STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Respondent,

Case No. C12 A-009
-and- Docket No. 12-000055-MERC

SUSAN FRENCH,
An Individual-Charging Party.
_____/

APPEARANCES:

Fixel Law Offices PLLC, by Joni Fixel, for Charging Party

Christopher Tomasi, Assistant General Counsel, for Respondent

AMENDED DECISION AND ORDER

On August 2, 2013, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above matter, recommending that we dismiss Charging Party's unfair labor practice charge. The ALJ held that Respondent Police Officers Association of Michigan (the Union) did not violate the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217, in its processing of a grievance filed on behalf of Charging Party Susan French. The ALJ found that the charge was not filed within the six-month statute of limitations set forth in § 16(a) of PERA and, even if the charge had been timely filed, it failed to state a claim upon which relief can be granted.

The ALJ's Decision and Recommended Order was served on the parties in accordance with § 16 of PERA. Charging Party filed exceptions to the ALJ's Decision and Recommended Order on August 26, 2013. The Union filed a response to Charging Party's exceptions on August 30, 2013.

In her exceptions, Charging Party alleges that the ALJ erred by finding that the charge was not timely filed. She seeks the opportunity to submit evidence that the charge had been hand delivered by courier to the Lansing office of the Michigan Employment Relations Commission (MERC) six days before the statute of limitations expired. Charging Party also takes exception to the ALJ's finding that she failed to state a claim because she did not allege facts sufficient to

find animus or arbitrary conduct by the Union, or facts to support a contract violation by the employer.

Factual Summary:

We adopt the facts as alleged in the charge since this matter is being decided on Summary Disposition. Charging Party was terminated by her employer, the Isabella County Sheriff's Department, on May 28, 2010. The Union filed a grievance on June 3, 2010 claiming that Charging Party was terminated without just cause. The Union vice-president sent an e-mail to the employer on June 17, 2010 stating its intent to take the grievance to arbitration. The Step 3 grievance meetings were held on June 21, 2010 and June 29, 2010, after the e-mail from the Union vice-president demanding arbitration. The employer's Step 3 answer denying the grievance was issued on July 9, 2010, also after the Union's e-mail demanding arbitration.

The matter proceeded to arbitration on June 7, 2011. At the outset of the hearing, the employer argued that the arbitrator lacked jurisdiction to reach the merits of the grievance because the Union failed to give notice that it intended to pursue arbitration within 30 days of the employer's Step 3 grievance response, as required by the collective bargaining agreement. The arbitrator appeared to agree and refused to hear the matter on the merits, opting instead to bifurcate the hearing and rule on the jurisdictional issue before deciding if he could reach the merits of the grievance. The hearing went forward, with the arbitrator only accepting evidence on the issue of the timeliness of the Union's notice to proceed to arbitration. The arbitrator issued his decision on August 15, 2011, concluding that the grievance was not arbitrable due to the Union's failure to comply with the time limits for filing set forth in the contract. Charging Party subsequently filed this unfair labor practice charge alleging that the Union's "late" demand for arbitration violated PERA.

The unfair labor practice charge was filed at MERC's Lansing office on January 12, 2012. The ALJ found that the six-month statute of limitations began to run on June 7, 2011 when, at the arbitration hearing, Charging Party became aware of the Union's alleged failure to file a timely demand for arbitration. The ALJ concluded that the deadline for filing the MERC charge was January 9, 2012[1], and her charge, therefore, was time barred.

Discussion and Conclusions of Law:

A charge must be filed within six months of the date of the action(s) alleged to be unfair labor practices. *Teamsters Local 214,* 25 MPER 72 (2012). 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 six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Communities Sch,* 1994 MERC Lab Op 582; *Washtenaw Cmty Mental*

[1] The ALJ's conclusion that the deadline for filing the charge was January 9, 2012 is incorrect. The deadline was actually December 7, 2011, since the statute began to run on June 7, 2011. However, the ALJ's miscalculation does not change the result. The December 7, 2011deadline means that rather than filing the charge three days late, Charging Party actually filed the charge 33 days after the statute of limitations expired. Neither party noted the ALJ's error either at the hearing or when the matter was on exceptions to the Commission.

Health, 17 MPER 45 (2004); *Police Officers Labor Council Local 355*, 2002 MERC Lab Op 145.

