STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION (MEA), and
its agent, MICHIGAN EDUCATION SUPPORT SERVICES ASSOCIATION (MESSA),
Labor Organization-Respondent in Case No. CU03 B-013
Incumbent Labor Organization in Case No. R02 L-166,

-and-

MACKINAW CITY PUBLIC SCHOOLS,
Public Employer-Charging Party in Case No. CU03 B-013
Employer in Case No. R02 L-166,

-and-

BARBARA GRAVER,
An Individual-Petitioner in Case No. R02 L-166.
____/

APPEARANCES:

Arthur R. Przybylowicz, Esq., General Counsel, for the Michigan Education Association

White, Schneider, Young & Chiodini, P.C., by Karen Bush Schneider, Esq., for the Michigan Education Support Services Association

David W. Hershey, Esq., Labor Relations Consultant, Michigan Association of School Boards, for the Mackinaw City Public Schools

Barbara Graver, In Propria Persona

DECISION AND ORDER

On November 2, 2004, Administrative Law Judge Julia Stern issued her Decision and Recommended Order in the above entitled cases, finding that the Respondents Michigan Education Association (MEA), and the Michigan Educational Support Services Association (MESSA) as its agent, unlawfully coerced employees in the exercise of their Section 9 rights, thereby violating Section 10(3) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(3). In addition, she found that the objections to election filed by the Employer in Case No. R02 L-166 pursuant to Section 12(1) of PERA had merit and recommended that the Commission order a rerun election.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On December 10, and December 13, 2004, Respondents MEA and MESSA respectively, filed timely exceptions to the ALJ's Decision and Recommended Order. On January 3, 2005, the Employer filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, the MEA asserts that MESSA's disaffiliation policy reflects the lawful exercise of business judgment by MESSA concerning its long-term best operational interests and consequently the ALJ erred in finding it unlawful. The MEA further maintains that its actions in truthfully advising bargaining unit members of the policy prior to the election did not coerce employees in the exercise of their Section 9 rights or upset the laboratory conditions for the election by interfering with employees' free choice of a bargaining representative.

MESSA's exceptions challenge the ALJ's decision on similar grounds. In addition, MESSA argues that the ALJ's decision ignores the Commission's longstanding precedent that it will not inquire into, or interfere with, a labor organization's internal structure and business affairs. MESSA has the right to determine what products and services it will provide and to whom they will be made available. As discussed below, we find that Respondents' exceptions have merit.

Facts:

The parties stipulated to the facts in this matter, which are detailed below and summarized as necessary. The Northern Michigan Education Association, MESPA, an affiliate of the MEA, represents a bargaining unit composed of "all full-time and regularly scheduled part-time aides, food services, secretarial, custodial/maintenance and bus drivers." The collective bargaining agreement between the MEA and the Employer expired on or about August 31, 2002. On December 6, 2002, Barbara Graver, an employee of the Mackinaw City Public Schools, filed the petition in Case No. R02 L-166 seeking to decertify the MEA as the bargaining agent for this unit.

The MEA represents two bargaining units of the Employer's employees, a bargaining unit of teachers and the unit covered by the decertification petition. At all times relevant hereto, the unit covered by the petition had eight members.

MESSA is a Voluntary Employee Benefit Association trust fund (VEBA) established under the United States Internal Revenue Code. The MEA and MESSA are associated organizations. MESSA was expressly created for and operates to provide health insurance programs to eligible employees of an educational agency in conjunction with MEA's labor representative status and services. MESSA and the MEA have interlocking boards of directors and share certain operations. The MEA's board is comprised entirely of MEA members. Currently a majority of MESSA's board is comprised of MEA members.

The disaffiliation policy at issue in this case is found at Article I, Section 1(c) of MESSA's bylaws, which were adopted by MESSA's Board of Directors on or about October 11, 2002. The policy states that:

> MESSA benefits will be terminated at the end of the last month benefits are provided under the contract between the employer and the local MEA collective bargaining unit for all employees of the collective bargaining unit, upon the election of a bargaining unit to disaffiliate or decertify from MEA or a local unit thereof.

