33) pages.2 It is notable that the cover letter sent with the February 11, 2008 submission had affixed to it the notation that it was sent via certified mail, with the assigned number of that certified mailing. Neither of the two earlier letters had such a certified mail notation, as would be expected if they had in fact been sent via certified mail. The February 11 submission was in fact properly received by mail on February 14, 2008.

While the Union asserts that there were repeated certified mailings to the Respondent, no representation is made as to actual service on the Respondent, and the Union has not submitted the standard postal service return receipts as to any of its claimed certified mailings. The Union did submit with its brief two certified mail receipts of the sort retained by the sender, which at best can support a claim that an item was sent, not that it was actually received. The brief asserts that these two receipts, submitted as Charging Party Exhibit 4, establish that the items were sent on January 25, 2008.3 The records provided by Charging Party contradict its affidavit and its several proofs of service and instead support the conclusion that neither the Commission nor the Respondent received any mailing in this matter prior to February 14, 2008.

Discussion and Conclusions of Law:

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2 That February 11, 2008 fax of course violated the Commission Rules limiting faxed documents to eleven pages; however, that technical violation is of no significance to this ruling.

3 While not relied upon in reaching this decision, the records of the USPS, which are available on-line, appear to reflect that the certified mail receipt appended to the brief and supposedly sent to the Respondent on January 25 was delivered on February 14, 2008. The certified mail receipt purportedly establishing a January 25 mailing to the Commission is identified as non-existent by postal service records. Postal records likewise appear to establish that the item associated with the certified mail number affixed to the February 11, 2008 cover letter was in fact delivered to the Commission on February 14, 2008.

Failure to State a Claim

The factual allegations contained in the charge and its attachments, read in the light most favorable to Charging Party and taking into account the response to the order to show cause, state no more than a breach of contract claim. The Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its collective bargaining obligations. *University of Michigan*, 1978 MERC Lab Op 994, 996, citing *NLRB v C & C Plywood Corp,* 385 US 421 (1967). However, if the term or condition in dispute is "covered by" a provision in the collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich. 309, 317-321 (1996). As the Commission stated in *St Clair Co Road Comm,* 1992 MERC Lab Op 533 at 538:

> Where there is a contract covering the subject matter of the dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is present.

In those cases where the Commission has found employer repudiation, the employer's contractual defense has been either spurious or nonexistent. For example, in *City of Detroit*, 1976 MERC Lab Op 652, the employer asserted that its need to implement an affirmative action plan to remedy past racial discrimination justified its refusal to follow clear language in the contract dealing with promotions. In *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901, the employer justified its decision to alter the contractual wage rate based on economic necessity and a management's rights clause that made no reference to wages. In *Cass City Pub Schs,* 1982 MERC Lab Op 241, the employer insisted on applying a religious exception to a union security clause that did not mention this exception. In *City of Detroit, Dep't of Transportation,* 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985), and *Taylor Bd of Ed,* 1983 MERC Lab Op 77, the employers argued only that they could no longer afford to fulfill their contractual obligations. Here, Charging Party pled no more than an ordinary dispute over the application of terms of the collective bargaining agreement which should be resolved pursuant to the contractually mandated grievance procedure. Therefore, Charging Party has failed to state a claim upon which the Commission could grant relief.

Statute of Limitations

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. When an unlawful unilateral change is charged, the statute of limitations ordinarily runs from when the change was announced, not from when it was later

implemented. *Tuscola Intermediate School District*, 1985 MERC Lab Op 123. Section 16(a) of PERA also requires timely service of the complaint by Charging Party upon the person or entity against whom the charge is brought. *Romulus Comm Schools*, 1996 MERC Lab Op 370, 373; *Ingham Medical Hosp*, 1970 MERC Lab Op 745, 747, 751. Dismissal is required when a charge is not timely or properly served. See *City of Dearborn*, 1994 MERC Lab Op 413, 415.

I find that no legitimate question of fact exists on the question of the untimeliness of the charge. The time for filing and service of the charge began to run on July 25, or at the latest, on July 27, 2007. The burden of timely filing a charge is upon the charging party. That burden was not met by faxing, on January 25, 2008, a charge form bereft of any allegations against the Employer other than "See attached pleading", where no such pleading was attached. The January 30 fax included only a cover letter and a purported proof of service.

Likewise, the burden of establishing timely service of the charge is upon the Union. That burden has not been met. It is particularly notable that even in its response to the order to show cause, the Union makes no representation as to when, if ever, the charge was in fact actually served on the Employer. While the Union asserts that it repeatedly attempted to serve the charge via certified mail, no return receipts were proffered and it must, therefore, be presumed that none exist.

Here, the charge was first filed on February 11, 2008. It is apparent that it was not served sooner than that date, and the charge is therefore untimely in challenging actions occurring more than six months earlier, on July 25, 2007, which the Union acknowledges it was aware of no later than July 27, 2007.

RECOMMENDED ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge

Dated:_____