STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ANN ARBOR EDUCATION ASSOCIATION,
Labor Organization-Respondent in MERC Case Nos. CU15 K-040 and CU16 B-006,

-and-

JEFFREY L. FINNAN,
An Individual-Charging Party in MERC Case No. CU15 K-040,

-and-

CORY J. MERANTE,
An Individual-Charging Party in MERC Case No. CU16 B-006.
____/

APPEARANCES:

White Schneider PC, by Jeffrey S. Donahue, for Respondent

National Right to Work Legal Defense Foundation, by John N. Raudabaugh, Milton L. Chappell and Jeff D. Jennings, for Charging Parties

DECISION AND ORDER

On June 30, 2017, Administrative Law Judge Travis Calderwood (ALJ) issued his Decision and Recommended Order[1] in the above matter finding that Respondent, Ann Arbor Education Association (AAEA or Union), violated § 10(2)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(a) by attempting to collect fees from Charging Parties, Jeffrey L. Finnan and Cory J. Merante, after Finnan and Merante had resigned their union memberships. The ALJ held that Respondents violated PERA by sending letters to Charging Parties asserting that they were each required to pay agency fees. Respondent based its claim for agency fees on a March 18, 2013 memorandum of agreement (MOA) with Charging Parties' employer, which provided that bargaining unit members who were not union members would be considered agency shop fee payers. Based on the Court of Appeals decision in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017), the ALJ concluded that the agency fee provision was unlawful and unenforceable. The ALJ found that Respondent's actions unlawfully restrained or coerced both Charging Parties in the exercise of their § 9 right to refrain from financially supporting a labor organization and

[1] In MAHS Hearing Docket Nos. 15-059636, and 16-003639

thereby violated § 10(2)(a) of PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

On August 23, 2017, after requesting and receiving an extension of time, Respondent filed exceptions and a brief in support of the exceptions to the ALJ's Decision and Recommended Order. Charging Parties also requested and were granted an extension of time. On October 5, 2017, Charging Parties filed cross exceptions and a brief in support of their cross exceptions to the ALJ's Decision and Recommended Order. Respondent filed its response to Charging Parties' cross exceptions on October 16, 2017.

In its exceptions, Respondent contends that the ALJ erred by finding that Respondent unlawfully restrained or coerced Charging Parties in the exercise of their § 9 right to refrain from financially supporting a labor organization and by concluding that Respondent's acts violated § 10(2)(a) of PERA. Respondent also asserts that the ALJ erred by finding that the Union "acted in a manner that sought to protect their own financial interests at the expense of their members." Respondent further contends that the ALJ erred in his analysis of the Court of Appeals decision in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017) and in his application of that decision to this matter.

In their cross exceptions, Charging Parties contend that the ALJ erred by declining to find that Respondent violated PERA by ratifying and maintaining the 2015 Memorandum of Agreement (2015 MOA), by not recommending that the Commission order Respondent to cease and desist from ratifying and maintaining such agreements, and by not including such cease-and-desist language in the Notice to Employees. Charging Parties also assert that the ALJ erred by refusing to award civil fines against Respondent under § 9(3) of PERA for each of the six times they allege that Respondent demanded the payment of agency fees after Act 349 took effect. Charging Parties further contend that the ALJ erred by finding that Charging Parties did not allege that Respondent violated § 10(3) of PERA. Charging Parties cite as error the ALJ's finding that "Charging Parties have never claimed, nor does the record support a finding, that their continued status as public employees was in any way conditioned on their payment of fees to [AAEA]." Charging Parties also argue that by failing to find that Respondent violated § 10(3), the ALJ further erred by failing to award civil fines under § 10(8) for the alleged violation of § 10(3).

In its response to Charging Parties' cross exceptions, Respondent contends that the cross exceptions are without merit and should be dismissed.

We have reviewed the Respondent's exceptions and Charging Parties' cross exceptions. We find that neither party raises arguments that would change the result in this matter.

<u>Factual Summary:</u>

The material facts in this case are not in dispute and are based on the documents submitted by the parties. Charging Parties are both teachers employed by the Ann Arbor Public Schools (the Employer). They are both members of the bargaining unit represented by Respondent Union.

Agreements between the AAEA and the Employer Prior to the Enactment of Act 349

The AAEA entered into a collective bargaining agreement (Master Agreement) with the Employer covering the period of August 28, 2009 through August 30, 2011. The Master Agreement included an agency shop provision under Article 3.00 of the collective bargaining agreement, titled "Association Rights." Under the terms of Article 3.00, bargaining unit members who failed to submit a union membership form, would be considered agency shop fee payers. Article 3.00 required the Employer to deduct membership dues or agency fees from employees' paychecks. Article 3.00 does not list any remedy for the Union if the Employer fails to deduct the dues or fees from the employee's wages and the employee fails to remit the dues or fees.[2]

On June 14, 2010, the AAEA and the Employer extended their agreement through the 2011-2012 school year. That agreement (2010 TA) included wage concessions and a wage freeze. The 2010 TA also contained promises by the Employer that AAEA members employed in 2009 through 2011 would not be laid off and provided for mitigation of any layoff in 2011 to 2012 through the maintenance of at least 10 substitute positions staffed by bargaining unit members. The Financial Package of the 2010 TA provides for a 25% employer/75% employee division of any increase in general fund equity greater than 10%. The employee share was to be applied to the salary schedule or used to increase the Employer's contribution to health insurance, "off scale" payments, or contributions to tax-deferred accounts. Additionally, the 2010 TA provided that it would extend until June 30 of the year in which $4.5 million had been applied to the salary scale and/or health benefits. Additionally, the 2010 TA includes "MoAs tied to the 'District's Financial Crisis.'" Those provisions provide for certain staffing levels for media specialists and clerical assistance, and for the suspension of provisions restricting the Employer from placing student teachers in the classrooms without the agreement of the bargaining unit teacher called upon to supervise the student teacher. Additionally, the 2010 TA provided for a joint committee on alternative methods of compensation comprised of three representatives from the School Board and three from the Union.

On March 16, 2012, 2012 PA 53 (Act 53) was enacted and given immediate effect. Act 53 amended § 10(1)(b) of PERA, MCL 423.10(1)(b), by prohibiting public school employers from assisting labor organizations in collecting union dues or service fees. However, where the public school employer collected dues or service fees pursuant to a collective bargaining agreement that was in effect on the effective date of Act 53, the prohibition did not apply until that contract expired.

On July 11, 2012, the AAEA and the Employer entered into a memorandum of agreement covering certain aspects of their relationship during the 2012-2013 school year. The agreement stated that the parties had entered into the agreement regarding the change in

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[2] In our recent decision regarding union security/agency shop provisions, *Clarkston Cmty Sch*, 31 MPER 26 (2017), the collective bargaining agreement provided that if an employee failed to pay agency fees, the union could require the employer to begin proceedings to terminate the employee. There is no similar language in the collective bargaining agreement, the MOAs, or the TAs between the Ann Arbor Public Schools and the Ann Arbor Education Association with which we have been provided.

the starting and ending times at the elementary school and the high school "in order to allow budget reductions and keep as many cuts away from the classroom as possible." The agreement discussed school starting and ending times, as well as some transportation issues. That agreement did not address the Association Rights language of the 2009 to 2011 Master Agreement.

Act 349

On December 11, 2012, the Michigan Legislature passed 2012 PA 349 (Act 349), which became effective March 28, 2013. Act 349 amended § 9 of PERA 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. Section 9 as amended provides in relevant part:

> (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.

> (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.

Act 349 also amended § 10 of PERA by eliminating the language previously contained in § 10(1)(c) and § 10(2). Before the enactment of Act 349, § 10(1)(c) included the following language:

> However, this act or any other law of this state does not preclude a public employer from making an agreement with an exclusive bargaining representative as described in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

Before Act 349 was enacted § 10(2) of PERA provided:

> It is the purpose of 1973 PA 25 to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee that may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

The above quoted language from both § 10(1)(c) and § 10(2) was eliminated when Act 349 was adopted. Act 349 also added subsections (3) through (10) to § 10. Section 10 as amended provides in relevant part:

> (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.
> >
> > (b) Restrain or coerce a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.
> >
> > (c) Cause or attempt to cause a public employer to discriminate against a public employee in violation of subsection (1)(c).