According to Respondent, the disaffiliation policy was adopted by MESSA in furtherance of its association with the MEA and of its purpose to provide health and related employee benefit plans to MEA constituent members and other eligible school employees. Other eligible school employees are unrepresented employees, employees represented by other labor organizations, school administrators and board of education members employed by districts in which Respondent MEA maintains at least one bargaining unit. According to Respondent, the tie between the MEA and MESSA is advantageous to both because of the marketing/promotion/service the organizations provide to one another. The MEA and MESSA find it considerably more efficient and productive to market and administer MESSA plan benefits through the use of existing MEA communication links and personnel. According to Respondent, to the extent that MESSA has extended membership to non-MEA members, it has offered it to school employees whose interests are not antithetical to the MEA and its programs. Respondent maintains that to permit individuals who have disaffiliated from the MEA to remain eligible for MESSA benefits would be destructive to the MEA and MESSA through the undermining of the organizations' programs, membership and services, and would have a negative impact on MEA member morale.

On February 5, 2003, representatives of MEA and MESSA held a meeting with bargaining unit employees. Seven of the eight bargaining unit members were present for the meeting. At that meeting, MESSA Field Representative Carol Barrett spoke about the benefits employees received from MESSA. Barrett distributed a document entitled "MESSA Super Care and Super Med Offer You More," and discussed MESSA's outstanding coverage in such areas as LTD benefits, coverage in the event of layoff, and dependent care coverage. She also described MESSA's disaffiliation policy, explaining that in the event the unit voted to decertify, their eligibility for MESSA benefits would end pursuant to the policy. Barrett suggested that members of the bargaining unit send plan specifications to other insurance carriers to order to evaluate the comparability of available health coverage. She volunteered to assist the unit in drafting such a letter and exploring alternate coverage. Following Barrett's speech, a bargaining unit member spoke in support of retaining MEA membership. This meeting lasted approximately 30 minutes.

On February 18, 2003, the Employer filed an unfair labor practice charge against the MEA and MESSA, as its agent, alleging that Respondents violated Section 10(3) of PERA when the MESSA representative told employees at the February 5, 2003 meeting that if they voted to decertify the MEA, MESSA would discontinue the MESSA health insurance purchased by the Employer to cover members of the bargaining unit.

An election was subsequently conducted by mail ballot. On February 19, 2003, the ballots were counted and tallied by Commission agents. The vote was five to three in favor of retaining the Northern Michigan Education Association as the employees' bargaining agent. On February 20, 2003, the Employer filed objections to the election arguing that the statements made by the MESSA representative at the February 5, 2003 meeting destroyed the laboratory conditions necessary for a valid election.

Discussion and Conclusions of Law:

The ALJ found that MESSA's disaffiliation policy had no lawful business purpose and was primarily punitive. Accordingly, she concluded that Respondent unlawfully coerced employees in the exercise of their Section 9 rights by threatening to terminate employees' MESSA insurance pursuant to MESSA's unlawful disaffiliation policy if they decertified the MEA. In reaching her decision, the ALJ relied on *Lodge No 199 of District 12, IAM*, 235 NLRB 1491(1978), *aff'd Baltimore Rebuilders, Inc v NLRB*, 611 F2d 1372 (CA 4, 1979). Both Respondents assert that the ALJ misapplied the holding in that case. We agree.

In *Lodge No 199*, a union-sponsored pension plan required employees to forfeit past service credits if their employer stopped making contributions to the plan under certain circumstances, including decertification, but not others. Because the effect of the decertification vote was to cause the loss of all past service credit pursuant to the terms of the pension plan, it was alleged that the union restrained and coerced employees in the exercise of rights guaranteed in the Act and caused the employer to discriminate against employees by the unlawful maintenance and enforcement of that provision in the plan. Both the National Labor Relations Board (NLRB) and the Court of Appeals held that the forfeiture provisions were lawful. They found that the provisions served a legitimate business purpose of the pension fund, and that any impact on employee voting was indirect.

The appellate court in *Baltimore Rebuilders, Inc*, 611 F2d at 1378, stated the following:

> The Act is intended to insulate employees' rights to employment from the exercise of their organizational rights. *Radio Officers' Union v NLRB,* 347 US 17, 40 (1954), and to assure that when union membership or unit representation is elected it is done so by a process of free choice. Illegal are actions calculated to inhibit that process. *However, the creation of a benefit so valuable that predictably it will be elected by a free and rational choice does not violate the Act.* (Emphasis added.)

The court emphasized the fact that forfeiture of service credits could be caused by factors other than decertification; for example, the employer and union could agree to join another pension plan, or they could agree to eliminate pension benefits from their contract in favor of higher wages or other benefits. The court also stated that cancellation was only one of many factors involved in the collective decision to decertify and cannot dictate the outcome of that

vote, or intimidate an individual employee in the free exercise of his right to vote for or against the local's representation. *Id*. at 1379.