The limitation period commences when the person knows, or should have known, of the alleged violation that caused his/her injury and has good reason to believe the act was improper. *Teamsters Local 214*, 25 MPER 72; *City of Detroit*, 18 MPER 73 (2005); *AFSCME Local 1583*, 18 MPER 42 (2005); *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836. We agree with the ALJ that the statute began to run on June 7, 2011, the date Charging Party learned of the employer's claim that it did not receive timely notice of the demand for arbitration in the manner required by the collective bargaining agreement. Accordingly, the ALJ was correct in finding that the charge was untimely filed.

We note that at the hearing on summary disposition, Charging Party's attorney stated that the charge was both filed with MERC and served on the Union by certified mail. She, however, was unable to produce proof of mailing, stating that she did not have copies of the certified mail return receipts. In her exceptions, Charging Party, for the first time, claims that the charge was hand-delivered via courier to the MERC Lansing office on January 3, 2012, six days before the statute of limitations expired. A review of the hearing transcript reveals that Charging Party did not mention service by courier at any time during the hearing on summary disposition when asked by the ALJ about the method of filing. In her exceptions, she requests that the Commission remand this matter for a full hearing on the merits, at which she states she will produce either an affidavit from the courier or will call the courier to testify. However, a charging party may not raise issues in exceptions that were neither stated in the charge nor raised at the hearing. *American Fed'n of Teachers, Local 2000*, 22 MPER 21 (2009); *Detroit Pub Sch*, 22 MPER 19 (2009).

Moreover, by requesting remand, Charging Party is essentially moving to re-open the record. A motion to reopen the record will be granted only where the party making the motion proffers new evidence and all of the following requirements are met:

(a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
(b) The additional evidence itself, and not merely its materiality, is newly discovered.
(c) The additional evidence, if adduced and credited, would require a different result.

General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166.

Here, Charging Party did not attach an affidavit from the courier to her exceptions, nor did she assert that the affidavit would include newly discovered evidence which could not with reasonable diligence have been discovered earlier. By the time she filed her exceptions, Charging Party was well aware, having been present when the ALJ rendered his bench opinion, that the statute of limitations was one of the grounds upon which the ALJ would recommend dismissal of her case. If, as she claims, a courier delivered the charge on January 3, 2013, Charging Party had ample opportunity to present such information to the ALJ, and it is

reasonable to expect that she would have so informed him. However, as noted above, Charging Party, despite being directly questioned by the ALJ at the hearing as to the timing and method of service of the charge, never claimed that it had been hand delivered via courier six days before the statute of limitations expired.

We also agree with the ALJ that even if the charge had been filed within six months of the alleged unlawful act, it fails to state a claim upon which relief can be granted. To prevail on a claim of breach of duty of fair representation involving a grievance, a charging party must allege both that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement. *Goolsby v City of Detroit*, 211 Mich App 214 (1995); *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 488 (1993). Unless the union acted in bad faith, was grossly negligent, or its actions were arbitrary or capricious, an employee's dissatisfaction with her union's decisions does not establish a breach of the duty of fair representation. *Ann Arbor Pub Sch*, 16 MPER 15 (2003); *Michigan Council 25, AFSCME, Local 3308*, 1999 MERC Lab Op 132. See also *Ruzika v General Motors Corp*, 707 F.2d 259 (CA 6, 1983) (Unions failure to file a timely grievance does not breach the duty of fair representation.)

We agree with the ALJ that the Union's action in sending the notice of intent to arbitrate prior to receipt of the employer's Step 3 answer does not rise to the level of bad faith or gross negligence, nor was it arbitrary or capricious. At the hearing, Charging Party conceded as much. Her counsel stated "… it is a mistake, it is not malicious. Can I say that it was a bad faith (sic) that they intentionally did something against Ms. French? No. Was it an arbitrary act? It was a negligent act. Was it gross negligence as in a gross negligent act (sic) by a state official? No." (Transcript at p. 17) However, simple negligence will not support a claim of breach of the duty of fair representation. *Vaca v. Sipes*, 386 US 171, 177 (1967) ("To pursue a charge against a union, a Charging Party must allege and be prepared to prove that the union's conduct toward him or her was arbitrary, discriminatory or done in bad faith and not merely a disputed tactical choice, or even merely negligent.") and *Ann Arbor Pub Sch*, 16 MPER 15 (2003) (In the absence of a showing of bad faith, gross negligence, or arbitrary or capricious action by the union, an employee's dissatisfaction with her union's decisions does not establish a breach of the duty of fair representation.)

