STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CLARKSTON COMMUNITY SCHOOLS,
Public Employer-Respondent in MERC Case No. C15 K-148
Hearing Docket No. 15-059436,

-and-

CLARKSTON EDUCATION ASSOCIATION,
MICHIGAN EDUCATION ASSOCIATION,
Labor Organizations-Respondents in MERC Case No. CU15 K-039
Hearing Docket No. 15-059437,

-and-

RON CONWELL,
Individual Charging Party.
_____/

APPEARANCES:

Dickinson Wright, PLC, by George P. Butler III, and Jeffrey Ammons, for Respondent Employer

White, Schneider, Young and Chiodini, PC, by Jeffrey S. Donahue, for Respondent Labor Organizations and for Respondent Employer on briefs

National Right to Work Legal Defense Foundation, Inc. by Amanda Freeman and Milton Chappell, for Charging Party

DECISION AND ORDER

On October 13, 2016, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order on Motions for Summary Disposition in the above matter finding that Respondent Employer, Clarkston Community Schools, and Respondent Unions, Clarkston Education Association (CEA), and Michigan Education Association (MEA), violated § 10(3) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(3), by maintaining an unlawful union security clause in their collective bargaining agreement. The ALJ also found that Respondent Employer violated § 10(1)(a) of PERA and Respondent Unions violated § 10(2)(a) of PERA by maintaining the unlawful union security clause in their collective bargaining agreement.[1] The ALJ further found that Respondent Unions violated § 10(2)(a) of

[1] In the Summary of Conclusions section on page 14 of her Decision and Recommended Order, the ALJ stated, "Respondents violated Section 10(1)(a) of PERA by maintaining a clause in their collective bargaining agreement

PERA by sending Charging Party, Ron Conwell, a letter informing him that he was required to pay an agency fee for the 2015-2016 school year, and impliedly threatening to terminate his employment if he refused to pay.[2] ALJ Stern further found that the Commission has jurisdiction over the claim, that Charging Party has standing to assert that the union security clause is unlawful, that his charge is timely, but that the Commission does not have the authority to issue a civil fine against Respondents for violating § 10(3) of PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After receiving an extension of time, Respondents jointly filed exceptions and a brief in support of the exceptions to the ALJ's Decision and Recommended Order on December 2, 2016. After being granted an extension of time, Charging Party filed his cross exceptions to the ALJ's Decision and Recommended Order on January 4, 2017. Respondents filed their joint response to Charging Party's cross exceptions on February 16, 2017.

In their exceptions, Respondents contend that the ALJ erred by finding that: (1) the Commission has jurisdiction over the matter, (2) Charging Party has standing to bring this unfair labor practice charge, (3) Charging Party's claims are ripe for adjudication, (4) Charging Party's claim is not barred by the statute of limitations, (5) Respondents violated § 10(3) by enforcing the union security provision in the collective bargaining agreement that was entered into after the effective date of 2012 PA 349 (Act 349), and (6) by concluding that the 2014 and 2015 agency shop provisions are extensions or renewals of provisions entered into before Act 349's effective date.

In his cross-exceptions, Charging Party contends that the ALJ erred by concluding that the Commission does not have jurisdiction to assess a civil fine against Respondents pursuant to § 9(3) or § 10(8) of PERA.

In their response to Charging Party's cross exceptions, Respondents contend that the ALJ correctly found that the Commission has no authority to assess punitive damages and should not impose a civil fine.

We have reviewed the exceptions filed by both parties. We find Respondents' exceptions to be without merit. However, we find that Charging Party's cross exceptions have merit.

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made unlawful by § 10(3) of PERA and by entering into a new agreement covering the period 2015-2017 containing this unlawful clause." Section 10(1)(a) prohibits public employers from interfering with, restraining, or coercing "public employees in the exercise of their rights guaranteed in section 9." Section 10(1)(a) applies only to public employers. Section 10(2)(a) prohibits labor organizations from restraining, or coercing "public employees in the exercise of their rights guaranteed in section 9"and applies only to labor organizations. In her Recommended Order, the ALJ ordered each of the Respondents to cease and desist from interfering with, restraining, or coercing employees by entering into and maintaining in effect union security agreements that require employees to pay agency fees to a labor organization in violation of § 10(3) of PERA. Accordingly, we find that her reference to Respondents' violation of § 10(1)(a) was intended to mean a violation of § 10(1)(a) by the Employer and a violation of § 10(2)(a) by the Unions.

[2] The union security provision in Respondents' collective bargaining agreement gave the unions the right to initiate the process to terminate the employment of a bargaining unit member who failed to pay union dues or a service fee.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. The material facts in this matter are not in dispute.

Respondents were parties to a collective bargaining agreement (2012 collective bargaining agreement) covering September 1, 2012 through August 31, 2013. The 2012 collective bargaining agreement contained a union security clause providing that if a teacher failed to pay union dues or the service fee, the union president could request that the teacher's employment be terminated at the close of the school year, and the teacher would be dismissed in accordance with applicable law.

On December 11, 2012, the Michigan Legislature passed 2012 PA 349 (Act 349), which amended PERA. The changes to PERA included language expressly providing that public employees have a right to refrain from union activity. Other changes made union security clauses illegal for collective bargaining agreements affecting most public employees covered by PERA. Act 349 became effective March 28, 2013.

On March 21, 2013, Respondent Employer, Respondent Unions, and two other MEA affiliates representing other bargaining units employed by Respondent Employer entered into a memorandum of understanding (MOU) which provided:

1. CCS and Union agree that *the agency or closed shop provisions ("Agency Shop") in the collectively bargained agreements between CCS and the Union are hereby extended for a period not to exceed the term of the applicable, successor collectively bargained agreement but said extension, in each case, is contingent and conditioned upon ratification and execution of all successor collectively bargained agreements between CCS and the Union by on or before midnight on June 15, 2013.* It is further acknowledged that CCS, at its option, may revoke and terminate Agency Shop in the event that any unit of Union is unable to observe the applicable deadline for ratification and execution of a successor collectively bargained agreement. Union agrees that it will not legally challenge any such revocation or termination. The parties agree that this MOU does not constitute the settlement of or a successor to any collectively bargained agreement between CCS and Union, that this MOU creates no binding precedent or past practice and that it does not establish a pattern of bargaining or constitute multiple unit bargaining, the multi-party nature of this MOU being for the mere convenience of the parties hereto.

2. In consideration of the CCS agreements contained in Paragraph 1 of this MOU, Union agrees that it shall, at its sole cost and expense and through counsel acceptable to CCS, defend and hold harmless CCS. . .

3. This MOU is effective upon ratification by the parties which will in no case be later than March 26, 2013 and *expires on June 30, 2016*. [Emphasis added]

On June 15, 2013, Respondents entered into a new collective bargaining agreement (2013 collective bargaining agreement) covering September 1, 2013 through August 31, 2014. The 2013 collective bargaining agreement included the agency shop language from the Respondents' 2012 collective bargaining agreement. On September 22, 2014, Respondents entered into a successor collective bargaining agreement (2014 collective bargaining agreement) containing the same agency fee language and covering the period from September 22, 2014 through August 31, 2015.

On August 20, 2015, Charging Party Ron Conwell sent a letter to the MEA, with copies to the other two Respondents, in which he resigned his union membership. On August 31, 2015, Charging Party received a reply from the CEA, through the MEA, stating that he was required, as a condition of employment, to either be a union member or pay a fair share fee to the Union.

Around September 1, 2015, Respondents entered into a new collective bargaining agreement (2015 collective bargaining agreement) covering the period of September 1, 2015 through June 30, 2017, which also included the same agency fee clause that was in the earlier contracts. However, the 2015 collective bargaining agreement contained language stating that the agency fee provision was "null and void and of no further force and effect after June 30, 2016, in accordance with the Memorandum of Understanding between the District and the Association executed on March 21, 2013."

On October 8, 2015, Charging Party's attorney sent a letter to Respondents asserting that Act 349 applied to Charging Party as of September 1, 2014, the day after the expiration of the successor agreement referred to in the MOU. Neither Charging Party nor his attorney received a response to that letter. Charging Party filed the unfair labor practice charges in this matter on November 9, 2015. In December 2015, Respondent MEA sent a packet of materials to Charging Party that included a service fee election form, which indicated three choices for employees who did not want to be union members. The documents in the packet also directed Charging Party to send payment for the "pro rata amount due pursuant to the service fee election form worksheet." Charging Party returned the service fee election form to Respondent MEA, but did not send any payment.

Discussion and Conclusions of Law:

Along with other changes to PERA, Act 349 amended § 9 by adding subdivision (b) to subsection 9(1) and by adding subsections (2) and (3). Subdivision (b) of subsection 9(1) expressly gives public employees the right to refrain from union activity. Act 349 also amended § 10 by eliminating the language previously contained in subsection 10(2) that permitted unions and employers to agree to provisions in their collective bargaining agreements that required all bargaining unit members to share in the financial support of those employees' exclusive bargaining representatives. Act 349 also added subsections (3) through (10) to § 10. Sections 9 and 10 as amended, provide in relevant part

Section 9.

(1) Public employees may do any of the following:

(a) Organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice.

(b) Refrain from any or all of the activities identified in subdivision (a).

(2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:

(a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.

(b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.

(c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

(d) Pay the costs of an independent examiner verification as described in section 10(9).

(3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

* * *

Section 10.

(1) A public employer or an officer or agent of a public employer shall not do any of the following:

(a) Interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9.

(b) Initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. A public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization. However, a public school employer's collection of dues or service fees pursuant to a

collective bargaining agreement that is in effect on March 16, 2012 is not prohibited until the agreement expires or is terminated, extended, or renewed. A public employer may permit employees to confer with a labor organization during working hours without loss of time or pay.

(c) Discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization.

* * *

(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.

* * *

(c) Cause or attempt to cause a public employer to discriminate against a public employee in violation of subsection (1)(c).

* * *

(3) Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:

(a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.

(b) Become or remain a member of a labor organization or bargaining representative.

(c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.

(d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

* * *

(5) An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after March 28, 2013.

(6) The court of appeals has exclusive original jurisdiction over any action challenging the validity of subsection (3), (4), or (5). The court of appeals shall hear the action in an expedited manner.

* * *

(8) A person, public employer, or labor organization that violates subsection (3) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

Commission Subject Matter Jurisdiction

In their exceptions, Respondents contend that the ALJ erred by finding that the Commission has jurisdiction over this matter. According to Respondents, Charging Party's charge is based on the fact that Respondent Unions demanded that he pay a fair share fee as a condition of employment on August 31, 2015. Respondents assert their efforts to "collect a debt that is due and owing pursuant to the valid and enforceable terms of the 2015 CBA cannot form the basis of an unfair labor practice under PERA."