(d) Refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees, subject to section 11.

(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.

* * *

(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.

* * *

(10) 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.

Agreements between the AAEA and the Employer after the Enactment of Act 349

On March 18, 2013, the Employer and the Union executed and ratified a memorandum of agreement (2013 MOA) in which the parties agreed to provisions covering several issues including potential changes in the health insurance plan, a change in the grievance procedure, and several other changes. One of the changes provided that there would be a 3% salary reduction for the 2013-2014 school year, but all teachers would continue to move up the salary schedule. The first sentence of the agreement states that the parties entered into the agreement "[i]n response to the financial deficits Ann Arbor Public Schools is facing due to a lack of funding for public school public education . . ." Paragraph #4 of the agreement provided that the agency shop provision in the parties' last collective bargaining agreement would be effective immediately upon ratification of the MOA and would continue in effect through June 30, 2016.

According to separate affidavits signed by the Union's president, Linda Carter, and the Employer's deputy superintendent of human resources, David A. Comsa, they were each involved in the negotiations for the 2013 MOA. Ms. Carter asserts that they "did not intend to circumvent, violate, or delay any state statute or law. To the contrary, the parties intended to fully comply and faithfully act in accordance with the law that was in effect at the time they reached their agreement." Similarly, in his affidavit, Mr. Comsa asserts that "the parties intended to fully comply and faithfully act in accordance with the law that was in effect at the time they reached their agreement."

The parties entered into a subsequent MOA on June 20, 2014 (2014 MOA) addressing certain issues affecting terms and conditions of employment for the 2014-2015 school year. That agreement provided for: a salary freeze and a step freeze for the 2014-2015 school year, lane advancement at 50% of the amount on the 2013-2014 salary schedule for the 2014-2015 school, and a $150 off-schedule payment for any teacher with an overall final rating of highly effective on his or her evaluation. The 2014 MOA did not address the agency shop provision in the collective bargaining agreement, nor did it mention the 2013 MOA.

On August 11, 2015, the parties entered into another MOA which provided "that the Agency Shop Agreement, previously entered into, continues until June 30, 2016 subject to transcript of oral argument" by the Employer's and the Union's respective attorneys before a MERC ALJ. According to the affidavit of George Przygodski, an MEA UniServ director, he was involved in the negotiations for the 2014 TA and the 2015 MOA and is signatory to both agreements. In his affidavit, he further states that during the negotiations for each of those agreements, the parties did not bargain over or reach any new, separate, or independent agreement with respect to the agency shop provision.

The 2015 MOA was entered into on the same day as a tentative agreement addressing certain issues affecting terms and conditions of employment and adopting the provisions of the last expired agreement. The 2015 tentative agreement (2015 TA) provided for a "1% on schedule payment" to employees at steps 10 and above. It also provided that $700,000 would be credited to the "Revenue Share Formula" entered into in the June 14, 2010 agreement.[3] The 2015 TA also provided for full step advancement credited in the 2015-2016 school year with compensation all year at 50% of the increase and reinstatement of educational lanes for the 2015-2016 school year. It further provided that if there was no successor agreement for the 2016-2017 school year, $1,100,000 would be credited to the "Revenue Share Formula." Additionally, $2 million for paid healthcare benefits would be credited to the "Revenue Share Formula." The 2015 TA also included provisions regarding disposition of a grievance regarding caseloads, the amount of time designated for certain meetings, and the beginning and ending times for the 2015-2016 school year.

Charging Party Cory J. Merante

Charging Party Cory J. Merante began working for the Ann Arbor Public Schools in 2000. In 2006, he began working as a teacher and joined the AAEA, the MEA, and the NEA. He resigned his membership in August 2015. On December 18, 2015, the MEA wrote to Merante demanding that he pay service fees for the 2015-2016 academic year. Merante responded by sending a service fee election form and a check for $232.49 to the AAEA. The December 18, 2015 letter did not threaten that Merante's employment would be jeopardized if he did not comply with the demand for payment of the service fee.

In the attachment to the charge filed on behalf of Cory J. Merante on February 17, 2016, Charging Party states:

> By its terms, the Freedom to Work law does not apply to any agreement entered into on or before March 28, 2013. Instead, it becomes effective to any agreement, contract, understanding or practice that takes effect or is renewed or extended after March 28, 2013. See PERA § 10(5).
>
> On or around March 18, 2013, AAEA and the District entered into a Tentative Memorandum of Agreement that was subsequently ratified by AAEA and the district ("2013 MOA"). The 2013 MOA included specific language requiring teachers to pay dues/fees to Respondent as a condition of public employment until June 30, 2016. *Because the new Freedom to Work law was not effective until March 28, 2013, the Freedom to Work law would not apply, until the 2013 MOA expired, or was renewed, or extended,* or a new agreement, contract, understanding or practice took effect after March 28, 2013, whichever first occurred (emphasis added).

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[3] The 2010 agreement setting out the "Revenue Share Formula" provided for a 25% employer/75% employee division of any increase in general fund equity greater than 10%. The employee share was to be applied to the salary schedule or to be used to increase the employer's contribution to health insurance, off scale payments, or contributions to tax-deferred accounts.

Charging Party Jeffrey L. Finnan

Charging Party Jeffrey L. Finnan became employed by the Ann Arbor Public Schools in the bargaining unit represented by Respondent in 2010. He became a member of the AAEA and its affiliated organizations, the MEA and the NEA sometime thereafter. He resigned his membership in the AAEA, the MEA, and the NEA on August 24, 2014.

On December 12, 2014, the AAEA sent a letter to Finnan demanding that he pay a service fee of $592.05 for the 2014-2015 school year. Like Merante, Finnan responded by sending a service fee election form and a check for $236.82 to the AAEA. The AAEA sent monthly invoices to Finnan from February 2015 until August 2015. Finnan responded by paying the AAEA the invoiced amounts. On November 13, 2015, Finnan filed an unfair labor practice charge in this matter.

On December 18, 2015, the MEA wrote to Finnan asserting that he was required to pay service fees for the 2015-2016 academic year. Finnan responded by again executing a service fee election form and paying $232.49 on or about January 19, 2016. Neither the December 12, 2014 letter nor the December 18, 2015 letter threatened that Finnan's employment would be in jeopardy if he did not comply with the demand for payment of the service fee.

On December 11, 2015, Charging Party's More Definite Statement of the Charge was filed in Case No. CU15 K-040 on behalf of Jeffrey L Finnan. In that document, Charging Party refers to the December 12, 2014 letter sent by Respondent to Finnan and states:

> The AAEA's letter ended by noting that "[f]ailure to deliver or mail (postmarked)… a check or money order… by January 12, 2015, will result in you being required to pay a service fee equal to association dues less the pro rata cost of liability insurance; you will not be eligible for the reduced fee," *but did not threaten his discharge if Mr. Finnan refused to pay a service fee* for the 2014-15 school year, because collection of the fee, according to the 2013 MOA, was "within the exclusive province of the Association," not the District (emphasis added).

Charging Party's More Definite Statement at pg. 3.

With minor changes, the above quoted language that is contained in the attachment to Charging Party Merante's charge is also included in the attachments to Finnan's amended charge and second amended charge.

Discussion and Conclusions of Law:

The 2013 MOA

Respondent contends that the 2013 MOA is lawful because the agreement was entered into prior to the effective date of Act 349. Respondent bases this contention on its interpretation of § 10(5) of PERA.

In its response to Charging Parties' cross exceptions, Respondent also notes that Charging Parties explicitly stated that Charging Parties were not arguing that the 2013 MOA was invalid. It appears that Charging Parties agree with that given the statements made in the attachment to Merante's charge, the attachment to Finnan's amended charge and the attachment to Finnan's second amended charge. As noted above, in each of these documents, Merante or Finnan states, in the attachment to a charge or amended charge filed on his behalf, "*Because the new Freedom to Work law was not effective until March 28, 2013, the Freedom to Work law would not apply, until the 2013 MOA expired, or was renewed, or extended,* or a new agreement, contract, understanding or practice took effect after March 28, 2013, whichever first occurred" (emphasis added).