In comparing the facts of this case to those of *Lodge No 199*, we find many similarities. It is clear that under the disaffiliation policy the effect of a decertification vote would result in employees losing a valuable benefit. However, employees could lose that benefit in other ways, as suggested by the court in *Baltimore Rebuilders.* They could negotiate other health insurance with the Employer, or even eliminate it in favor of increasing other benefits. Although the potential loss of MESSA benefits may encourage employees to continue as members of the MEA, as found in the *Lodge No 199* cases, it is not *impermissible* encouragement, but an indirect side effect of offering such a valuable benefit. In *Local 357 Teamsters v NLRB*, 365 US 667**,** 675-676 (1961) the U.S. Supreme Court observed: "The truth is that the union is a service agency that probably encourages membership whenever it does its job well."

While it is true that MESSA makes its insurance available to certain groups of employees and not to others, we find this to be an internal union matter that is driven by legitimate business considerations. Contrary to the ALJ, we find that MESSA has delineated several lawful business purposes for its policy: the policy furthers its purpose in providing health and benefit plans to MEA constituent members and other eligible employees; it is more efficient and productive to market and administer MESSA plan benefits through the use of existing MEA communication links and personnel; and, in the case of unrepresented employees, the availability of MESSA benefits provides the MEA with organizational opportunities. In short, MEA/MESSA have chosen where best to utilize their resources.

We have long held that we have no jurisdiction to regulate the internal affairs of labor organizations or to monitor the quality of the services they render, absent some direct impact upon the employment relationship or evidence of a denial of rights under Section 9 of PERA. *Schoolcraft Cmty College,* 1996 MERC Lab Op 492; *Detroit Ass'n of Educational Office Employees,* 1984 MERC Lab Op 947; *MESPA (Alma Pub Sch Union*), 1981 MERC Lab Op 149. The availability of particular health insurance coverage is not fundamental to the employment relationship. We find that the effect of MESSA's disaffiliation policy is indirect at best; it does not cause the loss of employment or interfere with the employment relationship or Section 9 rights. The fact that MESSA chooses not to extend a particular benefit to certain employees simply means that these employees have one less option available for health insurance and must look elsewhere for coverage. An employer does not unlawfully discriminate because it does not negotiate identical benefits for all bargaining units or employees.

Since we find the disaffiliation policy to be lawful, we conclude that the Objections to Election must be dismissed. The record indicates that employees were simply informed in a non-coercive way that should they decertify, they would lose MESSA coverage. As found in *Lodge No 199,* 235 NLRB at 1499, a statement which fairly describes to employees what the consequences of a decertification action will be does not constitute a threat or an unlawful utterance.

Based on the above discussion, we issue the Order set forth below:

ORDER

It is hereby ordered that the charge in Case No. CU03 B-013 be dismissed. It is further ordered that the Objections to Election in Case No. R02 L-166 be dismissed, and that a certification of representative be issued, certifying the MEA as collective bargaining agent of employees in the unit set forth above.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____
Nora Lynch, Commission Chairman

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Nino Green, Commission Member

Dated: ____________________

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION (MEA), and
its agent, MICHIGAN EDUCATION SUPPORT SERVICES ASSOCIATION (MESSA),
Labor Organization-Respondent in Case No. CU03 B-013
Incumbent Labor Organization in Case No. R02 L-166,

-and-

MACKINAW CITY PUBLIC SCHOOLS,
Public Employer-Charging Party in Case No. CU03 B-013
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BARBARA GRAVER
An Individual-Petitioner in Case No. R02 L-166.
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APPEARANCES:

Arthur R. Przybylowicz, Esq., General Counsel, for the Michigan Education Association

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David W. Hershey, Esq., Labor Relations Consultant, Michigan Association of School Boards, for the Mackinaw City Public Schools

Barbara Graver, in pro per

DECISION AND RECOMMENDED ORDERS
ON UNFAIR LABOR PRACTICE CHARGE
AND OBJECTION TO ELECTION

This proceeding involves an unfair labor practice charge filed by the Mackinaw City Public Schools (the Employer) against the Michigan Education Association (MEA), and the Michigan Educational Support Services Association (MESSA) as its agent, pursuant to Section 10(3) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, and objections filed by the Employer to a decertification election conducted pursuant to Section 12(1) of PERA. These cases were consolidated and assigned to be heard by Julia C.