In *Taylor Sch Dist*, 28 MPER 66 (2015)[3], the Commission first examined the effects of Act 349 on the rights of public employees to refrain from financially supporting a labor organization. We concluded that the public employees' charge that their employer and the labor organization representing the bargaining unit in which those employees worked stated a claim upon which relief could be granted under PERA. Moreover, the charging parties in *Taylor* first sought to pursue their claims in circuit court. As noted by the ALJ, the circuit court found that MERC had jurisdiction over the plaintiffs' claims and dismissed the complaint for lack of subject matter jurisdiction. The Michigan Court of Appeals affirmed the circuit court's dismissal of the plaintiffs' claim that the union security agreement violated PERA. The Court held that the matter "requires a decision maker to interpret and analyze the PERA— an area in which the MERC has administrative expertise." See, *Steffke* v *Taylor Federation of Teachers AFT, Local 1085*, unpublished opinion per curiam of the Court of Appeals, issued April 7, 2015 (Docket No. 317616).[4]

We further addressed the question of subject matter jurisdiction with respect to Act 349 in *Saginaw Ed Ass'n,* 29 MPER 21 (2015) aff"d __Mich App___; Michigan Court of Appeals decision issued May 2, 2017 (Docket Nos. 329419, 329425, 329426, 329427, 329428, 329429, 329430, 329431); 2017 WL 1683656. The Commission explained in *Saginaw* that we have jurisdiction over unfair labor practice charges in which it is claimed that a labor organization

[3] Affirmed in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017).
[4] The Court of Appeals' decision is also published at 28 MPER 71 (2015).

restrained or coerced a public employee in the exercise of his or her rights under § 9 of PERA. See *Michigan Ed Ass'n*, 18 MPER 64 (2005). See also, *Michigan State Univ Admin-Prof'l Ass'n*, 25 MPER 30 (2011); *MESPA (Alma Pub Sch Unit)*, 1981 MERC Lab Op 149, 154 (no exceptions). In *Saginaw*, we noted that prior to the enactment of Act 349, PERA did not expressly provide that public employees had the right to refrain from union activity or from financially supporting labor organizations.[5] With the enactment of Act 349, that is no longer the case.

Here, Respondents contend that the Commission lacks jurisdiction because "any efforts by Respondents to collect a debt that is due and owing pursuant to the valid and enforceable terms of the 2015 CBA cannot form the basis of an unfair labor practice under PERA." For the basis of its claim that Charging Party owes a debt to Respondent Unions, Respondents rely on the union security clause of the 2015 collective bargaining agreement, which covers the period of September 1, 2015 through June 30, 2017. We addressed a similar claim in *Grand Blanc Clerical Ass'n*, 29 MPER 57 (2016)[6], where the union threatened to use a debt collector to collect dues that accrued both before and after the union member had resigned from the union. After she resigned, the bargaining unit member paid dues that accrued prior to the date of her resignation from the union. However, the union also sought to collect dues that accrued after her resignation. There, we explained that a union's efforts to collect dues "that accrued *after* a former union member's resignation may be considered to be a violation of § 10(2)(a)" as those were amounts to which the union had no lawful claim. *Id.* We stated, "Unless the right to refrain from financially supporting a union has been willingly and knowingly waived[7] or the employee is covered by a lawful union security agreement, the employee does not owe union dues for the period after the employee's resignation from the union." *Id.*

In this case, the Unions are not seeking unpaid dues, as they acknowledge that Charging Party resigned during the window period designated by Respondent Unions for membership resignations. Instead, Respondent Unions seek service or agency fees pursuant to their union security agreement. Charging Party contends that Respondents interfered with his § 9 right to refrain from financially supporting the Unions when the Respondent Unions demanded that he pay a service fee to the Unions after he had already resigned from the Unions and after the expiration of the last collective bargaining agreement containing a lawful union security clause. As we explained in *Teamsters Local 214* **(***Beutler***)**, 29 MPER 46 (2015); aff'd *Teamsters Local 214 v Beutler* unpublished opinion per curiam of the Court of Appeals, issued August 10, 2017 (Docket No. 330854):

> The amendments to PERA by Act 349 now prohibit unions and employers from requiring employees to financially support unions as a condition of employment. Section 9(1)(b) expressly gives public employees the right to refrain from "join[ing], or assist[ing] in labor organizations." The prohibition against labor organizations "restrain[ing] or coerc[ing] public employees in the exercise of the

[5] See the discussion in *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004) n 5.

[6] Affirmed in consolidated cases *Saginaw Ed Ass'n* et al, __Mich App___; Michigan Court of Appeals decision issued May 2, 2017 (Docket Nos. 331762 & 331875).

[7] See *Teamsters Local 214* **(***Beutler***)**, 29 MPER 46 (2015), aff'd *Teamsters Local 214* v *Beutler*, unpublished opinion per curiam of the Court of Appeals, issued August 10, 2017 (Docket No. 330854).

> rights guaranteed in section 9," that had been included in § 10(3)(a) prior to the adoption of Act 349, is now in § 10(2)(a) of PERA. Therefore, we have jurisdiction over matters in which a public employee chooses to refrain from engaging in activities protected under § 9(1)(a) but is unlawfully restrained from doing so by a labor organization.

Charging Party resigned from the Unions during its designated August window period for resignations from union membership. After Charging Party's resignation from the Unions, in the absence of a lawful union security clause in the Respondents' collective bargaining agreement[8], he had no obligation to pay a service fee. Indeed, he had a PERA-protected right to refrain from financially supporting the Unions pursuant to § 9(1)(b). Thus, we have jurisdiction over Charging Party's claim that Respondent Unions restrained or coerced Charging Party in the exercise of his § 9 rights in violation of § 10(2)(a) of PERA. Moreover, Respondent Employer agreed to the inclusion of the unlawful union security clause in Respondents' 2015 collective bargaining agreement. Thus, we have jurisdiction over Charging Party's claim that Respondent Employer's actions interfered with, restrained, or coerced Charging Party in the exercise of his § 9 rights in violation of § 10(1)(a) of PERA.

Charging Party's Standing to Bring the Unfair Labor Practice Charge in This Matter

In their exceptions, Respondents contend that the ALJ erred by finding that Charging Party has standing to bring this unfair labor practice charge. Respondents assert that "as an individual bargaining unit member who 'did not negotiate, sign or otherwise personally enter into the collective bargaining agreement,' Mr. Conwell is not a party to the 2015 CBA that he now seeks to partially invalidate."[9] Respondents go on to argue that under the Revised Judicature Act third-party beneficiaries do not have the right to void the underlying agreement and that Charging Party lacks standing to challenge either the 2015 collective bargaining agreement or the 2013 MOU. Indeed, as we explained in *Detroit Pub Sch*, 25 MPER 77 (2012), an individual employee may not challenge a collective bargaining agreement as a violation of the duty to bargain under § 10(1)(e) of PERA. Only a party to the collective bargaining agreement has standing to challenge whether the other party has failed to keep commitments made under the collective bargaining agreement.

We first addressed the issue of an individual charging party's standing to challenge a union security agreement under Act 349 in *Taylor Sch Dist*, 28 MPER 66 (2015); aff'd *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017). In *Taylor*, the Commission majority held that the charging parties had standing to challenge the validity of a union security agreement as third-party beneficiaries of the collective bargaining agreement. There, the Commission majority also concluded that the charging parties had standing to challenge the enforcement of a union security agreement if they would be harmed by its enforcement. In affirming our decision in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617, 633-643 (2017), the Court of Appeals held that efforts to enforce that union security agreement after the effective date of Act 349 violated § 10(1)(a) and

[8] For the reasons discussed below, we find that the union security clause contained in the 2015 collective bargaining agreement is unlawful.

[9] Brief in Support of Respondents' Statement of Exceptions to the Decision and Recommended Order on Motions for Summary Disposition, pp 9-10.

(c), and § 10(2)(a) and (c) of PERA[10]. The Court explained that after the effective date of Act 349, the charging parties had the right to refrain from financially supporting the labor organization.

Whether a charging party has standing depends on whether the individual has a substantial interest that will ensure sincere and vigorous advocacy. *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633 (1995). There must be a showing that a substantial interest of the litigant will be detrimentally affected in a manner different from the public at large or that the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010).

In this case, Charging Party is not trying to change the collective bargaining agreement, he is objecting to Respondents' efforts to enforce the union security clause of that agreement against him. Contrary to Respondents' arguments, Charging Party does not need to be either a party to the collective bargaining agreement or a third-party beneficiary of the collective bargaining agreement to have standing to challenge Respondents' efforts to enforce provisions of that agreement against him. As the ALJ points out, "Conwell's claim, like those of the individual charging parties in *Taylor*, is not merely or even primarily a contract claim."[11]

Charging Party has the right under § 9 of PERA to refrain from financially supporting a labor organization unless he is covered by a lawful union security agreement or he has willingly and knowingly waived his right to refrain from financially supporting that labor organization. Charging Party's allegations assert that Respondents' actions of including a union security provision in the 2015 collective bargaining agreement violated Charging Party's rights under § 9. PERA implicitly gives public employees, such as Charging Party, the right to challenge actions by the labor organization representing the bargaining unit in which they are employed or by their public employer, if those actions interfere with, coerce, or restrain their exercise of § 9 rights. Indeed, we have long permitted individual bargaining unit members to challenge actions by the labor organizations representing their bargaining units and to challenge actions by their public employers on the grounds that the respondents' actions interfered with, restrained, or coerced the charging party/public employee in the exercise of his or her rights under § 9 of PERA. See, e.g. *Warren Consolidated Sch*, 19 MPER 37 (2006), (the employer and the union unlawfully discriminated against the charging party based on the extent of his participation in the union when they granted unlawful super seniority to a union officer and, thereby, caused the charging party to be laid off). See also, *Detroit Pub Sch*, 30 MPER 2 (2016) (the employer was motivated by the charging party's protected concerted activity when it engaged in numerous actions leading to the termination of the charging party's employment in violation of § 10(1)(a) and (c) of PERA); *City of Detroit Water & Sewerage Dep't*, 1993 MERC Lab Op 157; 6 MPER 24032 (no exceptions) (the employer violated § 10(1)(a) of PERA by restricting an employee from distributing literature on nonworking time in a nonworking area.); *Univ of Michigan*, 1990 MERC Lab Op 272; 3 MPER 21066, aff'd *Univ of Michigan v Harvey*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 1992 (Docket No. 128678) (because the charging party had engaged in protected concerted activity, the employer prohibited her from entering her

[10] The Court affirmed our decision, but did not explicitly address the issue of standing.
[11] ALJ's Decision and Recommended Order p.6.

work area at times other than her regular scheduled hours without her supervisor's prior permission.)

We agree with the ALJ that Charging Party does have standing to bring the charges in this matter without regard to whether he is considered a third-party beneficiary of the collective bargaining agreement between Respondents. We find that it is evident from the language of Act 349 that the changes it made to PERA were intended to protect public employees such as Charging Party, and that public employees have at least the same standing to pursue an unfair labor practice charge for an alleged violation of their § 9 rights as they did before Act 349 was enacted. Accordingly, we agree with the ALJ that Charging Party has standing to challenge the enforcement of an unlawful union security clause where its enforcement will interfere with, restrain or coerce Charging Party in the exercise his rights under § 9 of PERA.

