STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (SMART),
Public Employer - Respondent in Case No. C08 G-148,

-and-

UNITED AUTOMOBILE WORKERS (UAW), LOCAL 771,
Labor Organization - Respondent in Case No. CU08 G-035,

-and-

KEVIN (JOHN) MALOY,
An Individual - Charging Party.
_____/

APPEARANCES:

Kevin Maloy, *In Propria Persona*

DECISION AND ORDER

On August 18, 2008, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that the unfair labor practice charges filed by Charging Party, Kevin (John) Maloy[1], against Respondent Employer, the Suburban Mobility Authority for Regional Transportation (Employer) and against Respondent Union, United Auto Workers Local 771 (Union) each failed to state a claim upon which relief can be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The ALJ issued show cause orders requiring Charging Party to explain why the charge against each Respondent should not be dismissed for failure to state a claim under PERA.

The ALJ's Decision and Recommended Order on Summary Disposition was served on the interested parties in accordance with Section 16 of PERA. On September 10, 2008, Charging Party filed exceptions to the Decision and Recommended Order. Neither Respondent filed a response to the exceptions.

[1] Charging Party filed these matters as Kevin Maloy, although "John Maloy" appears on the ALJ's show cause orders and recommended decision. As such, the case caption now reads Kevin (John) Maloy.

In his exceptions, Charging Party alleges that both Respondents acted together to interfere with his "rights and privileges as a union member and activist" and to "discourage [his] membership in the union."[2] He also indicates that the Employer "interfered with and restrained" his rights protected under PERA by not adhering to the collective bargaining agreement and wrongfully discharging him. He further asserts that the Union acted in "bad faith" and "violated its duty to him" by purposely mishandling his grievance action against the Employer. We have thoroughly reviewed the record as to each charge and find that the exceptions have merit as to the latter charge against the Union only.

Factual Summary

The facts alleged in both matters were set forth fully in the Decision and Recommended Order and will not be repeated here, except where necessary. We also accept the allegations contained in this record as true for the purpose of reviewing the ALJ's conclusions on the motion for summary disposition.

Charging Party was employed by the Employer in the maintenance department for twenty-four years. On December 7, 2007, he was terminated for committing five progressive performance infractions in violation of a "five strikes" provision contained in the collective bargaining agreement.[3] He filed a grievance with the Union challenging the discharge as being unfair and improper; however, the Union later withdrew the grievance for lack of merit.[4] In the charge against the Employer, Charging Party alleges that the discharge was "wrongful" and contrary to the collective bargaining agreement. Specifically, he refutes the number of performance infractions used by the Employer to justify the termination. He also indicates that witness accounts confirm that two of the five infractions should not be credited against him as they were caused by someone else or due to faulty equipment. He contends that no more than three performance violations actually exist on his record, making his discharge premature and improper. His show cause response recites an applicable provision of PERA without providing added details on his complaint against the Employer.

The charge against the Union alleges "discrimination" for doing "little to nothing" to champion the grievance action contesting his discharge. He indicates that other members received much better treatment from the Union, and had their less merited grievances processed through mediation or arbitration with more favorable outcomes. In his show cause response he accuses the Union of acting with "hostility" and "discrimination" in the way that they handled his grievance; and he states that witnesses and other evidence can confirm these assertions at a hearing on the matter.

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[2] This allegation was never presented in the pleadings before the ALJ. While not used as the basis for any remand issued in this decision, it may be raised during an evidentiary hearing, if the ALJ deems appropriate.

[3] Per Charging Party's original complaint, the provision permits discharge for 5 or more progressive performance violations.

[4] Per the letter submitted by Charging Party dated May 27, 2008, which appears to be from the Vice President of UAW Local 771 and sent to Charging Party.

Discussions and Conclusions of Law:

In Case No. CU08 G-035, we disagree with the ALJ's conclusions as to the merits of the charge against the Union. The crux of this claim stems from the Union's decision to withdraw Charging Party's grievance and not proceed to arbitration. Generally, a union satisfies its duty of fair representation under PERA by serving the interest of all members without hostility, discrimination, bad faith, or arbitrary conduct. *American Ass'n of Univ Profs, Northern Michigan Univ Chapter*, 17 MPER 57 (2004). Since this duty is to the membership overall, a union may exercise considerable discretion on whether or not to pursue a grievance (*Michigan State Univ Admin-Prof'l Ass'n, MEA/NEA*, 20 MPER 45 (2007)), as long as its decision is not based on conduct that is discriminatory or in bad faith. *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21; 466 NW2nd333 (1991). While a member's disagreement with the withdrawal of a grievance does not constitute grounds for a breach of the duty of fair representation (*American Federation of Teachers, Local 2000*, 22 MPER 21 (2009)), the circumstances complained of in this matter were more than simple dissatisfaction. Here, Charging Party alleges that the Union acted with hostility in deciding to withdraw his grievance. He asserts that they acted in bad faith and contrary to section 10(3)(a)(i) of PERA. The ALJ concluded that Charging Party failed to state a claim against the Union upon which relief could be granted under the Act. We disagree. These assertions, if true, suggest that the Union may have breached its duty of fair representation when it chose not to pursue the grievance.

