STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 2394,
Respondent-Labor Organization,

Case No. CU10 I-039
-and- Docket No. 10-000070-MERC

NEIL SWEAT,
An Individual Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.L.C., by Richard G. Mack, Jr. and Jack Schulz, for the Labor Organization

Neil Sweat, appearing on his own behalf

DECISION AND ORDER

On December 20, 2013, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition finding that the charge against the Respondent failed to a state claim upon which relief can be granted under § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ held that Charging Party failed to allege any facts which would support a claim for breach of the duty of fair representation and recommended dismissal of the unfair labor practice charge in its entirety. The Decision and Recommended Order on Summary Disposition was served on the parties in accordance with § 16 of PERA.

On February 6, 2014, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. On March 19, 2014, Respondent filed a response to Charging Party's exceptions. On March 20, 2014, Charging Party filed a supplement to his exceptions and on April 25, 2014, Charging Party filed a corrected copy of his exceptions. On May 7, 2014, Respondent filed a Motion to Strike Charging Party's exceptions. Charging Party did not file a response to the Motion to Strike.

In his exceptions, Charging Party essentially makes many of the same arguments he presented at the hearing and in his written submissions. He also argues that the ALJ erred in determining that his claim concerning Respondent's handling of his 2009 grievance was barred by the statute of limitations. He takes exception to the ALJ's finding that Respondent acted reasonably in processing his grievances, insisting that his grievances were ignored, processed in

a perfunctory manner, and that Respondent made no effort whatsoever on his behalf, all in an attempt to protect itself from liability.

In its response to Charging Party's exceptions, Respondent contends that Charging Party failed to submit any evidence or argument that would demonstrate error on the part of the ALJ, and that the ALJ's decision was based on applicable law and should be affirmed.

As noted, Respondent filed a Motion to Strike Charging Party's exceptions alleging that all three versions of Charging Party's exceptions fail to comply with Rule 176, of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176. While it is true that Charging Party's exceptions do not strictly comply with the requirements of Rule 176, we will consider them to the extent that we are able to discern the issues on which Charging Party is requesting our review. *City of Detroit*, 21 MPER 39 (2008); *Gov't Administrators Ass'n*, 22 MPER 61 (2009). Because we are able to discern the issues on which Charging Party has requested review, Respondent's Motion to Strike Charging Party's initial exceptions, is denied.

However, the Commission rules do not provide for the filing of a supplement to, or revised/corrected copies of, exceptions. It is within our discretion to determine whether we will consider any pleadings that are not required by or included in our rules. Although Charging Party is a *pro se* litigant, the filing of several versions of the same pleading is to be discouraged. Accordingly, we did not consider Charging Party's supplemental exceptions, filed on March 20, 2014, or the "corrected copy" of his exceptions, filed on April 25, 2014, in our deliberations and decision. In addition, the "corrected copy" of Charging Party's exceptions was filed with 73 exhibits attached. Thirteen exhibits were admitted into evidence by the ALJ at the hearing. When filing exceptions, a party must include only those exhibits submitted at the hearing. See R 423.176 (1). The record in this matter closed on March 19, 2014. A party may not submit additional evidence after the record is closed without filing a motion to reopen the record. Charging Party did not file a motion asking that the record be reopened. Accordingly, we have considered only the evidence contained in the record as of March 19, 2014.

We have carefully reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the facts as found by the ALJ since this matter is being decided on Summary Disposition, and summarize the facts here only as necessary. We agree with the ALJ that there are no material facts at issue.

Charging Party was employed by the Detroit Housing Commission (DHC) and was a member of a bargaining unit represented by Respondent. Charging Party's responsibilities included cleaning out housing units to prepare them for new tenants ("bulking out") and collecting and processing rent checks from tenants pursuant to the DHC's policies and procedures, which included a requirement that rent checks be processed within 24 hours of receipt.

