STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AFSCME COUNCIL 25, and AFSCME LOCAL 25,
LOCAL 101, LOCAL 409, AND LOCAL 1659,
Labor Organizations - Respondents,

Case Nos. CU07 J-050, CU07 J-051
-and- CU07 J-052, CU07 J-053 & CU07 J-054

WAYNE COUNTY,
Public Employer - Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.L.C, by Bruce A. Miller, Esq., for Respondents

Clark Hill, P.L.C., by Paul Coughenour, Esq., for Charging Party

DECISION AND ORDER

On January 18, 2008, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Judgment in the above case finding that the charges filed by Charging Party Wayne County (County or Employer) against Respondent AFSCME Council 25, along with several of its constituent Local Unions, Nos. 25, 101, 409, and 1659 (collectively, AFSCME or Union), fail to state a claim upon which relief can be granted under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The County's charges alleged that AFSCME's participation in a class action lawsuit against Charging Party and the Wayne County Retirement Board was an unlawful attempt to represent retirees in a breach of contract action. The ALJ found that the charges were an attempted collateral attack on the Wayne Circuit Court's rulings in the parties' pending lawsuit, and recommended that we summarily dismiss the unfair labor practice charges in their entireties. The Decision and Recommended Order on Summary Judgment was served on the interested parties in accordance with Section 16 of PERA. After receiving an extension of time in which to file its exceptions, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on March 12, 2008. Respondents requested and were granted an extension of time in which to file their response to the exceptions and, on April 24, 2008, filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, the County contends the ALJ erred by failing to find that AFSCME's civil complaint alleges a change in conditions of employment/retirement

occurring after the expiration of the collective bargaining agreement between the parties and, therefore, should have been filed with MERC as an unfair labor practice charge. Charging Party contends the contractual grievance procedure is the exclusive means that may be used to resolve the parties' contractual disputes. Further, the County asserts that MERC has exclusive jurisdiction over the matter, that the civil litigation is baseless, and that it should be enjoined. The County also excepts to the ALJ's failure to find that AFSCME is unlawfully purporting to act as a bargaining agent for retirees in the civil litigation. Charging Party further alleges that the ALJ erroneously held that AFSCME is not barred from representing those retirees whom it did not represent while they were employed. Charging Party further contends that the ALJ erred by failing to find the Union illegally acted to prevent the Employer from exercising its rights regarding permissive subjects of bargaining by filing the circuit court action and obtaining a preliminary injunction. Additionally, Charging Party excepts to the ALJ's finding that its charges here constitute a collateral attack on the circuit court action.

In AFSCME's response to the exceptions, the Union asserts that it is no longer a party to the circuit court action, having been only a nominal party initially. AFSCME contends that inasmuch as the relief sought by Charging Party is a cease and desist order, the matter is now moot.

We have reviewed the County's exceptions and we find them to be without merit.

Factual Summary:

On April 19, 2007, AFSCME, Rosemary Butler, Nora Raymond, and Florence Glover, filed a class action lawsuit against the County and the Wayne County Retirement Board seeking injunctive relief. The complaint alleged that Wayne County unilaterally changed the life insurance premiums paid by retirees from a level premium of $2.36 per thousand to a variable age based rate going as high as $15.52 per thousand. The plaintiffs alleged that the change in the life insurance premium violated the collective bargaining agreement between the County and AFSCME and the vested rights of the retirees.

On October 18, 2007, the County filed five identical charges against AFSCME Council 25, and Local Nos. 25, 101, 409 and 1659. The County claimed that the Union violated PERA by filing the lawsuit, along with private individuals, against Wayne County. In the charges, the County asserted that by filing the lawsuit the Union unlawfully purported to represent retired persons who are currently outside the bargaining unit represented by the Union. Further, the County contends that through the lawsuit the Union is attempting to coerce the Employer into dealing with the Union on behalf of retirees, including retirees who were represented by the Union during their employment and those who were not eligible for inclusion in the bargaining unit represented by the Union during their employment. Further, Charging Party asserts that the Union is coercing the Employer, without negotiation or agreement, to involuntarily subsidize supplemental life insurance for retirees.

