STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AMALGAMATED TRANSIT UNION, LOCAL 26,
Respondent- Labor Organization,

Case No. CU14 E-028
-and- Docket No. 14-011790-MERC

FRANK D. LACEY, JR.
An Individual Charging Party.
_____/

APPEARANCES:

Law Offices of Mark H. Cousens, by John E. Eaton, for Respondent

Frank D. Lacey, Jr., appearing for himself

DECISION AND ORDER

On March 20, 2015, Administrative Law Judge Julia C. Stern issued her 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: April 27, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

AMALGAMATED TRANSIT UNION, LOCAL 26,
Labor Organization-Respondent,

Case No. CU14 E-028
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-and-

FRANK D. LACEY, JR.
An Individual-Charging Party.
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APPEARANCES:

Law Offices of Mark H. Cousens, by John E. Eaton, for Respondent

Frank D. Lacey, Jr., appearing for himself

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Detroit, Michigan on September 11, 2014, before Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). On October 20, 2014, both parties filed post-hearing briefs. Lacy also filed a motion for sanctions. To his motion, Lacey attached affidavits from individuals not called as witnesses at the hearing and letters and other documentary evidence not previously offered as exhibits at the hearing. For reasons discussed below, I find that the record should not be reopened to admit this material. Based upon a record consisting of pleadings filed by the parties before the hearing, the transcript of testimony and exhibits submitted at the hearing, and the parties' post-hearing briefs, I make the following findings of fact and conclusions of law and recommend that the Commission issue the order below.

The Unfair Labor Practice Charge:

Frank D. Lacey is employed by the City of Detroit (the Employer) as a coach operator in its Department of Transportation and is a member of a bargaining unit represented by Respondent Amalgamated Transit Union, Local 26. On May 22, 2014, Lacey filed this charge against Respondent alleging that it breached its duty of fair representation under §10(2)(a) of

PERA by the actions described below. On July 15, 2014, he filed a supplemental statement clarifying his allegations, and also provided further clarification at the hearing.

Lacey alleges that since sometime in 2012 and continuing to date, members of Respondent's executive board have violated their duty of fair representation by accepting from the Employer twice the amount of pay for conducting union business to which they are entitled under the collective bargaining agreement between Respondent and the Employer.

On November 25, 2013, Respondent's members voted to ratify a new collective bargaining agreement covering the term 2012 through June 30, 2014. Among other concessions, this agreement made permanent wage reductions which, under the predecessor agreement, were to expire after thirty-six months. Lacey alleges that Respondent unlawfully coerced and intimidated members into voting for the contract by telling them, at a pre-ratification meeting held on November 22, 2013, that if they did not vote for the contract the Employer's emergency manager could unilaterally impose new terms that would be even more unfavorable. He maintains that Respondent should have, but did not, explain to its members why Respondent had the leverage to insist on a better agreement because the Employer receives federal transit funding. He also asserts that Respondent failed to explain the full impact of the new contract. Lacey alleges, in addition, that Respondent violated its duty of fair representation by failing to provide members with a copy of the predecessor agreement before the November 25, 2013, ratification vote.

Lacey also alleges that Respondent's officers violated their duty of fair representation by failing to provide adequate notice of the election, permitting literature urging ratification to remain in the area of the ballot boxes while voting was taking place and failing to properly secure the ballot box. Lacey and Beverly King, another member of the bargaining unit, sent letters to Respondent's executive board challenging the election and attempting to have it set aside. Respondent does not have a process or procedure in its bylaws or constitution for handling challenges to the conduct of a ratification election. On November 27, 2013, Respondent President Fred Westbrook signed the new contract. Lacey alleges that Respondent's failure to have a procedure for filing challenges to a ratification election violates its duty of fair representation, and that Westbrook violated this duty of fair representation when he signed the 2012-2014 agreement without addressing King's and Lacey's challenges.

Motion for Sanctions:

Lacey's motion asserts that Respondent President Fred Westbrook testified falsely at the hearing and that Respondent deliberately provided false and misleading information at the hearing and in the position statement it filed prior to the hearing on July 1, 2014. As noted above, Lacey supports his motion with documents not offered as exhibits at the hearing and affidavits from individuals who were not called as witnesses. Lacey maintains that the hearing should be reopened to allow him to present this evidence and call these witnesses in order to demonstrate that Respondent presented false evidence. He also asserts that "appropriate action" should be taken to remedy Respondent's misconduct, including that Respondent be found in contempt of court.