According to Respondent, § 10(5) of PERA makes lawful any union security agreement that was in effect prior to the effective date of Act 349. This assertion is contrary to the Court of Appeals decision in *Taylor Sch Dist v Rhatigan,* 318 Mich App 617 (2017).[4] There, the Court majority held that § 10(5) only applies to union security agreements that violate § 10(3). Respondent contends that such a reading of § 10(5) renders it meaningless.

Respondents Contention That the *Taylor* Court's Reading of § 10(5) Renders It Meaningless

Section 10(5) of PERA states:

> 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.

As noted above, in *Taylor Sch Dist v Rhatigan,* 318 Mich App 617 (2017), the Court of Appeals concluded that § 10(5) only applies to agreements that violate § 10(3). In analyzing the second sentence of § 10(5), the *Taylor* majority explained, "'This subsection' is MCL 423.210(5), which by its terms expressly applies only to agreements that violate subsection (3) of section 10, MCL 423.210(3)." *Taylor Sch Dist* at 631. Noting that MERC did not find a violation of § 10(3), the Court stated:

[4] However, see footnote 6 regarding this issue.

> Moreover, the fact that the Legislature expressly restricted the applicability of that statutory limitation to agreements that violate MCL 423.210(3) speaks volumes. A judicial extension of that limitation to *all* agreements made before the effective date of 2012 PA 349 that violate *any* provision of PERA would contravene the plain language of the statute. *Id.* at 631-632.

Therefore, in enacting § 10(5) it is evident that the Legislature recognized it was likely that there were collective bargaining agreements in effect at the time of the adoption of Act 349 that would violate the newly enacted language of § 10(3). Apparently, the Legislature enacted § 10(5) to avoid invalidating collective bargaining agreement provisions that made payment of union service fees a condition of employment and that were adopted in reliance on § 10(2) of PERA as it was worded prior to the adoption of Act 349. Given the wording of § 10(2) at the time Act 349 was enacted, it appears that the Legislature wanted to allow the union security provisions that conditioned employment on payment of a union service fee in those pre-Act 349 collective bargaining agreements to be lawful until the agreed upon expiration date of those agreements.[5]

Section 10(5) provides that an agreement that violates § 10(3) and takes effect, is extended, or is renewed after March 28, 2013, is unlawful and unenforceable. Therefore, if an agreement requires a public employee "as a condition of continuing public employment," to "become or remain a member of a labor organization or… pay any dues, fees, assessments, or other charges, or expenses of any kind or amount," that agreement is unenforceable unless it took effect prior to March 28, 2013.

To determine whether the 2013 MOA is lawful pursuant to § 10(5), we must determine whether enforcement of the 2013 MOA would constitute a violation of § 10(3). That requires a closer look at the language of the 2013 MOA, which purports to make the Association Rights provision of the 2009-2011 Master Agreement effective for the period of March 18, 2013 through June 30, 2016. The 2013 MOA adopts the language of the Association Rights provision, with some additional language, and states in relevant part:

> 3.000 ASSOCIATION RIGHTS
>
> 3.100 Membership Fees and Payroll *Deductions*
>
> 3.110 Payroll *Deductions*, Membership or Representation Fees

[5] We note that we have encountered two kinds of union security agreements in cases involving Act 349. In some cases, the union security agreements have provided that if the employee fails to pay union dues or fees, the union can require the employer to initiate proceedings to terminate that employee's employment. See e.g. *Clarkston Cmty Sch*, 31 MPER 26 (2017), where we found that a union security agreement that was entered into by the union and employer after Act 349 became effective and authorized the employer to terminate the employment of employees who failed to pay union dues or fees was unlawful under § 10(3). In other cases, the union and the employer entered into the union security agreement before the effective date of Act 349, but the agreement did not violate § 10(3) because nothing in the union security agreement conditioned continued employment on payment of union dues or fees. That is the type of union security agreement present in this case and in *Michigan Ed Ass'n*, Case No. CU16 B-008, which is being issued concurrently with this decision.

3.111 Teachers shall either submit a membership form or shall be considered agency shop fee payers to Association.

3.112 Agency shop fees shall be determined by the Michigan Education Association in accordance with the law and Federal Court Decisions, and shall be reported by the Association as provided below. Any challenge by a bargaining unit member regarding the payment of service fees, or the amount thereof, shall be subject to the Association's internal appeal process for determining the appropriate fees and shall not involve the employer in any manner. The hold harmless provisions of Sections 3.11 5.1 through 3.11 5.4 are hereby specifically incorporated into this Section

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3.114 Payment of membership dues or financial responsibility fees shall be made in twenty (20) equal *deductions* beginning the second paycheck in September and continuing through the twentieth (20th) consecutive paycheck. Payroll *deductions* on one's assessments and for a teacher shall cease upon termination of said teacher's employment.

3.115.1 In the event of any action against the Board brought in a court or administrative agency because of its compliance with Section 3.110 of this agreement, including but not limited to any and all actions brought pursuant to Michigan's "Right to Work" legislation, MCL 423.209 and 423.210, the Association agrees to defend such action, at its own expense and through its own counsel …

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3.120 Remittance of *Deductions*

3.121 *The Board shall within ten (10) days after each deduction is made, remit to the Association the total amount deducted for that period, including dues, assessments and fees for the Association*, MEA, and NEA, accompanied by a list of teachers from whose salaries the deduction has been made.

3.122 The Board shall not be responsible for collecting any such dues, assessments, or fees not authorized to be deducted under Section 3.110

3.123 Notwithstanding any other provision of this Agreement, *in the event that Michigan law prohibits the employer from assisting in collecting dues or service fees from wages then the law will supersede any and all provisions to the contrary and collection of dues or service fees shall be within the exclusive province of the Association* without any further obligation/liabilities attributable to the employer (emphasis added).

It is clear from the wording of the Association Rights provision, as adopted by the 2013 MOA, that the provision is about the Employer's obligation to deduct union membership dues and agency fees from the paychecks of bargaining unit members. The Employer is only authorized to make those deductions if doing so is lawful. At the time that the parties agreed to the 2013 MOA, 2012 PA 53 (Act 53), § 10(1)(b) of PERA, had been enacted and public school employers were prohibited from deducting union dues or fees from employees' wages. Accordingly, to the extent that the Association Rights provision in the 2013 MOA requires the Employer to deduct dues or fees from public school employees' wages, § 10(1)(b) of PERA makes it unenforceable.

Section 10(3) of PERA prohibits requiring an individual to "become or remain a member of a labor organization or . . . [p]ay any dues, fees, assessments, or other charges, or expenses of any kind or amount," as a condition of obtaining or continuing public employment. The Association Rights provision categorizes those teachers who do not submit a membership form as "agency shop fee payers." It sets the means by which agency shop fees are determined and provides for payroll deduction of those fees unless the law prohibits the Employer from deducting such fees from employees' wages. Since the Employer is prohibited under Act 53 from deducting agency fees from employees' wages, it is up to the Union to collect any dues or fees to which it is entitled. The Association Rights provision does not provide any mechanism by which the Union is to collect dues or fees. Nothing in the Association Rights provision authorizes the Employer or the Union to take any action affecting the employment of a bargaining unit member who fails or refuses to pay union dues or fees. Therefore, the Association Rights provision does not make payment of dues or fees to the Union a condition of continued employment and is not a violation of § 10(3).

The language of the Association Rights provision in this case is very different from the union security language in the Commission's most recent decision regarding union security/agency shop provisions, *Clarkston Cmty Sch*, 31 MPER 26 (2017). In *Clarkston*, the union security language in the collective bargaining agreement specifically provided "Notification from the Association President of failure to pay the service fee will result in employment termination at the close of the school year." Therefore, a school employee who failed or refused to pay union dues or fees, while that union security clause was lawful, could have been discharged from employment with the Clarkston Community Schools. In *Clarkston*, we found that the union security provision at issue violated § 10(3) of PERA. There is no similar language in the collective bargaining agreement, the 2013 MOA, or in other documents submitted into the record of this case. If the union security provision at issue in *Clarkston* had been entered into before Act 349 was enacted, the second sentence of § 10(5) would have been applicable and the union security provision would have been lawful. It is, therefore, apparent that § 10(5) is not meaningless; the Legislature merely chose to limit its applicability to specific circumstances.[6]

[6] We recognize the incongruity of finding that a union security agreement entered into before the effective date of Act 349 that does not jeopardize employment is unlawful, when another union security agreement entered on the same date would be both lawful and enforceable because that agreement conditions continued employment on the payment of union dues or fees. However, on this issue, we are required to follow the opinion of the Court of Appeals majority in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017).