Discussion and Conclusion of Law

In its exceptions, Charging Party argues that the ALJ erred by failing to find that AFSCME's civil complaint should have been filed with MERC as an unfair labor practice charge. However, Charging Party has offered no authority to support its contention that PERA requires a union to file unfair labor practice charges when facts giving rise to a contract action may also support an unfair labor practice charge. Even if Respondents could have filed unfair labor practice charges against the County, the Union's failure to file such charges is not a PERA violation. Further, the County asserts that the Michigan Employment Relations Commission (MERC) has exclusive jurisdiction over the matter and that the civil litigation is baseless. These are arguments that Charging Party might have raised in the civil action. While MERC has exclusive jurisdiction over unfair labor practice charges, that is not the case with respect to alleged contract violations. MERC accepts jurisdiction only over alleged contract violations that also give rise to violations of PERA. *City of Detroit (Dep't of Transp)*, 19 MPER 34 (2006); *Village of Romeo*, 2000 MERC Lab Op 296, 298.

Charging Party also argues that the contractual grievance procedure is the exclusive means that may be used to resolve the parties' contractual disputes. If that is true, that is an argument that Charging Party could have made as a defense in the civil action, but it is not germane here. Even if we considered that the Union's actions in filing civil litigation to be a violation of the parties' contract, such a contract violation, without the assertion of facts sufficient to establish a repudiation of the contract, does not violate PERA. Repudiation warranting Commission involvement can be found only when there has been a substantial abandonment of the collective bargaining agreement or the relationship. *City of Detroit*, 22 MPER 11 (2009). See also *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 897.

The County also excepts to the ALJ's failure to find that AFSCME is unlawfully purporting to act as a bargaining agent for retirees in the civil litigation. Charging Party further alleges that the ALJ erroneously held that AFSCME is not barred from representing those retirees whom it did not represent while they were employed. While AFSCME was a named party in the class action lawsuit, it is not the class representative. AFSCME clearly has an interest in the outcome of the litigation over the amount of the insurance premium paid by retirees since AFSCME bargained for and entered the contract providing for the insurance of which the retirees are third party beneficiaries. See *UAW v Yard-Man, Inc*, 716 F2d 1476, 1486 (CA 6, 1983); *Rosen v Pub Service Elec and Gas Co*, 477 F2d 90, 94 n. 8 (CA 3, 1973). Since retirees are not part of the bargaining unit, AFSCME cannot represent retirees allegedly aggrieved by their former employer's actions in contract negotiations. *UAW v Acme Precision Products*, 515 FSupp 537, 539-40 (ED Mich, 1981). However, in actions to enforce the collective bargaining agreement, AFSCME may certainly represent those retirees who give their consent. See *Cleveland Elec Illuminating Co v Util Workers Union of America*, 440 F3d 809, 815 (CA 6, 2006). Moreover, retirees may, with or without union assistance, take action on their own to pursue the enforcement of their contractual rights under the collective bargaining agreement. *UAW v Yard-Man, Inc*, 716 F2d 1476, 1485.

Charging Party further contends that the ALJ erred by failing to find that the Union illegally acted to prevent the Employer from exercising its rights regarding permissive subjects of bargaining by filing the circuit court action and obtaining a preliminary injunction. We find no error in the ALJ's ruling in this regard for, as we explained in *Kalamazoo Co & Kalamazoo Co Sheriff*, 22 MPER ___ (Case No. C08 A-019, issued October 16, 2009), a party may not take unilateral action on a permissive subject that is contained in an enforceable bargained agreement. Since AFSCME and the retirees have filed suit to enforce a provision of the parties' collective bargaining agreement, it is up to the court to determine whether the provision in question is enforceable. Moreover, Charging Party has offered no authority to support its contention that a party's efforts to enforce terms of a collective bargaining agreement by filing a civil action violate PERA.

Finally, Charging Party excepts to the ALJ's finding that its charges here constitute a collateral attack on the circuit court action. We agree with the ALJ's conclusion. As we noted above, many of the issues raised by Charging Party could have been raised in the civil action and do not support a finding of a PERA violation.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, we agree with the ALJ that the charges filed by Wayne County fail to state a claim upon which relief can be granted under PERA and should be summarily dismissed.

