

***MERC TRAINING FOR LABOR & MANAGEMENT  
REPRESENTATIVES***

The Inn at St. Johns  
April 19, 2013

**RECENT MERC CASES<sup>1</sup>**

**(October 13, 2011 – February 28, 2013)**

D. Lynn Morison, Staff Attorney  
Bureau of Employment Relations  
Michigan Employment Relations Commission  
Telephone: (313) 456-3516  
[www.michigan.gov/merc](http://www.michigan.gov/merc)

---

<sup>1</sup> Appreciation is extended to Sidney McBride, Verna Miller, Iryna Sazonova, Simon Haileab, Emily Warren and Carl Wexel for their assistance with the preparation of these case summaries.

**TABLE OF CONTENTS**

- I. Unfair Labor Practice Charges Regarding the Duty to Bargain .....5
  - A. Permissive versus mandatory Subjects of Bargaining .....5
    - a. Oakland University Chapter, American Association of University Professors - and- Oakland University, .....5
    - b. University of Michigan –and– University of Michigan Skilled Trades Union, ..6
  - B. Maintenance of Status Quo after Contract Expiration – 2011 PA 54 .....8
    - a. Bedford Public Schools -and- Bedford Education Association, MEA/NEA .....8
    - b. Waverly Community Schools -and- Ingham County Education Assn/ Waverly Education Assn .....10
  - C. Past practice.....11
    - a. County of Wayne—and—Michigan AFSCME Council 25 and its Affiliated Locals 25, 101, 409, 1659,1862, 2057, 2926, and 3309 .....11
    - b. Southfield Public Schools –and- Michigan Educational Support Personnel Association (MESPA) –and- Educational Secretaries of Southfield, .....13
  - D. Transfer of bargaining unit work and subcontracting .....15
    - a. Pontiac School District -and- Pontiac Education Association, .....15
    - b. City of Detroit -and- American Federation of State, County and Municipal Employees (AFSCME), Local 207 .....16
    - c. Rochester Community Schools -and- American Federation of State, County and Municipal Employees (AFSCME), Council 25 and Its Affiliated Local 202.....17
    - d. Southfield Public Schools –and- Southfield Michigan Educational Support Personnel Association, .....19
  - E. MERC Subject Matter Jurisdiction .....20
    - a. City of Detroit -and- Detroit Police Officers Association, .....20
  - F. Good faith dispute over contract interpretation .....21
    - a. City of Pontiac and Teamsters Local 214 .....21
    - b. Blue Water Area Transportation Commission -and- Michigan AFSCME Council 25 and AFSCME Local 1518, .....22
    - c. City of Detroit (Police Department)—and—Detroit Police Lieutenants & Sergeants Association, .....23
    - d. City of Detroit -and- AFSCME Council 25, Local 542.....24
  - G. Direct Dealing .....25
    - a. West Bloomfield Township –and- Police Officers Association of Michigan (POAM) .....25

II. Unfair Labor Practice Charges Regarding Interference with or Discrimination for Protected Concerted Activity .....	26
A. Alleged Interference with protected concerted activity.....	26
a. Huron Valley Schools—and—Huron Valley Education Association, MEA/NEA. 26	
b. City of Inkster -and- Inkster Fire Fighters Union, Local 1577,.....	28
c. Police Officers Labor Council –and- Teamsters Local 214,.....	30
d. Macomb Academy –and- Macomb Academy Education Association, MEA/NEA, .....	31
e. AFSCME Local 3667, Riverview Firefighters Association –and- City of Riverview,.....	33
f. Southfield Public Schools –and- Southfield Michigan Educational Support Personnel Association,.....	33
B. Employee Rights and Employer Obligations under <i>NLRB v Weingarten</i> , 429 US 251 (1976) .....	34
a. City of Dearborn –and- Police Officer’s Association of Michigan.....	34
C. Duty of Fair Representation .....	35
a. Teamsters Local 214 -and- Denise Greer,.....	35
b. Detroit Police Officers Association -and- Robert Boroski, et al. ....	37
III. Procedural Issues.....	38
A. Waiver of Exceptions .....	38
a. City of Detroit -and- American Federation of State, County and Municipal Employees (AFSCME), Local 207 .....	38
B. Motion for Summary Disposition.....	39
a. City of Pontiac and Teamsters Local 214 .....	39
C. Standing – Motion to Intervene.....	40
a. Detroit Public Schools -and- Teamsters Local 214 –and- Denise Greer and 194 Members of Teamsters Local 214,.....	40
b. Detroit Public Schools -and- Teamsters Local 214 –and- Denise Greer and 194 Members of Teamsters Local 214,.....	41
D. Statute of Limitations .....	42
a. Traverse Area District Library -and- Margaret Kelly .....	42
b. City of Detroit -and- AFSCME Council 25, Local 542.....	42
c. Michigan State University Administrative Prof Assoc. -and- Danny Layne, .....	44
E. Intervention in Election Cases.....	45
a. University of Michigan –and – Graduate Employees Organization/AFT,.....	45

IV. Representation and Unit Placement .....	47
A. Act 312 Eligibility .....	47
a. Michigan State University (Police Department) -and- Capitol City Lodge No. 141, Fraternal Order of Police,.....	47
B. Supervisor Status .....	48
a. City of Warren -and- AFSCME Council 25 and its Affiliated Local 1971 –and- AFSCME Local 1250,.....	48
C. Executive Status .....	49
a. District Department of Health No.2 -and- Professional Management Association, 49	
b. City of Ishpeming -and- AFSCME Council 25, .....	51
D. Voter Eligibility in Representation Elections.....	52
a. Leelanau County and Leelanau County Sheriff -and- Teamsters Local 214 -and- Command Officers Association of Michigan .....	52
b. Leelanau County and Leelanau County Sheriff –and- Teamsters Local 214 – and- Command Officers Association of Michigan, .....	53

## I. Unfair Labor Practice Charges Regarding the Duty to Bargain

### A. Permissive versus mandatory Subjects of Bargaining

#### *a. Oakland University Chapter, American Association of University Professors -and- Oakland University,*

Court of Appeals No. 300680, issued February 9, 2012, unpublished, affirmed MERC Case No. C08 K-241, issued September 28, 2010, 23 MPER 86 (2010).

In an unpublished opinion, the Court of Appeals affirmed MERC's finding that the Employer committed an unfair labor practice by unilaterally repudiating a binding settlement between the Employer and the Union.

In 1999, the parties voluntarily entered into a settlement agreement regarding a grievance filed by the Union over an alleged violation of the parties' collective bargaining agreement. In the settlement agreement, the parties agreed to a certain interpretation of Article XXVIII of their contract, with the express agreement that such interpretation would prevail unless and until the contract language was changed. Further, the Employer expressly waived certain defenses to any future grievances asserting a violation of that provision of the collective bargaining agreement. The Employer agreed to not assert the jurisdictional defense that the issue is a governance matter, instead of a contract issue. The settlement was signed by the Employer's president and vice provost. In 2008, the Union filed a grievance alleging a violation of the same contract provision. In its response, the Employer asserted the very same jurisdictional defense that it agreed to waive in the 1999 settlement agreement. Based on the Employer's assertion of a previously waived defense, the Union then filed an unfair labor practice charge.

Contrary to the Employer's assertions, the Court of Appeals found the doctrine of repudiation can be applied to a grievance settlement, since a valid settlement agreement is as binding as any other contract between the parties. The Court quoted with approval MERC's statement in *City of Roseville*, 23 MPER 55 (2010), finding: "compromises that result in agreement provide stability to the parties' relationship and a degree of reliability to future interactions . . . . If settlements can be unilaterally revoked, both stability and the possibility of productive future discussions are undermined." The Court found MERC's reasoning in *City of Roseville* to be consistent with the public policy basis for the Labor Relations and Mediation Act, MCL 423.1.

The Court also found no merit to the Employer's argument that the settlement modified the collective bargaining agreement without Board approval. The Court concluded that MERC's factual finding, that the parties intended the settlement to interpret, rather than to amend, the collective bargaining agreement was supported by competent, material, and substantial evidence. Observing that Respondent had conceded that its board was not required to ratify a settlement agreement unless the settlement was an amendment to the collective bargaining agreement, the Court held that the Employer's board was not required to ratify the settlement in this matter.

The Court also rejected the Employer's argument that the settlement impermissibly interferes with its constitutional autonomy. Noting that the settlement involved a permissive subject of bargaining, that the Employer chose to bargain on the issue, and chose to interpret the contract provision through the settlement, the Court concluded that it would be illogical to find that enforcement of the settlement would impermissibly interfere with the "separation of academic governance and collective bargaining."

The Court observed that the Employer failed to notify the Union that action beyond the signatures of the president and vice-provost would be necessary to effectuate the terms of the settlement. The Court noted that it was reasonable for the Union to conclude that the representatives sent to the negotiations table by the Employer had the authority to settle routine grievances, and agreed with MERC's reasoning that it would be illogical to require the Union to question the authority of the Employer's agents, since it would be unlawful for the Union to do so under §10(3) of PERA. Inasmuch as the President and various vice presidents are among those to whom the Employer has delegated its contracting power, including the power to sign collective bargaining contracts, the Court rejected the Employer's argument that the president and vice-provost lacked apparent authority to bind the Employer to the terms of the settlement agreement.

Lastly, Respondent contended that its actions did not amount to repudiation because they did not have a substantial impact on the bargaining unit and there was a bona fide dispute over the interpretation of the settlement agreement. The Court agreed with MERC's reasoning in finding that the Employer's actions did have a significant impact on the bargaining unit because the action went to the core of the parties' previous agreement. In rejecting the Employer's argument that there was a bona fide dispute over the interpretation of the settlement, the Court pointed to the Employer's counsel's statement on the record, in which he acknowledged that the only dispute over the language of the settlement concerned its enforceability rather than its meaning. Therefore, the Court adopted MERC's conclusions that there was no bona fide dispute regarding the settlement language, the contract breach was significant, and the Employer committed an unfair labor practice.

*b. University of Michigan –and– University of Michigan Skilled Trades Union,*

MERC Case No. C10 H-192, issued February 21, 2012.

*Unfair Labor Practice Not Found—Employer Had No Duty to Bargain Over Installing Hidden Surveillance Cameras in a Room in Which Employees Did Not Perform Assigned Duties and Did Not Occupy With the Employer's Approval or Acquiescence; Area Where the Camera Was Installed Was Not Part of the Work Environment; Employees Had No Legitimate Expectation of Privacy in the Location Where the Hidden Camera Was Installed.*

The Commission adopted the ALJ's recommendation to dismiss the Union's charge alleging that the Employer breached its duty to bargain in good faith when it installed a hidden surveillance camera on its premises.

The University of Michigan Skilled Trades Union (Union) filed an unfair labor practice charge alleging that the University of Michigan (Employer) breached its duty to bargain when it installed a hidden surveillance camera without first bargaining with the Union. The Employer installed the camera in a room constructed on the Employer's premises by unknown persons without the Employer's knowledge. After installing the camera, the Employer discovered that the room was being used by two members of the bargaining unit represented by Charging Party. The two employees were engaging in unauthorized leisure activities when they were supposed to be working.

Finding that the use of a hidden camera was within the Employer's managerial right to supervise its employees, the ALJ found that the Employer had no duty to bargain over the installation of the camera and recommended that the Commission dismiss the charge. The ALJ also refused to apply federal case law holding that the installation of hidden surveillance cameras is a mandatory subject of bargaining.

In its exceptions, the Union contended that the ALJ erred by holding that the Employer had no duty to bargain over the installation of the hidden surveillance camera. The Union argued that the ALJ erred by refusing to follow NLRB precedent providing that the use of video surveillance is a mandatory subject of bargaining.

The Union contended that *Colgate-Palmolive Co*, 323 NLRB 515 (1997); *Brewers and Maltster's, Local No. 6 v NLRB*, 414 F3d 36 (DC Cir 2005); and *National Steel Corp v NLRB*, 324 F3d 928 (CA 7, 2003) each require an employer to bargain before installing a surveillance camera. In the cases that Charging Party relied on, matters were found to be mandatory bargaining subjects where they were "germane to the working environment and outside the scope of management decisions lying at the core of entrepreneurial control." In those cases, it was recognized that in the work environment, employees had legitimate privacy concerns and hidden surveillance cameras had the potential to affect employees' job security.