Respondents would have the Commission find that the 2013 MOA is lawful pursuant to § 10(5), because the 2013 MOA was adopted prior to March 28, 2013. However, § 10(5) specifically applies to agreements between a public employer and a labor organization or bargaining representative that were lawful when the agreements were entered into, but would now be unlawful under § 10(3) but for the Legislature's intention to allow such agreements to continue until their original expiration date. Regardless of the date that the MOA was entered into in this case, it does not violate § 10(3). Therefore, § 10(5) does not apply and does not render the 2013 MOA lawful.

<u>Differences between This Case and the *Taylor* Case</u>

Respondents point to the fact that in *Taylor Sch Dist v Rhatigan,* 318 Mich App 617 (2017), the Court majority concluded that the union breached its duty of fair representation under § 10(2)(a) and (c) and specifically noted that the union executed a 10-year union security agreement "almost contemporaneously with a CBA that included a 10% reduction in wages, suspension of pay increases, and other conditions that negatively impacted the wages and benefits of the teacher employees of the school district." *Taylor* at 642. Considering the circumstances, the Court majority found that it was reasonable for MERC to conclude the union breached its duty of fair representation by entering into the union security agreement to its own financial advantage though it would "essentially subvert and undermine the plain language and intent of state law in a manner that was reckless and indifferent to the interests of persons to whom it owed a duty of fair representation." *Taylor* at 642-643.

Respondent argues that there are significant factual differences between this case and the *Taylor* case. Clearly there are factual differences between this case and *Taylor*. In this case, the MOA containing the agency shop provision was for just over three years, not 10 years as in *Taylor.* Additionally, while there were changes to employees' wages, those changes are not as detrimental as the 10% wage reduction and suspension of pay increases in the *Taylor* case. Here employees were subjected to a 3% wage reduction for the 2013-2014 school year but continued to move up the salary schedule.

Respondent takes issue with the ALJ's finding that it acted to protect its financial interest at the expense of its members. We disagree with the ALJ's finding on that issue because there is no evidence in the record to support such a finding. There is no evidence that the changes to employees' wages in this case were the quid pro quo for the three-year agency shop provision. On the contrary, as discussed in our summary of the facts, there is evidence in the record that as early as 2010 and continuing at least through early 2013 the Employer was experiencing significant financial difficulties and that the wage reductions were bargained in that context.

Respondents further contend that contrary to the *Taylor* majority's finding regarding the intent of the respondents in that case, Respondents herein did not intend to limit their members' rights to refrain from financially supporting the union. Respondents point to the two affidavits signed by the Union's president, Linda Carter, and the Employer's deputy superintendent of human resources, David A. Comsa, in which they assert that they "intended to fully comply and faithfully act in accordance with *the law that was in effect the time they*

reached their agreement" (emphasis added). The former § 10(2) of PERA was in effect at the time they reached their agreement. At that time, that provision was merely days away from being repealed and replaced by the language of Act 349.

It is apparent that Respondent tried to prolong the applicability of the version of § 10(2) that was repealed by Act 349. However, Respondent's intent is immaterial. Act 349 does not contain a scienter requirement. As we said in *Clarkston Cmty Sch*, 31 MPER 26 (2017):

> 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.

In this case, Respondent did not attempt to require Charging Parties to pay service fees as a condition of continuing public employment. Nevertheless, it did attempt to require Charging Parties to pay service fees after Charging Parties had resigned their union membership and after Act 349 became effective.

Both parties have asserted that the union security agreement in the 2013 MOA is lawful, or was lawful prior to the adoption of the 2015 MOA, because the 2013 MOA was adopted before the effective date of Act 349. However, that fact does not determine whether Respondent committed an unfair labor practice. In *Taylor Sch Dist v Rhatigan,* 318 Mich App 617 (2017), the Court majority noted at page 630, footnote 5:

> Further, even if a contract is lawful when entered into, subsequent changes in law may render enforcement of that contract unlawful. See *Grand Rapids & I R Co v Cobbs & Mitchell*, 203 Mich 133, 142; 168 NW 961 (1918), quoting *L & NR R v Mottley*, 219 US 467; 31 S Ct 265; 55 L Ed 297 (1911) ("We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal, if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce."); see also *Gillette Comm'l Ops North Am & Subsidiaries v Dep't of Treas*, 312 Mich App 394, 414; 878 NW2d 891 (2015), quoting *Exxon Corp v Eagerton*, 462 US 176, 190; 103 S Ct 2296; 76 L Ed 2d 497 (1983).

Therefore, even if the union security agreement had been lawful when it was entered into months after the enactment of Act 349, its enforcement is not lawful after the effective date of Act 349.

Whether Respondent has committed an unfair labor practice does not depend on the lawfulness of the 2013 MOA. Instead, the question before us is whether enforcement of the 2013 MOA violated Charging Parties' § 9 rights. As the Court majority noted in *Taylor,* at 634-635*:*

> While respondents are correct that 2012 PA 349 was not in effect at the time the union security agreement was executed and ratified, we disagree with respondents' analysis of this issue. It is undisputed 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. MCL 423.209(1)(b) and (2)(a). And the charging parties' unfair labor practice charges in the lower tribunal challenged the *enforcement* of the union security agreement, asserting that its enforcement (after the effective date of 2012 PA 349) violated their newly existing rights under PERA.
>
> While respondents note that, under PERA, union security agreements such as the one in this case were lawful before March 28, 2013, the pivotal issue here is not so much the validity of the agreement itself, but rather whether its enforcement violated protected rights under PERA. Section 9 now clearly provides that the charging parties have the right to refrain from financially supporting a labor organization, and the enforcement of the union security agreement against the charging parties violates that protected right.

Therefore, the evidence in the record supports a finding that Respondent restrained or coerced Charging Parties in the exercise of their respective rights under § 9(1)(b) to refrain from financially supporting a labor organization. Accordingly, the ALJ was correct in concluding that Respondent violated § 10(2)(a) of PERA.

Act 349 had been in effect for almost two years when Respondent demanded that Charging Party Finnan pay agency fees to the Union on December 12, 2014 and almost three years when Respondent demanded that Charging Party Merante pay agency fees on December 18, 2015. Since March 28, 2013, Charging Parties have had the right under § 9 of PERA to refrain from financially supporting a labor organization unless they were covered by a lawful union security agreement or they willingly and knowingly waived their right to refrain from financially supporting that labor organization. Neither of those things occurred. Both Charging Parties ended their membership in the union and had no further obligation to pay union dues. In the absence of a lawful union security provision, Charging Parties had no obligation to pay agency fees and Respondents cannot legally require Charging Parties to pay such fees. Accordingly, by demanding that Charging Parties pay agency fees that neither of them owes, Respondents have unlawfully restrained or coerced Charging Parties in the exercise of their respective rights under § 9 of PERA to refrain from financially supporting a labor organization. By so doing, Respondent has violated § 10(2)(a) of PERA.

Charging Parties Cross Exceptions

In their cross exceptions, Charging Parties contend that the ALJ erred by declining to find that Respondent violated PERA by ratifying and maintaining the 2015 Memorandum of Agreement (MOA), by not recommending that the Commission order Respondent to cease and desist from ratifying and maintaining such agreements, and by not including such cease-and-desist language in the Notice to Employees. As noted above, in accordance with the Court of Appeals decision in *Taylor*, the validity of the agreement containing the union security provision is not the issue. The issue is whether Respondent attempted to enforce that agreement in a way that restrained or coerced Charging Parties in the exercise of their § 9 rights. The ALJ did not err by failing to find that the ratification or maintenance of the 2015 MOA was an unfair labor practice.

Charging Parties also assert that the ALJ erred by refusing to award civil fines against Respondent under § 9(3) of PERA for each of the times that Respondent demanded the payment of service fees after Act 349 took effect.

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.