ORDER

The charges in this case are hereby dismissed in their entirety.

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
EMPLOYMENT RELATIONS COMMISSION
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In the Matter of:

AFSCME COUNCIL 25, and AFSCME LOCAL 25,
LOCAL 101, LOCAL 409, AND LOCAL 1659,
Respondent-Labor Organizations,

Case Nos. CU07 J-050 &
J-051, J-052, J-053 & J-054

-and-

WAYNE COUNTY,
Charging Party-Public Employer.
_____/

APPEARANCES:

Paul Coughenour, for Charging Party Employer

Bruce A. Miller, for Respondent Union

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY JUDGMENT

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 Doyle O'Connor, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. This matter is being decided pursuant to an order to show cause why the charge should not be dismissed for failure to state a claim.

The Unfair Labor Practice Charge:

On October 18, 2007, five identical Charges were filed in this matter by Wayne County (the Employer) against AFSCME Council 25 and several of its constituent Local Unions Nos. 25, 101, 409 and 1659 (collectively, the Respondent or Union) asserting that the Union, acting with other private individuals, had violated the Act by pursuing litigation against Wayne County, and the Wayne County Retirement Board, relating to supplemental life insurance benefits for retirees. The Employer asserted that in that litigation the Union sought to represent retired persons who are presently, or were previously, outside the bargaining units represented by the Union, that such attempt at representation through litigation in the Circuit Court violated PERA, and that such litigation constituted an attempt to coerce the Employer into action without negotiation or agreement.

It was not apparent how the Employer's allegations, if proven, would constitute violations of the Act, nor was it apparent how this Commission would have authority to review or act upon the propriety of litigation pending before, and decisions made by, the Circuit Court, particularly where it was alleged in the charge that the Circuit Court litigation involves parties who are not party to this administrative agency action. Therefore, pursuant to R 423.165(2)(d), the Charging Party was ordered to show cause why the charge should not be dismissed for failure to state a claim upon which relief can be granted.

A timely response was filed by Charging Party on January 7, 2008[1], with a timely reply from the Respondent Union filed on January 11, 2008.

The Employer asserts that AFSCME acted improperly under the Act by seeking to represent retirees, including retirees who were not in AFSCME represented bargaining units while still employed, in a still pending Wayne County Circuit Court action related to certain fringe benefits provided to retirees. It is additionally claimed that AFSCME, through the mechanism of the litigation, is forcing the Employer to deal with the Union regarding individuals who were not AFSCME members. Third, the Employer asserts that the Union has improperly insisted to impasse on a purportedly permissive subject of bargaining and imposed changes in those conditions through a Court order. The Employer asserts that the Wayne Circuit Court approved the pursuit of a retiree breach of contract claim on an opt-out class action basis, and that the Circuit Court then granted certain injunctive relief maintaining the pre-dispute *status quo* pending further court order.

AFSCME characterizes the charge as a collateral attack on the trial court's decision-making in the matter pending in the Wayne Circuit Court and that it constitutes an effort to have this Commission make a finding as to whether or not the Wayne Circuit Court has exceeded its jurisdiction. AFSCME additionally asserts that it has in fact assisted in the pursuit of a class action breach of contract suit brought by and on behalf of a class of retirees, but that AFSCME is not itself a class representative in that litigation.

Discussion and Conclusions of Law:

The litigation brought by the Union, as described by the Employer, is an unremarkable suit to enforce claimed contractual rights. The proper mechanism for resolution of contract claims is either through arbitration or through litigation of the sort described herein in a court of general jurisdiction. What the Employer seeks by bringing these Charges is accurately described by the Union as a collateral attack on the Circuit Court litigation. The relief sought is an order by the Commission prohibiting AFSCME from pursuing litigation in the Circuit Court, where the Circuit Court has already certified the case as a proper class action suit and has granted preliminary relief. The Employer offers no plausible basis upon which such extraordinary relief could even be considered.

[1] The Employer sought and was granted an extension of time in which to file its response.