In 2008, Charging Party was suspended pending discharge for 30 days because he failed to process two rent checks and failed to bulk out housing units. Respondent filed a grievance challenging the suspension and engaged in negotiations with the DHC. When the DHC offered to reduce the suspension to 15 days, Charging Party refused to accept its offer. The parties eventually agreed that Charging Party would serve the 30-day suspension, but would not be discharged. Subsequently, Charging Party and Respondent had a dispute over the handling of the grievance, which Charging Party believed should go to arbitration. He filed a claim with Respondent's Internal Appeals Panel, which made no finding regarding the merits of the grievance, but did find that it had failed to properly respond to Charging Party regarding his request for arbitration. The Appeals Panel ordered Respondent to pay Charging Party the difference between the 15 days of lost pay he had been offered by the DHC during negotiations and the 30-day unpaid suspension he ultimately served.

In 2009, Charging Party again received a 30-day suspension with a recommendation of termination, after the DHC alleged, among other things, that he failed to timely process rent checks, which resulted in delays in posting rent payments to residents' accounts and triggered the assessment of approximately $750 in late fees, which the DHC then had to remove from residents' accounts. The 2009 notice of suspension references the prior suspension, pursuant to Respondent's progressive disciplinary policy. The collective bargaining agreement states that if Respondent wishes to grieve a suspension, its president "shall submit a written grievance to the commission head, or his or her designated representative, within five working days of the issuance of the suspension or discharge." Respondent filed a grievance more than five days after the suspension was issued. The DHC denied the grievance as untimely, and Charging Party was terminated. Respondent asserts that it was unable to file the grievance within five days because the DHC managers designated to accept grievances were out of the office attending a seminar. Respondent also believes the DHC should have considered the grievance timely pursuant to another section of the contract, which provides that "[a]ny grievance under this agreement which is not filed in writing within 20 working days after the grievance arises shall not be considered a grievance." Respondent ultimately decided not to seek arbitration for the 2009 grievance, after its Arbitration Review Panel determined that the grievance lacked merit.

Discussion and Conclusions of Law:

A union's duty of fair representation 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. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). A union has considerable discretion in deciding whether, or in what manner, to proceed with a grievance, and is permitted to assess each grievance on its individual merit. A union's actions are lawful so long as they are not so far outside a wide range of reasonableness as to be irrational. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *Air Line Pilots Ass'n v O'Neil*, 499 US 65 (1991). The fact that an individual member is dissatisfied with the union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131.

A union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success at arbitration. It is not required to follow the dictates of an individual grievant. Rather, it may investigate and present the case in the manner it determines best. Poor judgment and/or ordinary negligence are not sufficient to support a claim of unfair representation. *Goolsby*. To prevail on a claim of unfair representation based on a disputed grievance, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Knoke v East Jackson Sch Dist*, 201 Mich 480 (1993).

Charging Party was, in 2008, facing a suspension with a recommendation of discharge. Respondent filed a grievance and its president negotiated with the DHC, which offered to reduce the suspension to 15 days. While Charging Party rejected the offer, it was due to Respondent's negotiating on his behalf that he remained employed. We agree with the ALJ that the record clearly demonstrates that Respondent advocated on Charging Party's behalf. Charging Party is dissatisfied with Respondent's decision not to challenge the suspension further. However, the ALJ correctly noted that the fact that a member is dissatisfied with the union's efforts is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*. Charging Party argues that Respondent's decision was outside the bounds of ordinary reasonableness because he was not guilty of the violations alleged by the DHC. The ALJ made no findings as to whether Charging Party was in fact guilty of the incidents for which he was disciplined because the ALJ correctly noted that such a finding would not be relevant in reaching his decision. The issue, noted the ALJ, is whether Respondent had evidence of Charging Party's innocence, evidence which would make its decision not to arbitrate the grievance irrational, arbitrary or made in bad faith. Charging Party did not proffer any such evidence. We, therefore, agree with the ALJ that this case demonstrates an ordinary disagreement between an employee and his union over how far to take a grievance. The ALJ correctly concluded that Charging Party failed to demonstrate that Respondent's decision not to advance the grievance to arbitration was arbitrary, irrational, made in bad faith, dishonest or unreasonable. Charging Party states in his exceptions that Respondent "negligently failed to take a basic and required step towards resolving" the grievance, instead allowing the grievance to "expire." We disagree.