As we explained in *Clarkston Cmty Sch*, 31 MPER 26 (2017), "the only sanction we can impose for a violation of § 9(2) is through finding a violation of § 10." Therefore, the ALJ did not err by failing to recommend the award of civil fines against Respondent under § 9(3) of PERA.

Charging Parties further allege that the ALJ erred by finding that Charging Parties did not allege that Respondent violated § 10(3) of PERA. Charging Parties cite as error the ALJ's finding that "Charging Parties have never claimed, nor does the record support a finding, that their continued status as public employees was in any way conditioned on their payment of fees to [AAEA]." Charging Parties further argue that by failing to find that Respondent violated § 10(3) he further erred by failing to recommend that we award civil fines under § 10(8) for the alleged violation of § 10(3).

Charging Parties' charges do not allege facts that are sufficient to establish a violation of § 10(3). As we explained above, § 10(3) prohibits requiring an individual to "[p]ay any dues, fees, assessments, or other charges, or expenses of any kind or amount," as a condition of obtaining or continuing public employment " That is, there is nothing in the facts alleged by Charging Parties to establish that the agency fees Respondent attempted to require Charging Parties to pay were to be paid as a condition of Charging Parties obtaining or continuing public employment. Nothing in the record indicates that Charging Parties' continued employment was conditioned on their payment of the agency fees. Indeed, Charging Party Finnan admitted that Respondent did not threaten to discharge him if he failed to pay the agency fees. Therefore, the ALJ did not err by failing to find that Respondent violated § 10(3). Accordingly, the ALJ's failure to recommend an award of civil fines under § 10(8) is not error.

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 agree with ALJ's conclusion that Respondent violated § 10(2)(a) of PERA. On that basis, we affirm the ALJ's decision as modified herein. Accordingly, we adopt the following Order.

ORDER

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

1. Restraining or coercing Jeffrey L. Finnan in the exercise of his right guaranteed by § 9 of PERA to refrain from contributing to the financial support of a labor organization by demanding that he pay them a service fee after he resigned his union membership.

2. Refund to and make whole Jeffrey L. Finnan for any payment made to the Ann Arbor Education Association in response to a demand for service fees from May 13, 2015, through the present, plus interest on these sums at the statutory rate of five percent per annum, computed quarterly.

3. Cease and desist from restraining or coercing Cory J. Merante in the exercise of his right guaranteed by § 9 of PERA to refrain from contributing to the financial support of a labor organization by demanding that he pay them a service fee after he resigned his union membership.

4. Refund to and make whole Cory J. Merante for any payment made to the Ann Arbor Education Association in response to a demand for service fees from August 11, 2016, through the present, plus interest on these sums at the statutory rate of five percent per annum, computed quarterly.

5. Post the attached notice to members in all places on the premises of the Ann Arbor Public Schools where notices to bargaining unit members are customarily posted for a period of 30 consecutive days or, in the alternative,

mail copies of this notice to all unit members within 30 days of the date of this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: April 13, 2018

NOTICE TO EMPLOYEES

UPON THE FILING OF UNFAIR LABOR PRACTICE CHARGES BY JEFFREY L. FINNAN AND CORY J. MERANTE, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **ANN ARBOR 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 THE MEMBERS OF OUR BARGAINING UNIT THAT:

WE WILL NOT restrain or coerce Jeffrey L. Finnan in the exercise of his right guaranteed by § 9 of PERA to refrain from contributing to the financial support of a labor organization after Finnan resigned his union membership.

WE WILL NOT restrain or coerce Cory J. Merante in the exercise of his right guaranteed by § 9 of PERA to refrain from contributing to the financial support of a labor organization after Merante resigned his union membership

WE WILL Refund to and make whole Jeffrey L. Finnan for any payment made to the Ann Arbor Education Association in response to a demand for service fees from May 13, 2015, through the present, plus interest on these sums at the statutory rate of five percent per annum, computed quarterly.

WE WILL Refund to and make whole Cory J. Merante for any payment made to the Ann Arbor Education Association in response to a demand for service fees from August 11, 2016, through the present, plus interest on these sums at the statutory rate of five percent per annum, computed quarterly.

ANN ARBOR EDUCATION ASSOCIATION

By: ___________________________

Title: __________________________

If this notice is not mailed to members, it must remain posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice 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.
Case No. CU15 K-040 and Case No. CU16 B-006

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

ANN ARBOR EDUCATION ASSOCIATION,
Labor Organization-Respondent,
Case No. CU15 K-040/Docket No. 15-059636-MERC,
Case No. CU16 B-006/Docket No. 16-003639-MERC,

-and-

JEFFREY L. FINNAN,
An Individual-Charging Party in Case No. CU15 K-040/Docket No. 15-059636-MERC,

-and-

CORY J. MERANTE,
An Individual-Charging Party in Case No. CU16 B-006/Docket No. 16-003639-MERC.

____/

APPEARANCES:

White Schneider PC, by Jeffrey S. Donahue, for the Respondent

National Right to Work Legal Defense Foundation, by John N. Raudabaugh, Milton L. Chappell and Jeff D. Jennings, for the Charging Parties

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the above captioned cases were assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission). The charges were consolidated under Rule 164 of the Commission's General Rules, R 423.164.

Unfair Labor Practice Charges and Procedural Background:

On November 13, 2015, Charging Party Jeffrey L. Finnan, a teacher employed by Ann Arbor Public Schools (District), filed an unfair labor practice charge, Case No. CU15 K-040/Docket No. 15-059636-MERC, against his collective bargaining representative, the Ann Arbor Education Association (Association). On November 20, 2015, I directed Finnan to file a More Definite Statement. A response to that directive was received on December 11, 2015;

subsequently a First Amended Charge was received on December 18, 2015, incorporating the allegations as set forth in the December 11, 2015, filing.

On February 11, 2016, Finnan's fellow teacher, Charging Party Cory J. Merante, filed his own unfair labor practice charge, Case No. CU16 B-006/Docket No. 16-003639-MERC, against the Association. Charging Party Finnan filed a Second Amended Charge on February 12, 2016. The charges were thereafter consolidated.

Both charges challenge the Association's repeated attempts to collect dues and/or service fees from Charging Parties under the State's "Freedom to Work" laws after both teachers had resigned their union membership. Charging Parties allege that the Association's conduct violated various subsections of Section 9, Section 10 and Section 16 of PERA.

Following a pre-hearing telephone conference with the parties it was quickly determined that there were no material facts in dispute and that the charges could be resolved through cross-motions for summary disposition. The parties agreed to a briefing schedule. The Association's Motion for Summary Disposition was filed on March 4, 2016. Charging Parties' Cross-Motion for Summary Disposition was filed on March 25, 2016. The Association filed its opposition to Charging Parties' Cross-Motion on April 29, 2016; Charging Parties filed their briefs in opposition on May 12, 2016.

Oral argument took place before the undersigned on May 19, 2016, in Detroit, Michigan. Charging Parties and the Association both filed timely post-hearing supplemental briefs in early to mid-July 2016.

On December 21, 2016, Charging Parties requested leave to file the Court of Appeals recently unpublished decision in *Taylor School District v Rhatigan*, Docket No. 326128 (December 13, 2016) as a supplemental authority along with a brief letter outlining how the decision could influence the outcome in the present proceedings. I granted Charging Parties' request and received their supplemental filings on January 13, 2017. The Association filed its response on January 17, 2017.

<u>Public Act 349 of 2012</u>:

In December of 2012, the legislature adopted and the Governor signed Public Act 349 (PA 349), known as "Right to Work" or "Freedom to Work." PA 349 amended PERA and among other things essentially abolished union security clauses in the public sector.[7] The Legislature did not vote to give PA 349 immediate effect and therefore the statute could not become effective until March 28, 2013.[8]

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[7] At the same time as PA 349 was enacted, Public Act 348 of 2012, its sister bill impacting the private sector in the same fashion was also made law.

[8] Under Article 4, § 27, of the Michigan Constitution of 1963, an act may not take effect until the expiration of 90 days from the end of the session at which it was passed, unless given immediate effect to acts by a two-thirds vote of both legislative houses.

