STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT POLICE OFFICERS ASSOCIATION,
Labor Organization-Respondent,

Case No. CU05 D-012

-and-

JAMES E. HERBERT, JR.,
An Individual-Charging Party.
_____/

APPEARANCES:

Gregory, Moore, Jekle, Heinen & Brooks, L.L.P., by James Moore, Esq., for Respondent

Demorest Law Firm, by Mark S. Demorest, for Charging Party

DECISION AND ORDER

On January 21, 2010 Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the charge filed by Charging Party, James E. Herbert, Jr., against Respondent, Detroit Police Officers Association (Union or DPOA) was untimely and failed to state a claim upon which relief could be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. The charge alleged unfair representation by the Union for failing to pursue grievances on Charging Party's behalf. Following oral argument on Respondent's motion for summary disposition, the ALJ concluded that no legitimate material factual issues existed to support an unfair labor practice charge and that the allegations were time-barred. Accordingly, the ALJ recommended summary dismissal. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. After obtaining an extension, Charging Party filed exceptions to the ALJ's conclusions on March 18, 2010. Similarly, Respondent received an extension and filed a brief in support of the ALJ's recommendations on April 29, 2010.

In his exceptions, Charging Party alleges that the ALJ erred by (1) recommending summary dismissal for failure to state a claim absent a motion from Respondent, (2) finding the charge was time barred under PERA, and (3) rejecting his amended charge. After careful review of the exceptions, we find them to be without merit.

Factual Summary

We adopt the facts set forth in the ALJ's Decision and Recommended Order; they will not be repeated here, except where necessary. For the purpose of reviewing the ALJ's conclusions, we accept as true Charging Party's allegations as contained in the record.

Charging Party began employment as a Detroit police officer in 1986. In 2002, he received an unpaid suspension stemming from an off-duty, alcohol related driving offense.[1] In June, 2003, an arbitrator's award overturned the unpaid suspension and ordered Charging Party's return to payroll and recovery of lost wages and benefits. Charging Party was returned to payroll and later to work, but not placed on active duty status as a police officer. In October, 2004, his law enforcement certification expired due to his two-year period of non-active status as a police officer. In March 2005, Charging Party requested that Respondent file grievances to help obtain his re-certification and return to active status as a police officer. The Union refused to file the grievances indicating that it lacked any enforcement capability because the re-certification process was state controlled and outside of the parameters of its collective bargaining agreement. On April 8, 2005, Charging Party filed his initial charge[2] alleging that the Union breached its duty to him by not filing grievances against his employer for "improper and excessive discipline", "improper loss of certification" and "unequal treatment". The ALJ held the matter in abeyance while the parties resolved several related disputes involving Mr. Herbert. In February 2008, Charging Party was discharged as a police officer for lacking the required state certification. DPOA challenged his discharge. On September 30, 2009, Charging Party amended his earlier charge expanding the allegations against the Union to include "gross neglect", "retaliation" and failure to ensure complete implementation of an arbitrator's award. In October, 2009, an arbitrator reinstated Charging Party as a Detroit police officer, subject to his obtaining re-certification by March 1, 2010.

Discussions and Conclusions of Law

The essence of Charging Party's complaint stems from the Union's refusal to pursue grievances challenging his loss of police certification and active duty status as a police officer. He asserts that his pleadings provide sufficient detail to survive summary dismissal. It is well settled that a union must serve the interests of its members overall and may exercise considerable discretion in deciding what action is appropriate (*Michigan State Univ Admin-Prof'l Ass'n*, MEA/NEA, 20 MPER 45 (2007)), so long as its decisions are not arbitrary, discriminatory or in bad faith. *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21; 466 NW2d 333 (1991). Also, a member's dissatisfaction with the union's efforts or ultimate decision not to pursue a grievance, in itself, does not constitute a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131.