Whether Charging Party's Claims Are Ripe

In their exceptions, Respondents contend that the ALJ erred by finding that Charging Party's claims were ripe for adjudication. As pointed out by Respondents, the requirement that a claim be ripe is designed to prevent "the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Huntington Woods v Detroit*, 279 Mich App 603, 615–16; 761 NW2d 127, 135 (2008). A charge would not be ripe where the charging party seeks "'a decision in advance, about a right before it has been actually asserted and tested, or judgment upon some matter which, when rendered, for any reason cannot have practical legal effect upon the then existing controversy.' This doctrine applies to questions arising in the context of PERA (citations omitted)." *Southfield Police Officers Ass'n v Southfield*, 162 Mich App 729, 735 (1987), rev'd on other grounds, 433 Mich 168 (1989).

Respondents argue that Charging Party's claims are not yet ripe because Charging Party asks "the commission to order the Association to 'cease and desist demanding that [he] owes fees or any type of payment' and to order the district to 'update its records to reflect that charging party is a nonmember who owes nothing after August 2015.'"[12] In further support of its contention that Charging Party's claims are not ripe, Respondents assert:

> To date, however, Respondents have neither threatened nor initiated any legal action or otherwise attempted to collect the service fees that Mr. Conwell has failed to pay. Since Mr. Conwell advised Respondents by letter dated October 8, 2015 that he refused to pay service fees, the Association has taken no action to compel his payment and the District has taken no action to terminate his employment."[13]

Although Charging Party advised Respondents that he would not pay the claimed service fees in his October 8, 2015 letter, Respondents did not reply to the letter or otherwise provide Charging Party with any assurances that it would take no further action to enforce their claim for

[12] Brief in Support of Respondents' Statement of Exceptions to the Decision and Recommended Order on Motions for Summary Disposition, pp 12.

[13] Brief in Support of Respondents' Statement of Exceptions to the Decision and Recommended Order on Motions for Summary Disposition, pp 12-13.

the service fees. After waiting a month with no such assurances, Charging Party had no reason to expect Respondents to abandon their claim. He then filed the charges in this matter. The following month, Respondent MEA sent a packet of materials to Charging Party that included a service fee election form that setting forth three service fee choices for employees who did not want to be union members. The documents in the packet also directed Charging Party to send payment for the "pro rata amount due pursuant to the service fee election form worksheet." Under the circumstances, Charging Party could reasonably have interpreted Respondent Unions' actions as an indication that, despite his assertion that their claim was illegal, they intended to continue to pursue the claim for service fees. Charging Party could further have reasonably interpreted Respondent Unions' actions to mean that his failure to comply with their payment demand would result in Respondent Unions demanding that Respondent Employer terminate his employment. In the absence of any response from Respondent Employer to his October 8, 2015 letter, Charging Party could have reasonably feared that Respondent Employer would comply with a demand from the Union to terminate his employment.

Respondents argue that since the agency shop provision expired on June 30, 2016, Respondents can take no action to terminate Charging Party's employment. In fact, for reasons discussed below, Respondents could not lawfully take action to terminate Charging Party's employment in August 2015, when the MEA informed Charging Party of the Respondent Unions' contention that Charging Party was required to pay service fees. However, neither that fact, nor the fact that Respondent Unions have not sued or taken other steps to collect the service fee can deprive the charge of ripeness or render it moot. Unless Respondents are ordered to cease and desist from their efforts to enforce the union security clause against Charging Party, or Respondents provide genuine assurances that they will not take any further action to enforce the union security clause, Charging Party's right to refrain from financially supporting Respondent Unions remains in jeopardy. Thus, the matter is not moot and remains ripe for adjudication.

Statute of Limitations

In their exceptions, Respondents contend that the ALJ erred by finding that Charging Party's claim was not barred by the statute of limitations. We disagree. Pursuant to § 16(a) of the PERA, no complaint shall issue based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The limitations period under § 16(a) commences when the charging party "knows of the act which caused his injury, and has good reason to believe that the act was improper or done in an improper manner." *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983), aff'g 1981 MERC Lab Op 836; *AFSCME Local 1583*, 18 MPER 42 (2005). This Commission has long held that the statute of limitations contained in § 16(a) is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health***,** 17 MPER 45 (2004); *Walkerville Rural Communities Sch*, 1994 MERC Lab Op 582.

The collective bargaining agreement in place when Act 349 was enacted and when the MOU was adopted covered September 1, 2012 through August 31, 2013. Respondents point to Charging Party's argument that the successor to that agreement ran from September 1, 2013, through August 31, 2014, and was the final agreement to contain a lawful union security clause. Respondents argue, therefore, that when they entered into the 2014 agreement in which they

included a union security clause, Charging Party should have known that Respondents had acted in violation of his rights under § 9 of PERA.

Even though Charging Party was aware of Respondents' inclusion of the union security clause in the 2014 collective bargaining agreement at the time it occurred, that alone would not be sufficient to put Charging Party on notice that Respondents were acting to restrain or coerce him in the exercise of his § 9 rights. At that point, Charging Party had not suffered any injury for which he could file a charge. See, *Warren Consolidated Sch*, 19 MPER 37 (2006). In that case, the employer and the union included an unlawful super seniority clause in their collective bargaining agreement. However, that act was not sufficient to put the charging party on notice of the potential jeopardy to his rights. It was not until they acted on the super seniority clause by granting super seniority to a union officer and, thereby, caused the charging party to be laid off that the charging party became aware that his rights were jeopardized by the unlawful super seniority clause. As with *Warren Consolidated Sch*, the statute of limitations did not begin to run until Respondents had taken actions specifically detrimental to Charging Party.

Moreover, during most of the term of the 2014 collective bargaining agreement, which covered the period of September 22, 2014, through August 31, 2015, Charging Party remained a member of the Unions. Before he resigned from the Unions on August 20, 2015, Charging Party was exercising his § 9 right to support the Unions. Therefore, during most of the term of that collective bargaining agreement, his employment would not have been in jeopardy by the enforcement of the union security clause in the 2014 collective bargaining agreement. Accordingly, we conclude that it is not evident that Charging Party knew or should have known that the union security provision in the 2014 agreement would interfere with, restrain, or coerce him in the exercise of his § 9 rights prior to his resignation from the Unions.

On August 31, 2015, the MEA replied to Charging Party's resignation in a letter stating that he was required, as a condition of employment, to either be a union member or pay a fair share fee to the Union. That reply from the MEA put Charging Party on notice that his § 9 rights were in jeopardy. The initial act by Respondents that restrained, coerced, or interfered with Charging Party's exercise of his § 9 rights was the Respondent Unions' August 31, 2015 reply to his membership resignation. There was no coercion, restraint, or interference with Charging Party's exercise of his § 9 rights until that point. Charging Party filed his unfair labor practice charges against Respondents on November 9, 2015, well within six months of August 31, 2015. Moreover, even though Charging Party was aware of the existence of the union security clause, the earliest that Charging Party could have known that Respondents expected him to provide financial support to the Unions in violation of his § 9 rights would have been August 31, 2015, when he received the Union's reply to his resignation informing him that he was required to either be a union member or pay a fair share fee. Accordingly, we find that his unfair labor practice charge was timely.

The MOU and the Agency Shop Provisions in the 2014 – 2015 and 2015 – 2017 Collective Bargaining Agreements

In their exceptions, Respondents contend that the ALJ erred by concluding that the 2014 and 2015 agency shop provisions were extensions or renewals of provisions entered into before Act 349's effective date. We disagree.

On March 21, 2013, a few days before Act 349 became effective, Respondents entered into the MOU that provided for the extension of the union security provision in their collective bargaining agreement to their successor agreement.

The MOU provided in relevant part:

> CCS and Union[14] agree that the agency or closed shop provisions ("Agency Shop") in the collectively bargained agreements between CCS and the Union are hereby extended for a period *not to exceed the term of the applicable, successor collectively bargained agreement* but said extension, in each case, is contingent and *conditioned upon ratification and execution of all successor collectively bargained agreements between CCS and the Union by on or before midnight on June 15, 2013* (emphasis added).

The language of the MOU indicates that Respondents intended the MOU to apply to the collective bargaining agreement that immediately succeeded their September 1, 2012 through August 31, 2013 agreement. This is evident from the language stating that the agency or closed shop provisions would be "extended for a period not to exceed the term of the applicable successor collective bargaining agreement." This is further indicated by the requirement that the successor collectively bargained agreements be ratified and executed "on or before midnight on June 15, 2013." As the ALJ explained, according to this language, the MOU did not authorize Respondents to extend the union security clause beyond the expiration date of the *initial* successor agreement between Respondent Employer and Respondent Unions. Therefore, it is evident that Respondents intended the MOU to apply to the collective bargaining agreement that Respondents subsequently agreed would extend from September 1, 2013 through August 31, 2014. [15]

The MOU also provided that it was "effective upon ratification by the parties which will in no case be later than March 26, 2013 and expires on June 30, 2016." Based on that language,

[14] In the MOU, "Union" refers to the CEA, the MEA, and two MEA affiliates that represented two other bargaining units of the Employer's employees, the Clarkston Para-Educators Association, and the Clarkston Office Personnel Association.

[15] We note that in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017), the Court found that by attempting to enforce a union security agreement entered into after the enactment of Act 349, but before the Act's effective date, the respondents violated § 10(1)(a), and (c) and § 10(2)(a), and (c). The Court concluded that, "2012 PA 349 properly applies to agreements entered into after the enactment of that statutory amendment but before its effective date." *Id*. at 633. The Court pointed out that "when the charging parties filed their unfair labor practice charges in August 2013, PERA protected their right to be free of any responsibility to financially support a labor organization." *Id*. at 635. However, we make no ruling on the legality of the union security clause in the 2013 collective bargaining agreement as that issue is not before us.

Respondents contend that the union security clause was legal and enforceable through June 30, 2016. However, at the point that Respondents and the two unions representing the other two bargaining units entered into the MOU, they had not agreed on the terms of their successor collective bargaining agreements. Therefore, in drafting the MOU, the parties intended to provide themselves with the option of entering into a successor agreement potentially lasting as long as three years.[16] It is, therefore, apparent that if the parties had entered into a successor collective bargaining agreement that extended through June 30, 2016, they intended that the union security clause would end on that date. It wasn't until June 15, 2013, that Respondents entered into a successor agreement. That agreement covered only one year, September 1, 2013, through August 31, 2014. Since the clear and unambiguous wording of the MOU limits its applicability to "the term of the applicable, successor collectively bargained agreement," subsequent collective bargaining agreements were not included within the scope of the MOU. Thus, even if we were to assume that the MOU lawfully extended the union security clause through August 31, 2014, we would not find that the union security clauses in the subsequent collective bargaining agreements were lawful.

