STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT FEDERATION OF TEACHERS,
Labor Organization-Respondent,

Case No. CU14 E-029

-and-

DENNIS COTTON,
An Individual-Charging Party.

_____/

APPEARANCES:

Sachs Waldman, by Amy Bachelder, for Respondent

Benjamin Whitfield, Jr., for Charging Party

DECISION AND ORDER

On August 22, 2014 Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Charging Party Dennis Cotton failed to file his charge within the six-month statute of limitations period. The ALJ also found that even if the charge had been timely filed, it failed to state a claim upon which relief could be granted under § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ noted that 2011 PA 260 amended §15(3) of PERA to make subjects such as classroom observations and teacher placement, teacher evaluations, and teacher discipline and discharge prohibited subjects of bargaining, thus substantially limiting the ability of a labor organization to seek to enforce such contract provisions through the grievance procedure. The ALJ concluded, therefore, that Respondent Detroit Federation of Teachers did not violate its duty of fair representation by refusing to file grievances on Charging Party's behalf, and recommended that we dismiss 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 September 15, 2014 Charging Party filed exceptions to the ALJ's Decision and Recommended Order. In his exceptions, Charging Party argues that the ALJ erred when she found his claim to be time-barred, because the statute of limitations was not triggered until he was constructively discharged from employment, which was less than six months before he filed his charge. Charging Party additionally takes exception to the ALJ's conclusion that he failed to state a claim for breach of the duty of fair representation. He argues that a union's failure to

communicate effectively with a member about a grievance rises to the level of a breach of the duty of fair representation if the failure causes actual harm to the union member's rights.

Respondent did not file a Response to Charging Party's exceptions. We have 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 repeat them here only as necessary.

Charging Party was employed as a teacher by the Detroit Public Schools from October 2010 until he resigned on January 3, 2014. In January 2013, Charging Party received a new assignment which he believed to be unfair because it required him to teach kindergarten, a grade that he had not taught before. In February 2013, Charging Party called Respondent and spoke to its president, Keith Johnson, on two occasions. Johnson arranged for him to talk to another kindergarten teacher.

On March 5, 2013, Charging Party sent Johnson an e-mail concerning a meeting with Charging Party's principal following the principal's classroom observation of his teaching. Charging Party claimed that rather than give constructive feedback, the principal made demeaning and rude comments. On March 8, 2013, Johnson visited Charging Party's school to discuss his concerns. According to Charging Party, Johnson said that the principal's conduct was "significant, I can work with that." On March 13, 2013, Charging Party sent Johnson an e-mail asking him what he planned to do. Johnson replied that he would try to "give assistance regarding the teacher evaluation." Between March 13 and April 6, 2013, Charging Party called Johnson several times and left messages; Johnson did not return the calls. On April 6, 2013, Charging Party sent Johnson an e-mail, but Johnson did not reply. Charging Party had no contact with Johnson after March 2013. On May 5, 2013, Charging Party received a performance evaluation which stated that his teaching was "minimally effective." He spoke to Respondent's building representative, who did not suggest taking any action, but did tell Charging Party that teachers rated minimally effective had three years in which to improve.

Discussion and Conclusions of Law:

An unfair labor practice charge must be filed within six months of the date of the action(s) alleged to be unlawful. *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. *Washtenaw Cmty Mental Health,* 17 MPER 45 (2004).

The limitations period commences when a 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. City *of Detroit,* 18 MPER 73 (2005); *Huntington Woods v Wines*, 122 Mich App 650 (1983). When a charging party alleges a breach of a union's duty of fair representation due to the union's failure to take action on the charging party's behalf, the statute of limitations begins to run when

the charging party should have reasonably realized that the union was not going to take action. *Washtenaw Co Cmty Mental Health, supra*. We agree with the ALJ that Charging Party should have reasonably realized that Respondent was not going to act on his complaints no later than early October 2013, six months after his last e-mail to Johnson, to which he did not receive a response. The ALJ was, thus, correct in finding that Charging Party's May 24, 2014 charge was untimely.

We also agree with the ALJ that, even if timely, the charge does not state a claim upon which relief can be granted. The ALJ correctly stated that it is unclear from the charge what actions Charging Party expected Respondent to take or what actions the Union could have taken. The ALJ relied upon 2011 PA 260, which amended §15(3) of PERA to make the topics of classroom observation, teacher placement, evaluation, discipline and discharge prohibited subjects of bargaining. In *Michigan State AFL-CIO v MERC,* 212 Mich App 472 (1995), aff'd 453 Mich 362 (1996), the Court of Appeals concluded that in making certain topics prohibited subjects of bargaining, the Legislature intended to "foreclose the possibility that these areas could ever be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing to bargain over them." This Commission has held that by adding teacher placement, classroom observation, teacher evaluations, teacher discipline and discharge to the list of prohibited subjects of bargaining, the Legislature made public school employers solely responsible for these matters and prohibited them from being enforceable through the grievance procedure. *Pontiac Sch Dist,* 28 MPER 1 (2014); *Bedford Pub Sch,* 26 MPER 35 (2012), aff'd on other grounds, 305 Mich App 558 (2014). Respondent, therefore, lacked the legal authority to file grievances over Charging Party's assignment to the kindergarten classroom and his unfavorable performance evaluation.

