STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COUNTY OF WAYNE,
Public Employer-Respondent in Case No. C08 D-065,

-and-

AFSCME COUNCIL 25, LOCAL 101,
Labor Organization-Respondent in Case No. CU08 D-017,

-and-

RINARDIS UPSHAW,
An Individual-Charging Party.
_____/

APPEARANCES:

Barbara J. Johnson, Esq., Chief Labor Relations Analyst, for the Public Employer

Aina Watkins, Esq., Staff Attorney, AFSCME Council 25, for the Labor Organization

Rinardis Upshaw, *In Propria Persona*

DECISION AND ORDER

On March 18, 2009, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order on Summary Disposition in the above matters recommending dismissal of the unfair labor practice charges filed by Charging Party, Rinardis Upshaw, against Respondents, County of Wayne (Employer) and American Federation of State, County and Municipal Employees, Council 25, Local 101 (Union). The ALJ found that the original and amended charges, as well as Charging Party's other pleadings failed to state claims upon which relief could be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201- 423.217. He also concluded that the charge against the Employer was time-barred under Section 16 (a) of PERA. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On April 10, 2009, Charging Party filed a single paged document containing one sentence as his "exceptions" to the ALJ's decision.[1] Notwithstanding the improper format, we accepted the document as exceptions. After careful review, we find them to be without merit.

[1] The document specifically states: "I Rinardis Upshaw wish to filed (sic) a exceptions to the Administrative Law Judge Decision.

Discussion and Conclusions of Law:

In Case C08 D-065, the charge alleges a contract violation in 2006 when the Employer's used seasonal workers while Charging Party remained laid off from his bargaining unit position. He asserts that the Employer "interfered' with his protected rights by violating the collective bargaining agreement. PERA does not prohibit an employer from engaging in unfair conduct, unless the actions interfere with an employee's exercise of the specific rights set forth in that law. *MERC v Reeths-Puffer Sch Dist,* 391 Mich 253, 259 (1974). Moreover, an employee's allegation of a contract violation, without more, does not state an actionable PERA claim. *Ann Arbor Pub Sch*, 16 MPER 15 (2003); *Detroit Bd of Ed,* 1995 MERC Lab Op 75.

We concur with the ALJ that this charge does not suggest that the Employer's actions were intended to discourage, interfere with, or retaliate against Charging Party for engaging in protected activity. While he uses various "catch phrases" often associated with protections set forth in Section 9 of PERA, Charging Party does not allege facts to support his claim. We also find that this charge is barred by PERA's six month limitations period having been filed nearly sixteen months after Charging Party submitted initial grievances challenging the Employer's layoff and recall actions. As such, summary dismissal is appropriate under Rule 165 of MERC's General Rules.

In Case CU08 D-065, Charging Party alleges that the Union made "a side deal with the arbitrator" when handling his grievance matter. He accuses the Union of breaching its duty of fair representation. It is well understood that a union may exercise considerable discretion in deciding what appropriate action to take on a grievance (*Michigan State Univ Admin-Prof'l Ass'n*, MEA/NEA, 20 MPER 45 (2007)), so long as its decision is not arbitrary, biased, discriminatory or in bad faith. *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21; 466 NW2d 333 (1991). We agree with the ALJ that Charging Party's unsupported allegations are insufficient to support a claim that the Union acted improperly. The Union negotiated and settled his grievance along with several other outstanding grievances of its members. Charging Party's dissatisfaction with those efforts does not constitute a breach by the Union. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131. Lacking a valid claim, this charge must also be dismissed under R 423.165.

ORDER

The unfair labor practice charges are dismissed in their entirety.

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
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

COUNTY OF WAYNE,
Respondent-Public Employer in Case No. C08 D-065,

-and-

AFSCME COUNCIL 25, LOCAL 101,
Respondent-Labor Organization in Case No. CU08 D-017,

-and-

RINARDIS UPSHAW,
An Individual Charging Party.
_____/

APPEARANCES:

Barbara Johnson, for the Public Employer

Aina N. Watkins, for the Labor Organization

Rinardis Upshaw, appearing on his own behalf

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On April 4, 2008, Rinardis Upshaw filed unfair labor practice charges against his former Employer, Wayne County, and his Union, AFSCME Council 25, Local 101. 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.