Charging Party also asserts that the ALJ erred by concluding that she did not allege that the employer violated the contract. We disagree. The charge alleges only a violation of the duty of fair representation; nowhere does it claim that the employer violated the collective bargaining agreement and the employer is not cited in the caption of the case. While it does state, in the "Factual Background" section, that "[o]n June 3, 2010, the Union filed the original grievance in French's discharge stating that it was not for just cause …", the charge fails to include an allegation that the employer violated the contract. The ALJ, thus, did not err in concluding that the charge failed to state a claim. The ALJ additionally noted that in its response to the charge, the Union raised the defense that the charge failed to state a contract violation, yet Charging Party did not amend the charge to include that allegation, nor did she allege a contract violation during her opening statement at the hearing. The ALJ correctly concluded that Charging Party did not allege that the employer violated the contract.

Summary:

For all of the above reasons, we agree with the ALJ that the charge was not filed in a timely manner. We also agree that even had the charge been timely filed, it failed to state a claim upon which relief can be granted. We have carefully examined all other issues raised by Charging Party in her exceptions and find they would not change the result. We, therefore, affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charge.

Accordingly, we issue the following Order:

ORDER

The unfair labor practice charges are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____/s/_____
Edward D. Callaghan, Commission Chair

____/s/_____
Robert S. LaBrant, Commission Member

____ /s/_____
Natalie P. Yaw, Commission Member

Dated: January 31, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Respondent,

-and- Case No. C12 A-009
Docket 12-000055-MERC

SUSAN FRENCH,
Individual-Charging Party.
_____/

APPEARANCES:

Joni Fixel, for Charging Party

Christopher Tomasi, for Respondent

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, MCL 423.201, *et seq*, as amended, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based upon the entire record:

The Unfair Labor Practice Charge:

A charge was filed with MERC on January 12, 2012 against the Police Officers Association of Michigan (POAM) by Susan French, through counsel, alleging a breach of the duty of fair representation in the handling of a grievance over the termination of her employment. In sum, and accepting as true all factual allegations pled by Charging Party, French was fired; the Union pursued a grievance; on June 17, 2010 a local union representative sent an email notice to the Employer advising that the Union intended to arbitrate the dispute; an arbitrator later found that the emailed notice was not contractually sufficient under language which required written notice to the Employer of the Union's intent to arbitrate the matter. French learned of the Union's alleged error on June 7, 2011, when at the outset of the arbitration hearing, the

Employer moved for dismissal and the Arbitrator bifurcated the hearing, declining to take proofs on the merits. The Arbitrator dismissed the grievance on procedural grounds on August 15, 2011. The Charge did not assert that French was fired improperly, that there did not exist just cause for the termination of her employment, or that the Employer breached the collective bargaining agreement when it fired French. The asserted harm to French is that she was deprived of the opportunity to have her termination reviewed by an Arbitrator. Regardless, no claim is brought against the Employer so there was no possibility of securing French's re-employment through this proceeding.

The Charge did not assert any animus on the part of the Union toward French, and rather, concluded by acknowledging that the alleged failure to timely file a written demand for arbitration was "a mistake".

Findings of Fact and Discussion and Conclusions of Law:

Counsel for both parties appeared for a scheduled evidentiary hearing on April 3, 2013. Following opening statements, in which a challenge to the Commission's jurisdiction to hear this matter was made based on the running of the statute of limitations, and after considering the pleadings and extensive arguments by both counsel, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 which allows for a dismissal of a charge where a charge fails to factually state a claim upon which relief could be granted. See also *Detroit Public Schools,* 22 MPER 19 (2009); *Oakland County and Sheriff*, 20 MPER 63 (2007); aff'd 282 Mich App 266 (2009); aff'd 483 Mich 1133 (2009); *MAPE v MERC*, 153 Mich App 536, 549 (1986), *lv den* 428 Mich 856 (1987). Accordingly, I rendered a bench opinion, with the substantive portion of my findings of fact and conclusions of law issued from the bench set forth below:[1]