Stern, Administrative Law Judge for the Michigan Employment Relations Commission pursuant to Sections 12(2) and 16 of the Act. Based on the record, including a joint stipulation of facts filed by the parties on April 15, 2004, and briefs filed by the MEA, MESSA and the Employer on or before August 26, 2004, I make the following findings of fact and conclusions of law, and recommend that the Commission issue the following orders.

The Unfair Labor Practice Charge, Objections and Background:

The Northern Michigan Education Association, MESPA, an affiliate of the MEA, represents a bargaining unit of all full-time and regularly scheduled part-time aides, bus drivers, food service, secretarial and custodial/maintenance employees of the Employer. On December 6, 2002, Barbara Graver, an employee of the Mackinaw City Public Schools, filed the petition in Case No. R02 L-166 seeking to decertify the MEA as the bargaining agent for this unit. Petitioner, the Northern Michigan Education Association, and the Employer entered into a consent election agreement providing for an election by mail ballot, and ballots were mailed to employees on February 4, 2003. Ballots were to be returned to the Commission's offices by February 18, 2003. On February 19, 2003, the ballots were counted and tallied by Commission agents. Five votes were cast in favor of retaining the Northern Michigan Education Association as the employees' bargaining agent and three votes were cast in favor of decertification.

On February 18, 2003, the Employer filed an unfair labor practice charge against the MEA and MESSA as its agent. The charge alleged that Respondent violated Section 10(3) of PERA when a MESSA representative told employees that if they voted to decertify the MEA, MESSA would discontinue the MESSA health insurance purchased by the Employer to cover members of the bargaining unit. This statement was made in a meeting with members of the bargaining unit on February 5, 2003.

On February 20, 2003, Respondent refiled its unfair labor practice charge as an objection to conduct improperly affecting the election under R 423.149(b). The charge and the representation case were consolidated for hearing. On April 4, 2003, the MEA filed a motion for summary dismissal of the charge and objections. I denied the motion on April 29, 2003. Shortly before the scheduled hearing on June 5, 2003, the parties agreed to submit a stipulation of facts in lieu of hearing. As noted above, the parties did not submit this stipulation until April 15, 2004.

Facts:

The parties stipulated to the following relevant facts:

The Employer is a school district and a public school employer as defined in Sections 1(i) and (h) of PERA. MEA is a bargaining representative as defined in Section 1(a) of PERA. The MEA represents two bargaining units of the Employer's employees, a bargaining unit of teachers and the unit covered by the decertification petition. At all times relevant hereto, the unit covered by the petition had eight members.

MESSA is a Voluntary Employee Benefit Association trust fund (VEBA) established under the United States Internal Revenue Code. The MEA and MESSA are associated

organizations. MESSA was expressly created for and operates to provide health insurance programs to eligible employees of an educational agency in conjunction with MEA's labor representative status and services. MESSA and the MEA have interlocking boards of directors and share certain operations. The MEA's board is comprised entirely of MEA members. Currently a majority of MESSA's board is comprised of MEA members.

Eligibility for MESSA insurance benefits is described in Article I of MESSA's bylaws:

> Section 1. *Membership.* The following may become members of Michigan Education Special Services Association (hereinafter called "MESSA" in these bylaws) by paying contributions as prescribed under the appropriate program, if the person meets the underwriting requirements associated with the program:
>
> (a) Any Active, Associate, Service Associate, Retiree or Student member of Michigan Education Association (hereinafter called "MEA" in these bylaws) as defined in MEA's bylaws;
>
> (b) Any employee of MEA, MESSA, and Michigan Educators Financial Services Association, Inc., or any subsidiary of any of the foregoing;
>
> (c) Subject to the MESSA Disaffiliation Policy, any employee of an educational agency in which a local association of MEA is the recognized bargaining agent and has negotiated MESSA benefits for its members;
>
> (d) Any retirant eligible for benefits under Section 91 of The Public School Employees Retirement Act of 1979, being MCLA 38.1391, as amended.
>
> Any person who is a member of MESSA at termination of employment may continue membership in MESSA by paying contributions as prescribed under the appropriate program.

The "Disaffiliation Policy" referred to in Article I, Section 1(c) of MESSA's bylaws was adopted by MESSA's Board of Directors on or about October 11, 2002. It replaced a predecessor policy. The policy states:

> In consideration of the best long-term interest of the total MESSA membership, the MESSA Board of Trustees adopts the following policy concerning termination of MESSA benefits if a collective bargaining unit disaffiliates or decertifies from MEA or a local unit thereof.
>
> MESSA benefits will be terminated at the end of the last month benefits are provided under the contract between the employer and the local MEA collective bargaining unit for all employees of the collective bargaining unit, upon the election of a bargaining unit to disaffiliate or decertify from MEA or a local unit thereof.