When Charging Party again received a 30-day suspension in 2009, Respondent again filed a grievance. The ALJ correctly concluded that Respondent's handling of the 2009 grievance was, like its handling of the 2008 grievance, well within its discretion, reasonable and not arbitrary. The ALJ noted, and we agree, that it came down to a disagreement between Charging Party and Respondent over the merits of the allegations made against Charging Party by the DHC. Charging Party failed to present evidence that Respondent had any information which might demonstrate that he was innocent of the workplace violations of which he was accused. Respondent's Arbitration Review Panel determined that the grievance lacked merit precisely because of the absence of evidence pointing to Charging Party's innocence. Charging Party argues that had Respondent taken the 2008 grievance to arbitration, he would not have been suspended and the DHC could not have used the 2008 suspension to support its decision to terminate him in 2009. Like the ALJ, we find this argument meritless. The ALJ stated that the 2009 notice of termination did not indicate "that Mr. Sweat would not have been terminated in 2009 had it not been for the prior 30-day suspension." In addition, the evidence reveals that some violations were considered serious enough to warrant dismissal without first going through

all steps of the progressive disciplinary policy. The ALJ correctly ruled that Respondent acted reasonably and well within its discretion in its handling of both grievances.

Charging Party also takes exception to the ALJ's finding that his claim that Respondent violated PERA by filing the 2009 grievance late is untimely. The initial unfair labor practice charge, filed on September 10, 2010, does not allege that Respondent filed an untimely grievance. The ALJ correctly noted that Charging Party did not learn of "the arguably untimely grievance filing until . . . at the latest, October 1, 2011." PERA contains a six-month statute of limitations at § 16(a), which states, "No complaint shall issue based on any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of the charge upon each of the named respondents." The statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Cmty Sch*, 1994 MERC Lab Op 582. The limitations period commences when the charging party knows or should have known of the acts constituting the 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 (1983).

We agree with the ALJ that the statute of limitations expired six months after Charging Party learned of the allegedly untimely grievance filing, or April 1, 2012. Charging Party did not seek to amend his charge to add such an allegation. The first time the allegation was raised was in December 2012 when Charging Party filed a position statement. The allegation was, thus, made by Charging Party well more than six months after he became aware of the alleged misconduct by Respondent. The ALJ correctly found that the allegation was untimely. Charging Party argues that the statute of limitations is tolled until the internal appeals process has ended, but that is not a correct statement of the law. The statute of limitations is not tolled by the attempts of an employee or a union to seek a remedy elsewhere, including the filing of a grievance, or while another proceeding involving the dispute is pending. *Univ of Michigan,* 23 MPER 6 (2010); *Wayne County,* 1998 MERC Lab Op 560. Internal efforts to remedy unfair labor practices will not toll the limitations period for filing complaints. *Troy Sch Dist,* 16 MPER 34 (2003).

We have carefully examined all other issues raised by Charging Party in his 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 and, accordingly, 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: 9/11/14

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 2394,
Respondent-Labor Organization,

Case No. CU10 I-039
-and- Docket No. 10-000070-MERC

NEIL SWEAT,
An Individual Charging Party.
_____/

APPEARANCES:

Miller Cohen, P.L.C., by Richard G. Mack, Jr. and Jack Schulz, for the Labor Organization

Tyrone D. Davidson and Leonard Mungo, for the Charging Party

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed on September 9, 2010, by Neil Sweat against his Union, the American Federation of State, County and Municipal Employees (AFSCME) Council 25, Local 2394. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

Procedural Background:

Charging Party filed his initial charge against AFSCME Council 25, Local 2394 *in pro per* on September 9, 2010.[1] The charge in Case No. CU10 I-039; Docket No. 10-000070-MERC alleges that the Union breached its duty of fair representation under PERA by failing or refusing to request information from the Detroit Housing Commission ("DHC" or "the Employer") and by failing to notify Charging Party of the time and location of a grievance hearing. In an order