The Commission, as an administrative agency, does not have the power of a general jurisdiction court to issue a contempt order and does not have the authority to assess fines for punitive purposes. See, e.g., *Wayne Co*, 26 MPER 22 (2012). In addition, Rule 166(1) of the Commission's General Rules, R 423.166, limits the right of parties to reopen a record to admit new evidence after the close of a hearing. It states:

> Rule 166. (1) A party to a proceeding may move for reopening of the record following the close of a hearing conducted under Part 7 of these rules. A motion for reopening of the record will be granted only upon a showing of all of the following:
>
> (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.

Some of the additional evidence and testimony Lacey seeks to have the Commission consider is in response to assertions made by Respondent in the position statement it filed prior to the hearing. Lacey has offered no explanation for why this evidence could not have been produced at the hearing. Lacey also seeks to admit evidence to rebut testimony and evidence presented by Respondent at the hearing. Lacey could have, but did not, request that the hearing be continued to allow him the opportunity to present rebuttal evidence. Lacey has not demonstrated, therefore, that the evidence that he seeks to have admitted could not have been produced at the original hearing. I also conclude, for reasons set out in the discussion section of this decision below, that none of the additional evidence Lacey seeks to have admitted, if credited, would require a different result. For these reasons, Lacey's motion for sanctions, and his request to reopen the record, is denied.

Findings of Fact:

Filing and Service of Charge

Respondent asserts that the charge was untimely filed because the events alleged to constitute the unfair labor practices all occurred more than six months before Respondent was served with a copy of the charge. According to Respondent, it was not served until June 12, 2014, when it received a copy of the charge and a complaint and notice of hearing from the ALJ in the mail.

Lacey maintains that on May 23, 2014, he served the charge on Respondent by personally delivering it to Respondent's office and also sent a copy of the charge by certified mail. According to Lacey's testimony, when he filed his charge with the Bureau of Employment Relations on May 22, 2014, he was told that he needed to submit a written statement that he had

served the charge on Respondent. The following day, May 23, 2014, Lacey prepared a cover letter addressed to Local 26 President Westbrook and sent the cover letter, a copy of the charge, and a proof of service to Westbrook at Respondent's office by certified mail. Lacey also mailed the proof of service to the Bureau, where it was received on May 29.

The envelope Lacey sent to Westbrook by certified mail on May 23, 2014, was admitted at the hearing. The envelope bears a stamp from the U.S. Postal Service indicating that it was returned as unclaimed. Lacey also provided documentation from the U.S. Postal Service stating that it tried to deliver the letter on May 27, 2014, but no authorized recipient was available. According to that documentation, a notice was left at Respondent's office address, but no one claimed the letter.

Lacey testified that on May 23 he also personally took a copy of the charge to Respondent's offices and handed it to Henry Foutner, Respondent's financial secretary. Foutner denied receiving the charge from Lacey, and testified that he did not see the charge until Westbrook showed it to him sometime later. He added that he felt certain he would have remembered if Lacey had come to the office and given it to him. Foutner also testified that it is his practice to sign for certified letters addressed to Westbrook at the office if Westbrook is not there, but that sometimes no one is in the office during normal business hours. According to Foutner, if a notice had been left by the Postal Service that it had tried to deliver a letter he would have gone to the post office and picked it up.

Lacey also discussed his charge on May 23 with Willie Mitchell, who serves as Respondent's steward at the terminal at which Lacey works. Mitchell asked to see the charge and to make a copy for his records, and Lacey gave him what Mitchell recalls was the attachment to the charge listing the alleged unfair labor practices without the form which constituted the first page. According to Mitchell, he gave it back to Lacey without copying it because he had to attend a meeting.

