STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TRAVERSE AREA DISTRICT LIBRARY,
Public Employer-Respondent

Case No. C11 G-121

-and-

MARGARET KELLY,
An Individual-Charging Party.
_____/

APPEARANCES:

Miller Canfield, Paddock & Stone, PLC by Adam S. Forman, for Respondent

Jay Zelenock Law Firm, PLC by Kathryn Halbert, for Charging Party

DECISION AND ORDER

On December 15, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above matter finding that the unfair labor practice charge filed by Charging Party, Margaret Kelly, against Respondent, Traverse Area District Library (Employer) was time barred from relief under section 16 (a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.216(a). The ALJ found that the charge had been filed more than six months after the alleged retaliatory conduct by Respondent. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of the Act. After requesting and receiving an extension of time, Charging Party filed exceptions on January 9, 2012. Also after receiving an extension of time, the Employer filed its response to the exceptions on February 13, 2012.

In her exceptions, Charging Party alleges that the ALJ erred in recommending that the charge be dismissed based on PERA's limitations period. After careful review of the parties' pleadings, we find Charging Party's exceptions to be without merit for the reasons stated below.

Discussion and Conclusions of Law:

Charging Party excepts to the ALJ's finding that the charge should be summarily dismissed based on the limitations period under PERA. She contends that the six month period began to run once a contractually mandated mediation process was completed. She further asserts that her charge merits our review as it states a cognizable PERA claim.

As the ALJ correctly indicates, 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. . . ". This limitations period under section 16(a) is jurisdictional and cannot be waived. *Detroit Federation of Teachers*, 21 MPER 3 (2008). Charging Party alleges that her employment discharge on January 10, 2011 was in retaliation to her having engaged in concerted activity by participating in the effort to accrete several positions into an existing affiliate of the Teamsters union. She asserts that she waited and filed her charge on July 29, 2011 in light of a proviso in her employment contract that required her to participate in facilitative mediation before seeking an outside remedy on the discharge matter. As such, she contends the statutory timeline under PERA did not begin to run until after this requirement was met on July 22, 2011.

However, we have consistently held that internal efforts to remedy unfair labor practices will not toll the limitations period for filing those complaints before us. *Troy Sch Dist*, 16 MPER 34 (2003). We have also rejected claims that internal remedies set forth in an agreement must be exhausted prior to filing a charge under PERA. *Michigan State Univ Admin-Prof'l Ass'n, MEA/NEA*, 25 MPER 30 (2011). As such, summary dismissal is proper here since Charging Party's allegations are based upon a job termination that occurred more than six months prior to the filing of her charge. *Shiawassee Co Rd Comm*, 1978 MERC Lab Op 1182. Absent a timely claim under PERA, this charge can be dismissed in accordance with Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R423.165. We have also considered the other arguments raised in Charging Party's exceptions and find that they would not change the outcome in this matter. Accordingly, we adopt the factual findings and legal conclusions in the ALJ's Decision and Recommended Order and summarily dismiss the charge against Respondent.

ORDER

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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-and-

MARGARET KELLY,
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APPEARANCES:

Miller Canfield Paddock & Stone, PLC, by Kathryn Halbert, for the Public Employer

Jay Zelenock Law Firm, PLC, by Adam Forman, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), MCL 423.201 et seq, this case came before Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings and briefs filed by the parties regarding the Employer's motion for summary disposition, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Margaret Kelly filed a charge on July 29, 2011 asserting that her Employer, Traverse Area District Library (Employer or Library), terminated her employment on January 10, 2011 in retaliation for her support of an ultimately successful effort by the Teamsters Union to recruit employees at the Library. Additional claims were asserted regarding actions collateral to the termination of employment, including that the Employer defamed Kelly in the process of terminating her, delayed tendering payments due to Kelly following her termination, and failed to recruit or rehire Kelly for later occurring vacancies, in particular, for the vacancy created by her own termination from employment.

The Facts and Motion For Summary Disposition:

On September 23, 2011, the Employer moved for summary dismissal, asserting that the claim was barred by the statute of limitations. A timely response was filed. Both the motion and the response to it were supported by facially competent affidavits. Neither party requested oral argument.

The Charge as filed states a claim for relief and provides factually specific allegations of unlawful conduct by the Employer. Because the question of compliance with the statute of limitations is jurisdictional, the merits of the underlying termination, and other disputes, are not subject to review if the matter was not timely placed before the Commission. It is factually undisputed that the Charge was filed more than six months after the termination of Kelly's employment with the Library. Kelly was fired on January 10 and the Charge was filed on July 29.

Kelly was employed pursuant to a 2005 contract with the Library which provided, in the event of her termination from employment, that any "claim of damages" must "be first submitted to facilitative mediation before pursuing any cause of action in any state or federal court or agency". The contract also provided that she could not initiate any action or lawsuit more than "six months after termination of employment or termination of facilitative mediation, whichever is later" and that the employee, but not the employer, waived any statute of limitations to the contrary.

