STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COMMUNITY COLLEGE,
Public Employer - Respondent,

-and-

Case No. C13 B-036
Docket No. 13-000228-MERC

AFSCME COUNCIL 25 AND LOCAL 1921.1,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Butzel Long, P.C., by Robert A. Boonin, for Respondent

Shawntane Williams, Staff Attorney, for Charging Party

DECISION AND ORDER

On September 4, 2013, Administrative Law Judge Doyle O'Connor issued a 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 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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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:

WASHTENAW COMMUNITY COLLEGE
Respondent-Employer,

Case No. C13 B-036
-and- Docket No. 13-000228-MERC

AFSCME COUNCIL 25, LOCAL 1921.1,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Shawntane Williams, for Charging Party

Robert A. Boonin, for Respondent

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 423.210 and 423.216, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge:

On February 22, 2013[1], a Charge was filed in this matter by AFSCME Council 25 and its Local 1921.1 (the Charging Party) against Washtenaw Community College (Respondent) alleging the retaliatory discharge of Eugene McGee, Jr., a Local Union officer. In the Charge, it is alleged that McGee was terminated on August 24, 2012. The Charge was

[1] The Charge was filed via fax on February 22, 2013 which is permitted by Commission Rule 423.181, so long as the original and remaining copies are filed within five business days. Charging Party filed the original Charge via mail received by MERC on February 27, 2013, which is within the requisite five days allowed under MERC Rules following a fax filing. The notice sent to the parties by MAHS only provided copies of the Charge bearing the later of the two dates, which unfortunately led to confusion regarding when the Charge was received by MERC. The proper date on which *filing* was deemed complete is February 22, 2013.

accompanied by a proof of service dated February 22, 2013, asserting service on an unspecified date upon the Respondent by certified mail.

The Position of the Parties and the Proceedings:

The Employer filed an Answer and affirmative defenses in which it requested dismissal of the Charge based on a failure to comply with the statute of limitations. While the February 22, 2013 filing was within six-months of the allegedly unlawful termination of McGee on August 24, 2012, the Employer asserted that the Charge was not properly served on the Employer until February 28, 2013. Based on a termination date of August 24, 2011, the statute of limitations would have run on February 25, 2013. The Employer acknowledged that AFSCME faxed a copy of the Charge to the Employer's offices on Friday, February 22, 2013, at 5:08 PM. However, the Employer asserted that AFSCME neither sought nor was granted consent by the Employer to accomplish service via fax. The Employer relied on MERC Rule 423.182(1) which permits service by facsimile transmission, but only "*with the permission of the person receiving the charge*". In the absence of such express permission, the Rules require service by mail or by hand delivery. The Employer acknowledged receipt of the Charge by certified mail on February 28, 2013.

While the Employer's Answer and Request for Dismissal were not supported by affidavit, and therefore a material question of fact may have existed, it nonetheless raised a substantial question as to the Commission's jurisdiction to hear this matter, which had to be addressed as a preliminary matter. An order to show cause why the matter should not be dismissed, and order for more definite statement, was issued on April 4, 2013.

The Charging Party was directed, pursuant to Commission Rules R 423.151(5), R423.165 (2), and R 423.182, to show cause why the charge should not be dismissed as barred by the statute of limitations. The Union was cautioned that it must establish, including by providing USPS return receipts, that the Charge was both filed and properly served within the statute of limitations period.

Additionally, the Employer had provided a fact specific explanation for the claimed lawful basis for its termination of McGee. While those claims were at that stage likely subject to factual dispute, the Charge itself provided only a conclusory assertion that "*It is the Union's position that Mr. McGee's termination was a direct result of his role as Bargaining Chair and Chief Spokesperson for the Local*". Therefore, Charging Party was ordered to provide a more definite statement of its Charge. Counsel for Charging Party was cautioned that Charging Party had an obligation

to provide a factual explanation of what the Employer did and how it was unlawful, and not just conclusory statements alleging a belief that the Employer's motivation was unlawful, citing *Martin v Shiawassee County Bd of Commrs,* 109 Mich App 32 (1981); *Wayne County Dept Public Health*, 1998 MERC Lab Op 590, 600 (no exceptions); *Lansing School District,* 1998 MERC Lab Op 403. Counsel for Charging Party was further cautioned that although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice; rather, the charging party must present factual assertions, and ultimately substantial evidence, from which a reasonable inference of discrimination may be drawn, citing *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703; *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Charging Party was directed to supplement the bare legal conclusions contained in its Charge with the assertion of a factual basis for the Charge which, if proved, would support a finding of a violation.

Charging Party was directed to file a written response no later than April 25, 2013 and was expressly cautioned that to avoid dismissal of the Charge, the written response to that Order must assert facts that establish a violation of PERA occurring within the statute of limitations. The response needed to describe who did what and when they did it, and explain why such actions constituted a violation of PERA and how the Union would establish the alleged improper motivation by the Employer and rebut the Employer's assertion of a lawful basis for the termination of McGee.

Charging Party was advised through the Order that a timely response to that Order would be reviewed to determine whether a proper claim had been made and whether a hearing should be scheduled. Charging Party was further cautioned that, if the Charge and the response to the Order did not state a valid claim, or if Charging Party could not establish that the Charge was timely and properly filed and served, or if they did not timely respond to the Order, a decision recommending that the Charge be dismissed without a hearing would be issued.