JUDGE O'CONNOR:

FINDINGS OF FACT:

> Accepting Charging Party's allegations as true, and even though the Union's alleged error occurred in June of 2010, I find that the six-month statute of limitations began to run no later than June 7, 2011 [when Charging Party indisputably became aware of the alleged error and its import to the arbitration proceedings] and, therefore, to be timely, a charge must have been both filed and served by no later than January 8, 2012, which was a Sunday and,

[1] The transcript excerpt reproduced herein contains typographical corrections and other non-substantive edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

therefore, service and filing must have been accomplished by January 9th, 2012.

The charge was filed by mail to the Commission's Lansing office from Charging Party's attorney's Lansing office. It was not actually received by the Commission until January 12, 2012. That is the date by which we measure against the running of the statute of limitations. The charge was, according to a proof of service, served on the Respondent by certified mail. The return receipt is not available. I've asked Charging Party's counsel for a copy of it and it's apparently not in her file. I asked the Union's counsel whether he's aware of when the charge was actually received by the Union and the Union is not aware of when it was received. Those are two different triggering events, but both must be accomplished within the statute of limitations. I know and must rely on the fact that the Commission did not receive [the Charge] by January 9th; it received the Charge on January 12th.

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 her 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.

Here the Charging Party was aware by no later than June 7, 2011, that the Employer was alleging that the Union had blown the arbitration filing deadline and Charging Party was aware by that date that the Arbitrator took the assertion seriously enough to bifurcate the hearing [and to decline to take proofs on the merits]. While the Arbitrator's formal ruling accepting the Employer's theory that the emailed demand for arbitration failed to comply with the contractual mandate of a "written demand", was not issued until August 15, 2011, the Charging Party was on notice of the alleged error by the Union by no later than June 7, 2011. As found by the Court of Appeals in *Huntington Woods*:

> With respect to determining when a person discovers, or knows or has reason to know of, his cause of action so as to commence the running of the limitation period, we have explained that it is not necessary that the person recognize that he has suffered invasion of a legal right. *Leary v Rupp,* 89 Mich App 145 (1979). Nor is running of the limitation period held in abeyance until a person obtains professional assistance to help him determine whether he has a cause of action. *Sedlak v Ford Motor Co,* 64 Mich App 61 (1975). Rather, the limitation period commences when the person knows of the act which caused his injury, and has good reason to believe that the act was improper or done in an improper manner. *Leary, supra.*

French was aware on June 7, 2011, that it was alleged [by the employer] that the Union had blown the arbitration deadline by emailing the demand in June of 2010 rather than handing in a written demand. She knew at that point "of the act which caused her injury", as the *Huntington* Court put it. The statute of limitations began to run on that day and did not await French securing additional information. Moreover, the Arbitrator's award of August 15, 2011, undisputedly established, well within the statute of limitations, that the [demand for arbitration] deadline had not, in the opinion of that arbitrator, been met. It might be a different matter if French was merely aware on June 7, 2011, of a claimed untimeliness but that the Arbitrator had not dismissed the case based on the finding of untimeliness until after six months had already run. Those are not the facts here. A ULP Charge could have been filed and served within six months of the June 7 arbitration hearing. In fact, the charge was prepared [and dated] by [Charging Party's] counsel on December 28, and had it been hand delivered rather than mailed, it would have been timely. It was not and therefore is barred by the statute of limitations and must be dismissed.

Additionally and alternatively, the charge fails to state a claim and is subject to summary disposition on the merits even were it found to be timely; even if I took the testimony and all the testimony supported each allegation made in the charge, there would be no claim. There is no assertion in the charge that French was fired improperly or that the employer violated the collective bargaining agreement. There was no assertion in the opening statement to that effect either and courts and administrative tribunals are entitled to rely on opening statements. No claim was