[1] The instant charge had been consolidated with an unfair labor practice charge filed by Sweat against his former employer, the Detroit Housing Commission, in Case No. C11 C-051; Docket No. 11-000799-MERC. A Decision and Recommended Order in that related matter is being issued contemporaneously with the instant decision.

issued on October 6, 2010, I directed Sweat to show cause why the charge should not be dismissed for failure to state a claim upon which relief could be granted. Thereafter, Charging Party was granted a ninety-day extension of time in which to respond to the order so that he could attempt to retain an attorney to represent him in connection with this matter.

Sweat filed a response to the order to show cause on April 1, 2011. Once again, Charging Party filed his pleading *in pro per*. Upon receipt of the document, I directed AFSCME Council 25, Local 2394 to file a position statement addressing the allegations in the charge, as well as the assertions set forth by Sweat in his response to the order show cause. The Union filed its position statement on June 3, 2011. Based upon a review of the pleadings, including the charge and the response to the order to show cause, I concluded that questions of fact existed with respect to the allegations set forth by Sweat and that an evidentiary hearing was warranted. Thereafter, the case was delayed, in part, due to the recurrent substitution of counsel for AFSCME Council 25, Local 2394. During that period, Sweat retained the services of Tyrone Davidson, a non-attorney, to assist him in connection with his charge against the Union.

On January 10, 2013, Sweat filed a supplemental position statement in an attempt to further clarify his allegations with respect to the Union. Based on that document, as well as the arguments set forth by Davidson on Sweat's behalf during various prehearing conferences held in this matter, it became apparent that Charging Party's claim against AFSCME Counsel 25, Local 2394 was based primarily upon the Union's handling of a 2008 grievance. Charging Party asserts that AFSCME Council 25, Local 2394 failed to process that grievance to arbitration, which resulted in Sweat having to serve a 30-day suspension. Although Sweat ultimately returned to work after that incident, he was terminated a year later after receiving another 30-day suspension from the Employer. Charging Party alleges that the DHC, following its policy of progressive discipline, relied upon the 2008 suspension in making the decision to terminate Sweat's employment in 2009. Charging Party contends that he would not have been terminated in 2009 had the Union not mishandled the earlier grievance. Sweat further asserts that AFSCME Council 25, Local 2394 failed to properly investigate the factual circumstances which led to his discharge in 2009 and that the Union failed to file the 2009 grievance in a timely manner which caused the grievance to be rejected by the DHC. As a remedy, Charging Party is seeking monetary relief from the Union in the amount of $620,000 for actual, exemplary and future damages.

The evidentiary hearing finally commenced on October 28, 2013. By the end of the second day of hearing, Charging Party had not presented evidence to substantiate any of the claims he and his representative had set forth in the pleadings and during the various prehearing conferences held in this matter during the several years preceding the start of the hearing. For that reason, I adjourned the hearing and directed Charging Party to immediately proffer a verbal offer of proof to establish whether Sweat was capable of presenting credible evidence proving that the Union breached its duty of fair representation under PERA. After considering Charging Party's offer of proof and the extensive arguments made by the representatives for each party on the record, 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(1). See also *Detroit Pub Sch*, 22 MPER 19 (2009) and *Oakland Co and Oakland Co Sheriff v Oakland Co Deputy Sheriffs Ass'n*, 282 Mich App 266 (2009). Accordingly, I rendered a decision from the

bench, finding that Charging Party had failed to state a valid claim against the Union under PERA.

Facts:

The following facts are derived from the unfair labor practice charge, Charging Party's response to the order to show cause, his position statement and the offer of proof, as well as the factual assertions set forth by the Union which were not specifically disputed by Charging Party during the course of this proceeding. Neil Sweat was employed by the DHC and was a member of a bargaining unit represented by AFSCME Council 25, Local 2394. Charging Party's responsibilities at the DHC included cleaning out housing units so that they were ready for use by new tenants, a practice referred to by the parties as "bulking." Sweat was also responsible for picking up rent checks from housing units to which he was assigned and administering the checks pursuant to the DHC's normal policies, which included a requirement that rent checks be processed and turned over to the proper location within 24 hours of receipt.