The Agency Shop /Union Security Provision of Respondents' Collective Bargaining Agreement

In their exceptions, Respondents contend that the ALJ erred by finding that Respondents violated § 10(3) by enforcing the agency shop provision in the collective bargaining agreement, which was entered into after the effective date of 2012 PA 349. We disagree.

Section 10(3) of PERA provides in relevant part:

> Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:
>
> > (b) Become or remain a member of a labor organization or bargaining representative.
> >
> > (c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.

Article XXI of Respondents' 2014 collective bargaining agreement and their 2015 collective bargaining agreement covers agency shop and provides that the Union has the right "[t]o collect service fee contributions from all teachers who are members of the bargaining unit within thirty (30) days of the beginning of school or within thirty (30) days of employment in case of teachers hired after the beginning of school." The agency shop provision in each collective bargaining agreement further provides that "[n]otification from the Association

[16] Respondents acknowledge, at page 15 of Respondents' Position Statement and Brief in Support of Respondents' Motion for Summary Disposition that, "at the time that the parties negotiated and executed the MOU, they were still engaged in negotiations over their 'successor collectively bargained agreements' and had no way of knowing what the ultimate length of the term of the successor agreement would be for each unit. As a result, the parties may have reasonably assumed that each successor CBA would be in effect for a period of three years until June 30, 2016, making the terms of the first and final paragraph of their MOU entirely consistent."

President of the failure to pay the service fee will result in employment termination at the close of the school year." Accordingly, we agree with the ALJ that the union security clause that Respondents included in the 2014 collective bargaining agreement was unlawful under § 10(3) of Act 349. The same is true of the union security clause in the 2015 collective bargaining agreement. Moreover, the union security clauses in both of these two agreements are unlawful and unenforceable under § 10(5) of PERA, since they were extended or renewed after March 28, 2013. Thus, each Respondent has violated § 10(3) of PERA. By maintaining the unlawful agency shop provision, Respondents have coerced or restrained Charging Party in the exercise of his rights under § 9 of PERA and by so doing, Respondent Employer has violated § 10(1)(a) of PERA and Respondent Unions have violated § 10(2)(a) of PERA. Finally, Respondent Unions have also violated § 10(2)(a) of PERA by attempting to require Charging Party to pay service fees to which Respondent Unions are not entitled.

The Commission's Authority to Assess a Civil Fine for Violations of § 10(3) of PERA

In his cross-exceptions, Charging Party contends that the ALJ erred by concluding that the Commission does not have jurisdiction to assess a civil fine against Respondents pursuant to §9(3) or § 10(8) of PERA. The ALJ addressed only the Commission's authority to issue a fine under § 9(3) and concluded that the Commission does not have authority to assess a civil fine under that provision. Section 9(3) of PERA provides:

> A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

Section 9(2) of PERA provides in relevant part:

> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> > (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.

Respondent Unions violated § 9(2) by unlawfully attempting to require Charging Party to pay a service fee. Based on the language of the union security agreement, which Respondent Unions sought to enforce, Respondent Unions' implied threat to initiate discharge proceedings against Charging Party for failure to pay the service fee is an unlawful threat to compel him to financially support the Unions and, therefore, is a violation of § 9(2). However, as the ALJ noted, the only sanction we can impose for a violation of § 9(2) is through finding a violation of § 10. The ALJ correctly concluded that Respondent Unions' actions coerced, or restrained Charging Party's exercise of his § 9 rights and, thereby violated § 10(2)(a).

The ALJ explained that the Commission's authority to find an unfair labor practice is limited by § 16(a) of PERA to violations of § 10. We agree. However, the ALJ failed to expressly address the Charging Party's claim that Respondents are liable for a civil fine under § 10(8).

Respondents do not question the Commission's jurisdiction to impose a civil fine pursuant to § 10(8), but argue that the Commission should not do so. Respondents claim they had not violated PERA and, therefore, no civil fine is appropriate. They also argue that under the "new Right to Work law, there has been a great deal of litigation, none of which is settled yet" (emphasis in original). Respondents rely on our decision in *Grand Blanc Clerical Ass'n*, 29 MPER 57 (2016), where we stated:

> [T]his Commission had not issued any decisions interpreting the changes resulting from the amendment of PERA by Act 349. As a result, the interpretation of the applicable law was uncertain. Act 349 significantly changed public employees' rights and our jurisdiction to address issues affecting those newly recognized employee rights.

In our *Grand Blanc* decision, issued February 11, 2016, we exercised our discretion by declining to find that Respondent MEA had violated § 10(2)(a) when it threatened to hire a debt collector in an unlawful attempt to collect union dues that the MEA claimed had accrued after the charging party's union resignation. Respondent's actions in that case occurred on February 11, 2014, which was before we had issued any decisions interpreting Act 349.[17]

On February 13, 2015, the Commission issued its first decision on the question of the lawfulness of union security agreements made after the enactment of Act 349, but before its effective date. See, *Taylor Sch Dist*, 28 MPER 66 (2015). There the Commission majority stated:

> The answer is not found in the length of the contract, but in whether the Employer has violated § 10(1)(a) and (c) of PERA by interfering with, restraining, or coercing public employees in the exercise of rights guaranteed by §9 "**in order to encourage membership in a labor organization."** . . . We hold that the Employer violated § 10(1)(a) of PERA by coercing Charging Parties to financially support the Union.
>
> * * *
>
> The Union acted arbitrarily, in a manner that discriminated against some bargaining unit members, and was indifferent to the interests of those members. It was aware that PA 349 was pending when it negotiated for and ratified a Union Security Agreement that it knew would compel unwilling members to support it financially for ten years (emphasis in original).

[17] In *Teamsters Local 214 (House),* 29 MPER 56 (2016), the Commission similarly exercised its discretion. There we stated that we "would not interpret a union's statement that funds are owed to it as an unlawful demand, when that statement was made before we issued our decision in *Saginaw* and the statement is based on an agreement lawfully entered into before the enactment of Act 349." *Id*. However, shortly before the decision in the instant matter was issued, the Court of Appeals issued its decision on the charging party's appeal of our decision in *Teamsters Local 214*. The Court of Appeals reversed the Commission on that point. The Court found what we regarded as an appropriate exercise of discretion to be error. See, *Teamsters Local 214 v House,* unpublished opinion per curiam of the Court of Appeals, issued September 12, 2017 (Docket No. 331767).

That decision was issued prior to Charging Party's resignation from the Unions on August 20, 2015. Therefore, by checking applicable case law, Respondents could have determined from a review of our decision in *Taylor Sch Dist* that a union security clause entered into after the enactment of Act 349, though before its effective date, was likely to be found unlawful. A review of that decision would have put Respondents on notice of the probable unlawfulness of their actions before they sent the August 31, 2015 letter to Charging Party instructing him to pay a service fee to the Unions. Moreover, our decision in *Saginaw Ed Ass'n*, 29 MPER 21 (2015) was issued September 23, 2015, and should have put at least Respondent MEA, a party to that case, on notice of the fact that individual bargaining unit members have a right to refrain from financially supporting labor organizations in the absence of a lawful union security agreement. Our decision affirmed the ALJ's September 2, 2014 decision and recommended order in *Saginaw*, which also found that bargaining unit members have a right to refrain from financially supporting labor organizations in the absence of a lawful union security agreement. All of this occurred before Charging Party's attorney sent the October 8, 2015 letter to Respondents and before Respondent Unions sent the December 2015 service fee election form along with a demand that Charging Party submit the pro rata amount of the service fee Respondent Unions claimed was due.

Additionally, Respondents contend that the Commission has an obligation to inquire into the motivations and intent of Respondents in taking the actions they did before assessing any penalty under § 10(8). On the contrary, the imposition of a civil fine under § 10(8) is appropriate upon a finding of a violation of § 10(3). Respondents have not denied that they agreed to include the union security provisions in their 2014 and 2015 collective bargaining agreements. Respondents' motives in entering into unlawful union security provisions that violate the PERA-protected rights of public employees are not relevant to the determination of whether Respondents required Charging Party to pay service fees to a labor organization as a condition of continuing public employment.

Respondents further argue that imposing a civil fine under § 10(8) would be punitive and that the Commission lacks the authority to award punitive damages, citing *Senior Accountants v City of Detroit*, 60 Mich App 606, 613 (1975) and *Goolsby v Detroit*, 211 Mich App 214 (1995). In *Senior Accountants*, the Court discusses the possibility of a claim for punitive damages in dicta. We note that, unless authorized by statute, "[p]unitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400. However, punitive damages are not an issue in this case. In *Goolsby,* the Court of Appeals found that the language of § 16(b) of PERA is not sufficiently specific to authorize us to award attorney fees and costs. Attorney fees and costs are also not an issue here.

The issue here is whether we are authorized to impose a civil fine under § 10(8). Section 10(8) of PERA specifically provides us with such authorization, providing: "A person, public employer, or labor organization that violates subsection (3) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state."

Our goal in construing the language of Act 349 is to effectuate the Legislature's intent as inferred from the wording of the statute. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157 (2011); *Casco Twp v Sec'y of State*, 472 Mich 566, 571, (2005). *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748 (2002). To do so, we must first review the statute's wording, which provides the most reliable evidence of the Act's intent. *Neal v Wilkes*, 470 Mich 661, 665 (2004); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). The rules of statutory construction tell us that, much like any literary composition, a statute is enacted and is meant to be read as a whole. *Metropolitan Council 23, AFSCME* v *Oakland Co (Prosecutor's Investigators)*, 409 Mich 299, 317-318 (1980). Every word of a statute should be given meaning and no word should be made nugatory. *Apsey v Mem'l Hosp*, 477 Mich 120, 127 (2007); *People v Warren*, 462 Mich 415, 429 n. 24, (2000); *Baker v Gen Motors Corp*, 409 Mich 639, 665 (1980). We must interpret the words of Act 349 "in their context and with a view to their place in the overall statutory scheme." *Manuel v Gill*, 481 Mich 637, 650; (2008) quoting *Davis v Michigan Dep't of Treasury*, 489 US 803, 809 (1989). A statutory provision that is in dispute must be read in the light of the general purpose of the act and in conjunction with pertinent provisions thereof. *Romeo Homes v Comm'r of Revenue*, 361 Mich 128, 135 (1960).

When the Legislature enacted Act 349, they included § 10(8) as well as § 9(3). We presume the Legislature was aware of the provisions of § 16 of PERA, which provide: "Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the commission." Act 349 expressly granted public employees the right to refrain from financially supporting labor organizations and included specific language providing for remedies and penalties for violations of that right to refrain[18]. Section 10(8) specifically provides one of the means by which violations of § 10(3) are to be remedied.

By including the unlawful union security clause in the 2015 collective bargaining agreement, Respondents each violated § 10(3) of PERA. Additionally, by attempting to enforce the unlawful union security clause in the 2015 collective bargaining agreement, Respondent Unions violated § 10(3) of PERA. Therefore, Respondents are each liable for a civil fine of $500 under § 10(8).