The Commission found the facts of this case to be distinguishable from the NLRB cases cited by the Union. In each of the three cases relied on by the Union, the hidden cameras were in locations considered to be part of the working environment and were placed where they would record the activities of employees who were legitimately at those locations. Here, the Employer installed a single camera for the limited and temporary purpose of discovering two specific things: the identity of persons frequenting a room that had been surreptitiously constructed without the Employer's knowledge or consent; and the nature of the activities occurring in that room. The room was located in an area in which employees did not perform assigned duties and did not otherwise frequent or occupy with the Employer's approval or acquiescence. The employees caught by the Employer's camera, had no legitimate expectation of privacy and the hidden room was not part of the "working environment." The Commission agreed with the ALJ that the Employer's use of a hidden camera in an area that is not part of the working environment is within management's right to supervise its employees during work time. Under these circumstances, the Employer did not have a duty to bargain over the placement of the surveillance camera.

## **B. Maintenance of Status Quo after Contract Expiration – 2011 PA 54**

### ***a. Bedford Public Schools -and- Bedford Education Association, MEA/NEA***

MERC Case No. C11 L-211, issued December 14, 2012

*Unfair Labor Practice Not Found; Respondent Did Not Breach Its Duty to Bargain by Failing to Comply with Provision of Expired Contract Requiring Payment of Wage Increases Based on Educational Achievement; § 15b of PERA, 2011 PA 54, Prohibits Payment of Wage Step Increases after Contract Expiration; Wage Increases Based on Educational Advancement Are Akin To Wage Step Increases. During the Period between Contract Expiration and the Effective Date of a Successor Agreement, Wage Increases Based on Educational Advancement Are Prohibited by § 15b of PERA.*

The Commission reversed the ALJ's Decision and Recommended Order, which found that Bedford Public Schools (Employer) breached its duty to bargain when it failed to pay wage increases for educational achievement pursuant to its expired contract with Bedford Education Association, MEA/NEA (Union). The Commission held that the Employer did not commit an unfair labor practice, as it was prohibited from paying the wage increases at issue pursuant to § 15b of PERA, 2011 PA 54.

The Union, which represents a bargaining unit of teachers and certain other professionals, and the Employer are parties to a collective bargaining agreement that expired on June 30, 2010. At the time of the events leading to the charge in this case, the parties had not reached a successor agreement. The expired contract provided that employees would receive salary adjustments based on increases in their level of educational achievement and years of experience. In the beginning of the 2011-2012 academic year, the Employer paid increased wages to bargaining unit members whose educational achievement moved them to higher "lanes" on the salary grid. However on October 14, 2011, the Employer sent notice to the Union that § 15b of PERA requires wages to be frozen at the point the contract expired and until a successor agreement is reached. Subsequently, the Employer began deducting from bargaining unit members' wages to recover the previously paid wage increases that were based on educational achievement. § 15b of PERA, which became effective on June 8, 2011, and provides in relevant part:

Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases.

Before the effective date of 2011 PA 54, it was well-settled that when a collective bargaining agreement expired, a public employer had the continuing obligation to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reached agreement or impasse. Thus, before 2011 PA 54 was enacted, mandatory subjects of bargaining, such as cost of living adjustments and step increases, survived the contract

by operation of law during the bargaining process unless there was a clear and unmistakable waiver. The passage of 2011 PA 54 altered the duty to bargain under PERA by prohibiting public employers from making automatic wage adjustments, including step increases, after contract expiration. The issue before the Commission in this case was whether the prohibition against step increases after contract expiration applied to wage increases based on educational achievement.

The Commission explained that in reviewing the ALJ's decision in this case and the decision by ALJ Stern in *Waverly Cmty Sch -and- Ingham Co Ed Assn/Waverly Ed Assn*, Case No. C11 K-206, its task is to determine and give effect to the intent of the Legislature in adopting Act 54. To do so, the Commission first reviewed the statute's wording and, agreeing with the ALJ that the language of Act 54 is unambiguous, gave the words used in the statute their plain and ordinary meaning. The Commission concluded that in stating, "a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement," Act 54 limits the wages payable by a public employer after contract expiration to the amounts being paid at the applicable levels of the salary grid on the date the contract expired. The Commission explained that if review of Act 54 is limited to its first sentence, one might interpret it to mean that the amounts payable for wages are those amounts set forth in the collective bargaining agreement, including all those specified in a salary grid. By including the language: "The prohibition in this subsection includes increases that would result from wage step increases," the Legislature made it clear that wage step increases that were not due as of the date of contract expiration are not to be paid prior to the effective date of a successor collective bargaining agreement.

The Commission noted that in past cases involving the employer's duty to make salary adjustments after contract expiration, the employer was required to pay wage increases due to increased years of service or educational advancement upon the occurrence of a designated event. Once the employee met the contract's years of service requirement or educational credential requirement, the employer was obligated to pay the increased wage. See for example *Sandusky Cmty Sch*, 22 MPER 90 (2009); *MESPA v Jackson Cmty College*, 187 Mich App 708 (1992), aff'g 1989 MERC Lab Op 913; *Detroit Pub Sch, (Bus Drivers & Site Mgmt Units)*, 1984 MERC Lab Op 579. While noting the difference between the conditions triggering an employer's obligation to pay such wage increases, the Commission pointed out that it has made no distinction between the legal effects of these types of provisions as mandatory subjects of bargaining. Moreover, in discussing wage increases based on increased years of service or educational achievement, the Commission has frequently referred to both types of increases as "step increases."

Principles of statutory construction hold that the legislature is presumed to be aware of statutory interpretations by the administrative bodies charged with statutory enforcement. The Commission explained that prior to the decision in this case and the decision in *Waverly Community Schools -and- Ingham County Education Assn/ Waverly Education Assn*, Case No. C11-K-206, which was issued concurrently, the Commission has made no legal distinction between wage increases based on educational advancement, which are sometimes known as "lane changes" or "rail increases," and wage increases based on increased experience. Since the Commission has historically treated wage increases based on educational advancement the same as wage increases based on increased experience, it concluded that the Legislature would do the same. Accordingly, the Commission found

that by stating "the prohibition in [2011 PA 54] includes increases that would result from wage step increases," the Legislature was extending that prohibition to wage increases based on either increased years of service or educational advancement.

*b. Waverly Community Schools -and- Ingham County Education Assn/ Waverly Education Assn*

MERC Case No. C11 K-206, issued December 14, 2012

*Unfair Labor Practice Not Found; Respondent Did Not Breach Its Duty to Bargain by Failing to Comply with Provision of Expired Contract Requiring Payment of Wage Increases Based on Educational Achievement; § 15b of PERA, 2011 PA 54, Prohibits Payment of Wage Step Increases after Contract Expiration; Wage Increases Based on Educational Advancement Are Akin To Wage Step Increases. During the Period between Contract Expiration and the Effective Date of a Successor Agreement, Wage Increases Based on Educational Advancement Are Prohibited by § 15b of PERA.*

The Commission affirmed the ALJ's Decision and Recommended Order finding that Waverly Community Schools (Employer) did not commit an unfair labor practice when it failed to pay wage increases for educational achievement pursuant to its expired contract with Ingham County Education Association/Waverly Education Association (Union). The Commission agreed with the ALJ that the prohibition against wage increases following the expiration of a collective bargaining agreement in § 15b of PERA, 2011 PA 54, includes increases based on enhanced educational credentials and that the Employer had no obligation to pay such increases after contract expiration.

The Union, which represents a bargaining unit of teachers and certain other professionals, and the Employer are parties to a collective bargaining agreement that expired on June 30, 2011. The contract provided that employees would receive salary adjustments based on increases in their level of educational achievement and years of experience. The contract provided eleven vertical salary steps based on years of experience and six horizontal salary "lanes" based on level of education. The parties had not reached a successor agreement when their contract expired on June 30, 2011. After the contract expired, but before the parties reached a successor agreement, nine bargaining unit members provided the Employer with evidence of educational achievement, which they contended entitled them to horizontal salary lane increases. Respondent declined to pay the salary increases based on 2011 PA 54, which became effective on June 8, 2011, and provides in relevant part:

Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases.

Before the effective date of 2011 PA 54, it was well-settled that when a collective bargaining agreement expired, a public employer had the continuing obligation to apply the terms of mandatory subjects of bargaining in the expired contract until the parties

reached agreement or impasse. Thus, before 2011 PA 54 was enacted, mandatory subjects of bargaining, such as cost of living adjustments (COLA) and step increases, survived the contract by operation of law during the bargaining process unless there was a clear and unmistakable waiver. The passage of 2011 PA 54 altered the duty to bargain under PERA by prohibiting public employers from making automatic wage adjustments, including step increases, after contract expiration. The issue before the Commission in this case was whether the prohibition against step increases after contract expiration applied to wage increases based on educational achievement.

The Commission noted that in past cases involving the employer's duty to make salary adjustments after contract expiration, the employer was required to pay wage increases due to increased years of service or educational advancement upon the occurrence of a designated event. Once the employee met the contract's years of service requirement or educational credential requirement, the employer was obligated to pay the increased wage. See for example *Sandusky Cmty Sch*, 22 MPER 90 (2009); *MESPA v Jackson Cmty College*, 187 Mich App 708 (1992), aff'g 1989 MERC Lab Op 913; *Detroit Pub Sch, (Bus Drivers & Site Mgmt Units)*, 1984 MERC Lab Op 579. While noting the difference between the conditions triggering an employer's obligation to pay such wage increases, the Commission pointed out that it has made no distinction between the legal effects of these types of provisions as mandatory subjects of bargaining. Moreover, in discussing wage increases based on increased years of service or educational achievement, the Commission has frequently referred to both types of increases as "step increases."

Principles of statutory construction hold that the legislature is presumed to be aware of statutory interpretations by the administrative bodies charged with statutory enforcement. The Commission explained that prior to the decision in this case and the decision in *Bedford Public Schools-and- Bedford Education Association, MEA/NEA*, Case No. C11 L-211, which was issued concurrently, the Commission has made no legal distinction between wage increases based on educational advancement, which are sometimes known as "lane changes" or "rail increases," and wage increases based on increased experience. Since the Commission has historically treated wage increases based on educational advancement the same as wage increases based on increased experience, it concluded that the Legislature would not do otherwise. Accordingly, the Commission found that by stating "the prohibition in [2011 PA 54] includes increases that would result from wage step increases," the Legislature was extending that prohibition to wage increases based on either increased years of service or educational advancement.

### C. Past practice

*a. County of Wayne—and—Michigan AFSCME Council 25 and its Affiliated Locals 25, 101, 409, 1659,1862, 2057, 2926, and 3309*

MERC Case No. C09 J-211, issued September 17, 2012

*Unfair Labor Practice Found- Retirement and Health Care Benefits are Mandatory Subjects of Bargaining; Employer Violated Duty to Bargain by Unilaterally Changing the Past Practice of Providing Health Care Benefits to Employees Who Retire on Duty or Non-Duty Disability Pensions; The Past Practice of the Parties Was Binding and Any Change Required Notice of and an Opportunity to Bargain.*

The Commission majority affirmed the ALJ's Decision and Recommended Order on Summary Disposition which found that Respondent, Wayne County (Employer), violated §10(1)(e) of PERA by eliminating the practice of not requiring retirees receiving pensions based on disability to meet age or service requirements for health care benefits, without first bargaining over the subject with Charging Parties, Michigan AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926, and 3317.

For over thirty years, Respondent consistently provided health care benefits to retirees receiving a duty disability pension without regard to age or years of service and to retirees receiving a non-duty disability pension with ten years of credited service. Since at least 2000, the parties' collective bargaining agreements have limited health care benefits to retirees who meet certain age and service requirements. However, none of the parties' agreements covering the years 2000-2004 expressly address health care benefits for those who retire on the basis of disability. In 2008, the parties executed collective bargaining agreements covering the years 2004-2008. Later in 2008, Respondent and bargaining units represented by several of the Charging Parties executed collective bargaining agreements covering 2008-2011. After 2008, Respondent continued to provide health care benefits to retirees receiving a disability pension without regard to age or years of service. In March 2010, Respondent issued an administrative order announcing that it would only provide health care benefits to recipients of disability pensions who met the age and years of service requirements for a standard pension.