In this matter, we agree with the ALJ that the allegations in the original charge and the first amended charge are insufficient to support a claim that the Union violated its duty of fair representation for not pursuing certain grievances. At best, the record reflects Charging Party's discontent with his Union's efforts. Also, the allegations in a complaint of a breach of this duty must contain more than conclusory statements of improper representation by a union. *Martin v Shiawassee Co Bd of Comm'rs*, 109 Mich App 32, 35 (1981). Charging Party insists that the

[1] Charging Party was acquitted of this offense on October 26, 2005.
[2] A similar charge was filed against the employer that same day, but later withdrawn by Charging Party.

Union's conduct was improper; however, his assertions lack sufficient factual detail. It appears from Charging Party's own pleadings that Respondent processed grievances pertaining to the disciplinary actions that lead to his unpaid suspension and discharge. These grievances resulted in separate arbitration decisions that returned Charging Party to the city's payroll, subject to certain conditions. Also as noted in the record before the ALJ, one arbitrator opined that Charging Party's own "insubordination and lack of due diligence" caused his continued failure to re-gain the re-certification needed to return to active status as a police officer. Based on the record before us, we concur with the ALJ that it appears that Respondent acted reasonably and could not have done much more to aid Charging Party's efforts to regain his police certification. Without a cognizable claim under PERA, the charge can be dismissed under Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165. Also contrary to Charging Party's assertion, this same rule permits the ALJ to act on his own and recommend summary dismissal of charges, where appropriate. *Michigan State Univ Admin-Prof'l Ass'n*, MEA/NEA, 23 MPER 62 (2010).

We also agree with the ALJ that the charge is time barred. Under Section 423.216(a) of PERA, ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge . . .". This limitations period is jurisdictional and cannot be waived. *Detroit Federation of Teachers*, 21 MPER 3 (2008). The charge filed in 2005 was predicated on events that initially occurred in 2002 and 2003. As such, summary dismissal is appropriate where the allegations are based on events occurring outside of the six month statutory period. *Shiawassee Co Rd Comm*, 1978 MERC Lab Op 1182. Charging Party also contends that events occurring since the filing of his initial charge should sustain the timeliness of his amended charge as a new complaint. Even if correct, as set forth above, the amended charge would still fail as it lacks the factually supported allegations needed to sustain an action under PERA.

Finally, we have carefully examined the remaining issues raised by Charging Party and find that they would not change the results. Accordingly, we adopt the ALJ's findings of fact and conclusions of law that this charge must be summarily dismissed as time barred and failing to state a claim under PERA.

ORDER

This unfair practice labor charge is dismissed in its 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:

Case No. CU05 D-012

DETROIT POLICE OFFICERS ASSOCIATION,
Respondent-Labor Organization,

-and-

JAMES E. HERBERT, JR.,
An Individual Charging Party.
_____/

APPEARANCES:

Gregory, Moore, Jeakle, Heinen & Brooks, by James M. Moore, for Respondent

Demorest Law Firm, by Mark S. Demorest, for Charging Party

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

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, acting on behalf of the Michigan Employment Relations Commission (MERC). Based on the pleadings, the exhibits agreed to by the parties and the oral argument of counsel on November 24, 2009, I make the following findings of fact and conclusions of law.

This case arises from an unfair labor practice charge originally filed on April 8, 2005 by James E. Herbert, Jr. against his labor organization, the Detroit Police Officers Association (hereinafter "DPOA" or "the Union"). The charge, which was filed *in pro per*, alleged that the DPOA violated PERA by failing to file grievances "for improper and excessive discipline", "improper loss of certification" and "unequal treatment." On September 21, 2005, attorney Mark S. Demorest entered an appearance as counsel for Charging Party. On November 16, 2005, Respondent filed a motion to dismiss the charge on the ground the Union had never been served with a copy thereof. I concluded that Respondent had been properly notified of the existence of the charge and denied the Union's motion. Thereafter, the parties agreed to hold this case in abeyance pending resolution of other proceedings involving Charging Party. Thereafter, the case remained in adjourned without date status at the request of the parties for a period of several years.