Termination of benefits shall not apply to employees outside the bargaining unit which disaffiliates or decertifies from MEA or a local unit thereof.

According to Respondent, the disaffiliation policy was adopted by MESSA in furtherance of its association with MEA and of its purpose to provide health and related employee benefit plans to MEA constituent members and other eligible school employees. Other eligible school employees are unrepresented employees, employees represented by other labor organizations, school administrators and board of education members employed by districts in which Respondent MEA maintains at least one bargaining unit. According to Respondent, the tie between MEA and MESSA is advantageous to both because of the marketing/promotion/service the organizations provide to one another. MEA and MESSA find it considerably more efficient and productive to market and administer MESSA plan benefits through the use of existing MEA communication links and personnel. According to Respondent, to the extent that MESSA has extended membership to non-MEA members, it has offered it to school employees whose interests are not antithetical to MEA and its programs. Respondent maintains that to permit individuals who have disaffiliated from MEA to remain eligible for MESSA benefits would be destructive to MEA and MESSA through the undermining of the organizations' programs, membership and services, and would have a negative impact on MEA member morale.

The Employer has a group of unrepresented administrative and support employees who have been and are currently covered by a MESSA insurance plan. Employees in the teachers' bargaining unit represented by the MEA are also eligible for and receiving MESSA insurance benefits.

The collective bargaining agreement between the MEA and the Employer for the unit covered by the petition expired on or about August 31, 2002. As noted above, the decertification petition in this case was filed on December 6, 2002, and ballots were mailed to voters on February 4, 2003. Shortly after the filing of the decertification petition, MEA Uniserv Director Terry Cox discussed the decertification petition with Graver in a telephone call. Cox indicated that if all the members of the bargaining unit supported decertification, an election would not be necessary because MEA would voluntarily withdraw. Cox told Graver that taking such action would cause the employees to lose their MESSA insurance, and that they would need to find other insurance. Graver told Cox that everyone in the unit did not support decertification. Cox suggested that a membership meeting be held to discuss the impact of decertification. The meeting was scheduled for February 3. Because of a snowstorm, the meeting was rescheduled for February 5.

On or about February 4, 2003, Employer Superintendent Michael "Mick" Bootz, telephoned MESSA representative Carol Barrett and questioned her about the loss of MESSA coverage if the bargaining unit disaffiliated from the MEA. Barrett explained MESSA's disaffiliation policy.

On February 5, 2003, representatives of MEA and MESSA held a meeting with bargaining unit employees. Attendance at the meeting by bargaining unit members was voluntary. Seven of the eight bargaining unit members were present for the meeting. Cox began the meeting by stating that she had not come to talk employees into being MEA members. She

told them they should vote their conscience. Cox discussed the liability insurance that MEA's parent organization, the National Education Association (NEA), provides to all its members. Cox advised the employees that they should be aware of the possibility they might need to employ their own attorney, especially for corporal punishment charges that might arise. Cox also pointed out that the MEA provides information for paraprofessionals regarding the requirements of the federal No Child Left Behind Act. She suggested the local intermediate school district as an alternate source of information regarding these requirements. MESSA Field Representative Carol Barrett then spoke about the benefits employees received from MESSA. MESSA provides comprehensive health and related employee benefits plans known as Super Care and Super Med. Barrett distributed a document entitled "MESSA Super Care and Super Med Offer You More," and talked about MESSA's outstanding coverage in such areas as LTD benefits, coverage in the event of layoff, and dependent care coverage. She also described MESSA's disaffiliation policy. Barrett told employees that that in the event the unit voted to decertify, their eligibility for MESSA benefits would end pursuant to the policy. Barrett suggested that members of the bargaining unit send plan specifications to other insurance carriers to order to evaluate the comparability of available health coverage. She volunteered to assist the unit in drafting such a letter and exploring alternate coverage. Following Barrett's speech, a bargaining unit member spoke in support of retaining MEA membership. This meeting lasted approximately 30 minutes.

After the February 5 meeting, Superintendent Bootz "surveyed" the members of the bargaining unit. On February 13, 2003, Bootz wrote a letter to the Employer's Board of Education stating that members of the bargaining unit "had voted to withdraw from the MEA," but that after the threat of the loss of MESSA insurance had been conveyed to them, some of the employees "changed their vote."