In its exceptions, Respondent argued that it did not have a duty to bargain over the change because the past practice was superseded by collective bargaining agreements executed by the parties in 2008. Respondent pointed to language incorporated in the 2008 contracts which reserves the right of Respondent's benefit administrator to make final determinations as to all issues concerning eligibility for benefits. However, the language Respondent relied on was also incorporated in the 2000-2004 collective bargaining agreements. The Commission majority also found the parties' 2000-2004 collective bargaining agreements generally tied eligibility for health care benefits to eligibility for a pension and made no mention of health care benefits for those who retire on the basis of disability. On comparing the language of those contracts with that of the 2004-2008 and 2008-2011 collective bargaining agreements, the Commission found there was no appreciable difference with respect to with respect to the eligibility of disability pension recipients for health care benefits. In the absence of language specifically addressing disability pension recipients' eligibility for health care benefits, the Commission found no support for Respondent's contention that the past practice was superseded by the contracts executed in 2008.

Further, the Commission majority found that there was no evidence in the record indicating that Charging Parties were aware at the time the 2004-2008 and 2008 -2011 collective bargaining agreements were executed that retirees receiving disability pensions would no longer be eligible for health care benefits unless they met the age and years of service requirements for a standard pension. The Commission found that Respondent failed to show that Charging Parties waived their right to bargain over the termination of the past practice. Absent an explicit, clear, and unmistakable waiver of bargaining rights, Respondent was not relieved of its duty to give the unions notice and an opportunity to bargain before deciding to terminate the past practice.

The ALJ suggested that the Commission award attorney fees to Charging Parties in the light of four recent decisions in which Respondent was found to have violated its duty to bargain and based on Respondent's actions in eliminating the past practice. The ALJ urged the Commission to reconsider its interpretation of *Goolsby v Detroit*, 211 Mich App 214 (1995), and assess costs and attorney fees against Respondent. The Commission majority agreed with the conclusion in *Goolsby* finding that the language of § 16(b) of PERA is not sufficiently specific enough to authorize the Commission to a grant attorney fees.

The concurring commissioner agreed that Respondent breached its duty to bargain. However, he found that, while this was not an appropriate case for an award of attorney fees, given the NLRB's precedent on assessing attorney fees, he is not willing to conclude that the Commission lacks the authority to award attorney fees in an appropriate case.

The third commissioner dissented in part and concurred in part. He agreed that the language of § 16(b) of PERA does not authorize the Commission to a grant attorney fees. However, he concluded that Respondent did not violate its duty to bargain in good faith under §10(1)(e) and determined that the charge should be dismissed. The dissenting commissioner disagreed with the majority's adoption of the ALJ's finding that the collective bargaining agreement was ambiguous and that Respondent gave "tacit approval" to the contracts modification by the past practice of providing health care benefits to retirees receiving disability pensions. The commissioner found Respondent's 2006 Health and Welfare Benefit Plan was fully incorporated into the collective bargaining agreements. Additionally, the Commissioner found that the contract language established that Charging Party and Respondent bargained over health care benefits and retirees' eligibility for such benefits. He concluded that Respondent's past practice of not enforcing the age and service requirements for health care benefits with respect to recipients of disability pensions did not waive its right to do so. As a result, the dissenting commissioner held that Respondent had not committed an unfair labor practice by electing to enforce the terms of the contract.

In conclusion, the Commission majority affirmed the ALJ's finding that Respondent unlawfully made a unilateral change to terms and conditions of employment without first giving Charging Parties notice and an opportunity to bargain over whether the age and service requirements for health care benefits should begin to apply to recipients of disability pensions. The majority also found that § 16(b) of PERA does not authorize the Commission to award attorney fees.

***b. Southfield Public Schools –and- Michigan Educational Support Personnel Association (MESPA) –and- Educational Secretaries of Southfield,***

Case Nos. C09 B-017 and C09 B-019, issued November 15, 2011.

*Unfair Labor Practice Found; Unilateral Change; Employees' Receipt of Paid Association Release Time was Established Term or Condition of Employment; Employer Violated Duty to Bargain By Eliminating Paid Association Release Time Without First Giving Unions Notice and Opportunity to Bargain.*

The Commission adopted the ALJ's factual findings and legal conclusions in support of its decision holding that Southfield Public Schools (Employer) violated its duty to bargain in good faith.

The Michigan Educational Support Personnel Association and the Educational Secretaries of Southfield (Unions) each alleged that the Employer violated its duty to bargain by discontinuing its practice of providing the Unions' members with paid association release time without first giving the Unions notice and an opportunity to bargain over the matter. The Employer asserted that paid association release time was not an established term or condition of employment because the parties' collective bargaining agreements unambiguously provided that only the Unions' presidents would be paid for release time. The Employer also asserted that even if it did have a duty to bargain over the elimination of paid association release time, the Unions waived their rights by failing to make a timely demand to bargain over the issue.

Paid time to engage in union activities during working hours is a mandatory subject of bargaining. The Commission agreed with the ALJ that the provisions of the parties' collective bargaining agreements were ambiguous as to whether the Employer was required to pay association release time, and that Employer's practice of paying for this time was not contrary to the clear language of the contract. The record showed that Respondent had consistently paid association release time to the Unions' officers and members over at least twenty years for the MESPA unit and at least ten years for the ESOS unit. Therefore, the Commission agreed with the ALJ's conclusion that the past practice of paying association release time to employees had become an established term or condition of employment for both bargaining units.

Without having previously raised the issue at the bargaining table, the Employer notified the Unions of its decision to end its long-term practice by sending the Unions a letter a few days before decision's effective date. The Commission further agreed with the ALJ that merely giving notice to the Unions that the Employer was terminating the past practice was not sufficient. The Employer had an obligation to give the Unions an opportunity to bargain before it eliminated the practice.

The Commission also agreed with the ALJ's rejection of the Employer's argument that the Unions had waived their right to bargain over the matter by failing to make a timely demand. In cases where a bargaining demand would be futile because the employer had already made a final decision on the issue when it notified the union of the change, the union has no obligation to demand bargaining. In this case, the Employer's letter notified the Unions of the effective date of the change in practice, but said nothing about giving the Unions an opportunity to bargain over the issue. The Employer's notice invited the Unions to call if they wished to discuss the matter, but did not indicate that implementation of the change was conditioned on the parties failing to reach agreement on the issue. When the Unions contacted the Employer to object to the change prior to its effective date, the Employer merely replied that it was following the contract. Thus, it was clear from the Employer's notice to the Unions and their subsequent discussion that the Employer's decision was final and a demand to bargain would be futile. When the Unions made a subsequent demand to bargain over paid association release time, the Employer claimed the demand was untimely and refused to bargain. Accordingly, the Commission found that the Unions did not waive their right to bargain over the elimination of paid association

release time. The Commission, therefore, adopted the ALJ's recommended order requiring the Employer to cease and desist from making unilateral changes in terms and conditions of employment and to reinstate the practice of paying for association leave time until it has satisfied its obligation to bargain with the Unions over the issue.

#### **D. Transfer of bargaining unit work and subcontracting**

##### *a. Pontiac School District -and- Pontiac Education Association,*

295 Mich App 147 (January 5, 2012) (Docket No. 300555), Leave to appeal to the Michigan Supreme Court denied September 26, 2012 (S. Ct. Docket No. 144629). affirmed MERC Case No. C04 H-215; issued September 22, 2010, 23 MPER 81.

In a split decision, the Court of Appeals majority affirmed MERC's decision in favor of the charging party, Pontiac Education Association ("PEA"), finding that the Respondent, Pontiac School District (Employer) committed an unfair labor practice when it unilaterally decided to contract with a third party to provide certain educational services without bargaining with the PEA.

In May of 2004, the Employer decided to privatize services that had been provided by occupational therapists and physical therapists employed by the school district. The PEA asserted that the Employer could not act unilaterally to privatize these services because the issue was subject to bargaining under the parties' collective bargaining agreement. The Employer laid off the occupational and physical therapists anyway, and contracted with a private entity to provide occupational and physical therapy services. The PEA filed an unfair labor practice charge.

The dispute concerned the interpretation of MCL 423.215(3)(f), which provides that the decision of a school district to contract with a third party for one or more "non-instructional support services" is not subject to bargaining. Under the statute, "non-instructional support services" may be contracted out to third parties without collectively bargaining. The terms "instructional" and "non-instructional" are not defined in the statute. The Administrative Law Judge's (ALJ) decision, which was affirmed by MERC, turned on the meaning of "non-instructional." The ALJ and MERC both upheld the PEA's unfair labor practice charge, concluding that the occupational and physical therapists did not provide "non-instructional support services."

On appeal, the Employer argued that the occupational and physical therapists provide non-instructional support services; the PEA argued that they provide instructional support services.

The Court of Appeals majority analyzed the statute by giving words or phrases that are not statutorily defined their "plain and ordinary" meaning within the context used in the statute. This principle supports the ALJ's and MERC's reasoning that the word "instruction" is not limited to teaching core curriculum subjects, such as math or science, but has a more general meaning that extends to imparting knowledge of any kind. Based on this interpretation, the majority held that positions in which individuals impart any type

of knowledge or information to students are “instructional,” and their services are not exempt from collective bargaining under MCL 423.215(3)(f).

The Court majority rejected the Employer’s argument that the ALJ and MERC improperly failed to consider legislative history in rendering their decisions. The ALJ and MERC properly refused to rely on legislative history, because legislative history is not to be used to interpret statutes unless the statute is ambiguous. The Court determined that the statute in question is not ambiguous, and the ALJ and MERC were correct in focusing on the plain language of the statute.

At the hearing before the ALJ, the Employer presented evidence from expert witnesses offering their opinions that the therapists did not provide instruction. The therapists testified as to their roles in the school, and MERC concluded that the therapists fairly characterized their responsibilities as helping students develop the skills necessary to be able to receive traditional classroom instruction from the other teachers. This evidence, along with the plain and ordinary meaning of “instruction,” led MERC to conclude that the therapists do not provide noninstructional support services. The Court majority found that MERC’s decision was supported by substantial, competent, and material evidence.

The Court of Appeals affirmed MERC’s decision, reasoning that there is an instructional component to the services provided by the occupational and physical therapists, even though their instruction was not the traditional classroom variety. Regardless of how the therapists’ instruction is characterized, the Court held that the therapists did not provide “non-instructional support services” for the purposes of exempting the school district from the duty to collectively bargain over subcontracting the therapists’ services.

The dissenting opinion incorporated definitions from other statutes to interpret the meanings of “instructional” and “non-instructional” and determined that the services provided by the therapists are not part of the traditional classroom environment, and are not “instructional” within the “commonly understood” meaning of the term.

***b. City of Detroit -and- American Federation of State, County and Municipal Employees (AFSCME), Local 207***

MERC Case No. C10 E-119, issued July 20, 2012

*Unfair Labor Practice Found – Employer Breached Duty to Bargain When it Unilaterally Decided to Transfer Work Exclusively Performed by Bargaining Unit Employees to a Different Bargaining Unit or to an Outside Contractor; Exclusivity of Bargaining Unit Work Not Destroyed by Prior De Minimis Transfer of that Work to Another Bargaining Unit. Omission of Details from Charge is Not Prejudicial When Underlying Facts are Fully Litigated; Failure to Object to Litigation of Issue Before ALJ Waives the Objection and Bars Filing Exceptions on that Issue.*

The Commission affirmed the ALJ’s Decision and Recommended Order finding that Respondent, City of Detroit (Employer), violated §10(1)(e) of PERA when it unilaterally decided to lay off employees in the Street Lighting Maintenance Worker (SLMW) classification, which was represented by the Charging Party, American Federation of State, County and Municipal Employees, Local 207 (Union), and to replace them with line

workers represented by the International Brotherhood of Electrical Workers (IBEW). Furthermore, the Commission agreed with the ALJ's finding that the Employer breached its duty to bargain when it laid off the sole employee in the AFSCME represented Public Lighting Department's repair mechanic classification and transferred the repair mechanic's work to a private contractor.

In its exceptions, the Employer alleged that the ALJ exceeded the scope of the charge when he made a decision regarding the repair mechanic. The Commission found that although the charge did not identify the job classifications of the affected employees, the record revealed that there were two classifications at issue, the SLMW and the repair mechanic. Furthermore, the Commission noted that at no point in the record, prior to filing its exceptions, did the Employer object to the Union raising, or the ALJ considering, the issue of the subcontracting of the work performed by the repair mechanic. Had the Employer objected while the matter was still before the ALJ, the Union could have timely moved to amend the charge to include the allegations regarding the repair mechanic and the issue could have been resolved by the ALJ. Instead, the Employer waited until it filed its exceptions to raise the issue. By that point, it was too late to raise the objection and the Commission determined that the Employer's failure to timely object constituted a waiver of its objection and barred the filing of an exception on that issue. The Commission agreed with the ALJ that the repair mechanic had exclusively performed the work of repairing traffic lights and affirmed the ALJ's conclusion that the Employer violated its duty to bargain under §10(1)(e) when it unilaterally decided to subcontract that work.