On September 30, 2009, Charging Party filed a "First Amended Charge." The Union responded by filing a motion for summary disposition in which it asserted that the amendment

should be denied and that Herbert's allegations should be dismissed as untimely and for failure to state a claim under PERA. Charging Party filed a brief in opposition to the motion for summary disposition on November 17, 2009.

Oral argument on the motion for summary disposition was held on November 24, 2009. After considering the arguments made by counsel on the record, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools*, 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party had failed to state a timely and valid claim under PERA for breach of the duty of fair representation. The substantive portion of my findings of fact and conclusions of law are set forth below:

> JUDGE PELTZ: The event which precipitated, essentially, all of the litigation which was filed here before the Commission occurred on August 24th of 2002, when the Charging Party, Mr. Herbert, James Herbert, Jr., received a ticket for allegedly driving while intoxicated, or OUIL.
>
> On either September 5th of 2002 or October 6th, 2002--again, there's some discrepancy in the various documents which were filed; I don't think it is a material dispute there, though-- Charging Party was suspended without pay, and this suspension without pay was contrary to certainly the past practice of the parties. Charging Party alleges, and there has been no dispute from the Union, that this was instituted at the behest of then-Police Chief Jerry Oliver as part of a new policy suspending officers without pay any time they were accused of a crime.
>
> The Union filed a grievance challenging the suspension without pay, filed that on behalf of Mr. Herbert, and on June 26th of 2003, an arbitration decision was issued in favor of Mr. Herbert. The arbitrator, Mr. Sugerman, issued an order requiring the employer to return Mr. Herbert to the payroll from suspension and to make him whole for his losses.
>
> The arbitration award issued by Mr. Sugerman specifically dealt with the issue of suspension, not any subsequent discharge, and the arbitrator made it very clear in his decision that the propriety of the suspension itself was not at issue. Rather, it was whether the suspension could be without pay. That was the issue which was in dispute. There was no argument put before the arbitrator that Charging Party should be returned to his former position.
>
> The arbitrator found in favor of the Union's arguments, again, and ordered that the Charging Party be returned to the payroll. Following that decision, on July 7th of 2003, Charging Party in fact was returned to the payroll, but not to active duty. Because he was no longer on active duty, he was no longer eligible for promotions or overtime.
>
> On October 6th of 2004, Charging Party lost his [Michigan Commission on Law

Enforcement Standards (MCOLES)] certification.

On March 11th of 2005, Charging Party was restored to active employment. However, he wasn't restored to his former position as a police officer.

On or about March 22nd of 2005, the City police department notified MCOLES that Charging Party's certification had expired. And on or about March 28th of 2005, Charging Party and other officers apparently similarly situated met with the Union and requested that they pursue a grievance over the failure of the department to return them to active duty and the loss of their [MCOLES} certification as police officers. That same day, the Union informed Charging Party that it would not take such action.

Again, April 8th of 2005, then the charge in this matter was filed. There was also a charge filed against the city; that charge [MERC Case No. C05 D-077] was later withdrawn by the Charging Party.

On October 26th of 2005, the Charging Party was acquitted of the OUIL charge which had led to his suspension.

On February 26th of 2008, the Charging Party was discharged from employment with the police department.

And then just recently, on October 30th of 2009, a decision was issued by Mr. Roumell, an arbitration decision, requiring Charging Party to, in order to regain his position, to obtain his MCOLES certification by March 1st of 2010.

Now, the arbitrator found in his decision that the failure--Charging Party's failure to re-attain his MCOLES certification was the result of his own insubordination and lack of due diligence with respect to his efforts to become certified.

That concludes the factual findings. And as I indicated, I believe, none of those facts are in dispute in this matter. Now, I will note at the outset of my discussion and conclusions of law section of this decision the applicable standard in a case such as this.

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, as stated in *Vaca v. Sipes*, 386 US 171 (1967), and *Goolsby v. City of 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. That's *Lowe v. Hotel Employees*, 389 Mich 123 (1973) and *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op [148].

