STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURLEY MEDICAL CENTER,
Respondent-Public Employer in Case No. C12 H-148/Docket No. 12-001361-MERC,

-and-

AFSCME COUNCIL 25, LOCAL 25,
Respondent-Labor Organization in Case No. CU12 H-033/Docket No. 12-001362-MERC,

-and-

ABNER ERIC ANTHONY,
An Individual Charging Party.
_____/

APPEARANCES:

The Williams Firm, P.C., by Timothy R. Winship, P.C., for Respondent Employer

Kenneth J. Bailey, AFSCME Council 25, for Respondent Labor Organization

Abner E. Anthony, *In Propria Persona*

DECISION AND ORDER

On January 2, 2013, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matters finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges 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

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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:

HURLEY MEDICAL CENTER,
Public Employer-Respondent in Case No. C12 H-148/Docket No. 12-001361-MERC,

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1603,
Labor Organization-Respondent in Case No. CU12 H-33/Docket No. 12-001362-MERC,

-and-

ABNER E. ANTHONY,
An Individual-Charging Party.
_____/

APPEARANCES:

The Williams Firm, P.C., by Timothy R. Winship, for the Public Employer Respondent

Kenneth J. Bailey, Michigan AFSCME Council 25, for the Labor Organization Respondent

Abner E. Anthony, appearing for himself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On August 20, 2012, Abner E. Anthony filed the above unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against his former employer, the Hurley Medical Center (the Employer), and his collective bargaining representative, AFSCME Council 25 and its affiliated Local 1603 (the Union), pursuant to §§10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to §16 of PERA, the charges were assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System.

On September 13, 2012, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, I issued an order directing Anthony to show cause in writing why his charges against both Respondents should not be dismissed without a hearing because they failed to state claims upon which relief could be granted under PERA and/or were untimely filed under §16(a) of PERA. On October 5, 2012, Anthony responded to my order with a motion to hold the

charges in abeyance until the conclusion of an arbitration hearing on a grievance challenging his May 2011 discharge by the Employer. On October 11, 2012, I issued another order again directing Anthony to explain why his charges should not be dismissed either because they were untimely filed or because they did not state a claim against either Respondent under PERA. After Anthony filed a response to my second order on October 30, I issued a third order, this time to the Respondent Union directing it to file an answer or position statement setting out any defenses it had to the charge. The Union filed a position statement on November 20. On November 28, I sent Anthony a letter stating that I was giving him another opportunity to explain why he believed the Union had violated PERA, and asked him, if he disagreed with the Union's account of the facts in its position statement, to explain how the Union had misstated the facts. Anthony did not respond to this order.

Based upon the facts as asserted by Anthony in his pleadings and the additional undisputed facts set out in the Union's position statement, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

In his charge against the Union, Anthony alleged that the Union breached its duty of fair representation toward him by "providing him with incorrect information, failing to represent him after he was discharged in May 2011, and telling him to go to the Flint Civil Service Commission for at least six months and continuing to date." Anthony's charge against the Employer does not indicate how the Employer allegedly violated PERA. However, it is clear from Anthony's pleadings that he believes that he was wrongfully terminated.

Facts:

Except as specifically noted below, the facts below are undisputed by Anthony and the Union.

Anthony was employed by the Employer as an orderly. In early February 2011, Anthony submitted a request to the Employer for intermittent leave for a personal medical condition under the Family Medical Leave Act (FMLA). Effective March 9, 2011, Anthony's hours were reduced from forty to twenty per week as part of a reduction in force. After Anthony's hours were reduced, he began collecting underemployment benefits from the State of Michigan. Between March 9 and early May 2011, the Employer offered Anthony the opportunity to work additional hours beyond his regularly scheduled shift on a number of occasions. Anthony refused some or all of these hours. In addition, during this period Anthony was frequently, although intermittently, absent on days that he was scheduled to work. Anthony was paid from his banked leave for all of these absences, and reported his earnings for these dates to the Unemployment Insurance Agency as time worked.

On or about May 9, 2011, the Employer suspended Anthony indefinitely pending discharge. The reason given was that Anthony had refused to work additional hours that the Employer had offered him on eleven dates between March 18 and May 6 while continuing to collect underemployment benefits.

As an orderly, Anthony was a member of a bargaining unit represented by the Union. On or about May 10, 2011, the Union filed a grievance challenging Anthony's suspension. The Employer denied the grievance at step two of the grievance procedure on or about May 16. On May 27, 2011, Anthony's suspension was converted to a discharge.

The collective bargaining agreement covering Anthony's bargaining unit in May 2011 provided two options for resolution of disciplinary grievances. The first was a hearing before the City of Flint Civil Service Commission. The second was final and binding arbitration by an independent arbitrator.