Next, the Employer argued that the ALJ erred by finding that SLMWs exclusively performed the street lighting repair work. Although the Employer argued that the IBEW line workers had also performed street lighting repair work, the record showed that the work performed by the line workers was distinctly different from the work performed by the SLMWs. For several decades, the SLMWs' essential functions had included the inspecting, repairing and replacing of light fixtures on street light poles. The Employer contended that the line workers had also performed these tasks since at least 2004. The Commission noted that the Union had grieved the Employer's occasional assignments of these tasks to IBEW line workers and the grievances were still pending. Given the de minimis nature of these assignments of SLMW work outside the bargaining unit, they could not serve as the basis for a viable unfair labor practice charge. The Commission concluded that the contested and de minimis assignments of SLMW work did not destroy the exclusivity of the essential functions of the SLMWs' work. Thus, the Commission found that the Employer breached its duty to bargain when it transferred work that had been exclusively performed by the SLMWs.

*c. Rochester Community Schools -and- American Federation of State, County and Municipal Employees (AFSCME), Council 25 and Its Affiliated Local 202*

MERC Case No. C10 H-190, issued July 20, 2012

*Unfair Labor Practice Not Found – Public School Employer Subcontracting Noninstructional Support Services; No Duty to Bargain over Bidding Procedure If Union Representing Bargaining Unit Currently Providing such Services is Permitted to Bid on Equal Basis with other Bidders; Bidding Requirements and Procedures Need Not Be*

*Tailored to Meet Characteristics of Labor Organizations; If Employer fails to Allow Union to Submit Bid on Equal Basis with Third Party Contractors, Statutory Prohibition Against Bargaining is Removed; Failure to Submit Bid Waives Argument as to not Receiving Opportunity to Bid on Equal Basis.*

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent, Rochester Community Schools (Employer), did not violate its duty to bargain when it refused to negotiate with the Charging Party, AFSCME (Union), over the process for submitting bids to provide noninstructional support services, under §15(3)(f) of PERA. Furthermore, the Commission agreed with the ALJ's finding that, pursuant to §1(e)(i) of PERA, the Employer had no obligation to recognize the Union as the bargaining representative for the individuals employed by the subcontractor .

In the instant case, the Employer issued a request for proposals (RFP) for "professional hall monitoring services." The RFP listed qualifications that were to be met by successful bidders. Additionally, the RFP provided bidders with an opportunity to request exceptions to its terms and conditions. However, the Union did not submit a bid in response to the RFP. Furthermore, the Employer denied the Union's request to bargain over the decision to subcontract and the procedures for bidding. As a result, the Union filed an unfair labor practice charge.

In its exceptions, the Union objected to the ALJ's finding that the Employer had no duty to bargain over the terms of its RFP or the bidding procedures. In the factually similar case of *Lakeview Cmty Sch*, 25 MPER 37 (2011), the Commission held that §15(3)(f) of PERA did not mandate bargaining over the bidding procedures, because those procedures are also prohibited subjects of bargaining. Relying on *Lakeview*, the Commission rejected the Union's arguments and found that under §15(3)(f), a public school employer that has decided to subcontract noninstructional support services is only obligated to provide the union representing the employees who perform those services with the opportunity to bid on the contract on an equal basis with third party bidders. A public school employer only has a duty to bargain over subjects of bargaining prohibited under §15(3)(f) if the union is not given an equal opportunity to bid.

The Union also argued that the Employer's RFP was designed for response by third party contractors and that the Union is not capable of bidding on an equal basis with such contractors as it was unrealistic to expect it to meet certain RFP requirements. However, the RFP in this case allowed bidders the opportunity to request exceptions to the RFP's requirements. Therefore, the Commission rejected the Union's argument quoting *Lakeview*, which stated: "Because [the Union] did not submit a bid, and did not request an exception to any of the RFP's requirements, it cannot now complain that it was not given an equal opportunity to bid." In the absence of a bid by the bargaining unit, any claim that they were denied the opportunity to bid on an equal basis with third party bidders was waived.

Lastly, the Union alleged that the Employer was a joint employer of the employees hired by the third-party contractor and had unlawfully refused to recognize it as the bargaining representative for those employees. The Commission rejected this argument and noted that under §1(e) of PERA, workers hired by private entities having contracts with the state or a political subdivision thereof, such as the employees here, are not public employees. Thus,

the Employer was not a joint employer with the private contractor and had no obligation under PERA to recognize the Union as the bargaining representative for those employees.

*d. Southfield Public Schools –and- Southfield Michigan Educational Support Personnel Association,*

Case No. C08 F-115, issued October 17, 2011.

*Unfair Labor Practice Not Found- Employer's Decision to Subcontract Non-Instructional Support Services is a Prohibited Subject of Bargaining; Issue of Lawfulness of Employer's Decision to Subcontract Raises Questions of Fact, Which Could Not be Decided on Summary Disposition; Charging Party Failed to Show Employer's Decision to Subcontract Non-Instructional Support Services was Motivated by Anti-Union Animus.*

The Commission agreed with the ALJ's conclusion that Southfield Michigan Educational Support Personnel Association's (Union), did not show that Southfield Public Schools (Employer), discriminated against the Union's members by deciding to subcontract noninstructional support services. The Commission adopted the ALJ's recommended order to dismiss the unfair labor practice charge.

PERA §15(3)(f) provides that a public school employer's decision to contract with a third party for noninstructional support services is a prohibited subject of bargaining. Nevertheless, the Employer's decision to subcontract may be subject to review. A decision, which may otherwise be within the Employer's authority, may be an unfair labor practice if the decision is motivated by unlawful discriminatory intent. The question of the Employer's intent is one of fact and required an evidentiary hearing. Therefore, Commission upheld the ALJ's denial of the Employer's motion for summary disposition.

Where an allegation of unlawful discrimination is made, the burden is on the party making the claim to demonstrate that protected conduct was the motivating factor in the respondent's decision. *MESPA v Ewart Pub Sch*, 125 Mich App 71, 74 (1982). In this case, the Union did not establish a prima facie case of discrimination as it failed to show that the Employer was motivated by anti-union animus. The evidence that the Union offered, which included statements by a school principal and by a school board member regarding privatization, could not be directly linked to the deliberations of the school board or its decision.

The Commission rejected the Union's argument that the ALJ erred by not drawing adverse inferences from the Employer's failure to have its chief negotiator testify. The Union contended that the negotiator was likely to have knowledge of facts to either refute or support Charging Party's allegation of discrimination. However, as the Commission pointed out, the Union did not specify any facts that could properly be inferred from the Employer's failure to have the negotiator testify. The Commission could not infer discrimination without facts to support that legal conclusion. Accordingly, the Commission affirmed the ALJ's Decision and Recommended Order and dismissed the unfair practice charge.

## E. MERC Subject Matter Jurisdiction

### a. *City of Detroit -and- Detroit Police Officers Association,*

Court of Appeals No. 296135, Order issued October 18, 2011, affirmed MERC Case No. C07 E-110, issued January 5, 2010, 23 MPER 4 (2010).

In an unpublished opinion, the Court of Appeals affirmed MERC's decision to dismiss the unfair labor practice charges filed by appellant, Detroit Police Officers Association (Union), against the City of Detroit (Employer). The Court agreed with MERC's conclusion that it has no authority to review an Act 312 award.

The Union represents nonsupervisory police officers employed by the City of Detroit. After numerous attempts to negotiate a new collective bargaining agreement, the parties reached an impasse on the subject of healthcare plans relating to hospitalization. As a result, the issue was submitted to compulsory arbitration pursuant to Act 312 of 1969, MCL 423.231 *et seq.* The arbitration award adopted the Employer's proposal on the issue and, subsequently, the Employer began to implement the proposed policy. The Union objected to the Employer's implementation of the policy, demanded to bargain over the premiums for the health care plans, and demanded that there be an open enrollment period.

When the Employer did not comply with the Union's demands, the Union filed an unfair labor practice charge. MERC dismissed the charge, finding that the Union had not raised a claim upon which relief could be granted under PERA because the Act 312 award was not reviewable by MERC and had not been repudiated by the Employer. The Union asserted that MERC erred by failing to apply National Labor Relations Board precedent, *McClatchy Newspapers, Inc.*, 321 NLRB 1386; 153 LRRM 1137 (1996), which prohibits the post-impasse implementation of bargaining proposals unless there are objective guidelines for implementation or the union participates in the implementation process. Simply put, the Union argued that the Employer committed an unfair labor practice in its implementation of the Act 312 award because the award did not provide objective criteria for implementation and the Employer refused to bargain with the Union over implementation terms.

The Court agreed with MERC that *McClatchy Newspapers, Inc.* is not applicable and explained that the Act 312 award made this case distinguishable from the rule created in *McClatchy* because *McClatchy* involves circumstances where the parties have not reached an agreement. Here, the Act 312 award serves as the agreement of the parties and is final and binding.

Just as MERC did, the Court rejected the Union's argument that it was challenging the Employer's implementation of the Act 312 award rather than the substance of the award. The Union's argument asserted that the *McClatchy*-like violation stemmed from the absence of objective criteria for implementation, which is a criticism of the award and not a challenge to any post-award actions by the Employer. Given the Union's reasoning, the Court opined that the only way the Employer would have been able to avoid the claim that it had committed a *McClatchy*-like violation would have been to decline to implement the Act 312 award. Given the final and binding nature of Act 312 awards, that was not an

option. Finding the Union's charge was a direct attack on the substance of the Act 312 award, not an allegation of unlawful conduct by the Employer, the Court concluded that MERC did not err when it dismissed the charge.

The Court also rejected the Union's argument that the Act 312 award's failure to address the topic of premiums for the hospitalization plan made this matter subject to bargaining. The Court explained that this issue also raised a challenge to the arbitration award and the Act 312 process, which are subject to review by the circuit court and are not reviewable by MERC.

Finding no error in MERC's conclusion that the Union had not alleged facts demonstrating that the Employer repudiated the Act 312 award, the Court reiterated the standard explicated by MERC for finding a contract repudiation: "Repudiation exists when (1) the contract breach is substantial, and it has a significant impact on the bargaining unit and (2) no bona fide dispute over interpretation of the contract is involved." The Court noted that the method for making the healthcare plan available was not set forth in the Act 312 award and that there was a dispute between the parties regarding that issue. Therefore, the Court concluded that MERC did not err when it found that the Union failed to demonstrate that the Employer had repudiated the Act 312 award.

## **F. Good faith dispute over contract interpretation**

### *a. City of Pontiac and Teamsters Local 214*

MERC Case No. C11 B-023, issued November 15, 2012

*Unfair Labor Practice Not Found; Charging Party Failed to State a Claim upon which Relief can be granted under PERA; Summary Disposition Appropriate where No Material Facts are in Dispute; ALJ may Hear Argument and Dispose of Oral Motion for Summary Disposition without Prior Notice to Parties. Respondent's Duty To Bargain Over Subcontracting was Met when Parties' Agreed to Contract Language Specifying Circumstances under which Subcontracting may Occur; Since Contract Provisions Covering the Matter in Dispute could Reasonably be Relied on for the Action at Issue, Parties have a Bona Fide Dispute over Contract Interpretation. A Good Faith dispute over the Interpretation of the Collective Bargaining Agreement is not Repudiation and, therefore, must be Resolved by the Grievance Mechanism Provided in the Parties' Contract.*

In its decision, the Commission affirmed the ALJ's decision on summary disposition finding that the Charging Party, Teamsters Local 214, failed to State a Claim upon which relief could be granted under PERA.

The parties' collective bargaining agreement contains a provision specifying the circumstances under which the Employer may subcontract bargaining unit work. The Contract also contains a provision covering layoffs.

On two occasions in the fall of 2010, Respondent's emergency financial manager, sent notice to Charging Party indicating that the Respondent intended to subcontract certain services that were currently being provided by members of the bargaining unit represented

by Charging Party. Charging Party requested negotiations over Respondent's impending actions related to subcontracting of bargaining unit work and layoff of its bargaining unit members. Subsequently, the parties met on three occasions to discuss these issues.

Respondent sent layoff notices to employees in Charging Party's unit on September 10, 2010, January 18, February 3, and February 1, 2011. However, Charging Party claims that copies of these notices were not sent to it in a timely fashion as required by the collective bargaining agreement.