The Alleged Unfair Labor Practices

The 2008-2012 Collective Bargaining Agreement

In July 2010, Respondent's membership ratified a new collective bargaining agreement covering the period 2008-2012. The record indicates that the Employer and Respondent never signed this agreement after it was ratified. The Respondent and the Employer, however, acknowledged the agreement as binding.[1] The agreement included a June 30, 2012, expiration date. It also included this clause:

[1] It is well established that if the union has conditioned its acceptance of a collective bargaining agreement on ratification by its membership, the agreement is binding once the union has notified the employer that its membership has ratified the tentative contract agreement and the employer has either ratified or implemented the agreement. *ATU Local 1039*, 1978 MERC Lab Op 987; *Calhoun Co Bd of Comm*¸ 1980 MERC Lab Op 323. An agreement that has been ratified by both parties cannot be repudiated even though it has not been signed and executed.

> The hourly rate for members of this bargaining unit shall be reduced by eight percent (8%) for three consecutive 12 month periods. Furthermore, in any event where the minimum hourly rate, when it is reduced by eight percent (8), causes it to fall below minimum wage, the rate shall be reduced to the minimum wage hourly rate, and adjusted whenever the minimum rate changes. It is understood by the parties that the completion of the three consecutive 12 month periods will exceed the contract period of the Master Agreement.
>
> Upon the completion of three (3) consecutive 12 month periods with an eight (8%) percent reduction in pay, the compensation ranges for bargaining unit members will be returned to the compensation ranges that were in effect prior to September 14, 2010.

Pursuant to this agreement, the wages of bargaining unit members were reduced by eight percent. According to Westbrook's testimony, the wage reductions went into effect sometime around November 2010. [2]

The new contract also cut the number of hours of pay Respondent's executive board members and stewards received from the Employer to compensate them for time spent in performing union duties. Previously, an executive board member was paid up to twenty hours of union duty pay per week, and a steward up to ten hours per week. The 2008-2012 contract provided, at Article V(C) and (D):

> (C) Certified executive board members of the Union, not to exceed (1) at each terminal, will each be allowed a maximum of ten (10) hours of pay per week to fully compensate them for time consumed in settlement of grievances, assisting terminal picks or runs and off days, attending department safety meetings, attending meetings with representatives of the department, whether same be called by Employer or the Union, assisting in the United Foundation Torch Drive, and other such community-wide drives, and for engaging in any activities bearing upon labor relations with the Department of Transportation.
>
> (D) In the three terminals, a steward, in addition to the executive board member, may be allowed a maximum of five (5) hours pay per week to compensate for time consumed assisting the executive board member. A steward may represent employees in handling labor relations activities with the Transportation District Superintendent . . .

Respondent did not provide its members with copies of the 2008-2012 agreement despite repeated requests from members, including Lacey, that it do so. Westbrook was a member of Respondent's executive board from 2001 until losing his position in a union election in July 2010. In the spring of 2013, he did not hold union office but had announced his candidacy for Respondent's presidency. Westbrook testified that he raised the issue of a lack of a printed contract with the executive board and Gaffney at a union meeting in April 2013. According to

[2] In his post-hearing brief, Lacey asserts that the wage reductions began on July 1, 2010. However, there was no testimony to this effect.

Westbrook, Gaffney said that Respondent had proofread a draft of the contract, corrected it, and sent it back to the Employer. However, the Employer had not yet returned a corrected copy so that Respondent could print and distribute it. After this meeting, Westbrook drafted a letter to the president of Respondent's international union about the issue and asked Lacey to send it. The international president sent a letter to Gaffney, with a copy to Lacey, informing him that it was a matter of federal law and the policy of the international local to provide every member, upon request, with a copy of their current collective bargaining agreement.

The reduction in union duty pay Respondent agreed to in the 2008-2012 contract was never implemented. Westbrook testified that in the spring of 2013, he learned that the reductions in union duty pay had not been implemented and that he raised this issue with the executive board and Gaffney at a union meeting. According to Westbrook, he was first told that the reductions "just had not been started yet," and then that the reductions would begin when the 2008-2012 agreement was signed. Westbrook then wrote a letter to the membership advising them that the reductions in union duty pay had not been implemented.[3] Westbrook testified that Gaffney said at the next union meeting that the Respondent and the Employer had agreed that the reduction in paid union time would not be implemented because the representatives of other bargaining units in the Department of Transportation had not had their union leave or release time reduced. Westbrook testified, however, that he knew of no written agreement between Respondent and the Employer amending the terms of the contract.