The Union's counsel requested, without any explanation, an extension of five weeks to respond to the Order to show cause. Given the simplicity of the questions related to compliance with the statute of limitations, I concluded that granting five weeks more time in addition to the initial 21 days was unnecessary. I granted an extension of two weeks with the response to be received no later than May 9, 2013. Despite that deadline, and despite the fact that the central question being addressed was the Union's compliance with deadlines, the Union's response was not mailed until May 10th and, in part because it was sent to an address

different than the one expressly provided in the Order, was not received until May 14, 2013. The Union's counsel did fax a copy of its filing at 7:28 PM on May 9th, which under MERC Rules is appropriately treated as received on May 10th.

In response to the jurisdictional issue, Charging Party's counsel acknowledged the salient facts that: 1) McGee was terminated on Friday, August 24, 2012; 2) the Charge was filed on Friday, February 22, 2013; 3) that the Union neither sought or received consent to serve the Charge via fax; and 4) that the Charge was not physically served on the Employer until it was received by certified mail on Tuesday, February 26, 2013, as established by a USPS return receipt record of delivery.

The Union did respond to the order for more definite statement by providing further allegations, once again largely conclusory, related to the termination of McGee's employment. That issue could of course only be addressed further if the Charge was found to be both timely filed and timely served.

The Employer timely responded to the Union's filing. The Employer reasserted the statute of limitations jurisdictional defect; raised the untimeliness of the Union's response to the Order; and asserted that even with the response to the order for more definite statement Charging Party had still not pled facts which, if accepted as true, would establish a violation of the Act.

Despite facing a motion for summary dismissal of its claims, no request for oral argument was made by the Union.

Findings of Fact:

The assertions of fact made in the Charge and in the response to the order for more definite statement are accepted as true for purposes of this Decision and Recommended Order.

Eugene McGee, Jr., was employed by Washtenaw Community College as a patrol security officer since October of 2001. He also served as bargaining chair and acting president for the newly recognized AFSCME bargaining unit. McGee was placed on a performance improvement plan after the AFSCME unit was recognized, and after having previously receiving satisfactory performance appraisals. On Friday, August 24, 2012, McGee was terminated from his employment for allegedly failing to improve his performance.

A charge alleging that McGee's termination was unlawful, and in retaliation for his Union activity, was filed with the Commission on Friday, February 22, 2013. Although AFSCME faxed a copy of the Charge to the Employer's offices on Friday, February 22, 2013, at 5:08 PM, AFSCME neither

sought nor was granted consent by the Employer to accomplish service via fax. The Charge was not physically served on the Employer until it was received by certified mail on Tuesday, February 26, 2013.

Discussion and Conclusions of Law:

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. 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).

Section 16(a) of PERA requires timely service of the complaint by the 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. See also, MERC Rule R 423.182(1) & (5). Dismissal is required when a charge is not timely or properly served. See, *Superiorland Library Cooperative*, 1983 MERC Lab Op 140; *City of Dearborn,* 1994 MERC Lab Op 413, 415; *Wayne County*, 23 MPER 51 (2010); *Traverse Area District Library*, 25 MPER 82 (2012). MERC Rule 423.182(1) permits service by facsimile transmission, but only "*with the permission of the person receiving the charge*". In the absence of such express permission, the Rules and the statute require actual service by mail or by hand delivery within the statute of limitations period. Commission Rule R 423.182 (5) provides that an administrative law judge "*shall decline to consider any unfair labor practice charge . . . that is not served within the applicable period of limitations*" (emphasis added).

It is factually undisputed that: McGee was terminated on Friday, August 24, 2012; 2) the Charge was filed on Friday, February 22, 2013; 3) the Union neither sought nor received consent to serve the Charge via fax; and 3) the Charge was not physically served on the Employer until it was received by certified mail on Tuesday, February 26, 2013. With MERC Rule R 423.183 excluding the day of the complained of event in calculating the time for filing and service, the statute of limitations began to run on August 25, 2012. Under MERC Rule R 423.183, the last day for filing and service of a Charge was therefore six-months later on February 25, 2013.

The Union's response argues that because McGee's termination occurred on a Friday, the statute of limitations did not begin to run until the following Monday, August 27, 2012. There is no support in the statute or Rules for such an interpretation. The Rules expressly provide a grace period only if the final day of the running of the statute of limitations occurs on a weekend or holiday.

While the Union's response notes that a copy was also sent by facsimile to an office of the Employer, the Union is, or should be, aware that MERC Rules allow faxed service only with the express consent of the recipient, which was admittedly not sought in this case. Had such permission been sought and received, the service of the Charge would have been deemed timely.

The Union did respond to the order for more definite statement by providing further allegations, once again largely conclusory, related to the alleged unlawfulness of the termination of McGee's employment. That issue cannot be addressed further where the Charge was not both timely filed and timely served.

The inescapable conclusion is that the Charge was timely filed, but not timely served, and must therefore be dismissed.[2]

Conclusion:

I have carefully considered all other arguments asserted by the parties 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

The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 4, 2013

[2] Charges filed on behalf of AFSCME by the same counsel were dismissed as not timely filed and served in *City of Detroit* (Tree Artisans dispute) C12 K-244 (ALJ Peltz, April 24, 2013); the same counsel is facing summary dismissal in *City of Detroit* (Furlough days claim), (C13 B-025) in part for failing to timely respond to an Order; and faced a similar statute of limitations question in *City of Detroit-DWSD* (CET imposition) C13 D-069.