In its charge, the Union alleged that Respondent violated its duty to bargain under § 10(1)(e) of PERA by refusing to bargain over subcontracting and layoffs of its bargaining unit members. Following an oral motion for summary disposition, and oral argument by both parties, the ALJ summarily dismissed the charge.

On exceptions, Charging Party contended that the ALJ erred in granting Respondent's motion for summary disposition and failed to give Charging Party adequate notice that she would hear a dispositive motion at hearing. The Commission found no error by the ALJ. Commission rules provide that oral motions may be made at hearing and such motions, including motions for summary disposition, may be disposed of at hearing by the ALJ. Moreover, the Commission found the ALJ correctly concluded that there were no material facts in dispute and Respondent was entitled to prevail on the legal issues. Therefore, the Commission rejected Charging Party's contention that the ALJ should have held an evidentiary hearing.

Since the parties' collective bargaining agreement contains clauses covering subcontracting and layoffs, the parties had met their duty to bargain over those issues. Further, the Commission found that the contract provisions covering subcontracting and layoffs could reasonably be relied on for the action taken by Respondent. Therefore, the matters in dispute were covered by the parties' collective bargaining agreement. The Commission agreed with the ALJ that the parties had a bona fide dispute over contract interpretation and, therefore, rejected Charging Party's claim of contract repudiation. An alleged contract breach arising from a good faith dispute over contract interpretation is not repudiation and must be resolved through the grievance mechanisms provided for in the parties' contract. Accordingly, the Commission agreed with the ALJ that Respondent had not breached its duty to bargain and dismissed the charge.

***b. Blue Water Area Transportation Commission -and- Michigan AFSCME Council 25 and AFSCME Local 1518,***

Case No. C08 C-051, issued October 16, 2012

*Unfair Labor Practice Not Found – Dispute Over An Employer's Long-Standing Policy; Employer Terminated an Employee For Failure To have Commercial Driver's License from U.S. Department of Transportation (DOT); Employer Had No Duty to Notify Union of DOT Requirements to Pass Fitness-For-Work Test, which was a Prerequisite for a DOT Commercial Driver's License. The Matter Involved a Bona Fide Dispute Regarding Contract Interpretation*

The Commission affirmed the ALJ's Decision and Recommended Order on Summary Disposition on Remand, finding that Respondent, Blue Water Area Transportation Commission (Employer), did not violate PERA when it terminated the employment of a bargaining unit member, R, because she was unable to qualify for a U.S. Department of Transportation issued commercial driver's license (DOT card). The Commission agreed with the ALJ's finding that the Charging Party, Michigan AFSCME Council 25 (Union) failed to state a claim for which relief could be granted under PERA and that dismissal of the charge was appropriate.

The Employer had a long-standing policy that required each of their bus drivers to have a DOT card. The requirements for a DOT card are contained in Federal Motor Carrier Safety Administration (FMCSA) regulations, which include the standards for fitness-for-work physicals that drivers must pass to obtain a DOT card. Thus, as a condition of employment, all bus drivers were required to meet the standards set forth in the FMCSA regulation. R is a diabetic whose condition required her to take insulin by injection. Due to her medical condition, she was ineligible for a DOT card and subsequently discharged by the Employer. The ALJ found that the Union's charge stated nothing more than an ordinary breach of contract and wrongful termination claim affecting only one employee.

The Union excepted to the ALJ finding that the charge asserted a mere breach of contract or wrongful termination claim. Rather, Charging Party asserted that its claim was based on the Employer's unilateral implementation or change of a work rule and, therefore, was a violation of PERA. The Union acknowledged the longstanding requirement that drivers possess a DOT card. However, the Union contended that the Employer failed to give notice of the requirement that drivers' not be dependent on insulin injections. The Commission explained that since the requirements for the FMCSA's fitness test were included in federal regulations, which were equally available to the Union and the Employer, the Employer had no obligation to inform the Union of the requirements contained in those regulations. The Commission rejected the Union's argument that the requirement that drivers not be dependent on insulin injections was a new rule. Since the requirement was incorporated in a long-standing work rule, it did not become a new work rule, in and of itself, by reason of the Union's belated discovery of it. The Commission agreed with the ALJ that the matter involved a bona fide dispute over contract interpretation, which was appropriately deferred to arbitration. Accordingly, the Commission dismissed the charge.

*c. City of Detroit (Police Department)—and—Detroit Police  
Lieutenants & Sergeants Association,*

MERC Case No. C10 F-132, issued August 22, 2012

*Unfair Labor Practice Not Found – Employer Did Not Repudiate Collective Bargaining Agreement when it Refused to Provide Bargaining Unit Members a Second Three Percent Wage Increase; the Matter was Grieved and Arbitrated, Thereafter the Circuit Court Issued an Order Confirming the Arbitration Award; Parties had a Bona Fide Dispute Over Whether Employer was Obligated to Pay Second Wage Increase.. Repudiation Does Not Occur where Parties have a Bona Fide Dispute Over Interpretation of the Contract*

The Commission affirmed the ALJ's Decision and Recommended Order on Summary Disposition, finding that Respondent, City of Detroit (Employer), did not violate PERA by failing to implement a wage increase, which Charging Party, Detroit Police Lieutenants and Sergeants Association (Union) contended was due pursuant to the parties' collective bargaining agreement. The Commission agreed with the ALJ's finding that Charging Party failed to state a claim for which relief could be granted under PERA and that dismissal of the charge was appropriate.

On July 1, 2008, the Employer increased wages for the Union's bargaining unit members by three percent pursuant to Article 54(B) of the parties' expired agreement. Article 54(B) established percentage differentials between the salaries of the Union's bargaining unit members and the salaries of police officers represented by the Detroit Police Officers Association (DPOA). On December 15, 2008, an Act 312 award was issued and included a provision, Article 54(A), which gave the bargaining unit members a wage increase of three percent effective July 1, 2008. Additionally, Article 54(B), which provided percentage differentials between the salaries of the Union's bargaining unit members and the DPOA salaries, was not changed by the Act 312 award.

The parties disputed whether the July 1, 2008 increase paid to the Union's members, to maintain the contractual differentials, also satisfied the July 1, 2008 salary increase called for by the Act 312 award. The Union alleged that their members were due two three percent wage increases. The Employer disagreed and refused to pay a second increase. Following the Employer's refusal, the Union instituted grievance proceedings and later filed a circuit court complaint for enforcement of the grievance arbitration award. The Union subsequently filed an unfair labor practice charge alleging that the Employer unlawfully repudiated the parties' agreement. The civil suit resulted in the matter being remanded back to the arbitrator who later issued an opinion rejecting the Union's argument that its members were entitled to two three percent wage increases on July 1, 2008. On review, the circuit court issued an order confirming the arbitrator's findings.

The issue before the Commission was whether there was a bona fide dispute over interpretation of the parties' contract. The Commission, explained that repudiation exists only when both the following occur: "(1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved." Here, the Commission found that there was a bona fide dispute over the parties' interpretation of the contract. Additionally, the Commission held that review of Act 312 arbitration awards is not within its jurisdiction. Thus, in finding that the parties had a bona fide dispute over certain provisions of the contract, the Commission found that the Employer did not repudiate its contract with the Union and did not violate PERA.

*d. City of Detroit -and- AFSCME Council 25, Local 542*

Case No. C09 L-241, issued April 20, 2012

*Unfair Labor Practice Not Found; Allegations Failed to State A Valid PERA Claim; No Bargaining Violation Found Where Parties Reached a Verbal Agreement on a Change to a Mandatory Subject of Bargaining Which Was Codified in a Written Letter to the Union.*

Respondent Employer's Exception Denied; Footnote Referenced by ALJ Not Material to Outcome of Case.

The Commission affirmed the ALJ's decision dismissing the charge filed by Charging Party AFSCME Council 25, Local 542 (Union) alleging a bargaining violation by Respondent, City of Detroit (City or Employer) for unilaterally changing a mandatory subject of bargaining.

Charging Party represents a bargaining unit of nonsupervisory employees of the City of Detroit's building maintenance department. As part of an ongoing reorganization, the Employer shifted various department functions to a general services department. The transfer to the building maintenance department involved changing employee assignments from work at stationary locations to roving work crews. The Employer met with Charging Party's representatives to discuss the new roving work crew plan that would also result in additional work assignments and overtime hours for several of Charging Party's bargaining units. At Charging Party's request, an additional component was included to the Employer's initial plan. Weeks later, the parties met again to allow the Union's stewards and individual members to bid on their new assignments under the roving work crew plan. During this same timeline, the Employer canceled its contracts with the outside cleaning vendors to ensure that Charging Party's members would be exclusively performing the work under the new plan. As the implementation date grew closer, one of Charging Party's affiliated locals objected to the roving work crew plan but did not provide any specifics as to its objection. After the Employer implemented the roving crew operation, Charging Party filed a charge claiming that a bargaining violation occurred and that the plan sought to frustrate the members' access to their union stewards. The ALJ rejected these contentions finding that the Union had agreed to the changes during the special meeting that was documented in a letter from the Employer.

On exceptions, MERC affirmed the ALJ's conclusions and dismissed the charge against the Employer. Like the ALJ, MERC concluded that the parties had bargained on the change to roving crews as demonstrated by: the Union's success in adding a component to the Employer's initial plan; the Union's members meeting to select new work assignments; and the Employer canceling its outside cleaning contracts in order to provide the increased work activity and overtime hours to Charging Party's members.

MERC dismissed the Employer's exception that sought to strike a footnote regarding the untimeliness of its post hearing brief. MERC reasoned that notwithstanding the dispute on the timeliness of the brief, the ALJ considered it in reaching his conclusions. As such, any MERC action on the footnote is not material to the outcome of the case.

## **G. Direct Dealing**

### *a. West Bloomfield Township –and- Police Officers Association of Michigan (POAM)*

Case No. C08 L-265, issued April 17, 2012

Unfair Labor Practice Not Found, Respondent did not Engage in Direct Dealing by Inquiring Into a Bargaining Unit Member's Interest in a Non-Union Position in

Exchange for Removing His Name From the Promotion List; Mere Discussions Between an Employer and Employee to Ascertain that Employee's Interest in a Non-Union Position Do Not Constitute a Direct Dealing Violation Under PERA Where There Has Been No Change in the Terms and Conditions of Employment and the Union's Authority Has Not Been Undermined.

The Commission agreed with the ALJ's finding that West Bloomfield Township (Employer) did not commit an unfair labor practice by directly contacting a bargaining unit member to inquire into his interest in moving into a vacant lateral position in the detective bureau. The ALJ and Commission reasoned that the Employer's actions did not change the existing conditions of employment and did not undermine the Union.

The Police Officers Association of Michigan (POAM or Union) represents a group of non-supervisory police officers working for the Employer. The Employer established a promotional list to fill future sergeant vacancies that contained the names of several bargaining unit members. Pursuant to the parties' collective bargaining agreement, the Employer maintained complete discretion to promote from within the top three candidates on the list notwithstanding the officer's actual rank order in that top cluster. After being overlooked for three sergeant's openings while in that top cluster, a unit member was approached by a group of command officers who inquired into his interest in a lateral assignment outside of the bargaining unit. In exchange for accepting the new position, the officer would be required to voluntarily remove his name from the promotional list for sergeant. Believing the transfer offer was an effort to select a candidate below the top cluster of the list, the officer declined taking the lateral position and contacted the Union. The Union filed an unfair labor practice charge alleging the Employer's discussion with the unit member was an attempt to circumvent the promotional process of the collective bargaining agreement. The ALJ rejected the Union's theory finding instead that a direct dealing violation had not occurred in light of the broad discretionary authority given to the Employer on promotional matters. The Commission also agreed with the ALJ's reasoning that the Employer operated within the parameters of the parties' contractual terms and its mere discussions with a bargaining unit member to ascertain their career interests did not constitute a PERA violation, especially where the discussions did not result in a change in the terms and conditions of employment, nor undermine the Union's authority.

## **II. Unfair Labor Practice Charges Regarding Interference with or Discrimination for Protected Concerted Activity**

### **A. Alleged Interference with protected concerted activity**

#### **a. Huron Valley Schools—and—Huron Valley Education Association, MEA/NEA.**

Case No. C10 F-139, issued July 20, 2012.

Unfair Labor Practice Not Found: Charge Dismissed Where Allegations Failed to State a Valid Claim Under PERA; Allegations Insufficient to Support the Union's Claim that Employer Retaliated Against An Employee Member for Invoking the Grievance Procedure; Employer's Criticisms of an Employee's Intent to File a Grievance Did Not Violate PERA

Where there Was No Showing of Anti-Union Animus and Respondent's Statements Did Not Reasonably Threaten or Penalize the Employee for the Grievance Action.