The union's ultimate duty is toward the membership as a whole, rather than solely to any individual, and the union is not required to follow the dictates of any individual employee, but rather, it may investigate and handle a case in the manner it determines to be best. *Detroit Police Lieutenants and Sergeants*, 1993 MERC Lab Op 729.

The Commission has steadfastly refused to interject itself in judgments over grievance and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1.

The union's decision on how to proceed is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Association v. O'Neill*, 499 US 65 (1991), and *City of Detroit Fire Department*, 1997 MERC Lab Op 31.

To prevail on a claim of [breach of the duty of fair representation] charging party must establish . . . not only a breach of the [duty of fair] representation, but also [breach of the collective] bargaining agreement by the employer. That's *Goolsby v. City of Detroit*, 211 Mich App 214 [(1995)], and *Knoke v. East Jackson Public School District*, 201 Mich App 480 [(1993)].

The fact that a member is dissatisfied with their union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Education Association*, 2001 MERC Lab Op 131, and *Wayne County DPW*, 1994 MERC Lab Op 855.

Where a union and an employer concur as to the interpretation of the contract or other agreement, their construction governs. *Saginaw Valley State University*, 19 MPER 36, a 2006 decision.

Turning to the application of case law to these facts, I will first address the allegations in the amended charge. I'll note--and there is some argument about this in the parties' briefs, although I don't believe either party referred to this today in oral argument, that our most recent telephone conference and our--and the procedure which we outlined in that conference constituted an agreement that the amended charge would be accepted in whole or in part in this matter or that I indicated that the amendment would be proper without having actually seen the amended charge.

The Commission rules are clear on this issue. Rule 423.153 allows the charging party to file an amended charge before, during, or after the conclusion of the hearing, as, in fact, the Charging Party noted in his brief. However, the rule goes on that the opposing party may then file an objection to the amended charge within ten days after receipt thereof. And even if an objection is not filed, the ALJ still has the discretion to permit the amendment upon such terms as are just and consistent with due process.

So I think the validity of the amendment is certainly an issue before me today. Now, obviously, to the extent that the amended charge merely clarifies the original

allegations, that is permissible and certainly in accordance with what we discussed, and I will be getting to those allegations in just a moment.

What I want to do, though, is start with the allegations which could be deemed either new allegations or, as Charging Party--Mr. Demorest has asserted today, events arising from the original charge. I want to address those at this time, and note that I will, in fact, be denying the amendment as to those issues on several grounds.

First, and I think most importantly here, there is nothing or next to nothing regarding the incidents themselves stated in either the first amended charge or the Charging Party's response to the Union's motion. There is a vague litany of various allegations, but they're cursory allegations, summary allegations, without any detail. And I think Charging Party, certainly on notice of the requirement that it--while we don't require lengthy pleadings or that all pleadings be supported by documents or anything of that nature, there is the underlying principle that the charge should put the other party or parties on notice of what is being alleged.

Here, we have a situation where the original charge was filed some four years ago, and we finally have an amended charge filed, again, which is vague at best as to any of these new allegations. And then the Union filed a motion for summary disposition arguing , . . . in part, that the amended charge should be dismissed because the allegations are vague and ambiguous. And the Charging Party turns around and files a response which doesn't provide any additional detail regarding those allegations.

The Charging Party should have known, obviously, that that argument had been made. And I'll note also that the rules, the Commission's rules, require--and this would be Rule 423.51--require that a charge shall include a clear and complete statement of the facts which allege a violation of PERA, including the date of the occurrence of each particular act, the names of the agents of the charged party who engaged therein, and the sections of PERA alleged to have been violated.

* * *

So, you know, given the fact that the rules are clear, that the Union made an argument in its motion for summary disposition that the allegations were vague and ambiguous, and that the case has been pending for over four years, at any point during which Charging Party could have sought to clarify its charge and didn't, I don't think it would be proper or just to allow these additional issues to be raised at this time and in this matter.