Conclusion

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we find the

[18] See also § 10(10), which provides:

> Except for actions required to be brought under subsection (6), a person who suffers an injury as a result of a violation or threatened violation of subsection (3) may bring a civil action for damages, injunctive relief, or both. In addition, a court shall award court costs and reasonable attorney fees to a plaintiff who prevails in an action brought under this subsection. Remedies provided in this subsection are independent of and in addition to other penalties and remedies prescribed by this act."

Although § 10(10) provides a private right of action to individuals injured by a violation of § 10(3), it does not expressly provide that a civil fine may be awarded in such actions. The last sentence of § 10(10) also indicates that the remedies provided therein are in addition to "other penalties and remedies prescribed by this act." Thus, if a civil damages, injunctive relief, court costs, or attorney fees are awarded under § 10(10) in a civil suit, that award would be in addition to other penalties and remedies that could be imposed by the Commission.

exceptions of Respondents to be without merit and affirm the portion of the ALJ's decision finding that Respondents violated § 10 of PERA by maintaining a clause in their collective bargaining agreement made unlawful by § 10(3) of PERA and by entering into a new agreement covering the period 2015-2017 containing this unlawful clause. Therefore, we find Respondent Employer violated § 10(1)(a) of PERA and Respondent Unions violated § 10(2)(a) of PERA. We also affirm the ALJ's finding that the Unions' August 31, 2015 letter to Conwell informing him that he was required to pay an agency fee for the 2015-2016 school year constituted an unlawful threat to initiate proceedings to terminate his employment if he refused to pay the agency fee and is also a violation of § 10(2)(a) of PERA.

However, we reverse the ALJ's finding that the Commission lacks authority to impose a civil fine against Respondents. While we agree with the ALJ that we do not have authority to impose a fine under § 9(3), we conclude that the Commission does have the authority to issue a civil fine under § 10(8) for violations of § 10(3). Accordingly, we issue the following order.

ORDER

Respondent Clarkston Community Schools, its officers, agents and representatives, are hereby ordered to:

1. Cease and desist from interfering with, restraining, or coercing employees, including but not limited to Ron Conwell, in the exercise of their rights guaranteed by § 9 of PERA, including the right to not financially support a labor organization, by entering into and maintaining in effect union security agreements that require employees, as a condition of continued employment, to pay agency fees to a labor organization in violation of § 10(3) of PERA.

2. Pay a civil fine in the amount of $500.00. Said fine shall be paid by cashier's check or money order, with Case No. C15 K-148 clearly indicated on the check or money order, made payable to the State of Michigan, and sent to the Department of Licensing and Regulatory Affairs, Bureau of Employment Relations, 3026 W. Grand Boulevard, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48902-2988, within thirty (30) days of the date of this Order.

3. Post the attached notice to members of the bargaining unit represented by the Michigan Education Association and the Clarkston Education Association in all places on the school premises where notices to employees are customarily posted for a period of thirty (30) consecutive days.

Respondents Michigan Education Association and Clarkston Education Association, their officers, agents, and representatives, are hereby ordered to:

1. Cease and desist from restraining or coercing employees, including but not limited to Ron Conwell, in the exercise of their rights guaranteed by § 9 of PERA, including the right to not financially support a labor organization, by entering into and maintaining in effect union security agreements that require

employees, as a condition of continued employment, to pay agency fees to a labor organization in violation of § 10(3) of PERA.

2. Cease and desist from threatening employees, including Ron Conwell, with termination under an unlawful union security agreement by sending them letters, after they have challenged the lawfulness of the agreement, stating that they were required as a condition of employment to pay an agency fee.

3. Pay a civil fine in the amount of $500.00. Said fine shall be paid by cashier's check or money order, with Case No. CU15 K-039 clearly indicated on the check or money order, made payable to the State of Michigan, and sent to the Department of Licensing and Regulatory Affairs, Bureau of Employment Relations, 3026 W. Grand Boulevard, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48902-2988, within thirty (30) days of the date of this Order.

4. Post the attached notice to bargaining unit members in all places on the premises of the Clarkston Community Schools where notices to bargaining unit members are customarily posted for a period of (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: September 18, 2017

NOTICE TO EMPLOYEES

Upon the filing of an unfair labor practice charge by Ron Conwell, an individual, the Michigan Employment Relations Commission has found the **Clarkston Community Schools** to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce employees, including but not limited to Ron Conwell, in the exercise of their rights guaranteed by § 9 of PERA, including the right to not financially support a labor organization, by entering into and maintaining in effect union security agreements that require employees, as a condition of continued employment, to pay agency fees to a labor organization in violation of § 10(3) of PERA.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by § 9 of PERA.

WE WILL pay a civil fine in the amount of $500.00.

CLARKSTON COMMUNITY SCHOOLS

By:_____

Title:_____

Date:_____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

NOTICE TO EMPLOYEES

Upon the filing of an unfair labor practice charge by Ron Conwell, an individual, the Michigan Employment Relations Commission has found the **Michigan Education Association** and the **Clarkston Education Association** to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order, WE HEREBY NOTIFY OUR BARGAINING UNIT MEMBERS THAT:

WE WILL NOT restrain, or coerce employees, including but not limited to Ron Conwell, in the exercise of their rights guaranteed by § 9 of PERA, including the right to not financially support a labor organization, by entering into and maintaining in effect union security agreements that require employees, as a condition of continued employment, to pay agency fees to a labor organization in violation of § 10(3) of PERA.

WE WILL NOT threaten employees, including Ron Conwell, with termination under an unlawful union security agreement by sending them letters, after they have challenged the lawfulness of the agreement, stating that they were required as a condition of employment to pay an agency fee.

WE WILL NOT in any other manner restrain, or coerce employees in the exercise of their rights guaranteed by § 9 of PERA.

WE WILL pay a civil fine in the amount of $500.00.

MICHIGAN EDUCATION ASSOCIATION

By:_____

Title:_____

Date:_____

CLARKSTON EDUCATION ASSOCIATION

By:_____

Title:_____

Date:_____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CLARKSTON COMMUNITY SCHOOLS,
Public Employer-Respondent in Case No. C15 K-148/Docket No. 15-059436-MERC,

-and-

CLARKSTON EDUCATION ASSOCIATION,
MICHIGAN EDUCATION ASSOCIATION,
Labor Organization-Respondent in Case No. CU15 K-039/Docket No. 15-059437-MERC,

-and-

RON CONWELL,
Individual Charging Party.
_____/

APPEARANCES:

Dickinson Wright, PLC, by George P. Butler III, and Jeffrey Ammons, for the Respondent Employer

White, Schneider, Young and Chiodini, PC, by Jeffrey S. Donahue, for the Respondent Labor Organization and also for the Respondent Employer on briefs

Amanda Freeman and Milton Chappell, National Right to Work Legal Defense Foundation, Inc., for the Charging Party

DECISION AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY DISPOSITION

On November 9, 2015, Ron Conwell, employed as a computer science teacher by the Clarkston Community Schools, filed unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against the Clarkston Community Schools (the Employer) and his collective bargaining representative, the Michigan Education Association (MEA) and its affiliate, the Clarkston Education Association (CEA), (collectively, the Union) under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charges were assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On January 4, 2016, Respondents filed a joint motion for summary dismissal of the charges against them and a request for oral argument.

On February 4, 2016, Charging Party filed a brief in opposition to Respondents' motion and a counter-motion for summary disposition. He also requested oral argument. Respondents filed a brief in opposition to Charging Party's motion on March 2, 2016. I heard oral argument on the motions on April 26, 2016.

Based on facts as set forth below and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

On August 20, 2015, Charging Party Conwell sent a letter to the MEA, with copies to the CEA and the Employer, resigning his union membership. On August 31, 2015, Conwell received a reply from the MEA stating that it had accepted his resignation, but that he was "a member of a bargaining unit that has a collective bargaining agreement in effect which requires all members of the bargaining unit, as a condition of employment, to either be members of the Association or to pay a fair share fee to the Association."

Conwell alleges that by entering into a collective bargaining agreement in September 2015 that required individuals to pay a fee to the Union as a condition of employment, the Employer interfered with Conwell's rights under Section 9 of PERA to refrain from financially supporting a labor organization and thus violated Section 10(1)(a) of PERA. He also alleges that by entering into this agreement, and by demanding that Conwell owed a fair share fee as a condition of employment, the Union violated Section 10(2)(a) of PERA. The charges, as I understand them, also allege that by these actions both Respondents violated Section 10(3) of PERA. [19]

Facts:

In December 2012, Section 9 and Section 10 of PERA was amended to, among other things, make it an unfair labor practice for a public employer and the labor organizations representing its employees, except public police or fire department employees, to require that the employees pay any "dues, fees or assessments" to a labor organization or bargaining representative as condition of obtaining or continuing employment. In the amended statute, Section 10(3) of PERA, as amended, outlaws previously lawful "agency fee" clauses in collective bargaining agreements pursuant to which employees who do not want to become members of a union are required to pay an agency or service fee to their bargaining representatives or be discharged. The December 2012 amendments, 2012 PA 349 (Act 349), are known, colloquially, as a "Right to Work" law. Along with the new Section 10(3), the Legislature added Section 10(5), which reads as follows:

> (5) An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. *This subsection applies only to an*

[19] It is unclear from the structure of Section 10, as amended, whether a violation of Section 10(3) by a public employer or labor organization constitutes an independent violation of PERA.

agreement, contract, understanding, or practice that takes effect or is extended or renewed after the effective date of the amendatory act that added this subsection. [Emphasis added]

The Act 349 amendments took effect on March 28, 2013.

The Union represents a bargaining unit of the Employer's certified teachers. When Act 349 was adopted, Respondents were parties to a collective bargaining agreement for this unit that covered the term September 1, 2012, through August 31, 2013. This agreement contained an agency shop clause that read, in pertinent part, as follows:

Association Rights:

A. To collect service fee contributions from all teachers who are members of the bargaining unit within thirty (30) days of the beginning of school or within thirty (30) days of employment in case of teachers hired after the beginning of school.

B. The service fee will be a legally permissible amount determined in a legally permissible manner and shall not exceed Association dues.

C. Notification from the Association President of failure to pay the service fee will result in employment termination at the close of the school year.

D. The procedure for dismissal shall be in accordance with applicable laws.

E. If a teacher contests the dismissal under this article through a law suit or any administrative agency proceeding, the termination notice will be automatically withdrawn until there is a final adjudication.

F. If a final decision is not reached before August 15, the teacher will resume teaching. Termination will not be effective until the close of the school year following an unfavorable decision against the teacher. The Association will protect and save harmless the Board from any and all claims, demands, suits and other forms of liability by reason of action taken by the Board in compliance with any sections of this article during the processing to final determination . . .

When Act 349 was adopted, there were two other bargaining units of the Employer's employees represented by MEA affiliates, the Clarkston Para-Educators Association, and the Clarkston Office Personnel Association. These units also had collective bargaining units containing agency fees clauses.