The Commission agreed with the ALJ's conclusion that Huron Valley Education Association, MEA/NEA (Union), did not show that Huron Valley Schools (Huron Valley/Employer), discriminated against the Union's member, J, for invoking the grievance procedure. The Commission adopted the ALJ's recommended order to dismiss the unfair labor practice charge.

Huron Valley hired J as a "resource room" teacher. As such, she provided supplemental services to students who are assigned to regular classroom settings, but who also need special education services. As part of a performance improvement plan, the Employer assigned a teacher to serve as "mentor" to J and assist her with improving communication skills. Several months into the evaluation period, the Employer arranged a special meeting between various teachers, including J's mentor, to discuss concerns involving J. Upon learning of the meeting, J contacted co-workers, insisted that they not attend the meeting and threatened that she would file a grievance. After the meeting took place, J contacted the principal and expressed opposition to the special meeting. The principal responded by informing J that the meeting was beneficial rather than punitive and that a grievance would be unnecessary. In an attempt to address J's concerns, the principal contacted the Union president and met with J, however, no formal grievance was filed. Subsequently, the Union filed a charge alleging that the Employer violated PERA by retaliating against J for engaging in protected concerted activity based on the principal's comments regarding the filing of a grievance over the special meeting.

The crux of the issue was whether the Employer's agent violated §10(1)(a) and (c) of PERA by allegedly threatening J in retaliation for invoking the grievance procedure. The Union alleges that the principal's comments regarding the filing a grievance were motivated by anti-union animus and interfered with her exercise of rights protected under PERA. Conversely, the Employer argued that the contacts by the principal were simply efforts to diffuse the situation and not made in retaliation for any protected concerted activity.

To state a prima facie case for a violation of §10(1)(c) of PERA, a party must prove: "(1) the employee engaged in protected activity; (2) the employer had knowledge of that activity; (3) the employer possessed anti-union animus; and (4) the protected activity was the motivating factor underlying the discriminatory conduct." *Genesee Co Sheriff Dep't*, 18 MPER 4 (2005). Here, the Commission agreed with the ALJ's conclusion that although J's intent to file a grievance was a protected concerted activity under PERA, the record did not support any existence of anti-union animus by the Employer. Rather, the Commission found that the actions of the principal were insufficient to reasonably conclude that he harbored any anti-union animus. Thus, the Commission rejected the Union's contention that the Employer's agent was motivated by anti-union animus and in violation of PERA.

In addition, the Commission also rejected the Union's claim of a §10(1)(a) violation. While anti-union animus is not a required element to sustain a charge, a party must still demonstrate that the complained of actions by an employer have "objectively" interfered with that party's exercise of protected concerted activity. *Macomb Academy*, 25 MPER 56 (2012). Here, the Commission rejected the Union's contention that there was an

interference with J's rights under PERA. The Commission noted that the principal initiated the contact with the union president in order to assist in resolving J's issue. Furthermore, the Commission, citing *City of Lincoln Park*, 1983 MERC Lab Op 362, stated that criticisms by a public employer to an employee regarding a grievance does not necessarily violate PERA, so long as the statements do not expressly or impliedly threaten to penalize the employee for filing a grievance. Therefore, the Commission found no showing of a §10(1)(a) violation.

Finally, the Union asserted that J suffered from an adverse employment action by the Employer. Again, the Commission rejected the Union's argument and concluded that the alleged comments made by the principal could not have reasonably interfered with J's decision to go forth with the grievance action. Accordingly, the Commission affirmed the ALJ's decision recommending dismissal of the charge.

*b. City of Inkster -and- Inkster Fire Fighters Union, Local 1577,*

Case No. C09 J-203, issued June 19, 2012

*Unfair Labor Practice Found- Employer Interfered with Employees' Exercise of § 9 Rights; Employer Questioned Employees about the Source of a Rumor That Had Been Discussed at a Union meeting; The Rumor Concerned the Hiring of Non-unit Employees to Perform Bargaining Unit Work, Which if True Would Impact Terms and Conditions of Bargaining Unit Employment; Respondent had no Right to Question Employees or Demand Written Statements About What was Said at a Union Meeting in the Absence of a Legitimate and Substantial Business Justification.*

The Commission affirmed in part and reversed in part the ALJ's Decision and Recommended Order regarding the City of Inkster's (Employer) interrogations of two employees, N and K. The Commission affirmed the ALJ's finding that the Employer violated § 10(1)(a) with respect to employee N when it: demanded to know whether he made a statement at a union meeting alleging that the Employer planned to hire nonunion workers to do bargaining unit work; threatened to conduct an investigation into whether he made the statement to other employees; and threatened to discipline him if he had made the statement. The Commission reversed the ALJ's decision to the extent that the ALJ found that the Employer had not violated the § 9 rights of employee K.

The Charging Party, Inkster Fire Fighters Union, Local 1577 (Union) represents a bargaining unit of full-time fire fighters, including the two employees at issue, N and K. The Employer also uses the services of trained, but unpaid, volunteer auxiliary fire fighters who are not part of the bargaining unit. The Employer's fire department includes an ambulance/rescue unit operated by bargaining unit fire fighters. The Union had proposed the creation of a second ambulance/rescue unit during the parties' latest contract negotiations, but the proposal was rejected the Employer.

One of the auxiliary firefighters, P, told N and K, that he had taken a physical examination to qualify for employment in a second ambulance/rescue unit that the Employer was planning to staff with auxiliary firefighters who would be paid \$10 per hour. The story P told to N and K was false. Subsequently, there was a discussion at a union meeting regarding a report of a second ambulance/rescue unit that the Employer planned to operate

with auxiliary firefighters. Shortly after the union meeting, the fire department chief learned that the false auxiliary ambulance rescue unit rumor had been discussed at a union meeting.

The fire department chief met with the union president and asked who started the rumor. The union president informed the chief that N had informed him of the rumor in his capacity as the Union's president. The chief then called his deputy chief to his office and summoned N to join them. The chief asked N if he had started the rumor about an auxiliary ambulance/rescue unit; N denied starting the rumor. The chief also asked N if he had told members at a union meeting that the Employer was going to hire auxiliary fire fighters for a second ambulance/rescue unit, to which N replied that what he said at a union meeting was none of the Employer's business. In N's presence, the chief instructed the deputy chief to begin an investigation and told N: "I'm going to have an investigation done on you, and if these statements are found true, I'm going to have you suspended."

The deputy chief met with K, who confirmed that he had heard the rumor from P and admitted that he asked about the rumor at the union meeting. The deputy chief ordered K to provide a written statement containing everything that K said during their interview, which included K's comments at the union meeting.

The Commission rejected the Employer's argument that the ALJ erred by concluding that the Employer's questioning of N inquired into activities protected by PERA. The Union and bargaining unit members have a legitimate interest in knowing whether the Employer planned to hire non-bargaining unit employees to perform bargaining unit work, which was therefore a legitimate subject of discussion at the union meeting. By inquiring into statements made by N at the union meeting regarding the rumor, the Employer probed into activities protected by PERA. Although the rumor was false, there is no evidence that N was aware of that. N engaged in activity protected by § 9 when he shared the rumor with the Union president without knowing that the rumor was false.

The issue of whether § 10(1)(a) has been violated is not determined by the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions may reasonably be said to tend to interfere with the free exercise of protected employee rights. A reasonable employee in N's position would have interpreted the Employer's actions to be an attempt to restrain his exercise of protected concerted activity.

The Commission also rejected the Employer's argument in reliance on *Ingham Co Sheriff v Capital City Lodge No. 141*, 273 Mich App 133 (2007), that it had a legitimate and substantial business justification for questioning N about the rumor. Unlike the employer in *Ingham Co*, the Employer had no rule governing the employee action that was potentially subject to discipline. Although the Employer claimed that rumors were causing unspecified dissension and friction, it presented no evidence that the auxiliary ambulance/rescue unit rumor affected order in the workplace. Thus, the Commission found that the Employer did not show a legitimate and substantial business justification for either questioning N about his discussion of the rumor with his fellow union members, or threatening to discipline him if it were determined that he had engaged in such discussion within the confines of a union meeting.

Contrary to the ALJ's conclusions, the Commission found that the Employer interfered with K's § 9 rights when it ordered him to submit a written statement recounting his own comments at the union meeting. Although K was not specifically questioned about what he said at the meeting, the Employer failed to present any legitimate business justification for ordering him to put that information in writing. The Commission concluded that the fact that K could be ordered to write down and submit to the Employer information about what had transpired at a union meeting would have caused a reasonable employee in his position to question whether he could speak candidly at future union meetings. Thus, the Commission held that by requiring K to prepare a written statement about the contents of the union meeting the Employer unlawfully interfered with K's exercise of rights protected under § 9 of PERA.

*c. Police Officers Labor Council –and- Teamsters Local 214,*

Case No. CU09 G-021, issued January 18, 2012.

*Unfair Labor Practice not Found: Summary Dismissal Appropriate; Evidentiary Hearing Not Warranted Where No Material Factual Dispute Exists; Unit Placement Proper Due to Sufficient Community of Interest between the Respondent and the Disputed Positions; Where a Position Shares a Community of Interest with More Than One Bargaining Unit and Both Units Claim the Position, MERC Does Not Interfere With the Employer's Placement Absent a Showing that a Community of Interest No Longer Exists Between the Disputed Position and the Current Bargaining Unit; Respondent Reasonably Relied on Employer's Representations as to the Training and Duties of the New Position When Agreeing to Represent the Positions*

The Commission agreed with the ALJ's conclusion that Police Officers Labor Council (POLC) did not commit an unfair labor practice by agreeing to represent the newly created position of campus security police officers (CSPOs) because of a shared community of interest existing between the CSPOs and the POLC unit.

Teamsters Local 214 (Teamsters) represented a bargaining unit of nonsupervisory public safety security officers (PSSOs) and POLC represented a bargaining unit of nonsupervisory public safety police officers (PSPOs) employed by the Detroit Public Schools (Employer or DPS) in the public safety department. PSPOs were authorized to carry firearms and make arrests, while PSSOs were not. Sometime in late 2008, DPS created a new position of CSPO that, according to the job description, would be authorized to carry firearms, undertake investigations, and make arrests. Therefore, DPS and POLC agreed to include the CSPOs in the existing POLC unit.

Upon learning that that the CSPOs had not completed the necessary state certified police training and were not permitted to carry firearms, Charging Party concluded that the newly created CSPOs were performing the same duties as its bargaining unit members. Charging Party then filed the instant charge, alleging that by initially agreeing to represent the CSPOs, POLC restrained and coerced these employees in the "free choice" of a bargaining agent and the exercise of rights under Section 9 of PERA.

Shortly after the ALJ issued her decision in a related case, the Employer filed exceptions and moved to reopen the record to admit new evidence to show that since the close of the

record, DPS had qualified under Act 330 to employ private security police officers and that the CSPOs had completed police certification training and been assigned new duties. After an order granting Employer's motion to reopen the record and introduce new evidence, a new hearing was held on the updated factual assertions.

The Commission agreed with the ALJ's conclusion that although the two bargaining units operated within the same public safety department and initially performed similar duties, their job classifications would change as CSPOs would be required to pass a state certified police training program and would perform functions similar to those of the PSPO in POLC's bargaining unit, while the PSSOs would lack such authority. The Teamsters, as the record shows, were clearly aware of these distinctions. Likewise, the Commission rejected the argument that the Employer and the POLC conspired to misrepresent the actual duties of the newly created CSPOs position in order to fraudulently place the new positions into POLC's bargaining unit. The Commission, agreeing with the ALJ, concluded that POLC reasonably relied on the Employer's representations as to the training and duties required of those who would fill the newly created CSPO positions.

Lastly, the Commission rejected the Teamsters' argument that the ALJ erroneously recommended dismissal without a hearing. Concluding that there was no genuine material factual dispute, the Commission held that the ALJ properly recommended dismissal of the charge.

*d. Macomb Academy –and- Macomb Academy Education Association, MEA/NEA,*

Case No. C09 I-173, issued January 13, 2012.