PA 349 amended several sections of PERA, including Sections 1, 9, 10, 14, and 15. Under Section 9, PA 349 added subdivision (b) to subsection 9(1), which expressly granted public employees the right to refrain from union activity. The Act further amended Section 9 to add subsections (2) and (3). Subsection (2) states:

> 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).

Newly added subsection (3) provides that any person that violates subsection (2) is liable for a civil fine of up to $500.

PA 349 went on to amend section 10(3) of PERA to prohibit any individual from being required as a condition of obtaining or continuing public employment to: (1) refrain or resign from membership in, affiliation with, or financial support of a union; (2) become or remain a member of a union; (3) pay any dues, or fees to a union; or (4) pay a charitable organization or third party an amount in lieu of union dues or fees. Similar to Section 9(3) above, under Section 10(8), any person, employer, or labor organization that violated Section 10(3) would be liable for a civil fine of up to $500.

The only grandfather clause included within PA 349 was contained in Section 10(5), and provided:

> 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 the effective date of the amendatory act that added this subsection.

<u>Factual Background</u>:

The following factual background is not in dispute and is derived from the parties' filings and the transcript of the oral argument.

The Association and the District are signatories to a collective bargaining agreement dated 2009-2011 and entitled "Master Agreement between the Ann Arbor Board of Education and the Ann Arbor Education Association. The agreement was, by its express terms, to expire on August 30, 2011. Section 3.000 of that Agreement, titled "Association Rights", provided in the relevant part the following:

> 3.111 Teachers shall either submit a membership form or shall be considered agency shop fee payers to [the] Association.
>
> 3.112 Agency shop fees shall be determined by the Michigan Education Association in accordance with the law and Federal Court Decisions, and shall be reported by the Association as provided below.
>
> ***
>
> 3.114 Payment of membership dues or financial responsibility fees shall be made in twenty (20) equal deductions beginning the second paycheck in September and continuing through the twentieth (20th) consecutive paycheck. Payroll deductions on one's assessments and for a teacher shall cease upon termination of said teacher's employment.
>
> 3.115.1 In the event of any action against the Board brought in a court or administrative agency because of its compliance with Section 3.110 of this agreement, the Association agrees to defend such action, at its own expense and though its own counsel …
>
> ***
>
> 3.121 The Board shall within ten (10) days after each deduction is made, remit to the Association the total amount deducted for that period, including dues, assessments and fees for the Association, MEA, and NEA, accompanied by a list of teachers from whose salaries the deduction has been made.

On or around June 14, 2010, the parties entered into an agreement that extended the 2009-2011 agreement for several more years.[9] That extension agreement made several changes to the 2009-2011 agreement but did not alter the above cited sections of Article 3.000.

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[9] That tentative agreement did not contain an express durational clause, and instead stated that the term "duration of agreement" referred to June 30 of some future year where a certain revenue goal was met.

On March 18, 2013, the Association and the District entered into a Memorandum of Agreement (2013 MOA), which provided in relevant part:

> 1. The parties agree that the AAEA will take a 3 percent salary reduction for the 2013-2014 school year. All teachers will continue to move up the salary schedule.
>
> * * *
>
> 4. The parties agree to the 3.00 Association Rights amendments. If the parties ratify this memorandum of agreement on or before March 27, 2013, Article 3.00 shall be effective immediately upon ratification of the agreement by both parties and shall continue in effect through June 30, 2016.
>
> * * *
>
> 7. This memorandum does not supersede or replace the agreement between the AAEA and AAPS [District] entered into on or about June 14, 2010.

Attached to that agreement was an amended Section 3.100, inclusive of the sections identified herein above from the 2009-2011 agreement. Section 3.115.1, was amended to account for the recent passage of PA 349, and stated:

> In the event of any action against the Board brought in a court or administrative agency because of its compliance with Section 3.110 of this agreement, including but not limited to any and all actions brought pursuant to Michigan's "Right to Work" legislation, MCL 423.209 and 423.210, the Association agrees to defend such action, at its own expense and though its own counsel …

The amendments to Article 3.000, also included the addition of Article 3.140, which provided:

> If the parties ratify this memorandum of agreement on or before March 27, 2013, this Section 3.100 "Membership Fees and Payroll Deductions," and subsections through 3.140, shall be effective immediately upon ratification of the agreement by both Parties and shall continue in effect through June 30, 2016.

On June 20, 2014, the Association and the District executed another agreement (2014 MOA) which included the offering of a healthcare plan identified as the "MESSA ABC Plan" beginning on January 1, 2015. That agreement also set forth various other items relating to the 2014-2015 school year, which included but was not limited to, school calendar publishing no later than July 31, 2014, salary and wage step freezes and lane advancement at 50% of the prior salary schedule. The agreement did not address the Article 3.000 language from the 2013 agreement.

On August 11, 2015, the Association and the District executed three separate agreements (2015 MOA). The first provided for a successor agreement for the 2015-2016 school year and

included several economic items. The second agreement related to prohibited subjects of bargaining. The third agreement was entitled "Agency Shop" and provided:

> The parties agree that the Agency Shop Agreement, previously entered into, continues until June 30, 2016…

Charging Party Finnan

In 2010, Charging Finnan began working as a teacher with the District. Sometime thereafter Finnan became a member of the Association. On August 24, 2014, Finnan resigned his membership in the Association and its respective affiliates, the MEA and NEA.

On December 12, 2014, the Association sent Finnan a written demand for the service fee covering the 2014-2015 school year in the amount of $592.05. The letter did not threaten Finnan with termination or discharge if he chose not to comply with the demand. Finnan filled out a service fee election form and sent that along with a check for $236.82 to the Association. Finnan elected to pay the remaining balance of the service fee in monthly installments. The Association then sent invoices beginning in February 2015 until August 2015; Finnan responded by sending checks for the invoiced amounts to the Association. Finnan filed his unfair labor practice Charge on November 13, 2015.

On December 18, 2015, the MEA, on behalf the Association, sent another letter, similar to the one sent in December 2014, claiming that Finnan was obligated to pay service fees for the 2015-2016 school year. Once again, Finnan executed the service fee election form and paid $232.49 on or around January 19, 2016. Similar to the December 2014 demand letter, the 2015 letter did not threaten Finnan with termination or discharge if he chose not to comply with the demand.

Charging Party Merante

Charging Party Merante has been a teacher in the District and a member of the bargaining unit represented by the Association since 2006. Charging Party first became a member of the Association and its affiliates, the MEA and NEA, sometime in 2010 and remained a member until he resigned his membership in August of 2015.

On December 18, 2015, the MEA, on behalf the Association, sent Merante a written demand for the service fees for the 2015-2016 school year. Merante executed the service fee election form and paid $232.49. This demand letter did not threaten Merante with termination or discharge if he chose not to comply with the demand.

Discussion and Conclusions of Law:

Charging Party Finnan's initial filing and his First Amended Charge did not challenge the validity of the 2013 MOA and instead argued that the 2014 MOA acted as trigger for PA 349's applicability.[10] Charging Party Finnan claimed that the Association's repeated demands for service fee payments violated his rights under Section 9(1)(b), Section 9(2)(a), Section 10(2)(a) and (c), and Section 10(3) and (5) of PERA. Charging Party's Second Amended Charge included the Association's demand(s) for service fee payments since his charge was initially filed.

Charging Party Merante's unfair labor practice charge, while containing similar language regarding the validity of the 2013 MOA as Charging Party Finnan's charge, makes no mention of the 2014 MOA as a triggering event for PA 349 and instead relies on the 2015 MOA as the trigger. Presumably the difference between the charges regarding which MOA triggered PA 349 was based on the year in which each Charging Party resigned his membership; Finnan in 2014 and Merante in 2015.

Respondent argues first that the allegations set forth by Charging Party Finnan regarding the 2014 MOA is barred by the statute of limitations. Next it argues that the 2013 MOA, ratified and executed prior to PA 349's effective date, contains a valid and enforceable union security clause until June 30, 2016, and that neither the 2014 or 2015 agreements triggered the applicability of the PA 349.

Statute of Limitations

The Commission has consistently held that the six-month statute of limitations, contained within Section 16(a) of PERA, is jurisdictional and cannot be waived. *Walkerville Rural Comm Sch*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). Respondent claims that Charging Party Finnan's charge is untimely since he claims that the execution of the 2014 MOA triggered PA 349, yet his charge was not filled until November 13, 2015.