In 2008, Charging Party was given a 30-day suspension pending discharge based upon an allegation that Sweat had failed to process two rent checks which the DHC alleged were found in his drawer at work. In addition, the Employer asserted that Sweat had failed to bulk out housing units and that he had "created blight." The Union filed a grievance challenging the suspension. Thereafter, Yolanda King, the President of Local 2394, engaged in negotiations with the Employer in an attempt to settle the matter. As part of those discussions, the DHC proposed reducing the suspension to 15 days, but the offer was turned down by either Sweat or King. Ultimately, the negotiations resulted in an agreement between the Employer and the Union that Sweat would serve the entire 30-day suspension, but that he would not be terminated. Sweat served the 30-day suspension and continued to work for the DHC.

Thereafter, a dispute arose between Charging Party and the Union over the handling of the grievance. Sweat wanted Respondent to continue processing the grievance to arbitration and he presented this claim to AFSCME's internal appeals panel. Although the appeals panel did not make any finding regarding whether the grievance had merit, it concluded that AFSCME Council 25 had failed to properly respond to Sweat regarding the request for arbitration of the grievance and ordered the Union to pay Charging Party the difference between the 15 days of lost pay he had been offered by the DHC during settlement negotiations and the 30-day unpaid suspension he actually served.

In 2009, Charging Party once again received a 30-day suspension with a recommendation of termination. The discipline resulted from an allegation that a batch of rent payment checks had been left within a drop box in a housing facility to which Charging Party was assigned. The DHC asserted that Sweat's failure to process the payments resulted in a delay in rent being posted into the residents' accounts and triggered the assessment of approximately $750 in late fees which the Employer then had to remove from the affected accounts. The checks were discovered by management on April 3, 2009. Although Sweat was not at work that day, the dates on the checks ranged from March 13, 2009 to April 1, 2009.

Article 11, Section D of the collective bargaining agreement between the DHC and AFSCME Council 25, Local 2394 states that if the Union considers a suspension or discharge to be improper, the Union president "shall submit a written grievance to the commission head, or his or her designated representative, within five working days of the issuance of the suspension or discharge." Although the Union grieved the 2009 suspension, it did not file the grievance until more than five days had elapsed after the discipline was issued. For that reason, the DHC denied the grievance and Sweat was terminated. King asserts that she was unable to file the grievance immediately because the management representatives who were designated to accept grievances on the Employer's behalf were out of the office attending training. In addition, King argued to the Employer that the grievance should have been considered timely filed pursuant to Article 9, Section B of the contract, which provides "Any grievance under this agreement which is not filed in writing within 20 working days after the grievance arises shall not be considered a grievance."

AFSCME Counsel 25 ultimately decided not to seek to arbitrate the 2009 grievance. The Union's arbitration review panel concluded that Sweat had failed to provide any information to dispute the DHC's allegation that he had failed to process rent payments in a timely manner.

Discussion and Conclusions of Law:

As noted, I issued a decision from the bench finding that there were no legitimate issues of material fact and that summary disposition in favor of the Union was warranted. The substantive portion of my findings and conclusions of law are set forth below:

> A union's duty of fair representation 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. *Vaca v Sipes*, 386 US 171, 1967; *Goolsby v Detroit*, 419 Mich 651, 1984. Within these boundaries, however, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. A union's actions will be held to be lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Lowe v Hotel Employees*, 389 Mich 123, 1973; *Air Line Pilots Ass'n v O'Neil*, 499 US 65, 1991. The Commission has steadfastly refused to interject itself in judgment over agreements made by employers and collective bargaining representatives despite frequent challenges by disgruntled employees. The fact that an individual member is dissatisfied with the union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Ass'n*, 2001 MERC Lab Op 131.
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> Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. To this end, the union is not required to follow the dictates of the individual grievant, but rather it may investigate and present the case in the manner it determines best. Poor judgment, or ordinary negligence, on the union's part, is not sufficient to support a claim of