On March 21, 2013, before Act 349 became effective, the CEA and the two other MEA affiliates, referred to in the memorandum as "the Union" entered into a joint memorandum of

understanding (the "2013 MOU") with the Employer. The 2013 MOU contained three paragraphs, the pertinent parts of which read as follows:

> *4.* CCS and Union agree that *the agency or closed shop provisions ("Agency Shop") in the collectively bargained agreements between CCS and the Union are hereby extended for a period not to exceed the term of the applicable, successor collectively bargained agreement but said extension, in each case, is contingent and conditioned upon ratification and execution of all successor collectively bargained agreements between CCS and the Union by on or before midnight on June 15, 2013.* It is further acknowledged that CCS, at its option, may revoke and terminate Agency Shop in the event that any unit of Union is unable to observe the applicable deadline for ratification and execution of a successor collectively bargained agreement. Union agrees that it will not legally challenge any such revocation or termination. The parties agree that this MOU does not constitute the settlement of or a successor to any collectively bargained agreement between CCS and Union, that this MOU creates no binding precedent or past practice and that it does not establish a pattern of bargaining or constitute multiple unit bargaining, the multi-party nature of this MOU being for the mere convenience of the parties hereto.
>
> *5.* In consideration of the CCS agreements contained in Paragraph 1 of this MOU, Union agrees that it shall, at its sole cost and expense and through counsel acceptable to CCS, defend and hold harmless CCS. . .
>
> *6.* This MOU is effective upon ratification by the parties which will in no case be later than March 26, 2013 and *expires on June 30, 2016.* [Emphasis added]

On June 15, 2013, the Respondent Union. i.e., the MEA and the CEA, and the Employer entered into a new collective bargaining agreement covering the term September 1, 2013, through August 31, 2014. This collective bargaining agreement included the agency shop language from the 2012-2013 agreement set out above. On September 22, 2014, Respondents entered into another collective bargaining agreement containing the same agency fee language. This agreement covered the period September 22, 2014 through August 31, 2015.

On August 20, 2015, Conwell sent a letter to the MEA resigning his union membership. Conwell also stated in his letter that the agency fee clause in the Respondents' collective bargaining agreement expiring on August 31, 2015, was illegal under Michigan's "Right to Work" law. Conwell went on to inform the Union that he expected immediate release from all obligations of membership and, if he could currently be lawfully compelled to pay union fees under Michigan law as a condition of his employment, that he invoked his rights under *Abood.*[20] Conwell received a reply from the MEA dated August 31, 2015, stating that it had accepted his

[20] Under *Abood v Detroit Bd of Ed,* 431 US 209 (1977) and *Chicago Teachers v Hudson,* 475 US 292 (1986), a non-member who is covered by a collective bargaining agreement with a lawful agency fee clause cannot, if he or she objects, be compelled to pay the portion of the agency fee used by his union for political, ideological, or other purposes deemed "non-chargeable" by the courts.

resignation, but that he was "a member of a bargaining unit that has a collective bargaining agreement in effect which requires all members of the bargaining unit, as a condition of employment, to either be members of the Association or to pay a fair share fee to the Association."

On or about September 1, 2015, Respondents entered into another collective bargaining agreement for the term September 1, 2015, through June 30, 2017. This agreement included the same agency fee clause as the previous agreements, but included a clause stating that the article was "null and void and of no further force and effect after June 30, 2016, in accordance with the Memorandum of Understanding between the District and the Association executed on March 21, 2013."

On October 8, 2015, Conwell's legal counsel sent a letter to the Respondents asserting that under the terms of the 2013 MOU, the new Right to Work Law fully applied to Conwell and other members of his bargaining unit the day after the successor agreement referenced in the first paragraph of the 2013 MOU expired. According to Conwell's counsel, this was September 1, 2014. The letter argued that the agency fee clauses in the 2014-2015 and 2015-2017 collective bargaining agreements were therefore null and void from their inception because both agreements were entered into, and became effective, after the new Right to Work Law was applicable to Conwell's bargaining unit. Conwell's counsel stated that since Conwell had paid all his membership dues for the 2014-2015 school year, he had no further obligation to pay union dues or fees to the Union. The letter alleged that the Union was violating Conwell's legal right to refrain from assisting a labor organization by "demanding that he owes a fair share fee, " and that the Respondents had violated employees' rights by entering into collective bargaining agreements containing agency shop clauses in violation of the Right to Work law. The letter demanded that the Union cease and desist from attempting to enforce the agency shop clause, cease and desist from demanding payment of a fair share fee from Conwell, update its records to reflect that Conwell did not owe a fair share fee, and send Conwell written confirmation that he does not owe a fair share fee.

Neither Conwell nor his counsel received a response to the October 8 letter. On November 9, 2015, Conwell filed the instant charges. In December 2015, the MEA sent Conwell the packet of materials it sends annually to non-members covered by agency fee clauses. Along with information, the packet included a service fee election form that included three choices for employees who did not want to be union members: paying a service equal to the amount of dues less the cost of the liability insurance the MEA provides to its members, paying a Union-determined reduced service fee, and paying the reduced service fee and challenging the amount of the fee pursuant to the procedure described in the packet. The materials also directed Conwell to send a check or money order for the "pro rata amount due pursuant to the Service Fee Election Form Worksheet." The materials stated if the non-member did not submit the election form with a check or money order by January 19, 2016, he or she would be "required to pay a service fee equal to association dues less the pro rata cost of liability insurance." According to an affidavit by Conwell attached to his motion for summary disposition, he checked the box on the service fee election form stating that he wished to pay a reduced service fee in order to protect his right to pay only the reduced fee if he lost his unfair labor practice case. Conwell returned the service fee election form to the MEA but did not send money.

Discussion and Conclusions of Law:

Jurisdiction, Standing and Ripeness

Respondents challenge the Commission's jurisdiction over Conwell's unfair labor practice claim and his standing to bring the claim. They also allege that Conwell's claim is not ripe for adjudication.

With respect to jurisdiction, Respondents assert that the crux of Conwell's claim is that the Union "demanded that he owed a fair share fee as a condition of employment on August 31, 2015" pursuant to the agency shop provision in the 2015-2017 collective bargaining agreement. Respondents argue that any efforts by Respondents to collect a debt that is due and owing pursuant to the valid and enforceable terms of the 20151-2017 collective bargaining agreement cannot form the basis of an unfair labor practice under PERA and, therefore, the Commission lacks jurisdiction over his claim. Respondents also argue that a threat to pursue a legal action to vindicate legal rights cannot form the basis of an unfair labor practice because the Union has a First Amendment right to pursue such action.

The parties in the instant case agree that this case presents different issues from those raised in *Taylor Sch Dist,* 28 MPER 66 (2015).[21] In that case, the Commission held that an employer and union committed violations of Section 10 by entering into a union security agreement before the effective date of Act 349 that extended employees' obligations to pay agency fees for ten years beyond the statute's effective date. In *Taylor,* the primary issues were whether the union security agreement was valid when it was executed and whether an agreement of this length was enforceable. In the instant case, Conwell does not dispute either the validity of the 2013 MOU or the enforceability of an agreement entered into before the effective date of Act 349 extending the agency fee clause for three years beyond the statute's effective date. Rather, the dispute in this case centers on whether the 2013 MOU extended the agency fee clause until June 30, 2016 or, under these circumstances, through August 31, 2014.

Conwell's charges, however, are similar to the charges filed by the individual bargaining unit members in *Taylor,* because, like the charging parties in *Taylor,* he alleges that a union security clause that applied to him at the time he filed his charge was unlawful and unenforceable under PERA and that his employer and union committed unfair labor practices under Section 10 of PERA by entering into the agreement. He also asserts that the Union committed an additional violation of Section 10 by attempting to enforce the illegal clause. Clearly, Conwell's claim, like those of the individual charging parties in *Taylor,* is not merely or even primarily a contract claim.

Along with their unfair labor practice charge, the charging parties in *Taylor* filed suit in circuit court. The circuit court dismissed the action on the basis that it lacked subject matter jurisdiction. In an unpublished decision, *Angela Steffke, Rebecca Metz, and Nancy Rhatigan,* v

[21] This decision, issued on February 13, 2015, is currently on appeal to the Michigan Court of Appeals.

Taylor Federation of Teachers AFT, Local 1085, Taylor Public School Board of Education, and Taylor School District, 28 MPER 71 (2015), the Court of Appeals affirmed the dismissal of two of the three counts in the circuit court complaint.

The Court first noted that under Section 16 of PERA the Commission has exclusive jurisdiction over unfair labor practices and that, in the first count of their complaint, the plaintiffs alleged that the union security agreement was illegal under PERA. The Court held that an allegation that the union and employer ratified an agreement that is illegal or precluded by PERA falls squarely in the category of claims alleging misconduct under PERA and that it requires the decision maker to interpret and analyze PERA— an area in which the Commission has administrative expertise. It concluded, therefore, that the Commission had exclusive jurisdiction over the first count of the plaintiffs' complaint.

I conclude that the Commission has jurisdiction to determine whether the union security agreement in effect at the time Conwell filed his charge was unlawful under Section 10(3) of PERA. I also conclude that the Commission has jurisdiction to determine whether Respondents committed an unfair labor practice by entering into this agreement and whether the Union committed an unfair labor practice by the actions it took to enforce it.

Respondents also assert that Conwell lacks standing to bring this charge, arguing that he lacks standing to void an agreement to which he was neither a party nor a third party beneficiary. Citing MCL 600.1405, they also argue that even if he is considered a third party beneficiary to the collective bargaining agreement, he has standing only to enforce the agreement, not invalidate it.[22]

In their *Taylor* decision, the Commission majority concluded that the charging parties in that case were third party beneficiaries of the contract and that, as such, they had standing to challenge all aspects of the agreement. Commissioner Yaw dissented, concluding that the charging parties lacked standing to bring the charge as third party beneficiaries because neither the employer nor the union made a promise in the contract to do or refrain from doing anything directly to or for any of the three charging parties. As noted above, the Commission's decision in *Taylor* is on appeal, but until they are set aside, I am bound by the conclusions of the Commission majority that an individual challenging either the validity or lawfulness of a union security clause applying to him or her has standing to assert these claims.

I also find that that Conwell has standing to bring this charge even if he is not considered a third party beneficiary of the 2015-2017 collective bargaining agreement. Even if a statute does not create an express cause of action or expressly confer standing on a party to enforce a

[22] MCL 600.1405 states:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

Respondents assert that under this statute, third party beneficiaries to a contract have only the right to enforce the agreement, not to invalidate it.

statute's provision, litigants may have standing if they have a substantial interest in the enforcement of the statute that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 359 and 373 (2010). In this case, none of the subsections of Section 10 of PERA explicitly define who has standing to enforce these subsections. Section 10(3) of PERA states that "an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following. . ." including paying fees to a labor organization. Conwell is an employee under PERA, is covered by union security agreement, is not a union member, has represented himself to both Respondent as unwilling to pay an agency fee, and has asserted that he will suffer harm if the union security clause is enforced. I conclude that as "an individual" within the meaning of that term in Section 10(3), Conwell is clearly within the class of individuals to whom the Legislature intended to grant standing to challenge the lawfulness of the union security clause in a collective bargaining agreement that covers him, even if Conwell lacks standing to challenge other aspects of that agreement. Moreover, as Conwell correctly notes, if he were held to lack standing to challenge the legality of the union security clause under Section 10(3), it is unclear who would have standing to do so.

