STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW COUNTY,
Public Employer-Respondent,

Case No. C15 B-021
-and- Docket No. 15-005421-MERC

GRADY FLOYD,
An Individual Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Andrew Cascini, for Respondent

Erane C. Washington-Kendrick, for Charging Party

DECISION AND ORDER

On June 17, 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 either 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: July 16, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WASHTENAW COUNTY,
Public Employer-Respondent,

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Docket No. 15-005421-MERC

-and-

GRADY FLOYD,
An Individual-Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Andrew Cascini, for the Respondent

Erane C. Washington-Kendrick, for Charging Party Grady Floyd

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On February 3, 2015, Grady Floyd filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his former employer, Washtenaw County, pursuant to §§10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and MCL 423.216. Floyd also filed an unfair labor practice charge against his collective bargaining agent, AFSCME Council 25 and its affiliated Local 2733 (the Union). Pursuant to Section 16 of PERA, the charges were consolidated and assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System. Floyd withdrew his charge against the Union on June 5, 2015.

On April 2, 2015, pursuant to Rule 1513 of the Administrative Rules of the Michigan Administrative Hearing System, R 792.11513, I issued an order directing Floyd to show cause in writing why his charge against the Respondent Employer should not be dismissed because it was untimely filed and because it failed to state a claim upon which relief could be granted under PERA. Floyd filed a timely response to my order on April 23, 2015, and Respondent filed a reply to the response on May 7, 2015. Based upon the facts as alleged by Floyd and other facts not in dispute as discussed below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Undisputed Facts:

Floyd was employed by the Employer until he was terminated on February 11, 2014. On Saturday, February 8, 2014, Floyd posted a comment on his Facebook page in which he complained about an unnamed co-worker making negative comments about him behind his back. On February 9, 2014, in response to reactions from his co-workers, Floyd deleted the post. A co-worker reported the post to the Employer. On Tuesday, February 11, 2014, Floyd was arrested by the police as he was entering the Employer's parking lot, his vehicle was searched, and the police discovered two handguns for which Floyd had a concealed weapons permit. That same day, the Employer terminated Floyd for having weapons in his vehicle on Employer property in violation of Employer policy and for allegedly making serious threats to other employees.

The Employer served Floyd with an order barring him from entering any Employer building. It also, either in connection with this order or for some other reason, posted his social security number where it could be seen by other employees.

The Washtenaw County Sheriff's office conducted an investigation of the Facebook incident. According to the investigator's report, a detective interviewed Floyd and a number of his co-workers about the content of the post and discovered that the recollections of the witnesses differed. The detective attempted, without success, to obtain a copy of the deleted posting. The detective was able to ascertain that on February 8, Floyd changed his profile picture on his Facebook page from a picture showing him holding a large gun to a picture of him holding a shotgun and an AK-47 with a grenade launcher.

Floyd admitted to the detective that he said in the post that "Pebbles and Bam-Bam" would take care of whoever was talking about him, and that this was a reference to his two handguns. He told the detective that he had no intention of shooting anyone or pointing a gun at them, but said that he meant in the post to scare the person who was talking about him and make that person stop. After reviewing the investigator's report, the Washtenaw County Prosecutor's office concluded that there was insufficient evidence of a crime and declined to bring charges.

Floyd maintained that he had not threatened anyone and also that he was not aware that a written Employer policy prohibiting possession of unauthorized lethal weapons "on the job" prohibited him from having guns in his car in the parking lot. The Union filed a grievance on Floyd's behalf. According to an affidavit submitted by Floyd's Union representative, Caryette Fenner, in connection with the charge Floyd filed against the Union, on February 11, 2014, Fenner asked the Employer for permission to interview all Floyd's co-workers interviewed by the Sheriff's Department. She was told at this time that she could not interview them because there was a pending criminal investigation. On March 12, 2014, after the investigation had been concluded and a decision had been made not to bring criminal charges against Floyd, Fenner asked again to interview the witnesses. Fenner was told that the Employer was concerned about the safety of the witnesses. In lieu of interviews, the Employer offered, and Fenner accepted, a copy of the detective's investigation report with the names of the co-worker witnesses redacted. On or about March 27, 2014, according to Fenner's affidavit, Fenner sent Floyd a copy of the investigation report. However, Floyd did not learn that the Employer had withheld the names of the employee witnesses until on or about August

14, 2014, when Union representatives told him that the Employer had said that they could not interview witnesses because the matter was being criminally investigated. By this time, the Union's arbitration panel had decided, based on Floyd's statements to the detective about the posting, not to pursue arbitration of Floyd's grievance and Floyd had exhausted his internal union appeals of this decision.