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to organize together or to form, join or assist in labor organizations, to engage in other lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to negotiate or bargain collectively with their public employers through representatives of their own free choice. Section 10(3)(a)(i) of PERA prohibits a labor organization from coercing employees in the exercise of their rights under Section 9. Section 10(1)(c) of PERA, like Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 USC 157, prohibits employers from discriminating in regards to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization. Section 10(3)(b) of PERA and Section 8(b)(2) of the NLRA prohibit a labor organization from causing or attempting to cause an employer to discriminate against an employee in violation of Section 10(1)(c) or 8(a)(3). These provisions, read together, prohibit a union from causing an employer to discriminate with regard to terms and conditions of employment in order to encourage participation in union activities or encourage union membership. *Radio Officers' Union of Commercial Telegraphers v NLRB,* 347 US 17, 39-40 (1954). See also *AFSCME Local 345*¸ 1993 MERC Lab Op 743 (no exceptions).

The Employer alleges that Respondent's disaffiliation policy is unlawful because it discriminates against employees who have exercised their rights under Section 9 of PERA. The Employer argues that since Respondent has decided to provide benefits to unrepresented

employees of certain employers, it cannot lawfully discriminate against unrepresented employees of these same employers who have decertified or disaffiliated from the MEA.[1] The Employer also alleges that Respondent illegally threatened employees when it described this unlawful policy and its effects on employees at the February 5, 2003 membership meeting.[2]

None of the cases cited by the parties address the central issue here – whether a union that maintains a VEBA to provide insurance benefits to its members and selected other individuals may lawfully discriminate against former members who have decertified or disaffiliated from the union. However, I find instructive the National Labor Relations Board (NLRB)'s analysis of an allegedly discriminatory union benefit plan in *Lodge No 199 of District 12, IAM,* 235 NLRB 1491 (1978), *aff'd Baltimore Rebuilders, Inc v NLRB,* 611 F2d 1372 (CA 4, 1979) instructive. The issue in that case was whether the union, through a union-sponsored benefit plan to which employers contributed on their employees' behalf, unlawfully discriminated against employees who voted to decertify it as their bargaining representative by a provision in the plan that required employees to forfeit "past service credits" if their employer ceased making contributions to the plan under certain circumstances, including decertification, but not others.[3]

In *Lodge No 199,* the administrative law judge first noted that a union violates Section 8(b)(2) of the NLRA by maintaining a benefit plan with an allegedly discriminatory provision only if the plan causes an employer to discriminate against employees in violation of Section 8(a)(3) of that Act. As the judge noted, this requires that there be: (1) unpermitted "discrimination," and (2) a resulting unjustifiable encouragement or discouragement of union membership. The administration law judge, the NLRB, and the Court of Appeals ultimately concluded that the forfeiture provision was not discriminatory because it operated evenly against employees whose employers ceased making contributions to the plan because employees had decertified the union, and employees whose employers had ceased making contributions for other reasons.

In the instant case, employees may lose MESSA insurance benefits under MESSA's membership rules for reasons other than decertification or disaffiliation. Employees lose MESSA benefits if their employer ceases making contributions on their behalf. In addition, employees, including those not represented by a bargaining agent, become ineligible for MESSA benefits if their employer and MEA agree in collective bargaining for MEA-represented units to

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[1] Respondent has made a business judgment to offer MESSA benefits only to MEA members and individuals employed by an educational employer who has negotiated MESSA benefits in a collective bargaining agreement with the MEA. The Employer does not challenge the lawfulness of this decision. The Employer also does not contest MEA's right to restrict MESSA membership to MEA members and employees in bargaining units represented by the MEA.

[2] MEA is a labor organization as that term is defined in MCL 423.2 (g) and used in PERA. MESSA is not a labor organization within that definition, and, therefore, its actions do not come within the scope of PERA except when it acts as MEA's agent. In *St Clair Intermediate School District v MEA and MESSA,* 458 Mich 540 (1998), the Court affirmed the Commission's finding that MESSA was MEA's agent. Respondents do not dispute that Barrett was the MEA's agent when she spoke to the Employer's employees about MESSA benefits on February 5, 2003.