On June 16, 2011, Anthony, on the advice of Union representative Patricia Ramirez, filed a request for hearing with the Flint Civil Service Commission over his "wrongful termination."[1] However, the Union also continued to process the grievance filed on Anthony's behalf on May 10. This grievance was denied by the Employer at the third step of the grievance procedure on July 8, 2011. On this same date, Anthony, apparently unaware that the Union had, in fact, filed a grievance on his behalf, filed a charge against the Union with the Equal Opportunity Commission (EEOC) and Michigan Department of Civil Rights (MDCR), alleging that, on May 9, 2011 he had attempted to file a grievance with his union representative but had been denied that right because of his race.

On July 18, 2011, the Union made a demand to the Employer to arbitrate the May 10 grievance. The grievance was submitted to AFSCME Council 25's arbitration review panel. On September 23, 2011, the panel notified Ramirez and Anthony by letter that the grievance had been conditionally accepted for arbitration. A copy of this letter was attached by Anthony to his pleadings. Thereafter, William Farmer, a staff specialist for Council 25, was assigned by the Union to handle the arbitration.

Meanwhile, in August 2011, the Union submitted a position statement to the MDCR in response to Anthony's charge with that agency in which it pointed out that the Union had filed a grievance on his behalf and that the grievance remained active. According to the Union, the EEOC/MDCR charge was withdrawn or about November 11, 2011. According to Anthony, however, his MDCR charge remained active at the time he filed these unfair labor practice charges.

On or about November 22, 2011, the Flint Civil Service Commission held a pre-hearing conference on Anthony's case. Farmer attended this conference with Anthony and thereafter made arrangements to meet with him to discuss his case so that Farmer could prepare to present the case before the Civil Service Commission. On November 30, the Flint Civil Service Commission notified Anthony that it had scheduled three hearing dates for his case in August and September 2012. However, on about December 8, 2011, the Emergency Manager for the City of Flint issued Order No. 6 abolishing the Flint Civil Service Commission. As a result, several disciplinary cases involving members of the Union's bargaining unit that were pending

[1] The Union asserts in its position statement that Ramirez and Anthony both signed the request. However, the only copy of the request, which Anthony attached to his pleadings, does not have Ramirez's signature.

before Flint Civil Service Commission, including Anthony's, could no longer be heard in that forum.

According to the Union's position statement, after December 2011 and continuing to date, the Respondents have been engaged "in discussions as to the resolution of all grievances which were pending before the Civil Service Commission at the time Order No. 6 was issued." Since the Union's position statement does not indicate that Respondents have scheduled hearing dates or selected an independent arbitrator to hear Anthony's grievance, I presume that neither of these actions have yet been taken.

Anthony admits that he was aware that the Flint Civil Service Commission had been abolished by Flint's emergency manager in November 2011, and that his case there was "lying dormant." Sometime between November 2011 and September 2012, Anthony had a conversation with the MDCR investigator assigned to his MDCR complaint who advised him to file unfair labor practice charges against the Union and Employer. According to Anthony, the investigator had earlier advised him not to file because she thought that the Respondents were working on his case. However, the investigator later changed her advice because, according to Anthony, she had noticed that the Union was not doing anything for him.

Before Anthony filed the charges in this case, he attempted to find out what was happening with his grievance by speaking to Nora Grambau, the AFSCME Council 25 staff representative assigned to his bargaining unit. According to Anthony, Grambau told him that she had never heard of his case.

Anthony asserts that after he filed his unfair labor practice charge, he was contacted by representatives of Local 1603 and the Employer. Anthony was told by these representatives that an arbitration hearing would be held on his grievance. It was this statement which prompted Anthony to request that his unfair labor practice charges be held in abeyance until the completion of the arbitration.

Discussion and Conclusions of Law:

Anthony's Charge Against the Employer

Section 16(a) of PERA contains six month statute of limitations that prohibits the Commission from finding an unfair labor practice based on actions occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the party against whom the charge is made. The six-month period begins to run when the charging party knows, or should have known, of the act which caused his injury, and had good reason to believe that the act was improper or done in any improper manner. It is not necessary that the charging party recognize at that time that he had suffered an invasion of a legal right. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983), aff'g 1981 MERC Lab Op 836. In the case of an allegedly unlawful termination, the unfair labor practice occurs on, and the statute of limitations normally begins to run from, the effective date of the termination. *Troy Sch Dist*, 16 MPER 34 (2003); *Kent Cmty Hospital*, 1987 MERC Lab Op 459; *Superiorland Library*

Cooperative, 1983 MERC Lab Op 140. That is, an unfair labor practice charge that is filed more than six months after an unlawful termination is normally found to be untimely.

The basis of Anthony's charge against the Employer appears to be that he was wrongfully terminated. The Employer discharged Anthony on or about May 27, 2011. Anthony clearly knew on May 27, 2011 that he had been discharged and it also clear that he believed at that time that he had been wrongfully terminated. The six month statute of limitation under §16(a), therefore, began to run in May 2011 even though Anthony may not have been aware of the existence of PERA or the Employment Relations Commission. Since Anthony did not file his charge until August 20, 2012, more than six months after he was discharged, his charge against the Employer was untimely filed.