We note, however, to prevail on a claim of unfair representation, a party must also establish the existence of a breach of the collective bargaining agreement. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 181 (1992). Charging Party asserts that the breach occurred when the Employer discharged him with less than the five progressive performance violations required under the collective bargaining agreement, and that the improper action caused a loss of wages and other work benefits. We find that the facts alleged, if true, support the existence of a breach of the collective bargaining agreement[5] and provide the necessary basis for continuing the action against the Union. Accordingly, we remand the charge against the Union that alleges breach of the duty of fair representation for a full evidentiary hearing.

In Case No. C08 G-148, the complaint against the Employer alleges "wrongful termination" by "circumventing" the terms of the collective bargaining agreement. To violate PERA, a party must show that the unfair action by the employer stemmed from anti-union animus. We agree with the ALJ that neither the charge nor show cause response alleges any misconduct that is related to Charging Party's union involvement. Only in his exceptions does he suggest that the discharge was motivated by his exercise of protected concerted rights. However, we will decide the merits of his exceptions as to this claim based on the record before the ALJ, and not on new facts or assertions not

[5] This claim is not actionable against the Employer due to the 6 month statutory period (R 423.216(a)).

supported by that record. *American Federation of Teachers, Local 2000*, 22 MPER 21 (2009).

Further, PERA does not seek to redress all instances of alleged wrongful conduct by public employers. *Detroit Pub Sch*, 22 MPER 16 (2009). Without a substantiated claim under the Act, this Commission lacks authority to judge the merits or fairness of the Employer's conduct. *Wayne Co*, 20 MPER 109 (2007). Charging Party's claim that the discharge was contrary to the "5 strikes" provision under the collective bargaining agreement, may constitute a contract violation, but without more, does not violate PERA or the exercise of the rights protected under the Act. Since the assertion does not state a valid claim under PERA, it can be dismissed under Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, and R 423.165. Also, the claim is time barred having been filed more than six months after Charging Party's termination date. Therefore, we concur with the findings of fact and conclusions of law by the ALJ, and dismiss the charge against the Respondent Employer for failure to state a claim and for untimeliness.

ORDER

The unfair labor practice charge against the Employer is dismissed. The charge against the Union is remanded to the ALJ for a full evidentiary hearing on the allegation of a breach of the duty of fair representation that is consistent with the findings and conclusions herein. The ALJ shall schedule this matter for a hearing forthwith and, upon the conclusion of said hearing, shall expeditiously make findings of fact and conclusions of law, and issue a supplemental recommended order. Following service of the supplemental order on the parties, the provisions of R 423.176 through R 423.179 of the Commission's Rules and Regulations shall be applicable.

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: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (SMART),
Respondent-Public Employer in Case No. C08 G-148,

-and-

UAW LOCAL 771,
Respondent-Labor Organization in Case No. CU08 G-035,

-and-

JOHN MALOY,
An Individual-Charging Party.
_____/

John Maloy, appearing for himself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On July 18, 2008, John Maloy filed the above charge against his former employer, the Suburban Mobility Authority for Regional Transportation (SMART or the Employer), and his collective bargaining representative, UAW Local 771 (the Union), pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Maloy's charge against the Employer alleged that it wrongfully terminated him on December 7, 2007. His charge against the Union alleged that it violated its duty of fair representation by withdrawing the grievance filed over his discharge without taking it to mediation or arbitration.

The charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules pursuant to Section 16 of PERA. Pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, on July 25, 2008, I issued an order to Maloy to show cause why his charge against the Union should not be dismissed for failure to state a claim upon which relief could be granted under PERA. I also ordered Maloy to show cause why his charge against his Employer should not be dismissed because it was untimely filed under Section 16(a) of PERA and because it failed to set forth a claim upon which relief could be granted under PERA. Maloy filed a response to my order to show cause on August 12, 2008. Based on the facts as set forth in the charges and in Maloy's response to the order to show cause, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge in Case No. C08 G-148

Maloy's charge against the Employer alleged that it wrongfully terminated him on December 7, 2007. Maloy asserted that under the collective bargaining agreement between the Employer and the Union, the Employer could terminate him only after five violations of the work rules. According to Maloy, he had not committed five work rule violations at the time he was terminated, as the Employer claimed. In support of this assertion, Maloy cited the fact that witnesses testified in his hearing before the State Unemployment Insurance Agency that he was not responsible for two of the incidents charged against him. Maloy did not allege in his charge that the Employer discharged or otherwise discriminated against him because of his union activities or because he engaged in any other activity protected by Section 9 of PERA.