The 2012-2014 Collective Bargaining Agreement

In 2012, the Employer and Respondent began negotiations for a new contract. In April 2012, after the State of Michigan concluded that the Employer was in severe financial stress, the Employer entered into a consent agreement with the State under the Local Government and School District Fiscal Accountability Act. The consent agreement required the Employer to develop a recovery plan to improve its financial condition and also released the Employer from its legal obligation to bargain with the unions representing its employees under §15(1) of PERA during the periods that the Employer was subject to the consent agreement. In March 2013, under a successor statute, the State appointed an emergency manager for the Employer. The statute gave the emergency manager the additional authority to terminate or modify existing collective bargaining agreements. In July 2013, the Employer filed for bankruptcy.

As a consequence of the above, between April 2012 and late 2014, the Employer could lawfully alter the existing wages, benefits and other existing terms and conditions of employment of most of its employees without complying with the requirements of good faith bargaining under PERA. However, the Employer is a recipient of federal transit funding under the Federal Transit Act, 49 USC §5101 et seq. Under this statute, and as a condition of continuing to receive federal transit funding, the Employer must have agreements with the unions representing its employees that protect the existing collective bargaining rights and benefits of its transit employees. The Employer, therefore, was subject to severe consequences under federal law if it refused to to bargain with Respondent and with the representatives of other unions representing transit employees. Throughout 2012 and through most of 2013, the Employer and Respondent continued to negotiate, without success, over the terms of a new collective bargaining agreement.

[3] Lacey, however, testified that he did not learn that the reductions had not been implemented until December 2013.

When Westbrook was elected president of Respondent in July 2013, Lacey asked him for a copy of the 2008-2012 contract. Westbrook testified that he had a copy of the 2005-2008 contract and a list of the changes to that agreement that had been ratified in 2010, but that Respondent still had no document from the Employer representing the 2008-2012 agreement. Westbrook did not press the Employer for a document; he testified that he decided that other matters, including the ongoing contract negotiations, took precedence at that time over printing a copy of an expired agreement.

During negotiations between Respondent and the emergency manager in 2013, the emergency manager offered to freeze wages at their current reduced levels if there was an agreement to make the reductions permanent. According to Westbrook, who took over as Respondent's chief negotiator after he was elected president in July, the emergency manager stated that if Respondent did not accept this offer, the Employer would impose a twenty percent cut in wages and other benefits on the unit because the emergency manager had already unilaterally implemented ten percent wage cuts for most other City employees. Westbrook testified that sometime in October 2013, having exhausted mediation, Respondent decided not to spend money on obtaining a fact finder's recommendation and/or non-binding arbitration award and instead entered into a tentative agreement with the emergency manager which accepted his terms. The tentative agreement was for a contract expiring on June 30, 2014, and took the form of a series of memoranda of understanding listing changes to the 2008-2012 agreement. The tentative agreement froze wages at their 2012 levels and stated that "it superseded and replaced any prior agreement on wage reduction." It also included new provisions on health care and pensions. Union duty pay was not addressed in the memoranda of understanding constituting the tentative agreement.

Respondent scheduled a ratification vote for Friday, November 22, 2013 and this date was announced to the membership sometime in October. Respondent held an informational meeting for its membership in late October to discuss the terms of the tentative agreement. Lacey did not attend this meeting, and there was no testimony regarding what information was provided at this meeting. Westbrook then went on vacation for two weeks in early November. While he was on vacation, he learned that the Employer had entered into an agreement with the union representing its emergency medical technicians to give them a two percent raise. Respondent's 2008-2012 contract, and the tentative agreement, included a "me too" clause, Article 54, stating that "the bargaining unit will not be economically disadvantaged as a result of subsequent settlements with other unions." On November 18, when Westbrook returned from vacation, he approached the Employer and the Employer agreed to give members of Respondent's unit a two percent wage increase effective July 1, 2014. Westbrook and Respondent's financial secretary then decided to postpone the ratification vote until Monday, November 25, and hold a second informational meeting on November 22. A notice was posted in the terminals announcing that the election had been postponed from November 22 to November 25, and that an informational meeting would be held in the evening of November 22. Westbrook testified that this notice was posted on November 18, but Lacey testified that the notice was not posted in his terminal until Thursday, November 21.

