STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer - Respondent in Case No. C09 K-225,

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 1497,
Labor Organization - Respondent in Case No. CU09 K-039,

-and-

DONALD KIRKLAND,
An Individual - Charging Party.
_____/

APPEARANCES:

Cassandra D. Harmon Higgins, Esq., Staff Attorney, AFSCME Council 25, for the Labor Organization

Donald Kirkland, *In Propria Persona*

DECISION AND ORDER

On February 24, 2010, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges. The Decision and Recommended Order was served on the interested parties in accord with Section 16 of the Act.

Pursuant to Rule 176, R423.176 of the General Rules of the Employment Relations Commission, exceptions must be filed no later than twenty days of service of the ALJ's Decision and Recommended Order, and "[a]t the same time, copies of the exceptions . . . shall be served on each party . . . . An exception that fails to comply with this rule may be disregarded." (*emphasis added*).

In this case, exceptions to the ALJ's Decision and Recommended Order were due by the close of business on March 19, 2010. That same day, Charging Party filed exceptions but failed to submit a statement attesting that the exceptions were timely served upon Respondents.

On April 21, 2010, we notified Charging Party that unless a statement of service was filed within 20 days, his exceptions would be disregarded. To date, Charging Party has not provided the required statement of service. Accordingly, the exceptions will not be considered.

ORDER

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: _____

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

In the Matter of:

WAYNE STATE UNIVERSITY,
Respondent-Public Employer in Case No. C09 K-225,

-and-

AFSCME COUNCIL 25, LOCAL 1497,
Respondent-Labor Organization in Case No. CU09 K-039,

-and-

DONALD KIRKLAND,
An Individual Charging Party.
_____/

APPEARANCES:

Cassandra D. Harmon Higgins, for the Labor Organization

Donald Kirkland, appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On November 16, 2009, Donald Kirkland filed unfair labor practice charges against his former Employer, Wayne State University, and his Union, AFSCME Council 25, Local 1497. 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 assert that the Employer and the Union conspired against Kirkland to bring about his discharge and that the parties violated the terms of their collective bargaining agreement by waiting "months" to hear his grievance. In the charge, Kirkland writes, "I need to know just what I was fired for and was I treated equally and fairly as everyone else at the university. Or was I singled out for my trying to make them follow the agreements and rules and that makes me a troublemaker."

On December 23, 2009, I issued an order directing Kirkland to show cause why the charges should not be dismissed as untimely and/or for failure to state claims upon which relief could be granted under PERA. Charging Party was specifically directed to provide factual support for his allegations and cautioned that a decision recommending dismissal of the charges would be issued without a hearing, if his response to the order did not state valid and timely claims under the Act.

Charging Party filed a response to the order to show cause on January 19, 2010, along with additional supporting documentation. The following facts are derived from the pleadings filed by Kirkland in this matter, including the attachments thereto, which are accepted as true for purposes of the motion for summary disposition.

Findings of Fact:

Kirkland, a former Union steward, was employed by Wayne State University as groundskeeper. He was terminated in January or February of 2009 for "no call/no show". A series of grievances were filed challenging the termination, as well as earlier disciplinary actions taken against Charging Party by the University. When the Employer denied the termination grievance in April of 2009, Charging Party requested that the Union advance the case to arbitration. Thereafter, the president of Local 1492 submitted the grievance to AFSCME Council 25 for consideration.

Ultimately, AFSCME Council 25 decided not to process the termination grievance to arbitration. The Union notified Charging Party of that decision in August of 2009 and, at the same time, advised Kirkland of his right to file an appeal. On August 31, 2009, Kirkland sent a letter to the Union's arbitration department requesting a live appeal with respect to each of his grievances. Thereafter, Kirkland filed the instant charges with the Commission.