[3] The plan allowed employees to receive credit for time the employee had worked for a contributing employer before the employer became a participant in the pension fund. Under the terms of the plan, employees forfeited their past service credits when their employers ceased making contributions to the fund, except when this was due to the employer going out of business.

replace MESSA with another insurance carrier. Nevertheless, unlike the benefit plan provisions in *Lodge No 199,* MESSA's membership rules draw an explicit distinction between unrepresented employees who have decertified from the MEA and unrepresented employees of the same employer who have not. The rules also explicitly distinguish between former MEA members who have chosen, through disaffiliation, to sever their ties with the MEA, and employees of the same employer who are represented by unions presumably more friendly to the MEA. Because MESSA's disaffiliation policy explicitly discriminates against former MEA members in these ways, it encourages membership in particular labor organizations – the MEA and others that have not explicitly broken ties with it through disaffiliation. However, as the judge noted in *Lodge No 199, supra,* such encouragement is not unlawful unless it is unjustified. Therefore, MESSA's disaffiliation policy is not unlawful unless its purpose is to punish MEA members for decertifying or disaffiliating from the MEA.

Respondent's rationale for refusing to provide MESSA benefits to employees who have decertified or disaffiliated from the MEA while offering them to other nonrepresented employees of the same employer, and to employees represented by other labor organizations, is set out in the stipulation of facts:

> To the extent MESSA has extended membership to non-MEA members, it has offered it to school employees whose interests are not antithetical to MEA and its programs. MEA and MESSA deem that to permit individuals who have disaffiliated from MEA to remain eligible for MESSA benefits would be destructive to MEA and MESSA through the undermining of the organizations' programs, membership and services, and would have a negative impact on MEA member morale.

Respondent explains that it believes that MEA member morale would be undermined if it permitted employees that it presumes to be hostile to the MEA and its objectives to enjoy benefits hard-won in collective bargaining. It also asserts that it has made a business judgment that if employees who have made a deliberate decision to leave the MEA are allowed to be MESSA members, there is a likelihood that sometime in the future these employees will attempt to weaken the ties between MESSA and the MEA. Respondent claims that making MESSA benefits available to administrators and school board members promotes harmonious labor relations between employers and the MEA. According to Respondent, providing other unrepresented employees with MESSA benefits provides the MEA with organizational opportunities, and providing these benefits to employees currently represented by other labor organization fosters labor solidarity. It argues that these goals are not served by providing benefits to employees who have made a conscious decision to dissociate themselves from the MEA, and who can reasonably be presumed to be hostile to that organization and its programs and goals.

Only a few of the reasons Respondent gives for the disaffiliation policy bear any relationship to the interests of MESSA as a provider of insurance services. I find none of these reasons persuasive as a justification for the policy. Respondent asserts that extending MESSA membership to unrepresented administrators and school members with decision-making authority increases the likelihood that educational employers will agree to MESSA benefits in

the contracts they negotiate with the MEA. However, unrepresented employees and employees represented by other labor organizations who do not have this decision-making authority are also eligible for MESSA membership. These unrepresented employees also receive the advantages of benefits won by others in collective bargaining on the same basis as unrepresented employees formerly represented by or affiliated with the MEA. MESSA has a legitimate business interest in preserving its ties with the MEA. However, there are undoubtedly individual MESSA members even within bargaining units represented by the MEA who appreciate MESSA's services but oppose the general goals of the MEA and therefore might wish to sever the connections between them. It seems unlikely that providing benefits to a relatively small group of unrepresented employees – those who were previously represented by the MEA but have voted to decertify or disaffiliate – could seriously jeopardize the ties between the two organizations. Should these employees prove a real threat to the MESSA/MEA relationship, of course, Respondent could legitimately limit MESSA membership to employees in bargaining units currently represented by the MEA.

As noted above, even if one accepts Respondent's claim that employees who have decertified or disaffiliated are hostile to the MEA, I find it unlikely that providing benefits to this relatively small group of unrepresented employees could seriously affect the long-term relationship between the MEA and MESSA. Respondent has not explained in what other way providing MESSA insurance to these employees could undermine its programs, membership or services. I am also not convinced that allowing employers to buy MESSA insurance for employees who have decertified the MEA, in addition to their other unrepresented employees, could affect the morale of employees who remain MEA members.

I find no lawful purpose for MESSA's disaffiliation policy. As discussed above, I find that that MESSA's disaffiliation policy discriminates against employees who decertify from the MEA by treating them differently from other unrepresented employees of the same employer. I find that the disaffiliation policy also discriminates against employees who disaffiliate from the MEA by making them ineligible for benefits available to other employees represented by non-MEA unions. I conclude that, by applying this policy, Respondent violates Section 10(3)(b) of PERA because it unlawfully causes employers to discriminate in violation of Section 10(1)(c) of the Act.