The informational meeting was attended by Respondent's international vice-president, Paul Bowen, in addition to Westbrook and Respondent's other officers. Lacey testified that

Bowen told members in attendance that Detroit's emergency manager had said that if the membership did not ratify, the emergency manager was going to impose terms that would be worse than anything Respondent could get in bargaining. Bowen also said, according to Lacey, that Respondent had no hope of winning any court battle. There was discussion at the informational meeting about the rights of Respondent and employees under the Federal Transit Act. According to Lacey, Bowen said the "only protection we had under 13-C [of the federal law] was collective bargaining."

Respondent's bylaws require all contracts, including contracts with the Employer, to be approved by the executive board and ratified by the membership. However, while both Respondent's bylaws and the constitution of its international union contain provisions pertaining to the election of officers, neither document contains any rules specifically for the conduct of ratification elections or mechanisms for challenging such elections.

According to Lacey, after the ratification vote was announced, flyers urging ratification were posted in dozens of places in his terminal, including the desk where employees had to come to swipe their identification cards and check in. Lacey testified that the flyers were still on the wall when the ratification election was held at his terminal on November 25, 2013. Some of the flyers were less than twenty feet from the ballot box, and, according to Lacey, there was also literature urging ratification on a table about a foot from where members showed their identification to vote.

Members voting in the ratification election approved the contract by a two-to-one margin. On the evening of November 25, after the ballots had been counted, a member reported to Westbrook that she had observed one of the poll workers take a ballot from a voter in the parking lot of a terminal after the polls had closed. The following day, Westbrook called Respondent's international union and asked for advice. He was asked if the number of signatures matched the number of ballots cast, and Westbrook reported that they did.

Respondent's executive board called an emergency union meeting for the evening of November 27 for the purpose of investigating the ballot incident. A notice of the meeting and its purpose was posted in the terminals earlier that day. On November 27, union member Beverly King submitted a letter to the executive board challenging the election and asking that a new vote be held. King complained that the date of the election had been changed without sufficient notice, that the only information about the new contract available at the polls was the new pay rate, and that a ballot had been improperly accepted.

Both the voter who had cast his ballot after the polls closed and the poll worker who was seen accepting it were questioned by the executive board at the November 27 meeting. The voter and poll worker agreed that the voter had come to vote during the hours of the election and was given a ballot, but left without casting it. The voter then returned to the polling place with the ballot after the polls were closed. The poll worker explained that he had accepted the voter's ballot because the voter had received it while the polls were still open. Westbrook and the rest of Respondent's executive board decided that since the margin of victory had been overwhelming and one vote would not have changed the result, the election should be certified. According to Westbrook, immediately after the November 27 meeting he went to the Employer's labor

relations office and signed a copy of the memoranda of understanding constituting the 2012-2014 contract.

On December 1, 2013, Lacey submitted to Respondent's executive board what he titled a "formal complaint" challenging the election. Lacey alleged that Respondent had misinformed members of their rights at the November 22 informational meeting. In addition to alleging that Respondent misstated the protections provided to employees by federal law, Lacey asserted that Respondent should have explained to members that their pension plan could be modified in the pending City of Detroit bankruptcy and that members might get nothing at all in retirement benefits. Lacey alleged that telling local members that if they did not accept the contract they would be subject to a twenty-percent pay cut along with other benefit cuts was untrue and amounted to intimidation. He also asserted that the ratified vote was improperly rescheduled with insufficient notice, and that there had been ballot stuffing and improprieties. On December 12, 2013, Lacey submitted a second document challenging Westbrook's authority under Respondent's constitution to call the November 27, 2013, emergency executive board meeting. Lacey did not receive any formal acknowledgement of, or response to, his December 1 and December 12 letters until February 4, 2014.

Westbrook testified that after November 27, he contacted the Employer to obtain a copy of the 2008-2012 contract. However, because the Employer's labor relations personnel had all changed, the Employer could not find a copy. Sometime in December 2013, Respondent finally obtained from the Employer a copy of the 2008-2012 contract – unsigned, but with corrections made by both Respondent and the Employer. At a membership meeting on January 25, 2014, Respondent distributed copies of the unsigned 2008-2012 contract bound together with the memoranda of understanding signed by Westbrook, by the City's labor relations director, and by the emergency manager. The date on the memoranda of understanding was December 5, 2013. The cover of the document stated that it constituted the collective bargaining agreement covering the period 2012 through June 30, 2014.

