STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COMMUNITY COLLEGE,
Public Employer-Respondent,

Case No. C11 E-109

-and-

HARL MILLER,
An Individual-Charging Party.
_____/

APPEARANCES:

Dykema Gossett, PLLC, by John A. Entenman, for Respondent

Nacht, Roumel, Salvatore, Blanchard & Walker, P.C., by Edward A. Macey, for Charging Party

DECISION AND ORDER

On August 19, 2011, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charge 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

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WASHTENAW COMMUNITY COLLEGE,
Respondent-Public Employer,

Case No. C11 E-109

-and-

HARL MILLER,
An Individual Charging Party.
_____/

APPEARANCES:

Nacht, Roumel, Salvatore, Blanchard & Walker, P.C., by Edward A. Macey, for Charging Party

Dykema Gossett, PLLC, by John A. Entenman, for Respondent

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

On July 18, 2011, Harl Miller filed an unfair labor practice charge against his former employer, Washtenaw Community College. 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) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission.

The unfair labor practice charge alleges that Miller was terminated by Respondent on or about September 20, 2010 for engaging in protected concerted activity. Miller concedes that the charge was not filed with the Commission and served upon Respondent within six months of the alleged PERA violations, but argues that the charge should nevertheless be considered timely because he was exhausting his internal union remedies until January 26, 2011, when Miller received a letter from his union's arbitration department denying his appeal of the labor organization's decision not to process his grievance to arbitration.

In an order issued on July 27, 2011, I directed Charging Party to show cause why the charge should not be dismissed as untimely under Section 16(a) of PERA. Miller, through counsel, filed a response to the order to show cause on August 17, 2011, in which he essentially reiterates the same argument set forth in the charge. Miller asserts that the statute of limitations for bringing a charge against a labor organization is tolled during the period in which a public

employee is pursuing a grievance and that the same principle should apply with respect to charges filed against public employers.

Discussion and Conclusions of Law:

Pursuant to Section 16(a) of PERA, 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 Comm Sch*, 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). Section 16(a) of PERA also requires timely service of the complaint by Charging Party upon the person or entity against whom the charge is brought. *Romulus Comm Schools*, 1996 MERC Lab Op 370, 373; *Ingham Medical Hosp*, 1970 MERC Lab Op 745, 747, 751. Dismissal is required when a charge is not timely or properly filed and served. See *City of Dearborn*, 1994 MERC Lab Op 413, 415. The statutory language of 16(a) provides an exception to the statute of limitation only when an employee is prevented from filing a charge because of service in the armed forces.

With respect to unfair labor practice charges filed by an individual employee alleging a breach of the duty of fair representation by a labor organization, the statute of limitations typically does not begin to run until the grievance process has concluded. This is not a "tolling" of the statute of limitations. Rather, where the employee is asserting that his or her labor organization should have processed a grievance to arbitration, the injury does not normally occur until the union makes its final decision with respect to the sustainability of the grievance. *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21 (1991). In contrast, where, as here, an employee was allegedly terminated for reasons which would constitute a violation of PERA, the termination is the injury or "improper act" and the limitations period begins to run on the effective date of the discharge or last date of employment, unless the charging party does not learn of his or her termination until after the effective date. In that case, the statute begins to run when the charging party first knows or should have known that he or she has been discharged. See *Troy Sch Dist*, 16 MPER 34 (2003), in which the Commission explicitly rejected the charging party's efforts to expand the holding in *Silbert* to a charge against an employer. See also *Univ of Michigan*, 23 MPER 64 (2010); *Wakefield-Marenisco School District*, 23 MPER 20 (2010); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530; *City of Detroit (Police Dept)*, 1992 MERC Lab Op 497; *Superiorland Library Cooperative*, 1983 MERC Lab Op 140.

In the instant case, Miller asserts that he was terminated by Washtenaw Community College on or about September 30, 2010, and there is no allegation or suggestion in the record that he was unaware of the unfair labor practice at that time. Yet, the charge was not filed in this matter until July 18, 2011, more than nine months later. Although the Union was apparently pursuing a grievance on Miller's behalf during that period, the Commission has consistently held that the statute of limitations is not tolled by the attempts of an employee or a union to seek a remedy elsewhere, including the filing of a grievance, or while another proceeding involving the dispute is pending. *Troy Sch Dist, supra*; *Univ Of Michigan*, 23 MPER 6 (2010); *Wayne County*, 1998 MERC Lab Op 560; *Washtenaw County*, 1992 MERC Lab Op 471; *Wayne County Probate*

Ct, 1992 MERC Lab Op 385; *Detroit Bd of Ed*, 1990 MERC Lab Op 781; *Int'l Assoc of Fire Fighters, Local 352*, 1989 MERC Lab Op 522; *Wayne County Com'ty College*, 1988 MERC Lab Op 213; *Southfield Pub Sch*, 1984 MERC Lab Op 1084. Charging Party has proffered no good faith argument for the modification of that existing law; instead, Charging Party essentially ignores that body of controlling law and seeks instead to rely on analogous, but inapplicable, authority. For these reasons, the charge against Respondent must be dismissed as untimely under Section 16(a) of the Act.

In so holding, I specifically reject Charging Party's assertion that this result puts public employees in a "catch-22" situation. Miller erroneously contends that dismissal of a charge under these circumstances effectively forces an employee to choose between pursuing a remedy under the grievance procedure or seek relief from the Commission under PERA. Such an argument evinces a lack of understanding of both the Act and the Commission's role in resolving labor disputes. The grievance procedure is the process by which employees, through their exclusive bargaining representative, enforce the terms of the collective bargaining agreement. The Commission has no jurisdiction to remedy ordinary contract disputes. Conversely, because a breach of contract is not a violation of PERA, a grievance arbitrator has no authority to determine whether a public employer has acted unlawfully under Section 423.210 of the Act. An employee may initiate an unfair labor practice proceeding regardless of whether a grievance is being processed at the same time because the legal issues are distinct. See e.g. *Cedar Springs Pub Sch*, 1985 MERC Lab Op 1101, aff'd 157 Mich App (1987), in which the Commission found that an employer had violated its duty to bargain with the Union even though an arbitrator had previously found that the disputed action by the employer had not violated the parties' contract. See also *Bay City School Dist Bay City Education Ass'n*, 425 Mich. 426, 439, 390 N.W.2d 159 (1986); *Macomb County*, 23 MPER 8 (2010).

For the above reasons, I hereby recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by Harl Miller against Washtenaw Community College in Case No. C11 E-109 is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 19, 2011