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 order dismissing Charging Party's unfair labor practice charge and issue the following Order:

ORDER

The unfair labor practice charge is 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: November 14, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DETROIT FEDERATION OF TEACHERS,
Labor Organization-Respondent,

Case No. CU14 E-029
Docket No. 14-011793-MERC

-and-

DENNIS COTTON,
An Individual-Charging Party.
_____/

APPEARANCES:

Sachs Waldman, by Amy Bachelder, for Respondent

Benjamin Whitfield, Jr., for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On May 23, 2014, Dennis Cotton filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his former collective bargaining representative, the Detroit Federation of Teachers, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

On June 10, 2014, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, and Rule 151(2)(c) of these rules, R 423.151(2)(c) I issued an order directing Cotton to amend his charge against the Respondent or show cause why it should not be dismissed as untimely filed or for failure to state a claim under PERA. Cotton filed a response to my order on July 1, 2014. Based upon the facts alleged by Cotton in his charge and response, as set forth below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Facts;

Cotton was employed by the Detroit Public Schools (the Employer) as either a permanent or substitute teacher from October 2010 until he resigned on January 3, 2014. During this time he was a member of a collective bargaining unit represented by Respondent. Cotton alleges that,

beginning in early 2013, Respondent violated its duty of fair representation under §10(2)(a) of PERA by failing to provide him with adequate assistance after his performance was criticized by his principal and he received an unfavorable evaluation. Cotton also alleges that Respondent acted in bad faith when it promised to represent him and then reneged on this promise.

Cotton's history with the Employer is as follows. Cotton was employed as a substitute teacher for some period until December 2006, when he resigned because he had failed to obtain a permanent position. In October 2010, he was hired as a permanent teacher. During the 2010-2011 school year, Cotton had two different assignments at two different elementary schools. In August 2011, Cotton was laid off. However, between September 2011 and February 2012, he worked, at two different schools, as a substitute teacher. In February 2012, he was recalled and assigned to his fifth elementary school. In June 2012, he was again laid off. However, in September 2012, he was recalled and assigned to a sixth school. In January 2013, he was given a three-week temporary assignment at a seventh school. In late January 2013, he was transferred to his eighth school, Thurgood Marshall Elementary, and assigned to teach kindergarten.

Cotton was disturbed when he received this last assignment because he had never before taught kindergarten. As Cotton had feared, his principal, Sharon Lee, soon expressed concerns about Cotton's performance. In February 2013, Cotton, fearing a poor evaluation, called Respondent and spoke to its president, Keith Johnson. Johnson told him that he had a "defeatist attitude" and just needed to do his job. Cotton called Johnson again shortly thereafter, and Johnson arranged for Cotton to talk to another kindergarten teacher. However, as Cotton phrases it, Johnson did not "devise a plan of action."

On March 4, 2013, Lee and her supervisor conducted an observation of Cotton in his classroom. According to Cotton, at a meeting to discuss the observation on March 5, 2013, Lee made demeaning and rude comments instead of providing useful feedback. After this meeting, Cotton sent Johnson an email detailing what had happened at the meeting and asking for assistance and guidance. On or around March 8, 2013, Johnson visited Cotton at his school. Cotton told Johnson about his repeated transfers, the fact that he has been assigned to teach kindergarten when he had not taught that grade before, and the harassing remarks made by Lee. Johnson told him, "That was significant, I can work with that." On March 13, 2013, Cotton sent Johnson an email asking him to clarify what he planned to do. Johnson replied that he would try and use the information Cotton had given him to "give assistance regarding the teacher evaluation." Between March 13 and April 6, 2013, Cotton called Johnson several times and left messages, but Johnson did not call him back. On April 6, 2013, Cotton sent Johnson an email, but did not receive a response.

On May 5, 2013, Cotton received a performance evaluation that rated him as "minimally effective." Cotton spoke with Respondent's building representative at Thurgood Marshall, who told him that "anyone with a minimally effective evaluation would be given three years to improve." Between May and September 2013, Cotton repeatedly attempted to transfer to another school, but was told that his performance evaluation prevented his transfer. At the beginning of the 2013 school year, Cotton returned to Thurgood Marshall and received yet another new assignment. However, between September 2013 and Cotton's resignation the following January, Lee continued to criticize Cotton's performance.