At the January 25 membership meeting, Lacey spoke about the issues raised in his December letters. Westbrook agreed to give him a written response, which he did on February 4, 2014. With respect to the conduct of the election, Westbrook said he had contacted the international president and Respondent's legal advisor and had concluded that the election was not compromised. He said that, in accord with Respondent's past practice, the date of the informational meeting and the date of the ratification vote had been posted at all the terminals. He also stated that although the member should not have been allowed to vote after the polls closed, that one vote did not affect the outcome. Finally he agreed that the literature at the polling place should have been discarded by the poll workers, but disagreed that its presence justified setting aside the election. Westbrook also explained Respondent's view of the rights of the Employer and Respondent under federal and state law, including that the Employer was not prohibited by law from imposing wage and benefit cuts, and why Respondent believed that the recently ratified contract was the best deal Respondent could obtain under the circumstances. Lacey did not consider this an adequate response to any of his complaints.

Discussion and Conclusions of Law:

Timeliness

Under §16(a) of PERA, an unfair labor practice charge must be filed and served on the Respondent within six months of the date of the alleged unfair labor practices. Per Rule 182 of the Commission's General Rules, R 423.182, service may be by hand delivery, registered, certified or regular mail, private delivery service, or by leaving a copy at the principal office or place of business of the person required to be served. For any means of service permitted by the rules, the date of service is the date of receipt. The limitation contained in Section 16(a) of PERA is jurisdictional. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004); *Police Officers Labor Council, Local 355*, 2002 MERC Lab Op 145; *Walkerville Rural Cmty Schs*, 1994 MERC Lab Op 582.

Lacey alleges that statements made by Respondent representatives to union members at a pre-ratification vote meeting on November 22, 2013 constituted unlawful coercion and intimidation. Lacey filed his charge on May 22, 2014, exactly six months after the date of this meeting. Because, as Lacey admits, he did not serve the charge on Respondent until May 23, 2014, his allegation that Respondent violated its duty of fair representation by the statements its representatives made and failed to make at that meeting is untimely and must be dismissed on that basis.

Lacey testified that he mailed a copy of the charge to Respondent by certified mail on May 23, 2014, and that he also delivered a copy of the charge to Respondent's business office on that date. The certified letter was returned as unclaimed and Respondent financial secretary Henry Foutner, to whom Lacey claimed to have handed the charge, denied that Lacey brought it to the office. However, I credit Lacey's testimony that on May 23, 2014, he took a copy of the charge to Respondent's office. Since I conclude that the charge was properly served on Respondent on May 23, 2014, the other allegations in Lacey's charge are not untimely because they involve alleged unfair labor practices occurring within six months of the date of the filing and service of the charge.

The Duty of Fair Representation

The duty of fair representation under PERA is grounded in §10(2)(a) of PERA, which reads as follows:

> (2) A labor organization or its agents shall not do any of the following:
>
> > (a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. This subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

The scope of the duty of fair representation under PERA has been defined by case law, incorporating case law arising under §301 of the federal Labor Management Relations Act, 29 USC §141 et seq, and §8(b)(1)(A) of the National Labor Relations Act. A union's legal duty of

fair representation under PERA 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 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct," while "discrimination" under this standard is limited to "intentional and severe discrimination unrelated to legitimate union objectives." *Merritt v International Assn of Machinists and Aerospace Workers*, 613 F3d 609, (CA 6, 2010), citing *Spellacy v Airline Pilots Assn*, 156 F3d 120, 126 (CA 2, 1998). "Arbitrary" conduct is irrational or unreasoned conduct; it also includes "inept conduct undertaken with little care or with indifference to the interests of those affected," and "extreme recklessness or gross negligence which can reasonably be expected to have an adverse effect on any or all union members." *Goolsby*, at 679.

