STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C12 C-061,

-and-

DETROIT ASSOCIATION OF EDUCATIONAL OFFICE EMPLOYEES,
Labor Organization- Respondent in Case No. CU12 C-014,

-and-

GERALDINE ELLINGTON,
An Individual Charging Party.
_____/

APPEARANCES:

Geraldine Ellington, *In Propria Persona*

DECISION AND ORDER

On May 16, 2012, 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 charges filed by Charging Party, Geraldine Ellington against Respondents Detroit Public Schools (Employer) and Detroit Association of Educational Office Employees (Union) were time-barred and failed to state claims upon which relief could be granted under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217. After determining that the initial charges were untimely and did not contain valid PERA claims against either Respondent, the ALJ ordered Charging Party to show cause why the charges should not be dismissed. On April 24, 2012 and May 7, 2012, Charging Party filed responses to the show cause order. After reviewing each response, the ALJ recommended summary dismissal of both charges concluding that the allegations failed to raise any issues that warranted a hearing. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA.

On June 7, 2012, Charging Party filed a document captioned "To show cause for receiving payout of sick time with Detroit Public Schools". Notwithstanding the

improper format, we accepted the document as her exceptions to the ALJ's decision. Neither Respondent filed a response.

In her exceptions, Charging Party reiterates her objections to the Employer's refusal to pay out her accumulated sick time. She references having had a similar dispute in 2010 involving the payout of vacation time that was eventually corrected. She also asserts that the sick time disbursement being sought in this matter should have been paid out under the prior action. After careful review of Charging Party's exceptions, we find them to be without merit as discussed below.

Discussion and Conclusions of Law:

The crux of these cases stem from charges filed on March 28, 2012 that relate to Charging Party's dispute over her entitlement to a payout of accumulated sick time in connection with her employment separation in August, 2007. The ALJ determined, and we agree, that both charges are barred by PERA's limitations period as Charging Party filed the instant matters well over six months after becoming aware of her payout concerns. We also note that this Commission summarily dismissed similar charges filed in 2009 wherein Charging Party asserted the same underlying allegations against Respondents based on a dispute involving the payout of accumulated vacation time[1].

Nonetheless, as to the claim against the Employer, the ALJ correctly notes that PERA does not prohibit all types of unfair treatment by public employers. *Detroit Pub Sch*, 22 MPER 16 (2009). Instead, it seeks to prohibit an employer's "unfair" actions that interfere with or restrain an employee's right to engage in lawful concerted activities set forth in Section 9. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 259 (1974). Charging Party asserts that the Employer breached the collective bargaining agreement by not properly paying out her accumulated sick time. However, her charge and other pleadings do not allege or suggest that this adverse conduct by the Employer was motivated by anti-union animus. Further, a violation of a collective bargaining agreement, alone, does not constitute PERA violation. *Ann Arbor Pub. Sch.*, 16 MPER 15 (2003). Without a valid PERA claim, we are precluded from examining the fairness of this Employer's actions. *Detroit Pub Sch*, supra.

Similarly, the charge against the Union fails to state a valid PERA claim. A union possesses wide latitude in determining what actions, if any, to undertake on a grievance, so long as its decisions are not arbitrary, discriminatory or made in bad faith. *Wayne Co*, 23 MPER 51 (2010). Charging Party complains that the Union "has not been a voice for [her] at any time [since] retirement". However, she provides no indication of the specific actions by the Union that she finds improper. At best, Charging Party expresses discontent with the Union, which alone, does not constitute a breach of the duty of fair representation. *Eaton Rapids Ed. Ass'n*, 2001 MERC Lab Op 131. We agree with the ALJ's conclusion that the record here does not support a charge against the Union.

[1] Refer *to Detroit Pub Sch*, 22 MPER 66 (2009) where the Commission adopted the ALJ's recommendation for summary dismissal of the charges due to untimeliness and failure to state valid PERA claims.

Since both charges are time-barred and fail to state claims under the Act, they are subject to dismissal under Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.165. Accordingly, we adopt the ALJ's findings of fact and conclusions of law and summarily dismiss all charges for untimeliness and failure to state cognizable claims under PERA.

ORDER

The unfair labor practice charges are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C12 C-061 & CU12 C-014
-and- Docket 12-000520 & 12-000519

DETROIT ASSOCIATION OF EDUCATIONAL OFFICE EMPLOYEES,
Labor Organization-Respondent,

-and- **CORRECTED – DOCKET # ONLY**

GERALDINE ELLINGTON,
An Individual Charging Party.
_____/

APPEARANCES:

Geraldine Ellington, Charging Party, appearing on her own behalf

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE 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 for hearing to Doyle O'Connor, Administrative Law Judge (ALJ) of the State Michigan Administrative Hearing System, on behalf of the Michigan Employment Relations Commission.

On March 28, 2012, two related, and identical, charges were filed in this matter against the Detroit Public Schools (the Employer) and the Detroit Association of Educational Office Employees (the Union). The Charges suggests a breach of a collective bargaining agreement related to the payout of sick days upon retirement and challenging the Union's conclusion that there was no contractual violation. The dispute arises out of the 2007 termination of Ellington's employment which was also addressed in a decision in *DPS and DAEOE*, 22 MPER 66 (2009). Similar charges arising from the same dispute over payout of sick bank days were also filed in September of 2010, and were administratively dismissed as untimely. On April 6, 2012, and pursuant to R 423.165(2)(d), the Charging Party was ordered to explain in writing why the two charges should not be dismissed for failure to state claims upon which relief can be granted.