Discussion and Conclusions of Law:

Under §16(a) of PERA, the Commission is prohibited from finding an unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the party against whom the charge is made. An unfair labor practice charge that is filed more than six months after the alleged unfair labor practice is untimely and must be dismissed. The limitation contained in §16(a) of PERA is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health and AFSCME Council 25*, 17 MPER 45 (2004); *Police Officers Labor Council, Local 355*, 2002 MERC Lab Op 145; *Walkerville Rural Cmty Schs*, 1994 MERC Lab Op 582. The statute of limitations under PERA begins to run when the charging party knows of the act which caused the injury and has good reason to believe that the act was improper or done in an improper manner. *City of Huntington Woods v Wine*, 122 Mich App 650, 652 (1983). When the allegation in a charge alleging a breach of a union's duty of fair representation is that the union failed to take action on the charging party's behalf, the statute of limitations begins to run when the charging party should have reasonably realized that the union was not going to take action. *Washtenaw Co Cmty Mental Health and AFSCME Council 25*, supra, citing *Metz v Tootsie Roll Industries, Inc*, 715 F2d 299 (CA7, 1983).

Under Section 10(2)(a) of PERA, a union representing public employees owes these employees a duty of fair representation. The union's legal duty under this section is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651,679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967). Arbitrary conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682. However, as long as it acts in good faith, a union has considerable discretion to decide how or whether to proceed with a grievance, and is permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. A union satisfies the duty of fair representation as long as its decision is within the range of reasonableness. *Air Line Pilots Assn, Int'l v O'Neill*, 499 US 65, 67 (1991). The fact that an individual member is dissatisfied with the union's efforts or its ultimate decision is insufficient to demonstrate a breach of the duty of fair representation. *Eaton Rapids EA.*

In January 2013, Cotton received his eighth new assignment in less than two and one half years, an assignment that Cotton believed was unfair because he was required to teach a grade that he had not taught before. In February, 2013, when Cotton began receiving criticism from his principal, he sought Respondent's assistance. Respondent President Keith Johnson helped him make contact with another kindergarten teacher, but did not take or offer to take any other action in his behalf. Cotton again sought Johnson's assistance in early March, 2013, after a meeting with the principal following a classroom observation. Johnson came to meet with Cotton at his school three days later and listened to his complaints about his repeated transfers, the fact that he had been assigned to teach an unfamiliar grade, and his principal's demeaning and unhelpful comments. During this conversation, and in an email a few days later, Johnson made comments

that led Cotton to believe that Johnson would take some action, although Johnson did not explicitly say what he planned to do. According to Cotton, when he tried in March and April to find out what Johnson was doing, Johnson did not respond. After Cotton received a poor evaluation in May 2013, he spoke to Respondent's building representative. She also did not suggest any specific action, but merely told him that teachers rated minimally effective had three years to improve. Although Cotton continued to have problems with his principal during the first semester of the 2013-2014 school year, he does not assert that he had any further contact with Johnson or any other Respondent representative.

Cotton asserts that he had no more contact with Johnson after March 2013. I find that Cotton should have reasonably realized that Respondent was not going to take action on his complaints no later than early October 2013, after the new school year had begun. I conclude, therefore, that Cotton's May 24, 2014 charge was untimely under §16(a) of PERA.

I also find that the charge fails to state a claim under the Act because it is unclear from Cotton's charge what actions he expected Respondent to take or what actions it could have taken in this case. In 2011 PA 260, effective December 14, 2011, the Legislature substantially limited the ability of labor organizations representing teachers to intervene when it amended §15(3) of PERA to add the following to the list of matters made "prohibited subjects of bargaining" under that section:

> (j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.
>
> (l) Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.
>
> (m) For public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. . .
>
> (n) Decisions about the format, timing, or number of classroom observations conducted for the purposes of section 3a of article II of 1937 PA 4, MCL 38.83a, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

In *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995), aff'd 453 Mich 362 (1996), the Court of Appeals concluded that in making certain topics "prohibited subjects of

bargaining" between public school districts and the unions representing their employees, the Legislature intended to "foreclose the possibility that these areas could ever be the subject of bargaining such that a school district could be found to have committed an unfair labor practice by refusing to bargain over them or that they could ever become part of a collective bargaining agreement." The Commission has held that by adding "teacher placement," classroom observations, teacher evaluations, and teacher discipline and discharge to the list of prohibited subjects of bargaining, the Legislature made public school employers solely responsible for these matters by prohibiting them from being the subjects of contract provisions enforceable through the grievance procedure and by eliminating any right of a union to bargain over them. *Ionia Pub Schs*, 27 MPER 55 (2014); *Pontiac Sch Dist*, 27 MPER 52 (2014); *Pontiac Sch Dist*, 28 MPER 1 (2014). Respondent, therefore, had no ability to grieve Cotton's assignment to the kindergarten classroom or his unfavorable evaluation.

I conclude that Cotton's charge was untimely filed and that it fails to state a claim upon which relief could be granted under PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 22, 2014