The Employer asserts that AFSCME is acting improperly in seeking to represent persons for whom it has not been designated as the exclusive bargaining agent. What the Employer ignores is that AFSCME is not claiming to act as the exclusive bargaining agent under PERA for such individuals; rather, it is seeking to enforce claimed contractual rights through the ordinary mechanism of a breach of contract suit. This argument is made notwithstanding the Employer's express reliance on the decision in *Allied Chemical & Alkali Workers v Pittsburgh Plate Glass*, 404 US 157 (1971), which established that individuals who have already retired are not 'employees' for the purpose of collective bargaining. Retirees are not part of a bargaining unit, nor is AFSCME, by bringing a breach of contract suit, seeking to act as their agent for collective bargaining. This class action suit could have just as appropriately been brought by an advocacy organization, such as the American Association of Retired Persons (AARP), rather than by AFSCME. Such litigation is an appropriate, and routine, mechanism for advocacy groups, including Unions, to pursue their social, economic, or political goals. The Employer offers no support for the proposition that AFSCME could be somehow barred from bringing a breach of contract claim on behalf of any group of retirees, or employees for that matter, regardless of whether or not those individuals were AFSCME members at some point in their work life.

The Employer advances the equally specious argument that the issuance of a Court order in AFSCME's favor somehow constitutes AFSCME having unilaterally imposed a change in conditions of employment. There was obviously a dispute as to what fringe benefits were due the affected class of former employees. It matters not at all, for purposes of this analysis, whether that dispute was resolved by an arbitrator pursuant to a grievance arbitration scheme or by a Court in response to a breach of contract suit. In either instance, there is no 'unilateral' action where a proper entity has granted relief to one of the two disputants. Further, as described by the Employer, the action taken by the Court did not change conditions of employment, rather it temporarily, pending further order of the Court, returned conditions to the pre-existing *status quo*. The Employer, regarding this argument, cites to and misapplies the holding in *Village of Holly*, 17 MPER 48 (2004), which recognized that retirees are not statutory employees under PERA and as such are not covered by the obligations under the Act.

Perhaps most outlandishly, the Employer relies upon the decision in *UAW v Yardman*, 716 F2d 1476 (CA 6, 1983), which is primarily relevant herein as the Sixth Circuit's seminal finding that a proper mechanism for the resolution of disputes over retiree fringe benefits is precisely the sort of breach of contract lawsuit pursued in the present dispute.

Finally, the Employer argues at length regarding the contractual merits of the retiree claims disputing a change in the cost of premiums for supplemental life insurance, and over whether or not the Circuit Court correctly analyzed the merits of the question when it granted preliminary relief. These are not issues properly addressed in an unfair labor practice case.

I find that the instant charges were pursued as an attempted collateral attack on the earlier issued Circuit Court decisions in the pending breach of contract suit, that is patently obvious that MERC is without even arguable jurisdiction over the claims raised by the Employer, and that the matter was pursued even though not warranted by existing law and without any apparent good faith argument for the extension, modification, or reversal of existing law. [2]

Where a charge fails to state a claim under the Act, it is subject to dismissal pursuant to a motion for summary disposition under R423.165. Where there is no legitimate dispute of fact, a decision may be rendered without an evidentiary hearing. Taking each factual allegation in the charges and in the response to the order to show cause in the light most favorable to the Employer, the allegations do not state claims against the Union under the Public Employment Relations Act (PERA), the statute that this agency enforces, and the charges are therefore subject to summary dismissal.

RECOMMENDED ORDER

The unfair labor practice charges are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge

Dated:_____

[2] For the reasons stated above, and were it not for the contrary holding in *Goolsby v Detroit*, 211 Mich App 214 (1995), I would in this instance follow the Commission's earlier decision in *Wayne-Westland Community School District*, 1987 MERC Lab Op 381, aff'd, *Hunter v Wayne-Westland Community School District*, 174 Mich App 330 (1989), and award compensatory damages to the Respondent. See also, *Police Officers Labor Council*, 1999 MERC Lab Op 196, 202, 209; *Michigan State University*, 16 MPER 52 (2003).