In Case No. C08 D-065, Upshaw alleged that the Employer committed an unfair labor practice by laying him off in violation of the collective bargaining agreement. In Case No. CU08 D-017, Upshaw alleged that the Union violated PERA by making erroneous statements of fact to Administrative Law Judge, Doyle O'Connor, in a prior proceeding before the Michigan Employment Relations Commission (MERC). In that prior case, Upshaw had alleged that

AFSCME unlawfully failed to pursue his contractual claims. In a Decision and Recommended Order dated December 21, 2007, Judge O'Connor dismissed the charge for failure to state a claim under PERA. In so holding, Judge O'Connor noted that it was "uncontested" that grievances relating to Upshaw had been, or were in the process of being, pursued by the Union. When no exceptions were filed, the ALJ's decision was adopted by the Commission as its final order in the case on March 26, 2008. Upshaw now contends that the Union violated PERA by lying to Judge O'Connor and that in fact his name was never included in any grievances filed by AFSCME Council 25, Local 101.

In an order issued on April 14, 2008, I directed Charging Party to show cause why the charges should not be dismissed as merely an attempt to relitigate the issues raised in the prior proceeding, and for failure to state claims under PERA. Charging Party was specifically directed to provide factual support for his allegation that AFSCME made misrepresentations to ALJ O'Connor and was encouraged to provide documentation to support his charge against the Union, including, but not limited to, copies of relevant grievances and arbitration awards.

Charging Party filed a response to the order to show cause on April 28, 2008. Based on that response, I indicated that I would be recommending dismissal of the charge against the Employer in Case No. C08 F-131 on the ground that Upshaw had alleged no facts from which it could be concluded that Wayne County violated PERA. With respect to the charge against AFSCME Council 25, Local 101 in Case No. CU08 D-017, I concluded that questions of fact existed with regard to the conduct of the Union and that a hearing pertaining to that charge would proceed on September 16, 2008.

In a letter to the undersigned dated May 14, 2008, Charging Party asserted that Wayne County violated the collective bargaining agreement by refusing to restore his "contracted position" and by giving a false statement to the unemployment insurance agency. On August 28, 2008, Charging Party filed amended charges containing new allegations against both Wayne County and AFSCME Council 25, Local 101. Upshaw now alleges that the County violated PERA by calling back seasonal workers and refusing to restore him to his contract position. With respect to AFSCME, Charging Party asserts that the Union committed an unfair labor practice when its staff representative entered into a "side deal" with a grievance arbitrator at a hearing on April 30, 2008. Attached to the amended charges were partial copies of arbitration decisions presumably involving AFSCME Council 25. Upon receipt of the amended charges, I adjourned the hearing and issued an order directing Charging Party to show cause why these new allegations should not be dismissed for failure to state claims under PERA.

Charging Party filed a response to the second order to show cause on September 17, 2008. With respect to Respondent Wayne County, Upshaw alleged that the Employer interfered with his "union rights – activities, sent a letter to return to work as a temporary seasonal worker with no pension, no benefits, no health insurance and call – privileges, this is retaliations [sic]." As to the conduct of the Union, the response merely repeated the conclusory assertion that the Union violated PERA by entering into a "side deal" with an arbitrator. Based upon the response, I indicated that I would be recommending dismissal of the allegations set forth in the amended charges. In so holding, I noted that the only allegation which might raise a cognizable and timely claim under PERA is Charging Party's assertion in the original charge that the Union

violated PERA by its conduct in the prior MERC proceeding before Judge O'Connor. With respect to that allegation, I ordered Respondent AFSCME Council 25, Local 101 to file a position statement describing in detail what actions, if any, it took on Upshaw's behalf. The Union was directed to attach to its response copies of the grievances referred to in the prior proceeding, along with full and complete copies of the arbitration decisions relating to such grievances and any other documents which might be relevant to the instant dispute.

The Union filed its position statement on October 27, 2008, along with supporting documentation, including the sworn affidavit of AFSCME staff specialist, William Harper, which chronicled Local 101's efforts to represent Charging Party. The position statement and attachments thereto assert the following facts:

(1) Wayne County is a party to a collective bargaining agreement covering AFSCME Locals 25, 101, 409 and 1659;

(2) In 2005, AFSCME Local 1659 filed a grievance alleging a violation of Article 19 of the contract, which pertains to layoff, displacement and recall.

(3) In October of 2006, AFSCME Local 101 filed a policy grievance alleging that three members of the bargaining unit, including Upshaw, were laid off in violation of Article 19 (Grievance No. 101-06-183S Policy). Upshaw later filed his own grievance alleging the contract violation (Grievance No. 101-060105M). The grievances were subsequently combined;

(4) AFSCME Local 101 and the County agreed to hold Grievance Nos. 101-06-183S Policy and 101-060105M in abeyance until after the issuance of a decision on the grievance filed by Local 1659. It was the County's position that the arbitrator's decision on Local 1659's grievance would apply to the grievances filed by Local 101 and Upshaw.