I also find, contrary to Respondents' argument, that Conwell's claims are ripe for adjudication. Respondents cite *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615–16 (2008):

> The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 371 n. 14 (2006).

In his request for relief, Conwell asks the Commission to "declare" that the agency shop clause in the 2015-2017 agreement is unlawful and unenforceable. He also asks the Commission to "declare" that the Union committed an unfair labor practice when it entered into the 2015-2017 collective bargaining agreement containing an agency fee clause, and demanded that Conwell owed a fair share fee as a condition of employment on August 31, 2015. Finally, he asks the Commission to order the Union to "recognize that Conwell owes nothing to the Union after August 2015 and update its records to reflect this fact," "and "cease and desist demanding that Charging Party owes fees or any type of payment to Respondent Union since August 2015." With respect to his charge against the Employer, he asks the Commission to "declare" that the Employer committed an unfair labor practice when it entered into the 2015-2017 agreement containing an agency fee clause and order the Employer to update its records to reflect that Conwell is a non-member who owes nothing after August 2015. Despite the use of the word "declare," in his charges, however, it is clear that Conwell is not seeking a declaratory judgment as to some future event, but asserting that both Respondents committed unfair labor practices by actions taken before he filed his charge.

Respondents argue that since the Union has neither initiated any legal action to collect the agency fees nor demanded Conwell's termination, and the Employer has taken no action to

terminate his employment, Conwell has not yet suffered an actual injury. It asserts that Conwell's claim is, therefore, merely speculative as it assumes future events – his termination or other attempts by the Union to collect the fee – that may not occur.

At the time the motions for summary disposition were filed, Conwell had not been terminated, i.e., the agency fee clause had not yet been enforced against him. In addition, Respondents had not taken any affirmatives steps toward terminating Conwell for his failure to pay an agency fee for the 2015-2016 school year, and the Union had not made any attempt, or threatened to make an attempt, to collect the fees by other means. However, as I read the agency fee clause, had Conwell not filed this unfair labor practice charge, the Union could have caused his termination at the end of the 2015-2016 school year by notifying the Employer that he had not paid his fees. If Conwell had waited to file the charge after he was terminated, he would be at least temporarily reinstated, but could then be terminated again at the end of any a school year during which he received an unfavorable decision, e.g., his charge was dismissed because it was untimely. Although Respondents asserted during oral argument that they had no plans to terminate Conwell for his failure to pay an agency fee for the 2015-2016 school year, there is no evidence in the pleadings that they informed Conwell that they would not enforce the agency fee clause against him.

I do not agree with Respondents that Conwell's claim is not ripe for adjudication merely because no action has yet been taken to terminate him. In my view, such claims become ripe when an agreement containing a union security clause becomes effective because the presence of a clause in a collective bargaining agreement making payment of agency fees a condition of employment, even if the clause is never enforced, carries the implicit threat of enforcement. In this case, Conwell also received a letter from the MEA stating that he was required to pay an agency fee under the union security clause after Conwell had sent the MEA a letter asserting that the clause was illegal. I find that a reasonable individual in Conwell's situation would have, in the context of the agency fee clause in the 2014-2015 and 2015-2017 agreements, viewed this as a threat to terminate him if he did not pay the agency fee for the 2015-2016 school year.

In the instant case, I conclude that both Conwell's challenge to the legality of the agency fee clause and his claim that the Union violated Section 10(2)(a) by sending him the August 31, 2015, letter are ripe for adjudication.

Statute of Limitations

Section 16(a) prohibits the Commission from finding an unfair labor practice based on conduct occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the respondent. The Commission has held that the statute of limitations in Section 16(a) is jurisdictional and cannot be waived. *Shiawassee Co Road Comm*, 1978 MERC Lab Op 1182, 1183; *Walkerville Rural Cmty Schs*, 1994 MERC Lab Op 582, 583. The statute of limitations begins to run when an individual knows or should know of the act which caused his injury and has good reason to believe that the act was improper or done in an improper manner. *City of Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

Respondents assert that Conwell's charge is untimely under Section 16(a) because it should have been filed within six months of the date that Conwell first became aware that Respondents had entered into an allegedly unlawful union security agreement. In this case, according to Respondents, the statute of limitations began to run on or about September 22, 2014, when the Union and Employer first entered into a union security agreement that, according to Conwell, was unlawful.

Conwell argues that while he might have been barred from filing a charge in November 2015 asserting that Respondents unlawfully entered into the 2014-2015 agreement, Respondents committed a separate unfair labor practice when they entered into the 2015-2017 agreement. He also argues that statute did not begin to run until he suffered an injury, and that he personally did not suffer an injury until he resigned from the Union, asserted his right not to pay an agency fee, and was informed by the Union on August 31, 2015, that he continued to owe an agency fee for the 2015-2016 school year. In response, Respondents assert that these arguments are simply attempts to revive untimely claims under a continuing violation theory. As Respondents' note, the Commission refused to recognize a continuing violation theory in *City of Adrian,* 1970 MERC Lab Op 579, and has continued to do so in many subsequent cases. According to Respondents, Commission precedent bars Conwell from arguing that his claim is timely because Respondents entered into another collective bargaining agreement in September 2015 that contained the same agency shop provision as in the 2014-2015 contract.

In *City of Adrian,* the Commission explicitly adopted the holding of the U.S. Supreme Court in *Local Lodge 1424 v NLRB (Bryan Mfg),* 362 US 411 (1960), interpreting the statute of limitations language in Section 10(b) of the National Labor Relations Act (NLRA), 29 150 *et seq.* Section 10(b) of the NLRA, like Section 16(a) of PERA, prohibits the finding of an unfair labor practice based acts occurring more than six months prior to the filing of the charge. In *Bryan,* the Court, as the Commission characterized it, "reject[ed] the doctrine of continuing violation if the inception of the violation occurred more than six months prior to the filing of a charge." Since *Adrian,* the Commission has repeatedly cited *Bryan Mfg* to dismiss as untimely charges in which the charging party alleges that his charge is timely because a wrong committed outside the statutory period has gone uncorrected. See *Washtenaw Co,* 19 MPER 63 (2006), (charge based on employer's continuing refusal to remove information allegedly placed unlawfully in charging party's personnel file more than six months before the charge was filed was untimely); *City of Ann Arbor,* 20 MPER 13 (2007) (charge alleging that the employer unlawfully refused to include charging party, as a temporary employee, in a bargaining unit of its employees was untimely where charging party had been excluded from the unit on this basis for ten years); *Traverse Area Dist Library,* 25 MPER 82 (charge was untimely because employee's discharge took place more than six months before the filing of the charge); *City of Detroit,* 25 MPER 68 (2012) (although these changes remained in place, charge alleging unlawful unilateral change in terms and conditions of employment was untimely because respondent's unilateral implementation of a new shift and "roving crews" occurred more than six months before the charge was filed); and *City of Lansing* 25 MPER 5 (2011) (charge was untimely because unilateral change in drug benefits occurred more than six months before the charge was filed.)

Although *Bryan* is often cited for the general principal that an untimely charge cannot be saved by application of a continuing violation theory, the specific issue in *Bryan* was the

timeliness, under Section 10(b) of the NLRA, of a charge alleging that an employer and union had committed unfair labor practices by enforcing a union security agreement which was unlawful because the union did not represent a majority of employees when the agreement was executed. Although the agreement had been enforced within the six month statutory period, the execution of the agreement took place more than six months before the charges were filed. As the Court noted, the National Labor Relations Board (NLRB or the Board) had held that entering into a union security agreement when the union did not represent a majority of employees violated the NLRA and that the maintenance and enforcement of such an agreement constituted a continuing violation irrespective of whether the union subsequently gained majority support. In *Bryan*, however, the Court agreed with the respondent union that the charge was time-barred. It noted that the conduct occurring within the limitations period, i.e., the enforcement of the union security clause, could be held to be an unfair labor practice only through reliance on an earlier unfair labor practice, i.e., the unlawful execution of the agreement when the union did not represent a majority, occurring outside the statutory limitations period. It held that a finding of violation which was inescapably grounded on events predating the limitations period was directly at odds with the purposes of Section 10(b). The Court further stated, at 422:

> The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the *vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered.* [Emphasis added.]

The Board has held that so-called superseniority contract clauses granting superseniority to union officers who are not involved in contract administration or grievance processing are presumptively unlawful. *Dairylea Cooperative*, 219 NLRB 656 (1975), enf'd 531 F2d 1162 (CA 2, 1976). Despite *Bryan*, the Board has held that charges alleging that an employer and union unlawfully enforced unlawful superseniority clauses within the 10(b) period, or even merely maintained them, are not untimely despite the fact that the agreement containing the clause was executed well outside the 10(b) period. See, e.g. *Auto Workers Local 1131 (Houdaille Ind)*, 268 NLRB 1468 (1984); *Guardsmark, LLC*, 2010 WL 3285380 (May 21, 2010). In *Arvin Automotive*, 205 NLRB 753 (1987), the NLRB explained that its holdings did not run afoul of *Bryan* because the enforcement and/or maintenance of contract clause unlawful on its face constituted separate violations. Thus, the Board was able to find violations based on conduct occurring within, or subsequent to, the six month period without inquiring into the circumstances surrounding the original execution of the contract in which the clauses appear, or any other circumstances occurring more than six months before the charge was filed. The Board noted that in cases involving unlawful enforcement of a superseniority clause, it had held that the statute of limitations begins to run from the date the union officer exercises his or her unlawfully acquired superseniority. While cases involving only the unlawful maintenance a superseniority clause are rare, the Board has found a violation based solely on the fact that the clause had been unlawfully

maintained within six months of the date the charge was filed. See e.g., *United States Steel Corp*, 268 NLRB 1187 (1984).

In *Warren Consolidated Schs,* 19 MPER 37 (2006), the Commission followed the NLRB, and the reasoning expressed in *Arvin,* in finding that a charge alleging that the respondent union and employer violated PERA by maintaining and enforcing an unlawful superseniority clause to be timely under Section 16(a). The charge in *Warren* was filed by an employee after the employer eliminated a position in his classification and a member of the union's executive board retained his position while the charging party was forced to bump into a lower-paid position.