*Unfair Labor Practices Found- Respondent Interfered With, Restrained, and Coerced Employees Engaging in Protected Concerted Activity; Employer's Actions, including Departing from its Established Practice of Giving Employees Notice Regarding Staffing Decisions Would Give Employees Reasonable Cause to Believe That Engaging in Protected Concerted Activity Would Jeopardize Their Employment; After Union Was Elected As the Employees' Representative, Employer's Announcement of Its Intention to Hire Any New Employees As Contract Employees, Who Would Be Excluded from the Bargaining Unit, Would Give Employees Reasonable Cause to Believe That Engaging in Union Activity Was Futile. Employer Violated Duty to Bargain; Employer had Duty to Maintain Status Quo While Parties were Bargaining First Contract; Employer's Power to Implement Unilateral Changes In Terms and Conditions of Employment of At-Will Employees Does Not Continue after Employees Have Union Representation.*

Macomb Academy (Employer) is a school that provides instruction in daily living and employment skills to young adults with cognitive impairments. Prior to the events that gave rise to this case, the teachers working for the Academy were unrepresented. In 2008, one of the employees (L) received a write up from the school's superintendent. Several teachers accompanied L to speak with the school board. One of those teachers (M) also spoke to the board on L's behalf. After the board's decision not to intervene, another one of the teachers contacted the Macomb Academy Education Association, MEA/NEA (Union) about obtaining representation. On April 28, 2009, the Union filed a petition for a representation election. On June 8, 2009, the Union was selected as the exclusive

bargaining agent in a unit of the Employer's full-time and part-time teachers from which contract employees were excluded.

The Commission agreed with the ALJ's conclusion that the Employer restrained and coerced its employees in the exercise of their §9 rights by withholding from its employees the benefit of knowing whether or not they would continue to be employed by the academy; by impliedly threatening to retaliate against its employees if they chose union representation; by announcing its decision to hire all new employees as contract employees; and by terminating the employment of two of its teachers as a result of their protected concerted activity or perceived union involvement.

The Employer argued that it refused to reveal which employees would continue to be employed because doing so might be seen as a threat. The Commission rejected the Employer's argument in light of the Employer's practice of giving ample, advance notice of its staffing decisions. Such a departure from the established practice, according to the Commission, was a reminder to the employees that they were dependent on the Employer's good will, which might be forfeited if they chose Union representation. The Employer also contended that there was no evidence that it was motivated by anti-union animus. The Commission explained a violation of §10(1)(a) does not require a showing of animus. An employer's actions violate §10(1)(a) when they may reasonably be said to have interfered with the free exercise of the rights protected by §9.

The Commission also held that the Employer's resolution to hire all new employees as contract employees violated §10(1)(a) because it gave notice to the employees that their unionization efforts would be wasted, since the Employer was taking action that would cause the bargaining unit to disappear through attrition.

The Employer commonly allowed its teachers to work without a special education endorsement and to do the student teaching necessary to meet the requirements for a special education endorsement while in its employ. Nevertheless, in April 2009, L was denied the opportunity to complete the student teaching she needed to do to fulfill the requirements for a special education endorsement. Although the Employer's review of L's teaching performance was positive, the Employer asserted that it denied L the opportunity to do her student teaching because L had not demonstrated strong teaching skills. On June 16, 2009, the Employer discharged L because she did not have a special education endorsement. On the same day, M was notified that her contract would not be renewed for the following year. The Employer asserted that M's employment was terminated because she was one of the highest paid teachers at the academy. However, when the decision regarding M was made, she was being paid less than two other teachers. Although M's evaluations were excellent, one of the two higher paid teachers who were retained was on an improvement plan because of performance problems. The Commission found that the protected concerted activity in which both L and M engaged motivated the Employer to deny L the opportunity to do student teaching and to discharge both L and M.

In addition, the Commission found that the Employer violated its duty to bargain by: unilaterally establishing a new interim pay schedule; reducing the salaries of several of its employees; altering the time of staff meetings; and implementing a new professional liability insurance plan. The Commission found no merit in the Employer's argument that its unilateral changes were not changes to the status quo because it made changes to terms

and conditions of employment before the Union was elected to represent the employees. It is well established that an employer violates its duty to bargain when it institutes changes in mandatory subjects of bargaining while the parties are bargaining a first contract. The Employer's failure to maintain terms and conditions of employment in this case constitutes a violation of the duty to bargain.

*e. AFSCME Local 3667, Riverview Firefighters Association – and- City of Riverview,*

Case No. CU11 A-001, issued December 19, 2011.

*Unfair Labor Practice Not Found: Summary Dismissal Appropriate Where Charge Fails to State a Valid PERA Claim; Allegations Did Not Factually Support that Respondent's Conduct Constituted an Unlawful Restraint or Coercion Where the Union's Press Release Did Not Explicitly Single Out the Director for Criticism or Demand He Be Replaced; Absent Special Circumstances, a Union's Press Release That Contains No Specific Threats of Harm is Protected Activity Under PERA and the First Amendment.*

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent AFSCME Local 3667 (Union) did not violate PERA Section 10(3)(a) by issuing a press release criticizing Charging Party City of Riverview's (Employer) plans to implement a central dispatch unit in its public safety department. The Union publically criticized the plan as being irresponsible and poorly planned with inadequate staff. The Employer objected and filed a charge alleging the press release violated PERA by seeking to interfere with or coerce the City in its selection of a bargaining representative. The ALJ rejected this contention holding instead that the press release constituted protected activity under both PERA and First Amendment where the Union had not made any direct threats of coercion or harm, nor specifically demanded the removal of the public safety director. The Commission also rejected the Employer's contention, on exceptions, that the ALJ erred in relying on the lack of MERC authority on this particular issue, and for concluding that 1st Amendment protections precluded a finding of a PERA violation. The Commission noted that public opinion on labor-management disputes is often sought by employer and union representatives. As such, one party's public announcement of its side or opinion of a disagreement on an issue, alone, does not rise to a level of interference or coercion in violation of PERA.

*f. Southfield Public Schools –and- Southfield Michigan Educational Support Personnel Association,*

Case No. C08 F-115, issued October 17, 2011.

*Unfair Labor Practice Not Found- Employer's Decision to Subcontract Non-Instructional Support Services is a Prohibited Subject of Bargaining; Issue of Lawfulness of Employer's Decision to Subcontract Raises Questions of Fact, Which Could Not be Decided on Summary Disposition; Charging Party Failed to Show Employer's Decision to Subcontract Non-Instructional Support Services was Motivated by Anti-Union Animus.*

The Commission agreed with the ALJ's conclusion that Southfield Michigan Educational Support Personnel Association's (Union), did not show that Southfield Public Schools

(Employer), discriminated against the Union's members by deciding to subcontract noninstructional support services. The Commission adopted the ALJ's recommended order to dismiss the unfair labor practice charge.

PERA §15(3)(f) provides that a public school employer's decision to contract with a third party for noninstructional support services is a prohibited subject of bargaining. Nevertheless, the Employer's decision to subcontract may be subject to review. A decision, which may otherwise be within the Employer's authority, may be an unfair labor practice if the decision is motivated by unlawful discriminatory intent. The question of the Employer's intent is one of fact and required an evidentiary hearing. Therefore, Commission upheld the ALJ's denial of the Employer's motion for summary disposition.

Where an allegation of unlawful discrimination is made, the burden is on the party making the claim to demonstrate that protected conduct was the motivating factor in the respondent's decision. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1982). In this case, the Union did not establish a prima facie case of discrimination as it failed to show that the Employer was motivated by anti-union animus. The evidence that the Union offered, which included statements by a school principal and by a school board member regarding privatization, could not be directly linked to the deliberations of the school board or its decision.

The Commission rejected the Union's argument that the ALJ erred by not drawing adverse inferences from the Employer's failure to have its chief negotiator testify. The Union contended that the negotiator was likely to have knowledge of facts to either refute or support Charging Party's allegation of discrimination. However, as the Commission pointed out, the Union did not specify any facts that could properly be inferred from the Employer's failure to have the negotiator testify. The Commission could not infer discrimination without facts to support that legal conclusion. Accordingly, the Commission affirmed the ALJ's Decision and Recommended Order and dismissed the unfair practice charge.

**B. Employee Rights and Employer Obligations under *NLRB v Weingarten*, 429 US 251 (1976)**

*a. City of Dearborn –and- Police Officer's Association of Michigan*

MERC Case No. C09 A-005, issued March 16, 2012

*Unfair Labor Practice Found- Respondent Violated the Weingarten rights of Charging Party's Member by Interfering and Refusing to Allow a Union Representative to be Present During an Investigatory Interview that the Employee Reasonably Believed Could Lead to Discipline; Criminal Investigatory Interviews Not Per Se Excluded from Weingarten Protections If Employee Reasonably Believes that the Interview Might Result in Discipline by the Employer; An Employee's Request for Union Representation Need Not Contain Special Words or Phrases, Only Reasonable Notice Is Required. Weingarten Remedy Limited to a Posting Requirement Where the Employee's Termination Was Based on Independent Information from a Properly Conducted Separate Investigation.*

The Commission agreed with the ALJ's finding that the City of Dearborn (Employer) committed an unfair labor practice and *Weingarten* violation, by interfering with an employee's attempt to have a union representative present during a criminal investigatory interview that the employee reasonably believed could lead to discipline.

In this case, a police dispatcher operated a personal web blog that comprised stories from information obtained from police reports and a computerized police database. After learning of the blog, the Employer contacted the state police who directed the Employer to conduct a criminal investigation and report to the prosecutor's office. Earlier on the same day as the criminal investigation, the Employer reprimanded the employee for a workplace violation unrelated to the web blog. Hours later while en route to the criminal investigatory interview location, the employee caught the attention of her union representative and motioned for him to come with her for possible assistance. However, the union representative did not attend after being informed by the employee's supervisor that the meeting involved a criminal matter only. Following the interview, the supervisor returned and immediately suspended the employee pending the outcome of the criminal investigation. Weeks later after learning that no criminal action would be sought by the prosecutor, the employee was returned to full work status. Over the next month, Respondent conducted a separate internal investigation that resulted in the employee's termination for various work violations relating to the web blog.

The Police Officers Association of Michigan (Union) filed a charge asserting that its member's *Weingarten* rights were violated because she was denied union representation during the criminal investigatory interview. The Employer contended that the employee never requested union representation, that it was unaware of the request, and that criminal investigatory interviews were not subject to *Weingarten* protection. The ALJ disagreed (and the Commission concurred) noting that no special words or phrases are necessary to satisfy the demand requirement, so long as the employer is put on reasonable notice that the employee desires union representation.

The Commission also rejected the Employer's assertion that the employee could not have reasonably believed the police interview could lead to further workplace discipline. However, based on the "totality of the circumstances," the Commission agreed with the ALJ's conclusion that it was possible for the employee to reasonably fear the criminal investigatory interview might lead to further discipline, especially having received a reprimand earlier that same day. The Commission also concurred with the ALJ's finding that a *Weingarten* violation occurred since the intent of the interview with police was to gain information in a pending criminal investigation, and not solely to issue an already decided disciplinary action.

### **C. Duty of Fair Representation**

#### *a. Teamsters Local 214 -and- Denise Greer,*

Case No. CU10 G-035, issued February 26, 2013

*Unfair Labor Practice Not Found – Failure to State a Claim; Charging Party Failed to Allege Facts that would Establish Union's Conduct was Arbitrary, Capricious or*

Characterized by Bad Faith; In the Absence of a Breach of Duty by Employer, Union has No Duty to Challenge Employer's Actions; Employer had No Duty to Bargain over Subcontracting of Noninstructional Support Services; Charging Party's Dissatisfaction with Union's Efforts is Insufficient to Constitute a Breach of Duty of Fair Representation; Union's Failure to Provide Charging Party with Information Requested as Union Steward is Internal Union Matter Outside the Scope of PERA; Charging Party's Past Role as Union Steward does Not Give her Authority to Represent Interests of Bargaining Unit Members who are Not Parties; Allegations of ALJ Bias Insufficient to Support Reversal.

In its decision, the Commission agreed with the ALJ's recommendation for summary dismissal of the charge against the Union as a result of the Charging Party's failure to state a claim upon which relief can be granted.

Charging Party was employed as a security officer by Detroit Public Schools until the Employer subcontracted the work of Charging Party's bargaining unit. As a result, her position was eliminated and her duties outsourced to a third party vendor. The Union unsuccessfully challenged the Employer's actions in unfair labor practice charges before the Commission and in an action for injunctive relief in state court.

Subsequent to this, Charging Party filed a charge alleging that the Union breached its duty of fair representation by failing to prevent her former Employer from subcontracting the bargaining unit's work and by failing to require the Employer to take certain actions with respect to the processing and resolution of grievances.