made which could have survived summary disposition. The case law is well settled that to pursue a claim for the breach of a Union's duty of fair representation, a charging party must both allege and be prepared to prove not only a breach of the duty of fair representation by the Union, but also allege and prove a breach of the collective bargaining agreement by the Employer. *Pearl v. Detroit,* 126 Mich App 228, 238, 336 N.W.2d 899 (1983); *Goolsby v City of Detroit*, 211 Mich App 214 (1995); *Knoke v E Jackson Pub Sch Dist*, 201 Mich App 480, 485 (1993); *Martin v E Lansing Sch Dist*, 193 Mich App 166, 181 (1992); and *Hines v. Anchor Motor Freight, Inc,* 424 US 554, 570–571 (1976). Thus, even if a plaintiff established that a Union's conduct would have otherwise constituted a breach of its duty of fair representation, the claim must fail where plaintiff failed to show that the employer violated the collective bargaining agreement. See, *Bonnell v Lorenzo,* 241 F3rd 800 (CA 6, 2001). Simply, without a breach of contract there arises no duty on the part of the Union. It is notable that the Union's Answer to the Charge raised as a defense the absence of any [allegation in the Charge of a] contract violation by the Employer. No amendment to the Charge was filed. Here, no breach of contract has been pled and the Charge is therefore subject to summary dismissal.

Moreover, and as a third alternative ground, the facts here are undisputed as to the Union's error, such that the Charge is subject to summary disposition on the merits, even were it found to be timely. Charging Party asserts no ill-will on the part of the Union. Rather, she acknowledges that their failing was a "mistake". The standard of care under case law interpreting a Union's duty of fair representation is not so strict as to make culpable a mere "mistake", especially where, as here, the alleged "mistake" was made by a workplace shop steward, co-worker.[2],[3]

MERC has held that the fact that a member is dissatisfied with their union's efforts is insufficient to constitute a proper charge of a breach of the duty of fair representation. *Eaton Rapids Ed Assoc,* 2001 MERC Lab Op 131; *Wayne County DPW,* 1994 MERC Lab Op 855. The fact that a Court, or MERC, concludes that the Union may have reached the wrong conclusion as to how

[2] I find that arbitrator David Grissom's dismissal of a discharge grievance based on such a parsimonious reading of "written notice following the Employer's denial of a grievance" as excluding emailed notice given too soon, to be both surprising and troubling, and that such a ruling could not reasonably have been anticipated.

[3] The standard of care for a layperson-Union steward of course does not rise to the level of that required of a licensed attorney, for whom blowing a statute of limitations, even by similar inadvertence, is treated as *prima facie* malpractice.

to proceed on a grievance does not mean that the Union acted arbitrarily or in bad faith or that it breached its duty of fair representation. *White v Detroit Edison*, 472 F3rd 420, 427 (2006).

Again, MERC has appropriately held that even if the Union's decision-making was based on a mistaken interpretation of the facts, a mere showing that the Union made the wrong choice is insufficient to establish the hostility, ill will, malice, indifference, or gross negligence that is required to support a claim. *DAEOE Local 4168*, 1997 MERC Lab Op 475; City *of Detroit, 1997 MERC Lab Op 31*. Under existing case law, a reasonable good faith tactical choice by a union is not a breach of the duty of fair representation. *Detroit Federation of Teachers*, 21 MPER 15 (2008)(no exceptions). I find that sending a notice to an employer of a demand for arbitration by a shop steward by e-mail rather than written mail is a reasonable good faith tactical choice, even if it blows up in his face later [to the disadvantage of the member and the Union], [and therefore it is] not a breach of the duty of fair representation. Similarly, in *Bondurant v. Air Line Pilots Ass'n, Int'l*, 679 F3rd 386 (2012), the Federal Court held that choices made by a Union are not a breach of its duty if the Union's actions were not "*wholly irrational*".

Accepting as true Charging Party's assertion that the Union mistakenly sent its demand for arbitration by email rather than later by hard copy, the Charge does not state a viable claim of a breach of the duty of fair representation. If proven, Charging Party's allegations would only establish that the Union made a good faith, if mistaken, minor tactical choice, which was ultimately ruled insufficient by an Arbitrator. Accepting that conclusion as true would not establish that the Union's conduct regarding French was arbitrary, discriminatory or done in bad faith. *Vaca v Sipes*, 386 US 171, 177 (1967); *Goolsby v Detroit*, 419 Mich 651, 679 (1984). The Charge must therefore be dismissed on its merits.

Conclusion:

I have carefully considered all of the 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: August 2, 2013