As noted above, on July 25, 2008, I ordered Maloy to show cause why his charge against the Employer should not be dismissed as untimely filed under Section 16(a) of PERA and because his charge against the Employer did not state a claim upon which relief could be granted under PERA.[6] In his August 12 response to the order to show cause, Maloy asserts that he was informed by the Union that he could not pursue any outside litigation against the Employer while his grievance was pending, and that he was not told that his grievance had been withdrawn until May 27, 2008. In his response, Maloy also asserts that he was wrongfully discharged in violation of "Section 16 thru Section 10(a) (c) – Section 9 of PERA . . . which prohibits a public employer from discriminating against an employee to encourage or discourage membership in a labor organization." However, Maloy did not set forth any facts in his response to the order to support a claim that he was discharged because of union activity.

Section 10(1) (c) of PERA prohibits a public employer from discriminating against an employee to encourage or discourage membership in a labor organization. A public employer who discharges an employee because that employee has engaged in union or other activity protected by the Act violates Section 10(1) of PERA. However, an employer does not violate PERA simply by terminating an employee unfairly or without just cause. Absent an allegation that a discharge 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 discharge. See e.g. *City of Detroit (Fire Department)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524. Maloy's charge against the Employer asserted that he was unfairly and

[6] Under Section 16(a) of PERA, the Commission does not have authority to remedy unfair labor practices occurring more than six months before the date that the charge is filed and served on the respondent. The limitation period under PERA commences when the person knows of the act, which caused his injury and has good reason to believe that the act was improper. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). The statute of limitations in Section 16(a) is jurisdictional and a respondent does not have to raise it as a defense. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583.

wrongfully discharged, but did not assert that it discharged or otherwise discriminated against him because of his union activities or because he engaged in any other activity protected by Section 9 of PERA. Although Maloy cites Section 10(1) (c) of PERA in his response to the order to show cause, he makes no factual allegations which would support a claim that the Employer terminated him for reasons prohibited by this section. I conclude that Maloy has failed to state a claim against the Employer upon which relief can be granted under PERA and that summary dismissal of his charge is appropriate under Rule 165 of the Commission's General Rules.

The Unfair Labor Practice Charge in Case No. CU08 G-035

In his charge against the Union, Maloy alleged that the Union discriminated against him by "doing little to nothing concerning my case." Maloy asserted that the Union did not allow his grievance to go to mediation, arbitration or "any kind of settlement solution." Maloy maintained in his charge that, based on his seniority and the merits of his case, the Union should have at least allowed one of these options.

Maloy attached to his August 12 response to the order to show cause a copy of a letter from Union vice-president William C. Costie dated May 27, 2008 stating that the Union was withdrawing his grievance for lack of merit. Maloy also states in his response:

> My 25 years of service with the Union meant nothing as far as this Union was concerned. They failed to serve my interests without hostility or discrimination, they failed to exercise my [sic] discretion in complete good faith and honesty, and they *Denied my right to Arbitration or Mediation.* [Emphasis in original].

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(3) (a) (i) of PERA. The union's duty 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 *Vaca v Sipes*, 386 US 171, 177 (1967). Because the union has a duty to represent the bargaining unit as a whole, it has considerable discretion in deciding how to handle a grievance and what grievances should be pressed and which settled. An individual member does not have a right to demand that a grievance be taken to arbitration. Rather, a union has the latitude to investigate claimed grievances by members against their employers to assess them as to their individual merit. *Lowe* v *Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-147 (1973). A union satisfies its duty of fair representation as long as it exercises its discretion in good faith and without discrimination and its decision is within the range of reasonableness. *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67 (1991).

As indicated above, a union member does not have the right to demand that his union take his grievance to arbitration. Rather, a union has both the right and obligation to make a decision regarding the merits of a grievance. The fact that a union member is

dissatisfied with his union's efforts on his behalf or the outcome of the grievance procedure does not establish that the union has breached its duty of fair representation. *Eaton Rapids Ed Ass'n,* 2001 MERC Lab Op 131; *Wayne Co*¸1994 MERC Lab Op 855. Maloy's charge and response to the order to show cause contain no factual allegations indicating that the Union failed to exercise its discretion or acted in bad faith or out of personal hostility in deciding to withdraw Maloy's grievance. I conclude that Maloy has failed to state a claim against the Union upon which relief can be granted under PERA, and that summary dismissal of his charge is appropriate under Rule 165 of the Commission's General Rule. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____