unfair representation. *Goolsby* at 672; *Whitten v Anchor Motor Freight, Inc*, 521 F 2nd 1335 (CA 6 1975). See also *Detroit Fed of Teachers*, 21 MPER 5 (2008) (no exceptions); *Wayne Co Cmty. College*, 19 MPER 25 (2006) (no exceptions); *Wayne Co. Sheriff Dept* 1998 MERC Lab Op 101 (no exceptions). To prevail on a claim of unfair representation, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Knoke v East Jackson Sch Dist*, 201 Mich 480, 488 (1993).

With respect to the conduct at issue in this case, there is no dispute that Mr. Sweat was facing in 2008 a suspension with a recommendation of discharge, or a "probationary suspension", which was a very serious offense. The Union grieved the matter and the Union president engaged in negotiations with the Employer which resulted in an offer to reduce the suspension to 15 days. Those negotiations [ultimately] resulted in Mr. Sweat not being discharged from his employment with the housing commission and not facing a probationary suspension. In other words, Mr. Sweat kept his job. And it's clear that the Union acted on his behalf with respect to the filing of the grievance and attempting to negotiate to save Mr. Sweat's job.

[I]t's clear that Mr. Sweat is dissatisfied with the Union's decision not to challenge the suspension further. As noted, however, MERC has held that the fact that a member is dissatisfied with the union's efforts is insufficient to constitute a proper charge of a breach of the duty of fair representation. In attempting to establish that the Union's decision was outside the bounds of ordinary reasonableness, Charging Party argues that he was not guilty of the acts which he was alleged to have engaged in. And it's possible he is correct. I'm making no finding as to whether he was in fact guilty of the incidents for which he was disciplined. The issue is whether the Union's acted unreasonably in response to the allegations Mr. Sweat was facing. And here we have a situation which I would describe as an ordinary disagreement between an employee and his Union over how far to take the challenge. [T]here is nothing in the offer of proof from Charging Party which would indicate that the Union's decision not to advance the grievance to arbitration in this situation was anything other than ordinary union decision-making and within the bounds [of reasonableness].

I'll note here that [Charging Party's allegation concerning] the Union's handling of the 2008 grievance is not in and of itself a timely claim. It is only [with respect to] how the handling of the 2008 grievance relates to the subsequent grievance which makes that assertion timely. So let's get to the 2009 incident.

[A]s I've previously noted, Charging Party again received a 30-day suspension [in 2009] with a recommendation of termination. Now, it is true that the notice of [termination] references a prior disciplinary event, that being the 2008 suspension. However, there is no indication within that document that Mr.

Sweat would not have been terminated in 2009 had it not been for the prior 30-day suspension.

[As with the 2008 incident], here we have essentially a disagreement between Charging Party and the Union over the merits of the allegations presented by the employer. With respect to those allegations, there's been nothing presented by Charging Party which would indicate that there was any evidence available to the Union which should have caused the Union to [have] reasonably determined that this grievance should be advanced to arbitration. The allegations were that Mr. Sweat had not processed payments that were ultimately found in a box on April 3, 2009. Charging Party has, continuously throughout [these proceedings] asserted that the allegation was essentially bogus because Mr. Sweat was not working on April 3, 2009. However, that ignores the true nature of the allegation made against him, which is that there were checks dating back to March 13th in that box which had not been processed in accordance with the housing commission's rules, which it is undisputed require the processing of checks and turning over those checks to the proper location within 24 hours of receipt.

So, again, while there may be some theoretical explanation as to how those checks got in there which would ultimately [prove that] the allegation is false, that's not the issue in this case. The issue is whether there was such evidence of Mr. Sweat's innocence to render the Union's decision not to arbitrate the grievance irrational. And through the offer of proof, there's nothing here.