The charge was filed within six months of charging party's displacement, but the contract containing the allegedly unlawful superseniority clause had been executed three years earlier. The respondent union argued that the charging party was required to file his charge within six months of that date that the contract was ratified and the charging party became aware of the clause. Relying on *Arvin,* the Commission held that the unlawful enforcement of the clause constituted a violation separate from its execution, and that, with regard to this violation, the statute of limitations began to run when the union officer exercised his unlawful superseniority. Citing *City of Huntington Woods v Wines,* supra, the Commission found that the act which caused the charging party's injury was his displacement, and that the charging party properly filed his charge within six months of that date.

Arvin and *Warren* are relevant to this case because Respondents argue that the statute of limitations on Conwell's claim that the agency shop provision in Respondents' 2015-2017 agreement is unlawful began to run when Conwell first became aware that Respondents first entered into what he alleges was an unlawful union security agreement, i.e., on or about September 24, 2014.

Unlawful superseniority clauses interfere with unit employees' right under the NLRA to refrain from engaging in union activity. If such clauses are enforced, they also discriminate against employees who prefer to refrain from such activity. *Dairylea,* at 657. I find that, as with unlawful superseniority clauses, the mere maintenance of a union security clauses made unlawful by Section 10(3) interferes with unit employees' rights under Section 9 of PERA to refrain from financially supporting a labor organization. I also find that a union's threat to enforce an unlawful union security clause violates Section 10(2)(a) of PERA because it interferes with employees' exercise of that Section 9 right. I conclude, therefore, that the maintenance, enforcement, or threat to enforce a union security agreement which is unlawful on its face under Section 10(3) of PERA constitute violations of PERA which are separate and distinct from the execution of such an agreement. I also conclude, that the Commission is not barred by Section 16(a) from finding unfair labor practices based on these violations because whether the union security agreement is unlawful does not depend on the circumstances under which it was executed.

I recognize, of course, that as in this case, whether a particular union security agreement is lawful under Section 10(3) of PERA depends in part on whether the agreement took effect before Act 349's effective date. This does not, however, require an inquiry into the circumstances under which it was executed. I find, therefore, that Conwell's charge that

Respondents violated PERA by entering into a collective bargaining agreement with a union security clause on September 1, 2015, is not time barred. I also find, therefore, Conwell's charge alleging that the Union unlawfully attempted to enforce this clause against him by sending him the August 31, 2016, letter is not barred by Section 16(a) of PERA because the acts alleged to constitute the unlawful enforcement occurred within six months of the filing of the charge.

The 2013 MOU

Both Respondents' 2014-2015 and 2015-2017 collective bargaining agreements contain agency fee clauses that require employees to pay either dues or an agency fee as a condition of employment.

The plain language of Section 10(3) and Section 10(5) makes such agency fee clauses unlawful if they are entered into, extended, or renewed after Act 379's effective date. Clearly, it makes no difference under these sections whether the union's membership, by majority vote, ratified the new, extended, or ratified agreement.

However, the 2013 MOU was entered into before Act 379's effective date. If I understand his argument correctly, Conwell does not dispute that, consistent with the Commission's decision in *Taylor,* Respondents could have lawfully entered into a MOU in March 2013 that extended the agency fee agreement through June 30, 2016. Respondents maintain that the 2013 MOU does extend the agency fee clause in the parties 2012-2013 agreement through June 30, 2016. In support of this claim, they attached to their motion affidavits from both Employer and Union negotiators stating that this was their intent and that there was oral agreement at the bargaining table that the 2013 MOU extended the agency fee clause through June 30, 2016. Conwell, however, argues that the 2013 MOU, as written, extends the agency fee clause only through the term of Respondents' successor agreement, assuming that they reached one on or before June 15, 2013.

The main goal when interpreting a contract is to ascertain and enforce the parties' intent. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375 (2003); *Burkhardt v Bailey*, 260 Mich App 636, 656 (2004). In doing so, the first task is to review the contract's language according to its plain meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61(2003); *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 182. If the language of the contract is unambiguous, the contract should be construed as written. *Farm Bureau Mutual. Ins Co. of Michigan v Nikkel*, 460 Mich. 558, 570 (1999). A contract is said to be ambiguous when its words may reasonably be understood in different ways. *Farm Bureau*, at 566. An unambiguous contractual provision is reflective of the parties' intent as a matter of law. *Quality Products*, at 375. Extrinsic evidence of the parties' intent may be considered only if the language is ambiguous. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 470 (2003). The first paragraph of the 2013 MOU begins:

> CCS and Union agree that the agency or closed shop provisions ("Agency Shop") in the collectively bargained agreements between CCS and the Union *are hereby extended for a period not to exceed the term of the applicable, successor collectively bargained agreement. . .*

I conclude that this language is not ambiguous. The plural "agreements" is used at the beginning of this sentence because the three MEA affiliates signing the MOU had separate collective bargaining agreements which each contained agency shop clauses. The sentence, however, then shifts to the singular, "the applicable successor collectively bargained a*greement.*" Thus, the agency fee provisions covering each of the three bargaining units are extended for a period that is no longer than the term of one successor collective bargaining agreement. It may be that when Respondents agreed to this language, negotiators for both the Union and Employer assumed that if they reached a successor agreement before June 15, 2013, the successor agreement would have a term of three years or longer. However, the successor agreement that they did finally reach had an expiration date of August 31, 2014. Under the plain language of the MOU, the agency fee clause expired on August 31, 2014 when that successor agreement expired.

Respondents point out that the last sentence of the 2013 MOU states that the MOU will expire on June 30, 2016. They argue that this should be construed as an agreement to extend the agency fee clause until that date. If possible, contracts should be interpreted in a way which harmonizes potentially conflicting terms. *Klapp*, at 468-469. In this case, however, I find no conflict between the first and last clauses of the 2013 MOU. The agency fee agreement was to expire when the first successor agreement reached by Respondents expired, if that successor agreement was reached by June 15, 2013 and the term of that successor agreement was shorter than the term of the MOU. That is, by giving the MOU an expiration date of June 30, 2016, Respondents placed an outer limit on the extension of the agency fee clause. If the June 2013 successor agreement had had an expiration date after June 30, 2016, under the terms of the MOU the agency fee clause would have expired on June 30, 2016. As indicated above, however, after Respondents had executed the MOU, and Act 349 had taken effect, Respondents entered into a successor agreement with a term significantly shorter than that of the MOU.

Because the language of the MOU is unambiguous, extrinsic evidence of the Respondents' intent is not relevant. I agree with Charging Party that under the plain and unambiguous language of the 2013 MOU, the agency fee provision covering the teachers' unit expired on that date. Therefore, Respondents' agreements in 2014 and 2015 were either "extensions," or "renewals" of this agency fee provision or new agency fee agreements entered into after PA 349's effective date and were unlawful.

Summary of Conclusions

In sum, in accord with the facts and discussion set out above, I find that the Commission has jurisdiction over Conwell's claims that Respondents committed unfair labor practices by entering into the 2015-2017 collective bargaining agreement with a union security clause that required employees to pay dues or an agency fee as a condition of employment. I also find that the Commission has jurisdiction to resolve Conwell's claim that the Union committed an unfair labor practice by attempting to enforce this clause. I also conclude that Conwell has standing to assert that the union security clause is unlawful, both as a third-party beneficiary of the collective bargaining agreement containing the clause and as a member of the class of individuals upon whom the Legislature intended to grant standing to bring this type of claim.

I find that the 2013 MOU which Respondents entered into before the effective date of Act 349 extended the agency fee clause in their existing contract only through the term of their next successor collective bargaining agreement, which in this case expired on August 30, 2014. I conclude, therefore, that any agreement by Respondents after that date requiring employees to pay agency fees as a condition of employment was unlawful under Section 10(3) of PERA.

I conclude that Conwell's claims are ripe for adjudication, even though Respondents have taken no action to terminate him in accord with the unlawful union security clause, because when he filed his charge the collective bargaining agreement covering him contained an unlawful union security agreement which allowed Respondents to terminate him for failing to pay an agency fee. I find that Respondents violated Section 10(1)(a) of PERA by maintaining a clause in their collective bargaining agreement made unlawful by Section 10(3) of PERA and by entering into a new agreement covering the period 2015-2017 containing this unlawful clause.

I also conclude that the Union's August 31, 2015, letter to Conwell informing him that he was required to pay an agency fee for the 2015-2016 school year constituted an additional unlawful threat to terminate him if he refused to pay the agency fee and a violation of Section 10(2)(a) of PERA.

I also find that Conwell was not barred by Section 16(a) of PERA from filing a charge in November 2015 alleging that the Union was attempting to enforce an unlawful agency fee agreement or that Respondents unlawfully entered into a new agreement, even though Respondents initially entered into an unlawful agency fee agreement more than six months before the charge was filed. For reasons set forth above, I conclude that Section 16(a) does not bar a finding that within the six month period before Conwell filed his charge, Respondents maintained an unlawful union security agreement, entered into a new collective bargaining contract containing the unlawful agreement, or unlawfully threated to enforce the agreement. I recommend, therefore, that the Commission issue the following order. [23]

RECOMMENDED ORDER

Respondent Clarkston Community Schools, its officers, agents and representatives, are hereby ordered to cease and desist from:

4. Interfering with, restraining, or coercing employees, including but not limited to Ron Conwell, in the exercise of their rights guaranteed by Section 9 of PERA, including the right not to financially support a labor organization, by entering into and maintaining in effect union security agreements that require

[23] In his request for relief, Conwell asks the Commission to fine each Respondent $500 for violating Section 9(2) of PERA. Section 9(3), however, states that "A person who violates subsection (2) is liable for a civil fine of not more than $500.00." The Commission's authority to find an unfair labor practice is limited by Section 16(a) of PERA to violations of Section 10 of that Act. Moreover, the Commission is not authorized by Section 16(b) to of PERA to take purely punitive action against persons found to have committed unfair labor practices. I conclude, therefore, that the Commission has no authority to assess a fine, or take any other action, to enforce Section 9(3) of PERA.

employees, as a condition of continued employment, to pay agency fees to a labor organization in violation of Section 10(3) of PERA.

5. Post the attached notice to members of the bargaining unit represented by the Michigan Education Association and the Clarkston Education Association in all places on the school premises where notices to employees are customarily posted for a period of thirty (30) consecutive days.

Respondent Michigan Education Association and Clarkston Education Association, its officers, agents, and representatives, are hereby ordered to cease and desist from:

5. Interfering with, restraining or coercing employees, including but not limited to Ron Conwell, in the exercise of their rights guaranteed by Section 9 of PERA, including the right not to financially support a labor organization, by entering into and maintaining in effect union security agreements that require employees, as a condition of continued employment, to pay agency fees to a labor organization in violation of Section 10(3) of PERA.

6. Threatening employees, including Ron Conwell, with termination under an unlawful union security agreement by sending them letters, after they have challenged the lawfulness of the agreement, stating that they were required as a condition of employment to pay an agency fee.

7. Post the attached notice to members in all places on the premises of the Clarkston Community Schools where notices to members are customarily posted for a period of (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 13, 2016