(5) On November 8, 2007, arbitrator George Roumell issued an Opinion and Interim Award granting AFSCME Local 1659's grievance. Roumell issued a final award on March 5, 2008. Thereafter, Local 101 entered into settlement negotiations with the County on Grievance Nos. 101-06-183S Policy and 101-060105M relating to all affected members.

(6) Upshaw filed two individual grievances against the County on July 30, 2007 and October 5, 2007 (Grievance Nos. 101-07-229M and 101-07-668M). AFSCME Local 101 combined the grievances and processed them both to arbitration. A hearing was held before arbitrator Robert Proctor on April 30, 2008. Proctor issued a final opinion denying the grievances on October 14, 2008.

Following the submission of the Union's position statement, I issued a supplemental order directing Charging Party to show cause why his charge against AFSCME Local 101 in Case No. CU08 D-017 should not be dismissed for failure to state a claim under PERA. In the order, dated December 2, 2008, Charging Party was specifically ordered to limit his response to

the issue of whether the relevant grievances were in fact pending at the time the Union filed its brief with Judge O'Connor in the prior case. Charging Party filed a timely response on December 16, 2008. In his response, Upshaw did not refute or contradict the facts set forth in the Union's position statement in any substantive respect. Rather, Upshaw merely asserted that AFSCME Local 101 violated PERA by failing to support him "in his attempts to be rehired by the county and receive relief."

DISCUSSION AND CONCLUSIONS OF LAW:

Having carefully reviewed the various pleadings filed by the parties in this matter, including the attachments thereto, I conclude that Charging Party has not raised any timely issue cognizable under PERA as to either Respondent. 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. Apart from the conclusory assertion that the County "interfered with his "union rights – activities" and engaged in "retaliations" [sic], Charging Party has not alleged that he engaged in any protected concerted activity for which he was subject to discrimination or retaliation by the Employer. Accordingly, I find that dismissal of the charge against Respondent Wayne County in Case No C08 D-065 is warranted.

The charge against the Employer in Case No. C08 D-065 must also be dismissed as untimely. 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). Here, the gravamen of Charging Party's dispute with the County is the assertion that the Employer continued to employ temporary employees after he and other full-time employees had been laid off. The various pleadings filed by Charging Party in this matter, as well as the attachments thereto, indicate that Upshaw was laid off on or about November 6, 2006, and that he filed a grievance over this issue as early as October 31, 2006. Clearly, Charging Party knew or should have known of the alleged unfair labor practice by the Employer more than six months prior to the filing of the charge in this matter on April 4, 2008. Accordingly, I find that the charge in Case No. C08 H-167 is time-barred under Section 16(a).

Similarly, the charge against Respondent AFSCME, Local 101 in Case No. CU08 D-017 must also be dismissed. 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.

Charging Party contends that AFSCME Local 101 breached its duty of fair representation by making erroneous statements to Judge O'Connor in Case Nos. CU07 I-048. Even assuming arguendo that such conduct would constitute a PERA violation, I find that Charging Party has failed to establish the existence of a genuine issue of material fact with respect to whether the Union made false representations in the prior case. Local 101 filed a position statement, supported by a sworn affidavit from its staff specialist, indicating that all of the grievances pertaining to Upshaw were in fact still pending at the time Judge O'Connor issued his decision in on December 21, 2007. According to the position statement and affidavit, the Union and the Employer agreed to hold Grievance Nos. 101-06-183S Policy and 101-060105M, both of which involved Charging Party, in abeyance pending disposition of a related grievance filed by AFSCME Local 1659. Arbitrator Roumell issued a final opinion granting that grievance on March 5, 2008. Thereafter, Local 101 entered into settlement negotiations with the County on its grievances. According to the position statement and affidavit, a final opinion on Upshaw's individual grievances was issued by Arbitrator Proctor on October 14, 2008. Despite having been given ample opportunity to do so, Charging Party failed to set forth any facts to contradict or rebut the assertions made by the Union in its position statement.

In his amended charge, Upshaw also asserted, without any supporting facts, that the Union violated PERA by entering into a "side deal" with an arbitrator at hearing on April 30, 2008. As noted, I ordered Charging Party to show cause why that allegation should not be dismissed for failure to state a claim under the Act. In his response to the order to show cause, Charging Party did not provide any additional information concerning this alleged "side deal" or assert any facts which would even suggest that the Union acted arbitrarily, discriminatorily or in bad faith with respect to its representation of Upshaw. I find this conclusory assertion insufficient to state a claim against the Union for breach of the duty of fair representation.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charges in Case Nos. C08 D-065 and CU08 D-017 be dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: March 18, 2009