The preceding notwithstanding, the fact remains Finnan is not complaining of the 2014 MOA's execution, or any of the agreements for that matter, but rather he and Charging Party Merante are both claiming that the Association's execution of the 2014 MOA or 2015 MOA triggered the applicability of PA 349 and as such, the Association can no longer lawfully demand the payment of service fees. I find that each request or demand by the Association is a separate and distinct claim under PERA. As such, Respondent's motion to dismiss based on timeliness

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[10] Charging Party Finnan's First Amended Charge stated:

> Because the new Freedom to Work law was not effective until March 28, 2013, the 2013 MOA legally contained a "union security" provision to which the Freedom to Work law did not apply, and would not apply, until the 2013 MOA expires, or is renewed or extended after March 28, 2013, whichever first occurs.

grounds is hereby **DENIED** as to the demands for service fees that occurred within the six-month period immediately preceding the filing of each charge by Charging Parties.

Public Act 349

Since the passage of PA 349, the Commission, as well as various other State and Federal courts have all been presented with challenges to the law's enforceability, validity and interpretation. At the time that the record originally closed in the present proceeding, July 2016, the Commission had already issued its decision in *Taylor School District,* 28 MPER 66 (2015); both parties argued from that perspective. On December 13, 2016, the Court of Appeals issued its decision in *Taylor School District and Taylor Federation of Teachers, AFT, Local 1085 v Nancy Rhatigan, et al.*, Docket No. 326128, issued December 13, 2016, __ Mich App__. While the Court's decision in *Taylor School District* was initially unpublished, pursuant to a publication request filed by plaintiff's counsel on December 30, 2016, the Court ordered that the decision be published on February 9, 2017. As stated above, Charging Parties requested, and were granted the opportunity, to re-open the record following the issuance of the Court of Appeals' decision in *Taylor School District.*[11]

The Commission, in *Taylor School District,* was faced with claims brought by several individual teachers who challenged both the union's and employer's decisions to enter into a ten-year union security agreement. There, the union and school district executed two separate agreements, the first a five-year agreement that set forth most of the terms and conditions of employment for the unit with a ten percent (10%) wage reduction and other economic concessions to the district's benefit. The second agreement consisted of just a union security agreement with a ten-year duration.

The respondents in *Taylor* argued that under the grandfather language in Section 10(5) of PA 349, their security agreement was enforceable after PA 349's March 28, 2013, effective date. The Commission initially, in considering PA 349's effective date of March 28, 2013, and the Act's grandfather language, Section 10(5), held that, "when the Union and the Employer executed the Union Security Agreement, such agreements were still lawful."

Addressing the interplay between the two agreements, the Commission, citing *Ann Arbor Fire Fighters Assn,* 1990 MERC Lab Op 528, and *City of Taylor*, 23 MPER 33 (2010) (no exceptions), determined that the fact that the two separate agreements had differing expiration dates was "insufficient, by itself, to render the Union Security Agreement unenforceable or invalid." The Commission then held that the ten-year security clause nonetheless was excessive and unreasonable and stated:

> Charging Parties assert that the "sole purpose of the Union Security Agreement was to render PA 349 null and void." While that statement is somewhat hyperbolic, given that PA 349 is the law of this State and is neither null nor void, we do agree that Respondents action was intended to delay the application of PA 349 for ten years beyond its legislatively mandated effective date. In so doing,

[11] The matter is currently pending before the Michigan Supreme Court in Docket No. 155116.

> Respondents have effectively compelled unwilling unit members, in violation of § 9 of PERA, to financially support the Union for the next decade.
>
> What if the parties had signed a one-hundred-year contract? What if they had entered into a perpetual union security in an attempt to nullify the State's Right-to Work legislation? Would not such actions be void as a matter of public policy? Just as one legislature cannot bind subsequent legislatures, one school board cannot bind subsequent school boards. Where do we as a Commission draw the line where a union and a school district can enter into a long-term contract binding on subsequent parties? Is fifty years, twenty-five years, or fifteen years acceptable?

While the above statements regarding the agreement's duration could be read to signify that the Commission would be willing to set some acceptable durational limit, it did not, and instead turned to consider the practical effect of employer's actions. It therefore held:

> 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 Commission, in addition to finding a violation of 10(1)(a), also found a violation of 10(1)(c), by concluding that the employer had demonstrated hostility toward charging parties' protected rights by entering into a contract which compelled them to support the union.

The Commission concluded that the union's decision to enter into the security agreement not only violated its duty of fair representation, but that the union had attempted to cause the employer to unlawfully discriminate against employees. It stated:

> The Union acted arbitrarily, in a manner that discriminated against some bargaining unit members, and was indifferent to the interest 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. The Union asserts that it was acting in the interest of all members and supports that contention by noting that the majority of the membership ratified the agreement and was, therefore, satisfied with the Union's conduct. We disagree. Imposing a lengthy financial burden on bargaining unit members, in order to avoid the application of a state law for ten years, is arbitrary, indifferent and reckless.

The practical effect of the Commission's decision as set forth above was to order, among other things, that both the employer and the union cease and desist from violating the charging parties' Section 9 rights and that neither party enforce or attempt to enforce the ten-year union security agreement.

The Court of Appeals, in its decision in *Taylor School District,* first addressed the prospective/retrospective applicability of PA 349. The Court, in considering Section 10(5) of PA 349, noted that the subsection's last sentence "by its terms expressly applies only to agreements that violate subsection (3) of Section 10." The Court went on to state:

> However, MERC did not find a violation of MCL 423.210(3) in this case. The statutory limitation to agreements that take effect after the effective date of the statutory amendment is therefore not applicable here. Moreover, the fact that the Legislature expressly restricted the applicability of that statutory limitation to agreements that violate MCL 423.210(3) speaks volumes. A judicial extension of that limitation to *all* agreements made before the effective date of 2012 PA 349 that violate *any* provision of PERA would contravene the plain language of the statute. See *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 536; 669 NW2d 594 (2003) (noting that a proviso limiting the scope of a statute' s application must be interpreted according to its plain meaning). Thus, contrary to respondents' contention, the proscriptions of 2012 PA 349 (other than those in section 10(3)) do not apply *only* to contracts entered into after the effective date of the statutory amendment. [Emphasis in Original].

The Court went on to state:

> We need not decide in this case just how far that retrospective applicability extends, but at a minimum conclude, under the circumstances before us, that 2012 PA 349 properly applies to agreements entered into after the enactment of that statutory amendment but before its effective date. With that backdrop, and with the above conclusions in mind, we will proceed to assess MERC's conclusions regarding the unfair labor practice charges against respondents, and will consider the unfair labor practice charges in the context of respondents' actions—after the effective date of 2012 PA 349—to enforce the provisions of the union security agreement.

With respect to the claims against the employer under 10(1)(a) and (c), the Court affirmed the Commission's decisions as reasonable and sound under PERA. Addressing the 10(1)(a) claim, the Court stated:

> In the instant case, MERC concluded that the school district violated section 10(1)(a) of PERA "by coercing Charging Parties to financially support the Union." Respondents challenge this legal conclusion, stating that because the union security agreement was executed and ratified before the March 28, 2013 effective date of 2012 PA 349, the charging parties did not have a right protected pursuant to section 9 of PERA to be free of any obligation to financially support the union. While respondents are correct that 2012 PA 349 was not in effect at the time the union security agreement was executed and ratified, we disagree with respondents' analysis of this issue. It is undisputed 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. MCL 423.209(1)(b), (2)(a). And the charging parties' unfair labor practice charges in the lower tribunal challenged the enforcement of the union security agreement, asserting that its *enforcement* (after the effective date of 2012 PA 349) violated their newly existing rights under PERA. [Emphasis in Original].

The clear text of the Court's decision makes it is clear that a public employee's newly granted rights under Section 9(2) of PERA to be free of compulsory financial obligations in support of labor organizations became effective March 28, 2013, and that the enforcement of *any* security agreement, regardless of when it was executed, violates such right. The Court stated:

> While respondents note that, under PERA, union security agreements such as the one in this case were lawful before March 28, 2013, the pivotal issue here is not so much the validity of the agreement itself, but rather whether its enforcement violated protected rights under PERA. *Section 9 now clearly provides that the charging parties have the right to refrain from financially supporting a labor organization, and the enforcement of the union security agreement against the charging parties violates that protected right.* [Emphasis added].