On April 23, 2012, Ellington filed a response to the Order. On May 1, 2012, the parties were advised via letter that the Ellington response to the Order did not raise any issues warranting a hearing and that the Charge would be dismissed if it was not withdrawn. On May 7, 2012, Ellington filed another response, again indicating that the dispute over the proper payout of her sick time arose from her 2007 termination of employment.

The Charge and Findings of Fact Regarding the Employer:

The charge alleges that the Employer failed to properly calculate or pay sick pay owed to Ellington, following her termination of 2007. This charge was filed in March of 2012. Ellington's responses to the Order to Show Cause establish that the present claim arose from a dispute closely related to the one that was addressed in the 2009 formal decision regarding her first charge and is seemingly indistinguishable from the allegations addressed in the 2010 administrative dismissal of her second charge.

Discussion and Conclusions of Law Regarding the Charge Against the Employer:

The Public Employment Relations Act (PERA) does not prohibit all types of discrimination or unfair treatment, nor is the Commission charged with interpreting a collective bargaining agreement to determine whether its provisions were followed. Absent a factually supported allegation that the Employer was motivated by union or other activity protected by Section 9 of PERA, the Commission is prohibited from making a judgment on the merits or fairness of the actions complained of by Charging Party in this matter. See e.g. *City of Detroit (Fire Department)*, 1988 MERC Lab Op 561, 563-564; *Detroit Board of Education*, 1987 MERC Lab Op 523, 524. Because there is no allegation suggesting that the Employer was motivated by union or other activity protected by PERA, it appears that the charge against the Employer fails to state a claim upon which relief can be granted.

Additionally, under PERA, there is a strict six-month statute of limitations for the filing and service of charges, and a charge alleging an unfair labor practice occurring more than six months prior to the filing and service of the charge is untimely. The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. Dismissal is required when a charge is not timely or properly served. See *City of Dearborn*, 1994 MERC Lab Op 413, 415. The events that led to the filing of the charge against the Employer occurred in 2007, and the charge is therefore untimely.

Charging Party was granted an opportunity to file a written statement explaining why the charges against the Employer should not be dismissed prior to a hearing. Taking each factual allegation in the charge and in the responses to the Order in the light most favorable to Charging Party, the allegations in C12 C-061 do not state any claim against the Employer under the Public Employment Relations Act (PERA), the statute that this agency enforces, and the charge is therefore subject to summary dismissal. Further, the charge is barred by the statute of limitations.

The Charge Against the Union:

The documents submitted with the charge form suggest that Ellington disagrees with the conclusion reached by her former Union regarding her 2011 renewed claim for sick leave arising from her 2007 departure from employment. Ellington's several responses to the earlier Order suggest no more than that Ellington disagrees with the conclusion reached by the Union as to the merits of her claim. Ellington's responses to the Order establish that the present claim arose from a dispute closely related to the one that was addressed in the 2009 formal decision regarding her first charge and is seemingly indistinguishable from the allegations addressed in the 2010 administrative dismissal of her second charge. There are no factual allegations of any action, or improper inaction, by the Union within the six months preceding the filing of the latest Charge.

Discussion and Conclusions of Law Regarding the Charge Against the Union:

Because Unions generally have very broad discretionary authority to decide how, and whether, a grievance claim should be pursued, the documents attached to the charge form, and Ellington's responses to the earlier Order, do not state a claim under PERA and the Charge is therefore subject to being dismissed without a hearing. The fact that Ellington is dissatisfied with the position taken by her former Union regarding her claim for post-retirement payout of sick pay is insufficient to constitute a proper charge of a breach of the Union's duty. *Eaton Rapids Ed Assoc*, 2001 MERC Lab Op 131; *Wayne County DPW*, 1994 MERC Lab Op 855. Because a union's ultimate duty is to the membership as a whole, the Respondent Union has considerable discretion to decide how, and whether, to pursue and present particular grievances. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 145-146 (1973). The Union's decision on how and whether to proceed in a grievance case is not unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit (Fire Dep't)*, 1997 MERC Lab Op 31, 34-35. Likewise, a good faith tactical choice made by a Union, even if unsuccessful or, in retrospect unwise, does not support a claim that the union breached its duty. *Detroit Federation of Teachers*, 21 MPER 15 (2008).

Further, the limitations period begins to run when a charging party knew, or should have known of the acts constituting an 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). The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. Dismissal is required when a charge is not timely or properly served. See *City of Dearborn*, 1994 MERC Lab Op 413, 415. The events that led to the filing of the charge against the Union occurred in 2007, and the charge is therefore untimely.

Taking each factual allegation in the charge in the light most favorable to Charging Party, the allegations in CU12 C-014 do not state a claim against the Union

under the PERA, the statute that this agency enforces, and the charge is therefore subject to summary dismissal.

Conclusion and Recommended Order

The unfair labor practice charges are both dismissed with prejudice.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 16, 2012