The Commission has interpreted the last sentence of §10(2)(a) to mean that the duty of fair representation does not extend to internal union affairs involving union structure and governance, and that a union's duty of fair representation towards members of its bargaining unit is limited to actions that have an effect on their terms and conditions of employment or their relationship with their employer. *SEIU Local 517*, 2002 MERC Lab Op 104; *AFSCME Council 25, Local 1918*, 1999 MERC Lab Op 11; *Private Industry Council*, 1993 MERC Lab Op 907; *MESPA (Alma Pub Sch Unit)*, 1981 MERC Lab Op 149. Whether a union submits the terms of a contract to its membership for a ratification vote and whether voting is limited to union members have been held to be matters outside the scope of §10(2)(a). *City of Lansing*, 1987 MERC Lab Op 701; *Lansing Sch Dist*, 1989 MERC Lab Op 210; *AFSCME Council 25, Local 1583*, 28 MPER 33 (2014).

However, in *Wayne Co Cmty College Federation of Teachers*, 1976 MERC Lab Op 347, the Commission held that because internal union policies and practices may have a substantial impact on the relationship of members of the unit to their employer, not all intraunion conduct is excluded from the duty of fair representation. It concluded in that case that the union violated its duty of fair representation by using a weighted voting formula for contract ratification elections, elections for members of its bargaining team, and elections for members of its executive board that essentially deprived part-time employees of any meaningful input into the collective bargaining process. A decade later, in *Service Employees International Union, Local 586*, 1986 MERC Lab Op 149, the Commission found that a union violated its duty to avoid arbitrary conduct when, without giving them any prior notice, it refused to permit certain union members to vote in a contract ratification election because it allegedly could not find their membership applications in its files.

Respondent's Alleged Breaches of Its Duty of Fair Representation

Lacey alleges that members of Respondent's executive board have violated Respondent's duty of fair representation by continuing to accept from the Employer twice the amount of pay for conducting union business to which they are entitled under the collective bargaining agreement. There is no dispute that the 2008-2012 collective bargaining agreement halved the

number of hours of union duty pay board members were supposed to receive from the Employer for performing union business and that this reduction was never implemented. How it came to be that the reduction was never implemented was not clear from the record. President Westbrook testified that he was told that there was an agreement between the Employer and Respondent, but he had no personal knowledge of this agreement or copy of any writing.

Whether or not there was an actual agreement between the Employer and the Respondent is irrelevant. I find no breach of the duty of representation in the executive board members' continued acceptance of the additional union duty pay because, I find, Lacey failed to show that their action had any impact on employees' terms and conditions of employment. Lacey argues that the board members' acceptance of union duty pay in excess of what the Employer was required by the contract to pay them "diminished their capacity to represent the membership fairly." However, this is mere speculation on Lacey's part. Union duty pay, as reflected in the language of the collective bargaining agreement, is intended to compensate union officers for time spent on their representative duties. There was no evidence that the executive board was influenced in any of its decisions, including its decision to enter into the October 2013 tentative contract agreement, by the fact that the Employer continued to provide board members – or, more accurately, one board member for each terminal – twenty hours of pay per week to perform these functions instead of ten.

In his brief, Lacey outlines several unfavorable outcomes that he believes might result from the board members' continued receipt of this money, including that the Employer might claim that it overpaid by mistake and demand that Respondent refund the money from its treasury. I conclude, however, that whether the board members should stop accepting this money is an internal union policy decision over which the Commission lacks jurisdiction.

Lacey also alleges that Respondent violated its duty of fair representation by failing to provide its members with copies of the 2008-2012 agreement before they were asked to ratify a new contract which altered the terms of that agreement. The record indicates that the Employer was primarily responsible for the unreasonable delay in the production of a written agreement, but there was also no indication that Respondent pressed the Employer to provide an agreement that they could sign. However, whether Respondent should have provided members with a written copy of the 2008-2012 agreement within a reasonable time after it was ratified in 2010 is not the issue here because Lacey's charge was clearly filed much later than six months after he could have reasonably expected to receive a copy of this agreement. Lacey's claim, as I understand it, is that Respondent violated its duty of fair representation by *holding the ratification election* when members did not have a copy of the prior contract.

