STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C08 J-220,

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 547,
Labor Organization-Respondent in Case No. CU08 J-056,

-and-

DANON WESLEY,
An Individual-Charging Party.
_____/

APPEARANCES:

Danon Wesley, *In Propria Persona*

DECISION AND ORDER

On November 21, 2008, Administrative Law Judge David M. Peltz issued his 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

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated:_____

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

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Respondent-Public Employer in Case No. C08 J-220,

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 547,
Respondent-Labor Organization in Case No. CU08 J-056,

-and-

DANON WESLEY,
An Individual Charging Party.
_____/

APPEARANCES:

Danon Wesley, appearing on behalf of himself

DECISION AND RECOMMENED ORDER ON SUMMARY DISPOSITION

On October 16, 2008, Danon Wesley filed unfair labor practice charges against the Detroit Public Schools and the International Union of Operating Engineers, Local 547 (IUOE). 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 David M. Peltz, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission. The identically worded charges allege that Wesley has not been receiving full pay since March of 2005 and that a grievance filed over the pay issue "has not been going according to Contracted procedure [sic]." In an order issued on October 22, 2008, Charging Party was directed to show cause why the charges should not be dismissed. Charging Party did not file a response to that order.

Discussion and Conclusions of Law:

The failure of a charging party to respond to an order to show cause may, in and of itself, warrant dismissal of the charge. *Detroit Federation of Teachers*, 21 MPER 3 (2008). In any event, I conclude that the charges must be dismissed on the basis that they fail to raise any timely issues cognizable under PERA as to either Respondent.

Pursuant to Section 16(a) of the Act, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools,* 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines,* 122 Mich App 650, 652 (1983). In the instant case, Wesley alleges that he has not been receiving "full pay" from the school district since March of 2005. Clearly, Charging Party knew or should have known of the alleged PERA violation more than six months prior to his filing of the charges with the Commission on October 16, 2008. Accordingly, I find that the charge against the Employer in Case No. C08 J-220 is time barred under Section 16(a) of the Act.

The charge against the school district must also be dismissed for failure to state a claim upon which relief can be granted under PERA. With respect to public employers, PERA does not prohibit all types of discrimination or unfair treatment, nor does the Act provide an independent cause of action for an employer's breach of contract. Absent an allegation that the Employer interfered with, restrained, coerced or retaliated against an employee for engaging in conduct protected by Section 9 of PERA, the Commission is prohibited from making a judgment on the merits or fairness of the Employer's action. See e.g. *City of Detroit (Fire Dep't),* 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed,* 1987 MERC Lab Op 523, 524. In the instant case, Charging Party has not alleged that the Detroit Public Schools discriminated or retaliated against him because of union or other protected concerted activity. Accordingly, I find that dismissal of the charge against the Employer is warranted.

Similarly, the charge against Respondent IUOE in Case No. CU08 J-056 must also be dismissed for failure to state a claim upon which relief can be granted. A union's duty of fair representation 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 (1984). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973). Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe, supra*. To this end, a union is not required to follow the dictates of the individual grievant, but rather it may investigate and present the case in the manner it determines to be best. *Detroit Police Lts and Sgts,* 1993 MERC Lab Op 729. The fact that an individual member is dissatisfied with the union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Assoc,* 2001 MERC Lab Op 131. A union does not breach its duty of fair representation merely by a delay in the processing of grievances as long as the delay does not cause the grievance to be denied. *Service Employees International Union, Local 502,* 2002 MERC Lab Op 185.

Despite having been given an opportunity to do so, Charging Party has alleged no facts from which it could be concluded that the IUOE acted arbitrarily, discriminatorily or in bad faith with

respect to its representation of him. The charge does not allege that the IUOE acted out of improper motive, nor is there any allegation that the Union's actions in connection with this matter were arbitrary or the result of gross negligence. Thus, pursuant to Rule 165, R 423.165, of the General Rules and Regulations of the Employment Relations Commission, dismissal of the charge against the IUOE in Case No. CU08 J-056 is also appropriate.

RECOMMENDED ORDER

The unfair labor practice charges in Case Nos. C08 J-220 and CU08 J-056 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____