I'll note with respect to the allegation that the Union violated PERA by filing [the 2009] grievance late, there is no question that the Employer at step three [of the grievance procedure] rejected the grievance on the ground that it was not filed within five days of the discipline. However, I find that [any claim based upon the Union's filing of the 2009 grievance was not timely asserted by Charging Party pursuant to Section 16(a) of PERA.] The initial charge against the Union was filed on September 10, 2010. There was no reference [in the charge] to an untimely grievance filing by the Union. Now, it is clear that Charging Party had not learned of [the arguably untimely grievance filing] until . . . at the latest, October 1, 2011. And so the statute of limitations would [not have expired until] six months after [Charging Party] learned of that event. But Charging Party did not raise that allegation with MERC or seek to amend its charge in any way, and the first time the allegation was raised was in late 2012 or early 2013 when it was raised in a position statement by Charging Party.

Under Commission law there is a six-month statute of limitations, specifically section 16(a) of PERA, which states, "No complaint shall issue based on any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of the charge upon each of the named respondents." The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived." *Walkerville Rural Cmty*

Sch, 1994 MERC Lab Op 582. The limitations period commences when the charging party knows or should have known of the acts constituting the 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, 1983. Here, the action complained of by Sweat occurred more than six months prior to Mr. Sweat raising that allegation with the Commission, and well after he became aware of the alleged misconduct by the Union.

[E]ven if that claim had been timely raised, I do not believe that it would state -- that Charging Party has set forth a claim under PERA with respect to the timing of the filing of the grievance. [T]he Union's position consistently in this matter since that allegation was raised was that -- and this is referenced in a document brought up by Charging Party in its offer of proof -- [the Union could not have filed the grievance within 5 days because the Employer representatives designated to receive grievances were out of town at the time and that the grievance was in fact timely filed pursuant to Article 9, Section B of the collective bargaining agreement] . . . which arguably gave the Union 20 days in which to file a grievance. There are two [seemingly inconsistent sections of the contract]. It's quite possible [that the Union's] interpretation of the contract was erroneous. However, even if that were the case, that fact standing alone would not establish that [the Union's interpretation] was anything other than an [ordinary] mistake.

The fact that a court or MERC may conclude that the union may have reached a wrong conclusion in interpreting a contract or deciding how 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 F3d 420 (2006). MERC has 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 require to support a claim. *DAEOE Local 4161*, 1977 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'll note here with respect to the tactical choice [made by the Union] that I'm not relying on solely [on the dispute over which provision in the contract is applicable]. There's also testimony from Yolanda King . . . that she was unable to file the grievance within five days because no one was in the office. Charging Party has indicated that he has no facts which could contradict [King's testimony]. [A]ll that Charging Party can establish at most [is that] the Union made a mere mistake. There has been no indication through the offer of proof or through any of the documents filed by Charging Party thus far in this matter [suggesting] that [Sweat] would be able to establish any hostility or animus toward him or any discriminatory motive or treatment by the Union officials involved, including Ms. King or members of the arbitration review panel. And

absent an indication that Charging Party would be able to show such hostility, there would, at most, be a finding of a mere mistake [by the Union] which would not rise to the level of wholly irrational or grossly negligent conduct. [As noted above, poor judgment, or ordinary negligence, on the union's part, is not sufficient to support a claim of unfair representation. *Goolsby* at 672.]

Finally, and similarly with respect to my analysis of the 2008 grievance, again, ultimately the union's arbitration panel decided not to try to arbitrate this grievance despite or regardless of the finding by the Employer that it was untimely. And there's been no indication Charging Party [will be] able to show that [there is] anything other than a difference of opinion between Mr. Sweat and the Union with respect to the merits of that grievance. That concludes my bench decision.[2]

Despite having been given ample opportunity to do so, Charging Party has failed to set forth any facts which, if proven, would establish AFSCME Council 25, Local 2394 violated PERA. Therefore, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by Neil Sweat against AFSCME Council 25, Local 2394 in Case No. CU10 I-039; Docket No. 10-000070-MERC is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 20, 2013

[2] The transcript excerpt reproduced herein contains typographical corrections and other edits for clarity purposes. The complete unedited transcript is maintained within the Commission case file.