Since the employees in the instant case did not vote to decertify or disaffiliate from the MEA, Respondent did not cancel their MESSA coverage. Thus, Respondent did not cause or attempt to cause the Employer to unlawfully discriminate against employees in violation of Section 10(3)(b) in this case. I find, however, that Respondent unlawfully coerced employees in the exercise of their Section 9 right to bargain though a representative of their own choice by threatening to terminate employees' MESSA insurance pursuant to MESSA's unlawful disaffiliation policy if they decertified the MEA.

I also find that the election should be set aside based on this unlawful threat. The Commission has adopted the NLRB's "laboratory conditions" standard for the conduct of elections. *Branch County Intermediate School Dist,* 2000 MERC Lab Op 18, 23-24; *Iosco County Medical Care Facility,* 1999 MERC Lab Op 299. See also *Ojibway Motor Hotel,* 1966 MERC Lab Op 17; *North Detroit General Hospital,* 1967 MERC Lab Op 79. Under this

standard, it is the Commission's duty to provide an atmosphere in which an election can be conducted under "conditions as nearly ideal as possible" so that the uninhibited desires of the employees in the proposed bargaining unit may be determined. *Huron Co Medical Care Facility,* 1998 MERC Lab Op 670, quoting *General Shoe Corp,* 77 NLRB 124 (1948). Respondent's unlawful threat to terminate the employees' MESSA health insurance benefits if they decertified occurred in close proximity to the election. I find that this threat interfered with employees' free choice of a bargaining representative, and that therefore the election should be rerun.

In accord with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following orders:

RECOMMENDED ORDER ON UNFAIR LABOR PRACTICE CHARGE

Respondent Michigan Education Association, its agent, the Michigan Education Support Services Association, and their officers and agents, are hereby ordered to:

1. Cease and desist from coercing its members in the exercise of their right to collectively bargain through a representative of their own free choice by threatening to terminate their MESSA insurance, pursuant to MESSA's unlawfully discriminatory membership rules, if the employees decertify the MEA.

2. Notify all members of the bargaining unit of full-time and regularly scheduled part-time aides, bus drivers, food service, secretarial and custodial/maintenance employees employed by the Mackinaw City Public Schools that they will not become ineligible for MESSA membership or MESSA insurance benefits in the event they decertify the MEA as the bargaining agent. Such notice shall be provided by individual letters sent to unit members at their current addresses provided by their employer within 14 days of the date of this order, but in no event less than 14 days before the conduct of a rerun election held pursuant to the attached direction of direction of election.

3. Provide the Mackinaw City Public Schools with a signed and dated copy of the attached notice to members for posting on its premises in places where notices to employees are customarily posted, for a period no longer than 30 consecutive days.

RECOMMENDED ORDER FOR RERUN ELECTION

It is hereby ordered that a rerun election be held in this matter at a time and date to be scheduled by the Bureau Director or the Commission or their agent. Eligible to vote will be employees employed during the period immediately prior to the issuance of his decision in the unit agreed to by the parties in their consent election agreement. As in the first election, the employees shall vote pursuant to the attached direction of election whether they wish to be represented by MEA-affiliate Northern Michigan Education Association, MESPA.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

Julia C. Stern
Administrative Law Judge

Dated: ______________

NOTICE TO MEMBERS

Upon a charge filed by the Mackinaw City Public Schools, and after opportunity for a public hearing, the Michigan Education Association (MEA), through its agent, the Michigan Education Support Services Association, (MESSA0, has been found by the Michigan Employment Relations Commission to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT coerce members in the exercise of their right to collectively bargain through a representative of their own free choice by threatening to terminate their MESSA insurance, pursuant to MESSA's unlawfully discriminatory membership rules, if the employees decertify the MEA.

WE WILL notify all members of the bargaining unit of full-time and regularly scheduled part-time aides, bus drivers, food service, secretarial and custodial/maintenance employees employed by the Mackinaw City Public Schools that they will not become ineligible for MESSA membership or MESSA insurance benefits in the event they decertify the MEA as the bargaining agent. We shall provide such notice by individual letters sent to unit members at their current addresses provided by their employer.

MICHIGAN EDUCATION ASSOCIATION

By: _________________________

Title: _________________________

Date: ___________

This notice is to be posted by the Mackinaw City Public Schools for period no longer than 30 consecutive days. The notice must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510