STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF BATTLE CREEK POLICE DEPARTMENT,
Public Employer-Respondent,

Case Nos. C13 E-079 & CU13 E-018

-and-

Docket Nos. 13-002770-MERC &
13-002772-MERC

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Respondent,

-and-

MARSHALL, SCOTT E.,
An Individual-Charging Party.
_____/

APPEARANCES:

Scott E. Marshall, appearing on his own behalf

DECISION AND ORDER

On July 3, 2013, Administrative Law Judge Doyle O'Connor issued his Decision and Recommended Order in the above matter 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

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Natalie P. Yaw, Commission Member

Dated:_____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF BATTLE CREEK POLICE DEPARTMENT,
Respondent-Public Employer,

Case No. C13 E-079&
-and- CU13 E-018

POLICE OFFICERS LABOR COUNCIL, Docket 13-002770-MERC &
Respondent-Labor Organization, 13-002772-MERC

-and-

MARSHALL, SCOTT E.,
An Individual Charging Party.
_____/

APPEARANCES:

Scott E. Marshall, Charging Party, appearing personally

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System (MAHS), on behalf of the Michigan Employment Relations Commission.

The Unfair Labor Practice Charges:

On May 6, 2013, two related charges were filed in this matter. The charge in case CU13 E-018 asserts that Respondent Police Officers Labor Council (the POLC or Union) violated its duty to fairly represent Scott E. Marshall (Marshall or the Charging Party) regarding a grievance matter. The second charge, filed against Respondent City of Battle Creek (the Employer) in case C13 E-079 asserted that the Employer retaliated against Marshall for reporting alleged misconduct by a co-worker in 2009, with the alleged retaliatory acts occurring in 2009, 2010 and 2011. On May 30, 2013, pursuant to R 423.165(2)(d), the Charging Party was ordered to show cause by no later than June 28, 2013, why the two

charges should not be dismissed for failure to state claims upon which relief could be granted. In that Order, Charging Party was expressly cautioned that if the Charges and his response to the Order did not state valid claims, or if the Charges were not timely filed, or if he did not timely respond to the Order, a decision would be issued recommending that the Charges be dismissed without a hearing. Charging Party did not respond in any way to the Order, nor did he request an extension of time in which to reply.

The Charge and Findings of Fact Regarding the Employer:

The Charge filed in this matter asserted that the Employer treated Charging Party improperly or unfairly by retaliating against him in 2009, 2010, and 2011. Charging Party's express assertion was that the Employer's retaliation was motivated by Marshall's report of alleged unlawful and violent misconduct by a co-worker, directed at an arrestee. Because there is no allegation suggesting that the Employer was motivated by union or other activity protected by PERA, the charge against the Employer failed to state a claim upon which relief could be granted.

Additionally, Charging Party was cautioned that 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 events that lead to the filing of the charge all occurred in 2009-2011, with the Charge filed in 2013.

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. Charging Party was expressly cautioned that to avoid dismissal of the Charge, any response to this Order to Show Cause must provide a factual basis to proceed that establishes the existence of alleged discrimination in violation of PERA and that it occurred within six-months of filing the charge. As noted above, no response to the order was filed.

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

Where a charge fails to state a claim under the Act, it is subject to dismissal pursuant to an order to show cause issued under R423.165. The failure to respond to such an order may, in itself, warrant dismissal. *Detroit Federation of Teachers*, 21 MPER 3 (2008). Regardless, 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, 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 complained of events happened in 2009-2011, with the charge filed in 2013, well outside the controlling statute of limitations.

Taking each factual allegation in the charge in the light most favorable to Charging Party, the allegations in C13 E-079 do not state a claim against the Employer under PERA, the statute that this agency enforces, and the charge is therefore subject to summary dismissal.

The Charge and Findings of Fact Regarding the Union:

The May 6, 2013, allegations filed against the Union did not properly state a claim under the Public Employment Relations Act (PERA), the statute that this agency enforces, and were therefore subject to dismissal. It also appeared that the Charge against the Union may not have been timely filed.

The charge alleged that, on November 13, 2012, the Union advised Marshall that they were declining to take grievance #12-128 to arbitration. It is unclear from the Charge what the nature of the grievance was; however, it appears from documents attached to the Charge that the grievance was filed by Marshall in September of 2012 to address his concerns with what he perceived to be misconduct by a fellow officer which had occurred in November of 2011. Marshall believed the officer had wrongfully failed to back him up on a domestic violence call, which Marshall believed to be a safety violation. Because Unions have the discretionary authority to decide whether or not a particular

case should be pursued to arbitration, the mere allegation that the Union declined to take a particular case to arbitration does not state a claim under PERA and the charge is therefore subject to being dismissed without a hearing. Additionally, the Charge did not provide any basis for establishing that the collective bargaining agreement was breached. Further, it was asserted by Marshall that the Union first told Marshall that they would not pursue such a grievance as early as February 2012, and that the Charge may therefore have not been timely when filed on May 6, 2013.

Charging Party was granted an opportunity to file a written statement explaining why the charges against the Union should not be dismissed prior to a hearing. Charging Party was expressly cautioned that to avoid dismissal of the Charge, any response to this Order to Show Cause must provide a factual basis to proceed that establishes the existence of alleged discrimination in violation of PERA and that it occurred within six-months of filing the charge. Charging Party was provided with a description of the relevant case law. As noted above, no response to the order was filed.

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

Where a charge fails to state a claim under the Act, it is subject to dismissal pursuant to an order to show cause issued under R423.165. The failure to respond to such an order may, in itself, warrant dismissal. *Detroit Federation of Teachers*, 21 MPER 3 (2008). Regardless, Marshall alleged no facts which if proven would establish any breach by the Union of its duty of fair representation. The facts alleged show only that Marshall disagreed with the Union over the merits of a particular grievance, which on its face did not appear to be the sort of dispute ordinarily addressed in the grievance procedure. The elected officials of a union have the right, and the obligation, to reach a good faith conclusion as to the proper goals to be secured in addressing a grievance claim in a particular situation, and are expected, and entitled, to act on behalf of the greater good of the bargaining unit, even to the disadvantage of certain employees. *Lowe v Hotel & Restaurant Employees Union, Local 705,* 389 Mich 123, 145-146 (1973); *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218, *aff'd* Mich App No. 116345 (March 26, 1991), *lv app den* 439 Mich 955 (1992); *City of Flint*, 1996 MERC Lab Op 1. See also, *Air Line Pilots Ass'n v O'Neill,* 499 US 65, 67 (1991).

Taking each factual allegation in the charge in the light most favorable to Charging Party, the allegations in CU13 E-018 do not state a

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

RECOMMENDED ORDER

The unfair labor practice charges are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: July 3, 2013