On that point, before I move on to the statute of limitations issue with regard to those, there was an additional allegation that the Union's inaction had resulted in some disciplinary measures [which] were blocking Charging Party's ability to attain or re-attain his MCOLES certification.

Now, first of all, there were no details, again, given as to those, but moreover, we have the October '09 grievance arbitration decision in which the arbitrator made the finding that Charging Party's failure to attain his MCOLES certification was due to

his own insubordination and lack of due diligence.

Now, the Union was a party to that arbitration . . . and Charging Party himself was, in fact, for purposes of the case law, a party to that proceeding as well. The Court of Appeals has held that--and let me back up and explain what I'm getting at here.

I think collateral estoppel would apply here and preclude the relitigation of this issue here, that being . . . the reason for Charging Party's failure to re-obtain MCOLES certification. That's essentially the same issue that the arbitrator dealt with in the '09 decision and that the Charging Party is making here.

The doctrine of collateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a final judgment and the issue in question was actually necessarily determined in the prior proceeding. See, for example, *People v. Gates*, 434 Mich 146 (1990).

The doctrine is intended to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. See *Detroit v. Qualls*, 434 Mich 340 (1990).

Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in the early action. *Arim v. General Motors Corp.*, 206 Mich App 178 (1994).

And I will note that the court has held that the decision of an arbitrator can have collateral estoppel effect on subsequent administrative or judicial tribunals and decisions, and has held with respect to the identity of the parties that individual employees are substantially identical to the labor organizations which represented them both in terms of arbitration and as charging parties before MERC. See, for example, the *Senior Accounts, Analysts and Appraisers Association v. City of Detroit*, 60 Mich App 606 (1975), which was affirmed by the Supreme Court at 399 Mich 449 (1976).

And for a general discussion of this entire matter with respect to the collateral estoppel effect of an arbitrator's decision, see also the *Dearborn Heights School District #7 v. Wayne County MEA and Sherrie Adis* [223 Mich App 120 (1998)].

And again, any allegation, even if it were not overly vague and ambiguous, regarding Charging Party's failure to re-obtain MCOLES certification is barred by the doctrine of collateral estoppel.

Now, even if I were to grant the amendment, ignoring the failure to comply with the specific requirements of the rules as to the detail provided in a charge, I would still find that these new allegations would be untimely. I'll note that dates are not provided as to most of these allegations. However, where dates are provided within the first amended charge, they're all outside of the six-month window predating the filing of the amended charge.

* * *

So I don't think there's any allegation here, any factually supported allegation of any incident which, if true, would constitute a breach of the duty of fair representation within the six-month period predating the filing of the amended charge.

And for all of those reasons, as I stated, I will dismiss the [new] allegations in the amended charge.

Regarding the remaining allegation, which I think carries over from the original charge in this matter--it's not spelled out as much in the first amended charge as it was in the original, but this was disparate treatment with respect to the incident involving the Union president, and then in the amended charge, there was a specific incident mentioned regarding a newspaper article alleging that the Union asked its members to support various officers.

First I'll note that as to those officers, there's no factual allegation that any of those officers were similarly situated, or any details provided regarding any of those particular incidents. Nor are there any allegations that Charging Party was actually harmed as a result of--even assuming they were similarly situated--as a result of this newspaper article.

With regard to the allegation involving the Union president, the allegation is of disparate treatment by the city, not by the Union. The allegation alleges that the Union president was treated differently in that he was not suspended without pay in the same manner [as Herbert]. That would not be an action by [the] Union; that would be an action by the employer. [To] the extent that the Union treated the situations differently, well, they're not similar or identical situations, so I don't see how either--how that could establish arbitrary or discriminatory conduct in this matter.