On January 28, 2011, Kelly requested facilitative mediation regarding her termination from employment. There is no assertion that Kelly caused any delay in processing the claim through facilitative mediation. That mediation was concluded on July 22, 1011, and the Charge was filed immediately thereafter on July 29, 2011. The Charge was therefore, filed within six months of the end of facilitative mediation, but not within six months of the termination of employment.

While the Charge asserted that sums owed to Kelly were not paid immediately following her termination, it is factually undisputed that those sums were paid by June 9, 2011.

While the response to the motion asserts that Kelly's termination was somehow not "final" until the conclusion of facilitative mediation, it is undisputed that her last actual day of work was January 10, 2011; moreover, the employment contract expressly provides that mediation is only available "if employee's employment is terminated" and that "in no event shall submission of a dispute to facilitative mediation pursuant to this paragraph delay the employee's last day of employment".

Discussion and Conclusions of Law:

Section 16(a) of PERA states that "no complaint shall issue upon any unfair labor practice occurring more than 6 months prior to the filing of the Charge…". The statute of limitations is jurisdictional in nature and conclusively bars the finding of a violation where the action complained of occurred more than six months prior to filing a charge. City of Detroit

(Department of Public Works), 2000 MERC Lab Op 149. The limitation period under PERA commences when the person knows of the act that caused his injury and has good reason to believe that the act was improper. Huntington Woods v Wines, 122 Mich App 650, 652 (1983). The six-month statute of limitations is jurisdictional and cannot be waived. Walkerville Rural Community Schools, 1994 MERC Lab Op 582, 583.

A motion for summary dismissal may appropriately be granted where allegations are based upon events which occurred more than six months prior to the charge. Shiawasee County Road Comm'n, 1978 MERC Lab Op 1182. Statutes of limitations are strictly construed. Mair v Consumers Power Co, 419 Mich. 74, 80; 384 NW2d 256 (1984). In the case of an unfair labor practice charge based on allegations of wrongful discharge, the statute of limitations begins to run on the effective date of the termination. See Kent Community Hospital, 1987 MERC Lab Op 459; Superiorland Library Cooperative, 1983 MERC Lab Op 140. Here, Kelly was terminated on January 10, 2011.

The Commission has repeatedly indicated that the limitations period cannot be waived by the parties and is not tolled by the pursuit of other remedies. Washtenaw County, 1992 MERC Lab Op 471 (claim pending in circuit court); Intl Assoc of Firefighters, Local 352, 1989 MERC Lab Op 522 (civil service proceedings); Detroit Fed of Teachers Local 231, AFT, AFL-CIO, 1989 MERC Lab Op 882 (pendency of union appeal process); Detroit Public Schools, 1982 MERC Lab Op 1058 (state tenure commission proceedings); Livonia Public Schools, 1975 MERC Lab Op 1010 (settlement efforts).

The Charging Party makes an exceptionally strong and appealing argument for the equitable tolling of the statute of limitations in this case. The contract that Kelly was required to sign to retain her employment in 2005 has terms which appear onerous. Kelly was contractually obliged to pursue facilitative mediation before bringing any claim in any other forum. Kelly was required to waive any statute of limitations longer than six months, while the employer, seemingly, gave no relevant consideration for that commitment. The combination of the contractual obligation to pursue mediation with a short statute of limitations placed Kelly in an arguably impossible, and unconscionable, position. Obviously, she could have breached her contractual obligation to pursue mediation, whereupon she might have faced a defense in a collateral forum that she had thereby waived any damages claim. Or Kelly could have done as she did, which is to keep her contractual commitments, while risking the assertion of a statute of limitations defense.

Were it within my authority to do so, I would find not that the statute of limitations was tolled, but rather that the Employer was equitably estopped from asserting the statute of limitations as a defense to the Charge. I am constrained, however, to follow the Commission's case law and the statutory language on which it is premised. The statute of limitations in this forum is not an affirmative defense which can be waived. The statute prohibits the Commission from issuing a complaint regarding an action taken more than six months prior to the filing and service of a charge. That prohibition is a direct restraint on the Commission, rather than on the parties, and deprives the Commission of jurisdiction to act.

I note that the Charge includes assertions related to the failure of the Employer to recruit or rehire Kelly to positions in her former classification, including her former position. It is factually undisputed that the Employer did not recruit anyone for those positions. Moreover, the assertion that an employee who has been discharged for alleged poor performance retains a claim for reinstatement or rehiring, such that the statute of limitations does not begin to run, cannot be countenanced. Such a claim is merely a rephrasing of the theory that a "continuing violation" arises where a wrong has gone uncorrected. In City of Adrian, 1970 MERC Lab Op 579, the Commission adopted the holding of the U.S. Supreme Court in Local Lodge 142 v NLRB (Bryan Mfg Co), 362 US 411 (1960), which rejected the doctrine of a continuing violation if the inception of the violation occurred more than six months prior to the filing of the charge.

I have carefully considered all other arguments asserted by the Charging Party in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 15, 2011