On November 20, 2009, the Union held a grievance appeal hearing regarding the various cases pertaining to Kirkland. Thereafter, by letter dated November 24, 2009, the Union's arbitration department notified Charging Party that it was delaying a decision on the termination grievance for thirty days pending the receipt of additional information from Kirkland pertaining to his discharge. Specifically, the letter from the Union stated, in pertinent part:

> **The grievant was terminated on February 10, 2009 for "no call/no show" January 30, 2009 - February 6, 2009. The grievant contends he was discharge[d] on January 15, 2009, which the Employer's notice indicates as an indefinite suspension, and while at work, for a meeting with the Employer, on January 29, 2009 he did not work.**
>
> **No evidence was provided to explain why the grievant did not return to work on January 30, 2009. The grievant has 30 days to provide tangible evidence or the case will be closed without further notice.**

> **Failure to provide this information within 30 days will result in the grievance being processed to closure based upon the original rejection. [Emphasis in original.]**

At the same time, the Union rejected Kirkland's appeal with respect to two of the remaining grievances.

On January 7, 2010, AFSCME notified Charging Party that it had yet to receive any documentation from Charging Party. Kirkland was given an additional three weeks in which to provide the necessary information to the Union regarding his failure to return to work. In his response to the Order to Show Cause issued in this matter, Kirkland characterized the Union's request for information as follows: "The reason the council is trying to get paperwork from me is to catch me in a trap so they can deny me arbitration and tell me to go away." Thus, it appears that Kirkland refused to assist the Union in its investigation by providing the requested information.

Discussion And Conclusions Of Law:

Having carefully reviewed the various pleadings filed by Charging Party in this matter, including the attachments thereto, I conclude that Kirkland has not raised any issue cognizable under PERA with respect to Wayne State University. Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any alleged 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, Kirkland was discharged by the University in January or February of 2009. However, the charge was not filed until November 16. 2009. The pursuit of a grievance does not toll or extend the statute of limitations for purposes of filing an unfair labor practice charge against the Employer. See e.g. *City of Detroit*, 21 MPER 39 (2008); *Troy Sch Dist*, 16 MPER 34 (2003). Accordingly, the charge against the Employer in Case No. C09 K-225 must be dismissed as untimely under Section 16(a) of the Act.

The charge against the University also fails to state a valid 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. Other than Kirkland expressing a desire to know if he was discharged for being a "troublemaker", the pleadings fail to allege any facts which, if proven, would establish that Kirkland engaged in protected concerted activity for which he was subject to discrimination or retaliation by the Employer. Thus, dismissal of the

charge against Respondent Wayne State University in Case No C09 K-225 is also warranted for failure to state a claim under the Act.

Similarly, the charge against Respondent AFSCME, Local 1497 in Case No. CU09 K-039 must also be dismissed for failure to state a claim. 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 processing 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 ample opportunity to do so, Charging Party has failed to set forth any facts which, if proven, would establish that AFSCME Local 1497 did not represent him fairly in connection with his discharge. To the contrary, the pleadings and supporting documentation filed by Charging Party in this matter establish that the Union processed a number of grievances on Charging Party's behalf, including a grievance challenging his termination from employment with the University, and that it advanced those grievances through the various steps of the contractual grievance procedure before ultimately deciding not to proceed to arbitration. Thereafter, Charging Party was given the opportunity to challenge that decision at a live grievance appeal hearing before AFSCME's arbitration department. Following that hearing, the Union requested additional information from Kirkland regarding the circumstances which resulted in his termination. When Kirkland failed to comply with that request within thirty days, the Union gave him an additional three weeks in which to provide the necessary information.

Beyond the bare conclusory assertion that the Union colluded with the Employer, Charging Party has failed to set forth any facts which would even suggest that AFSCME Council 25, Local 1492 acted arbitrarily, discriminatorily or in bad faith with respect to its representation of Kirkland.[1] While Charging Party claims that the Union did nothing to defend him during the grievance process, he attached to his response to the Order to Show Cause a letter which recounts the Union's attempt to understand and investigate his discharge. It is apparent that

[1] The only specific example cited by Kirkland to support his claim of collusion is the fact that the collective bargaining agreement requires the Employer and the Union to share the cost of arbitrating a grievance. Such an agreement is, of course, commonplace in public sector labor relations and in no way conflicts with the requirements of PERA.

Charging Party refused to provide the documentation requested by the Union in that letter or otherwise explain why he failed to return to work on January 30, 2009, information which the Union deemed necessary to make a determination as to whether to advance the case to arbitration. Although Charging Party obviously takes issue with the Union's decision not to arbitrate, such dissatisfaction, standing alone, is 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. C09 K-255 and CU09 K-039 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: February 24, 2010