Now, regarding the issue which is at the heart of this matter--that's that the Union should have pursued a grievance back in, at least according to the Charging Party's argument, back in 2005, March of 2005, regarding the city's failure to put him back on the active payroll as a police officer. [F]irst, I do, in fact, find [this] allegation untimely. And I should note for purposes of the record that this finding, as well as my earlier finding that allegations were untimely, these are all pursuant to Section 16(a) of PERA.

Section 16(a) states that no complaint shall issue based on 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. That's *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582. 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.

In this particular case--let me deal first with the argument from the Charging Party that the Union somehow waived its right to [raise] this issue by virtue of the fact that they filed an earlier motion on . . . statute of limitations grounds, which I denied.

As has been referenced by Mr. Moore, that earlier motion was on different grounds. It was an argument that the Charging Party had never been served with the charge. There was no argument brought forth that the original charge was untimely, and therefore, I certainly didn't rule on that allegation at that time.

Having said that, even if they were identical issues, again, the statute of limitations is jurisdictional and can't be waived, and it can be raised at any time, including on exception or on appeal. I therefore have a duty to inquire into any statute of limitations issues that are before me and to address those.

In this particular case, applying the statute of limitations here, we have a situation where the Charging Party returned to the payroll in July of 2003, and he claims that the Union should have taken action to force the employer to put him back on active status. But he apparently did not make that request . . . until March of 2005, after he had already lost his MCOLES certification.

Clearly, no matter what may have occurred during that period, Charging Party knew or should have known . . . that nothing was being done [by the Union] during that period of time to bring about the desired result during that essentially two-year period before the March meeting that has been referred to.

To the extent that this was the first time that Charging Party made this request to the Union, again, that was after--it was two years after, while he'd been sitting in a suspension with pay. And to make that request--even if that had been the first time, to make that request two years later, even if that is the situation, I still find that he knew or should have known that nothing had been done and there was a duty on the part of Mr. Herbert to take action on his own behalf to initiate such a process long before March of 2005.

Regardless, even if that charge was timely, there is no factually supported allegation which, if true, would establish that the Union should have taken any additional action. Now, clearly, the umpire's decisions, Mr. Sugerman's decision, dealt only with removing Charging Party from his suspension without pay and returning him to the payroll, not returning him to [any] particular job. So there can be no argument made that there should have been some action by the Union taken with respect to the implementation of that award.

I'll note also that there was an argument made in the Charging Party’s brief that the fact that the arbitrator ruled that Mr. Herbert should be returned to the payroll and made whole for his losses included--well, would have prevented what happened here, because by Charging Party not having been returned to active duty, he then became ineligible for overtime and the like.

That's not how back pay remedies work. A back pay remedy runs from the date that the Charging Party, in this case, was returned-- was suspended up until the date the arbitration decision becomes effective. The fact that additional damages may accrue after by virtue of that arbitration decision, that's not part and parcel of the [arbitrator's] make whole remedy.

I'll note also that by March of 2005, Charging Party had already lost his MCOLES certification. Therefore, there would be nothing that the Union could have done on his behalf to get that certification back. MCOLES is not a matter under control of the Union, and there has been no contractual provision . . . cited by Charging Party to indicate any grounds upon which the Union could have taken action to get Mr. Herbert's MCOLES certification back.

To that end, I will also note there is no contract provision cited, relied upon by the Charging Party, to support its position that the Union could have done anything following Mr. Sugerman's decision even if it had been--even if Charging Party's charge had been timely.

It's insufficient for Charging Party simply to assert in a duty of fair representation case that the Union should have done something, because a breach of contract--proof of a breach of contract is also required in a DFR case such as this. And there's been no contract provision cited at all. [I]n fact, the law requires not only that a contract provision be cited, but [for Charging Party] to show that the Union would have prevailed, and that there was a breach of contract that could be established. And there are no facts alleged here that would even suggest that--the presence of such a contract violation.

So for those reasons, I find that, even accepting all of the allegations pled in the first amended charge as true, that there has been no timely claim stated in this case.

Based on the findings of facts and conclusions of law set forth above, I issue the following recommended order:

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: January 21, 2010