Accordingly, any analysis that focuses on the validity of the 2013 MOA under PA 349, or whether either of the two subsequent agreements in 2014 and 2015 removed any protection available under Section 10(5), is not dispositive to these charges, as the Court clearly states the proper analysis is whether the attempted enforcement of a security agreement after March 28, 2013, violated Section 9(2) of PERA.

Moving on to the claim under Section 10(1)(c) of PERA, the Court, after a thorough analysis, stated that the:

> [S]chool district, by entering into the union security agreement, required, and essentially coerced, public employees to financially support a labor organization for a 10–year period in contravention of a state law protecting their rights to not do so. On this record, MERC reached a sound legal conclusion that, by doing so, the school district acted in a discriminatory manner that encouraged membership in the union.

Addressing the claim against the union, the Court, noting the proximity in time of the security agreement's execution with the passage of PA 349 and its effective date, and the execution of an agreement that included a significant wage reduction and suspension of pay increases, stated:

> Under these circumstances, we conclude that it was indeed reasonable for MERC to conclude that the union took deliberate action, in entering into the union security agreement to its own financial advantage, that would essentially subvert and undermine the plain language and intent of state law in a manner that was reckless and indifferent to the interests of persons to whom it owned a duty of fair representation. *Goolsby*, 419 Mich at 679, 358 NW2d 856. While respondents

> counter that the union had broad discretion to represent the bargaining unit, and that the union acted in a manner that protected the best interests of the bargaining unit as a whole in times of economic turmoil, *id.* at 665, 358 N.W.2d 856, MERC rejected this argument, impliedly concluding that the union acted to sustain and protect itself financially, and that it had not acted in accordance with its fiduciary duty to demonstrate "fidelity, of faith, of trust, and of confidence" to its members. *Goolsby*, 419 Mich at 662, 358 NW2d 856 (citation omitted). Under the circumstances of this case, and given the timeline of events leading up to the execution of the union security agreement under the wire of the effective date of 2012 PA 349, and the signing of a CBA that substantially negatively impacted union members, *id.* at 679, MERC's conclusion that the union's conduct rose to the level of arbitrary, discriminatory, and indifferent conduct in violation of its duty of fair representation found support in the record and was not based on a substantial and material error of law. *Calhoun Intermediate School Dist*, 314 Mich App at 46, 885 NW2d 310.

Respondent has argued throughout this proceeding that the Section 10(5) "grandfather clause" applies to any alleged violation of Section 10 and not just subsection (3). In addressing the Court's analysis of Section 10(5), Respondent states:

> The Court of Appeals has in essence read the grandfather clause in such a way to render it meaningless. To suggest that a party's contract is invalid under one section 3 of PERA, but valid under another section of PERA, is ludicrous. The Court of Appeals in essence states that as long as a charging party alleged a violation of Section 10(2)(a), (b), or (c), an agreement is invalid, but it would be valid and insulated from a charge brought under Section 10(3), makes no sense whatsoever when a successful allegation under Section 10(2) has the exact same effect as would an allegation under Section 10(3). Such a result renders the grandfather clause surplusage.

However, the Court is quite clear and explicit that the application of Section 10(5)'s grandfather language applies to Section 10(3) and that Section alone. The express text of Section 10(3) provides that "an individual shall not be required as a condition of *obtaining* or *continuing* public employment to do any of the following…" Charging Parties have never claimed, nor does the record support a finding, that their continued status as public employees was in any way conditioned on their payment of fees to the Association. Similarly, the Association agrees that its demands for service fees, while claiming to be made by authority of the 2013 MOA, did not threaten or challenge Charging Parties' continuation as public employees.

Respondent next argues that the Court's decision in *Taylor* is limited to the facts present therein, facts which it claims are distinguishable from the present proceedings. While the particulars of the facts are different, i.e., ten-year security agreement with a 10 percent (10%) wage reduction and suspension of pay increases compared to a three-year security agreement with a 3 percent (3%) salary reduction, I find that the practical effect is the same; both unions acted in a manner that sought to protect their own financial interests at the expense of their members. Similarly, the Association here, like respondents *Taylor,* recognized the intent of the

legislature's actions in enacting PA 349 and took steps that resulted in the attempted subversion and undermining of that intent.[12] With respect to the difference in lengths of the agreements, it does not appear from the Court's rationale that it considered the length of such subversion to be a deciding factor in affirming the Commission's decision.

Therefore, in accordance with Court's decision in *Taylor,* I find that the Association's attempts to collect service fee payments under the authority of the union security agreement contained in the 2013 MOA at any time after March 28, 2013, unlawfully restrained and/or coerced Charging Parties' exercise of their Section 9 right to be free from financial compulsion in violation of Section 10(2)(a) of PERA.[13] I have considered all other arguments as put forth by the parties and conclude there is no change in the outcome. I recommend, therefore, that the Commission issue the following order.[14]

RECOMMENDED ORDER

Respondent Ann Arbor Education Association, its officers, agents, and representatives, are hereby ordered to:

6. Cease and desist from interfering with, restraining or coercing Jeffrey L. Finnan in the exercise of his rights guaranteed by Section 9 of PERA to refrain from contributing to the financial support of a labor organization by any further demands that he pay a service fee.

7. Refund to and make whole Jeffrey L. Finnan for any payment made to the Association in response to a demand for service fees from May 13, 2015, through the present, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

8. Cease and desist from interfering with, restraining or coercing Cory J. Merante in the exercise of his rights guaranteed by Section 9 of PERA to refrain from contributing to the financial support of a labor organization by any further demands that he pay a service fee.

9. Refund to and make whole Cory J. Merante for any payment made to the Association in response to a demand for service fees from August 11, 2016, through the present, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

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[12] Section 3.115.1 of the 2013 MOA made specific reference to the "Right to Work" legislation.

[13] Pursuant to Section 16(a), this finding is limited to any demands for service fee payments by the Association occurring during the six-month period of time immediately preceding the filing of the charges by the respective Charging Party.

[14] Charging Parties request as relief that fines be assessed against Respondent pursuant to Section 9(3) and Section 10(8). However, the Commission has no independent statutory authority to remedy a violation of Section 9 rights, including the assessment of a "civil fine" outside of the unfair labor practices brought pursuant to Section 16 of the Act. Furthermore, the "civil fine" assessed under Section 10(8) applies to a violation of Section 10(3) and as explained previously Section 10(3) is inapplicable to the present proceedings.

10. Post the attached notice to members in all places on the premises of the Ann Arbor Public School where notices to bargaining unit members are customarily posted for a period of (30) consecutive days or, in the alternative, mail copies of this notice to all unit members within 30 days of the date of this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 30, 2017

NOTICE TO EMPLOYEES

UPON THE FILING OF UNFAIR LABOR PRACTICE CHARGES BY JEFFREY L. FINNAN AND CORY J. MERANTE, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **ANN ARBOR 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 THE MEMBERS OF OUR BARGAINING UNIT THAT:

WE WILL Cease and desist from interfering with, restraining or coercing Jeffrey L. Finnan in the exercise of his rights guaranteed by Section 9 of PERA to refrain from contributing to the financial support of a labor organization by any further demands that he pay a service fee.

WE WILL Cease and desist from interfering with, restraining or coercing Cory J. Merante in the exercise of his rights guaranteed by Section 9 of PERA to refrain from contributing to the financial support of a labor organization by any further demands that he pay a service fee.

WE WILL Refund to and make whole Jeffrey L. Finnan for any payment made to the Association in response to a demand for service fees from May 13, 2015, through the present, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

WE WILL Refund to and make whole Cory J. Merante for any payment made to the Association in response to a demand for service fees from August 11, 2016, through the present, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

ANN ARBOR EDUCATION ASSOCIATION

By: ___________________________

Title: __________________________

If this notice is not mailed to members, it must remain posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice 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.

Case No. CU15 K-040/Docket No. 15-059636-MERC and Case No. CU16 B-006/Docket No. 16-003639-MERC,