Floyd alleges, first, that he was wrongfully terminated. Second, he alleges that the Employer denied him due process by terminating him without hearing his side of the story or providing him with the witness statements against him. Third, he alleges that the Employer made false allegations to police resulting in him being arrested for crimes he did not commit. Fourth, he asserts that the Employer violated his confidentiality by posting his social security number. Fifth, in his initial charge and in his charge as amended, he alleges that the Employer interfered with the Union's handling of his grievance, and violated §10(1)(a) of PERA, by instructing the Union not to conduct an independent investigation into the content of the Facebook posting by interviewing Floyd's co-workers.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to form, join, or assist labor organizations, to negotiate or bargain with their public employers through representatives of their own free choice, to engage in lawful concerted activities for mutual aid or protection, and to refrain from any or all of these activities. Sections 10 (1)(a) and (c) of PERA prohibit a public employer from interfering with the §9 rights of its employees and from discharging or otherwise discriminating against them because they have engaged in, or refused to engage in, the types of activities protected by PERA.

However, PERA does not prohibit all types of discrimination or unfair treatment by a public employer. An employer does not violate PERA by taking actions that violate an individual's rights under a collective bargaining agreement unless the employer acts for reasons prohibited by the Act. *Detroit Bd of Ed,* 1995 MERC Lab Op 75, 78. Therefore, an individual does not state a cause or claim under PERA merely by asserting that his employer breached the collective bargaining agreement and/or lacked just cause to discipline or discharge him. *Utica Cmty Schs*, 2000 MERC Lab Op 268. The Commission's jurisdiction is limited to claims under the statutes it is charged with enforcing. It has, therefore, no jurisdiction to determine whether an employer has violated an individual's rights under the Michigan or Federal Constitutions. Absent an allegation that the employer interfered with, restrained, coerced, or retaliated against the employee for engaging in, or refusing to engage in, union or other activities of the type protected by PERA, the Commission has no jurisdiction to make a judgment on the fairness of an employer's actions. See, e.g., *City of Detroit (Fire Dep't*), 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524.

Under §16(a) of PERA, the Commission also lacks jurisdiction to find an unfair labor practice occurring more than six months prior to the filing of an unfair labor practice 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 commission of the alleged unfair labor practice is untimely. The limitation contained in §16(a) of PERA is jurisdictional and

cannot be waived. *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. The six month period begins to run when the charging party knows, or should have known, of the alleged violation, i.e. when it knows of the injury and had good reason to believe that it was improper. *City of Detroit,* 18 MPER 73 (2005); *AFSCME Local 1583*, 18 MPER 42 (2005); *Huntington Woods v Wines,* 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836.

While Floyd asserts that he was wrongfully terminated, he does not allege that the Employer's decision to terminate him was caused by his engaging in activities of the type protected by PERA. Floyd's claim that the Employer denied him due process in connection with his termination is a constitutional claim, not a claim that his rights under PERA were violated. In addition, neither Floyd's allegation that the Employer made false allegations about him to the police nor his allegation that it violated his confidentiality rights by posting his social security number in a public place are claims over which the Commission has jurisdiction. I conclude that these allegations do not state claims upon which relief can be granted under PERA and should be dismissed on this basis.

I also find that the allegations above were untimely under §16(a) of PERA. Floyd's charge against the Employer was not filed until February 3, 2015. Floyd was discharged on February 11, 2014, almost a year before he filed his charge, and the other acts alleged to constitute the unfair labor practices also occurred more than six months prior to date he filed his charge. I conclude that untimeliness provides a second basis for dismissing the allegations set forth above.

Floyd did not learn until August 14, 2014, less than six months before he filed his charge, that the Employer had told the Union not to interview his co-employees regarding the content of his Facebook posting. As noted above, the six month statute of limitations in §16(a) of PERA does not begin to run until the aggrieved individual knows or should have known of the act which caused the injury and had good reason to believe it was improper. I find that Floyd's allegation that the Employer interfered with the Union's handling of his grievance, and therefore violated §10(1)(a) of PERA, was not untimely filed. However, I conclude that Floyd has failed to allege facts which, if true, would support a finding that the Employer violated PERA and that the Employer is entitled to dismissal of this allegation as a matter of law. Floyd asserts that the Employer "instructed" the Union not to interview Floyd's co-employees who saw his February 8, 2014, Facebook post. However, as the Employer points out in its reply to Floyd's response to my order to show cause, the Employer does not have the authority to "instruct" a Union on how it should to handle a grievance. Floyd does not allege that the Employer used threats against Union officers or other forms of coercion to prevent Union representatives from interviewing the witnesses.

In addition, Floyd admits that his only knowledge of the conversations between Union representatives and the Employer about the Union's interviewing of witnesses in his case comes from what Union representatives told him. The affidavit submitted in this proceeding by Union representative Fenner does not support a claim that the Employer unlawfully coerced, as opposed to persuaded, the Union not to interview employee witnesses. According to Fenner, the Employer did not want to give the Union the names of employees who had seen Floyd's Facebook posting because of concerns about their safety. After the criminal investigation into Floyd's conduct had been

completed, however, the Union made a second request for the names of witnesses who had seen the post. However, it agreed, at the Employer's urging, to accept instead a copy of the investigation report with the employee witness names redacted. The Union made no further efforts to obtain the names of the witnesses, but decided, based on the statements Floyd himself had made during the investigation, not to proceed to arbitration on his discharge grievance. Floyd has made no factual allegations that contradict this version of events, and I conclude, as stated above, that the Employer is entitled to dismissal of this allegation as a matter of law. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 17, 2015