It is unclear from the record whether at the time of the November 25, 2013, vote any unit member, including Westbrook himself, had a copy of the wage concession language Respondent and the Employer had agreed to as part of the 2008-2012 contract. Lacey makes the point in his brief that having that language would have shown Respondent's members how much Respondent was giving up in the 2012-2014 agreement. I conclude, however, that the record does not support a finding that Respondent acted in bad faith or that its decision to hold the election when a copy of the previous contract was not available was arbitrary. In October and November 2013, Respondent was under pressure to finalize a collective bargaining agreement because the

Employer was in bankruptcy and because the Employer's emergency manager had threatened to impose cuts on its members equivalent to those that had been implemented for other bargaining units. The facts simply do not support a conclusion that Respondent decided to schedule a ratification election before it could provide copies of the prior agreement to its members because it hoped that the membership would not remember what it had agreed to in 2010. I also find that Respondent's decision to hold the election without providing its members with copies of the prior contract did not, under these circumstances, meet any of the definitions of arbitrary conduct, i.e., it was not irrational, did not manifest gross indifference to the interests of its members, and cannot be categorized as either ineptitude or gross negligence. I conclude, therefore, that Respondent did not violate its duty of fair representation under PERA by scheduling the November 25, 2013 contract ratification election without providing its members with a copy of their previous collective bargaining agreement.

As discussed above, the Commission has held that a union owes a duty of fair representation with respect to contract ratification elections, if it chooses to hold them, because of the impact of these elections on its members' relationship with their employer. However, I find no breach of Respondent's legal duty of fair representation in Respondent's conduct of the November 25, 2013, contract ratification election. In state and federal elections, elections are scheduled well in advance and their dates are not changed, distribution of electioneering materials are barred from the polls, voters are not allowed to leave and return to the polls before casting their ballots, and, unless a voter is waiting in line when the polls close, a voter cannot cast his ballot after the polls are closed. Although these rules help ensure fair elections, it is not the case that a fair election cannot be held in their absence. As discussed above, a union violates its duty of fair representation when it intentionally acts, or fails to act, out of an improper motive; when it discriminates against employees for reasons unrelated to a legitimate union objective, or when it engages in "arbitrary" conduct. In November 2013, Respondent did not have rules or bylaws prescribing how much notice must be provided before an election, whether electioneering materials had to be removed from the polls, or what a poll worker should do if a voter returned to the polling place with a ballot after the polls had closed. Even if such rules might have been desirable, I find that the failure to have such rules did not constitute "inept conduct … manifesting indifference to the interests of the employees." Nor can Respondent be faulted for its handling of the situation where a voter was allowed to cast his vote after the polls had closed. According to the record, a member reported that a poll worker had taken the ballot of a voter in the parking lot of a terminal after the polls had closed. The executive board compared the sign-in sheets and number of ballots cast, questioned the poll worker and voter, found no evidence of ballot-stuffing, and concluded that even if a ballot had been improperly accepted it made no difference to the results of the election.

I also find that Respondent did not breach its duty of fair representation by failing to have a procedure for allowing members to challenge the results of a contract ratification election. Under PERA, a union may, but is not required to, condition its agreement with an employer on the terms of a new contract on its members' ratification of these terms. Once this ratification is completed, a union cannot revoke its agreement. While Respondent could also make resolution of member challenges to the ratification election a condition of its acceptance, this would be cumbersome and problematic. For example, the implementation of new contract that benefitted all or some members would be delayed while these challenges were resolved. I find that

Respondent's duty of fair representation under PERA did not require it to make resolution of members challenges to a ratification election an additional condition of its acceptance of a collective bargaining agreement. I conclude that Respondent did not violate PERA by failing to have a procedure for allowing members to challenge the results of the November 25, 2013, ratification election or by failing to address the challenges that Lacey and King made to that election.

In sum, I conclude that Lacey's allegation that Respondent unlawfully intimidated and coerced members by statements its agents made at a meeting on November 22, 2013, must be dismissed as untimely filed because his charge was not served on Respondent within six months of that date. I also conclude that any claim by Lacey that Respondent violated its duty of fair representation by failing to provide its members with a copy of their 2008-2012 contract within a reasonable time after its effective date is untimely. Finally, I conclude, in accord with the findings of fact and conclusions of law set forth above, that Respondent did not violate its duty of fair representation by the other conduct set forth in the charge. 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

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: March 20, 2015