In addition, Anthony's charge does not state a claim against the Employer under PERA. PERA protects the rights of public employees in Michigan to engage in union activity and other activity for "mutual aid and protection" as set out in §9 of PERA.[2] Sections 10(1)(a) and 10(1)(c) of PERA make it unlawful for a public employer to discipline or discharge an employee for engaging in union activity or other activity protected by §9 of PERA. However PERA does not prohibit all types of unfair treatment, "wrongful discharge," or violations of a union contract. That is, a termination that is unjust, or that violates the "just cause" provision of a collective bargaining agreement, does not necessarily violate PERA. Absent an allegation that the employer interfered with, restrained, coerced, discriminated against, or retaliated against the employee for engaging in union or other activities specifically protected by §9, the Commission has no jurisdiction to make a judgment on the fairness of the employer's actions. See, e.g., *City of Detroit (Fire Dep't*), 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524. Anthony has not alleged that the Employer discharged him because he engaged in any activities protected by PERA, but simply asserts that his termination was wrongful. Since Anthony has not alleged that the Employer violated any provision of PERA, and because his charge against the Employer would, in any case, have been untimely under §16(a), his charge against the Employer must be dismissed.

Anthony's Charge Against the Union

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(3)(a)(i) of PERA. The union's legal duty 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. *Goolsby v Detroit*, 419 Mich 651,679(1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967).

"Bad faith," under this standard, indicates an intentional act or omission undertaken by the union dishonestly or fraudulently. *Goolsby* at 679. A union acts in bad faith when it "acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Merritt v International Ass'n of Machinists and Aerospace*

[2] Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, and to "engage in lawful concerted activities for mutual aid or protection."

Workers, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Ass'n-Int'l*, 156 F3d 120, 126 (CA 2, 1998). "Arbitrary" conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682. A union violates its duty of fair representation if it acts with reckless disregard for the interests of its members. For example, a union's unexplained failure to meet a time deadline for processing a grievance was held to constitute a breach of its duty when this failure resulted in the dismissal of the grievance in *Goolsby*. However, as long as it acts in good faith, a union has considerable discretion to decide how or whether to proceed with a grievance, and is permitted to assess each grievance with a view to its individual merit and to weigh the cost of arbitrating the grievance against the likelihood of a successful outcome. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1.

The Commission has held that a union does not breach its breach its duty of fair representation merely by delay in processing a grievance if that delay does not result in the denial of the grievance. *Teamsters State, County and Municipal Workers*, Local 214, 1995 MERC Lab Op 185, 189. It has also consistently held that a union's failure to communicate effectively with a member about a grievance is not a breach of its duty of fair representation unless that failure causes some actual harm to the member's rights. *Detroit Police Officers Ass'n*, 1999 MERC Lab Op 227, 230; *Eaton Rapids Ed. Ass'n*, 2001 MERC Lab Op 131, 134;*Technical, Professional and Officeworkers Ass'n of Michigan*, 1993 MERC Lab Op 177 (no exceptions); *Detroit Ass'n of Educational Office Employees, AFT Local 4168*, 1997 MERC Lab Op 475 (no exceptions).

Anthony's original charge first asserted that the Union breached its duty of fair representation by "providing him with incorrect information." Anthony did not explain in his charge or other pleadings what the incorrect information was or how the incorrect information harmed him. He also asserted that the Union breached its duty toward him by "telling him to go to the Flint Civil Service Commission" to challenge his termination. In retrospect, this advice probably delayed the resolution of his grievance. However, Anthony does not assert that the Union knew or had reason to know in June 2011 that the Civil Service Commission would be abolished before it could hear his case. Nothing in the facts as alleged by Anthony indicate either that the Union's motives in directing him to the Civil Service Commission were improper or that its advice to use that forum amounted to "gross negligence" or "inept conduct undertaken … with indifference to his interests."

As indicated by his subsequent pleadings, Anthony's principal complaint about the Union's handling of his grievance is the amount of time that has elapsed since his discharge in May 2011 without the grievance being resolved, coupled with the Union's failure to provide him with information about the status of his case after the Civil Service Commission was dissolved in December 2011. Anthony's frustration understandably increased after he approached Union representative Grambau for information and was told that she had never heard of his case. As Anthony explains in his pleadings, the loss of his job has had a considerable impact on his life and continues to do so. However, despite the Union's delay in scheduling an arbitration hearing, there are no facts indicating that the Union has done or failed to do anything with respect to

Anthony's grievance that has jeopardized the status of that grievance or Anthony's rights under the collective bargaining agreement. Nor is there any indication that these rights were damaged by the Union's failure to advise Anthony of the status of his grievance after the Civil Service Commission was abolished. I conclude that Anthony has not stated a claim upon which relief could be granted against the Union, and I find that his charge against the Union should be dismissed on that basis. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge in Case No. C12 H-148/Docket No.12-001361-MERC and the charge in Case No. CU H-33/12-001362-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____