The ALJ disagreed, finding that the Charging Party's claim was previously litigated in both state and federal court and was barred from further consideration by the doctrine of collateral estoppel. In view of this finding, the ALJ concluded that the charge was frivolous and recommended sanctions. The ALJ also rejected Charging Party's contention of bias stemming from his participation in settlement discussions held between the Charging Party's former Employer and Respondent Union. The ALJ further noted that, even assuming the facts alleged by the Charging Party were true, the charge nonetheless failed to state a claim upon which relief could be granted under PERA.

More than eleven months after she became aware of his assignment to this matter, Charging Party moved to disqualify the ALJ based on her claim that he demonstrated bias against union members in his conduct of a related case in 2007 and in his order requiring her to show cause that her charge should not be dismissed. In view of her unexplained lengthy delay in moving to disqualify and the absence of anything objectionable in the order to show cause, MERC found that the Charging Party's motion to disqualify the ALJ was properly denied.

The Commission further found that the Charging Party has no standing to pursue the claims of her former coworkers since those individuals did not file charges and were not therefore parties to the action. Noting that the subcontracting of security work and its impact on employees were prohibited subjects of bargaining under Section 15(3)(f) of PERA, the Commission held that the Employer had no duty to bargain when it outsourced the Charging Party's duties. Additionally, the Commission held that Charging Party failed to allege facts establishing that the Union's conduct toward her was arbitrary, discriminatory, or characterized by bad faith. Although the Charging Party may have been

dissatisfied with the Union's efforts in resolving grievances, this was not sufficient to constitute a breach of the duty of fair representation. Similarly, Charging Party's complaint about Respondent's failure to provide her with information she requested as a union steward involves the internal affairs of a labor organization and is outside the scope of PERA.

The Commission did, however, modify the ALJ's decision to find that the charge was not barred by the doctrines of res judicata or collateral estoppel in view of the absence of a final judgment in the state court action and of any preclusive effect in the federal action. The Commission further declined to award attorney's fees inasmuch as Respondent did not request attorney's fees and the Commission majority has previously held that § 16(b) does not authorize the Commission to award attorney's fees.

*b. Detroit Police Officers Association -and- Robert Boroski, et al.*

Case No.: CU10 G-031, issued June 19, 2012.

*Unfair Labor Practice Not Found: Charge Dismissed for Failing to State a Claim Upon Which Relief Can Be Granted Under PERA; Charging Parties' Failed to Allege Facts Sufficient to Support Their Claim that Respondent Breached Its Duty of Fair Representation; Respondent's Filing of a Grievance that Resulted in the Loss of Charging Parties' Promotions Was Within Its Discretionary Authority in light of its Commitment to Uphold the Terms of the Letter of Agreement with the Employer; A Member's Mere Dissatisfaction with a Union's Efforts Regarding the Handling of a Grievance, Alone, is Insufficient to Constitute a Breach of the Duty of Fair Representation.*

The Commission affirmed the ALJ's Decision and Recommended Order summarily dismissing the charges against Respondent, the Detroit Police Officers' Association (Union). The charge alleged that the Union violated its duty of fair representation by filing and prosecuting a grievance that ultimately caused several bargaining unit members (Charging Parties) to lose their promotions to sergeant. The charge also alleged that the Union failed to advise Charging Parties of its intent to file the grievance and failed to allow Charging Parties to participate in the processing of the grievance or in the arbitration hearing. The Union countered that the promotions violated a letter of agreement with the Employer regarding the eligibility list used for the promotions. The Commission agreed with the ALJ's conclusion that the charge did not indicate that the Union's actions fell outside the range of reasonableness.

In rejecting Charging Parties' exceptions, the Commission found that the facts alleged by Charging Parties did not support Charging Parties' assertions that the Union had acted arbitrarily, discriminatorily, or in bad faith. The Union's conduct in deciding whether to pursue a grievance must be viewed in light of its ultimate duty to the membership overall. The Commission reasoned that the Union's actions were appropriate in light of its vast discretion to determine the best strategies to undertake when enforcing the obligations in its bargaining agreements. Further, Charging Parties failed to allege any facts that would show the presence of ulterior motives by the Union for pursuing the grievance that caused the rescission of the promotions. The Commission also affirmed the ALJ's finding that the Union's failure to communicate with Charging Parties about the grievance, arbitration hearing, and decision did not constitute a breach of fair representation because Charging

Parties were not direct parties to the grievance. The Commission also agreed with the ALJ's finding that the Union did not act discriminatorily by challenging the promotions of Charging Parties but not objecting to the promotion of another bargaining unit member whose promotion had been delayed due to her maternity leave.

Finally, the Commission noted that a member's dissatisfaction with their union's efforts or ultimate decision not to pursue a grievance, alone, is insufficient to constitute a breach of the duty of fair representation, and that the Commission lacks authority to regulate or monitor a union's internal decisions on which grievances to file or process, absent a showing that the decisions were arbitrary, capricious, biased or made in bad faith.

### III. Procedural Issues

#### A. Waiver of Exceptions

##### *a. City of Detroit -and- American Federation of State, County and Municipal Employees (AFSCME), Local 207*

MERC Case No. C10 E-119, issued July 20, 2012

*Unfair Labor Practice Found – Employer Breached Duty to Bargain When it Unilaterally Decided to Transfer Work Exclusively Performed by Bargaining Unit Employees to a Different Bargaining Unit or to an Outside Contractor; Exclusivity of Bargaining Unit Work Not Destroyed by Prior De Minimis Transfer of that Work to Another Bargaining Unit. Omission of Details from Charge is Not Prejudicial When Underlying Facts are Fully Litigated; Failure to Object to Litigation of Issue Before ALJ Waives the Objection and Bars Filing Exceptions on that Issue.*

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent, City of Detroit (Employer), violated §10(1)(e) of PERA when it unilaterally decided to lay off employees in the Street Lighting Maintenance Worker (SLMW) classification, which was represented by the Charging Party, American Federation of State, County and Municipal Employees, Local 207 (Union), and to replace them with line workers represented by the International Brotherhood of Electrical Workers (IBEW). Furthermore, the Commission agreed with the ALJ's finding that the Employer breached its duty to bargain when it laid off the sole employee in the AFSCME represented Public Lighting Department's repair mechanic classification and transferred the repair mechanic's work to a private contractor.

In its exceptions, the Employer alleged that the ALJ exceeded the scope of the charge when he made a decision regarding the repair mechanic. The Commission found that although the charge did not identify the job classifications of the affected employees, the record revealed that there were two classifications at issue, the SLMW and the repair mechanic. Furthermore, the Commission noted that at no point in the record, prior to filing its exceptions, did the Employer object to the Union raising, or the ALJ considering, the issue of the subcontracting of the work performed by the repair mechanic. Had the Employer objected while the matter was still before the ALJ, the Union could have timely moved to amend the charge to include the allegations regarding the repair mechanic and the issue could have been resolved by the ALJ. Instead, the Employer waited until it filed

its exceptions to raise the issue. By that point, it was too late to raise the objection and the Commission determined that the Employer's failure to timely object constituted a waiver of its objection and barred the filing of an exception on that issue. The Commission agreed with the ALJ that the repair mechanic had exclusively performed the work of repairing traffic lights and affirmed the ALJ's conclusion that the Employer violated its duty to bargain under §10(1)(e) when it unilaterally decided to subcontract that work.

## **B. Motion for Summary Disposition**

### *a. City of Pontiac and Teamsters Local 214*

MERC Case No. C11 B-023, issued November 15, 2012

*Unfair Labor Practice Not Found; Charging Party Failed to State a Claim upon which Relief can be granted under PERA; Summary Disposition Appropriate where No Material Facts are in Dispute; ALJ may Hear Argument and Dispose of Oral Motion for Summary Disposition without Prior Notice to Parties. Respondent's Duty To Bargain Over Subcontracting was Met when Parties' Agreed to Contract Language Specifying Circumstances under which Subcontracting may Occur; Since Contract Provisions Covering the Matter in Dispute could Reasonably be Relied on for the Action at Issue, Parties have a Bona Fide Dispute over Contract Interpretation. A Good Faith dispute over the Interpretation of the Collective Bargaining Agreement is not Repudiation and, therefore, must be Resolved by the Grievance Mechanism Provided in the Parties' Contract.*

In its decision, the Commission affirmed the ALJ's decision on summary disposition finding that the Charging Party, Teamsters Local 214, failed to State a Claim upon which relief could be granted under PERA.

The parties' collective bargaining agreement contains a provision specifying the circumstances under which the Employer may subcontract bargaining unit work. The Contract also contains a provision covering layoffs.

In its charge, the Union alleged that Respondent violated its duty to bargain under § 10(1)(e) of PERA by refusing to bargain over subcontracting and layoffs of its bargaining unit members. Following an oral motion for summary disposition, and oral argument by both parties, the ALJ summarily dismissed the charge.

On exceptions, Charging Party contended that the ALJ erred in granting Respondent's motion for summary disposition and failed to give Charging Party adequate notice that she would hear a dispositive motion at hearing. The Commission found no error by the ALJ. Commission rules provide that oral motions may be made at hearing and such motions, including motions for summary disposition, may be disposed of at hearing by the ALJ. Moreover, the Commission found the ALJ correctly concluded that there were no material facts in dispute and Respondent was entitled to prevail on the legal issues. Therefore, the Commission rejected Charging Party's contention that the ALJ should have held an evidentiary hearing.

### C. Standing – Motion to Intervene

#### a. *Detroit Public Schools -and- Teamsters Local 214 –and- Denise Greer and 194 Members of Teamsters Local 214,*

Case No. C07 K-252, issued June 25, 2012

*Motion For Reconsideration Denied – Motion for Reconsideration Relied on Case Interpreting Michigan Court Rules Inapplicable to MERC Proceedings; Motion Offered no Authority to Support Contention that Intervention Should have been Allowed; Proposed Intervenors Merely Restated Arguments Made in Their Exceptions; Motion to Intervene and Exceptions Were Untimely and Therefore Denied*

The Commission denied the motion of Proposed Intervenors, Denise Greer and 194 Members of Teamsters Local 214, seeking reconsideration of the Commission's order denying their motion to intervene.

In support of their assertion that they had a right to intervene, Proposed Intervenors relied on *Nicholson v Citizens Ins Co of America*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2012 (Docket Nos. 300592, 303885); 2012 WL 716275. *Nicholson* applied MCR 2.209(A)(3) to a civil judicial proceeding. The Commission explained that *Nicholson* and MCR 2.209(A)(3) only apply to civil actions, and not administrative proceedings such as matters before MERC.

The Commission explained that even if it agreed that *Nicholson* and MCR 2.209(A)(3) applied, intervention could not be permitted. *Nicholson* noted "a motion to intervene is untimely when judgment for one of the parties has already been entered." In the present case, Proposed Intervenors disagreed with actions that their Union, Teamsters Local 214, took while the matter was at the hearing stage of the proceedings. However, the Proposed Intervenors waited until after the hearing had been completed, and after the ALJ's Decision and Recommended Order was issued months later, before seeking to intervene in the matter. Finding the matter analogous to the timeliness issue discussed in *Nicholson* the Commission found that the motion to intervene was untimely.

Proposed Intervenors asserted that Justice Markman's concurring opinion in *University of Michigan v Graduate Employees Organization/AFT*, 807 NW2d 714, 715 (Mich, 2012) suggests that a non-party may be permitted to intervene in MERC proceedings. However, since the "non-party" that Justice Markman referred to is the Michigan Attorney General, whose intervention may be authorized under MCL 14.28 in certain judicial or administrative proceedings, the Commission found no merit to the argument. Proposed Intervenors failed to identify any statute authorizing them to intervene in a MERC proceeding.

In their proposed exceptions, Proposed Intervenors contended that the ALJ erred by relying on what the Proposed Intervenors asserted was "a fraudulent stipulation" by the Union to the existence of an enforceable agreement between the Union and the Employer. However, the Commission found that there was nothing in the ALJ's Decision and Recommended Order to support Proposed Intervenors' assertion that the parties had fraudulently stipulated to the existence of an enforceable agreement or that the ALJ had

relied on such a stipulation. Thus, the Commission noted that there was no merit to the exceptions the Proposed Intervenors sought to raise and denied the motion for reconsideration.

***b. Detroit Public Schools -and- Teamsters Local 214 -and- Denise Greer and 194 Members of Teamsters Local 214,***

Case No. C07 K-252, issued April 17, 2012

*Motion to Intervene Denied - Proposed Intervenors Have no Standing to File a Charge Alleging a Violation of the Duty to Bargain and, Therefore, no Right to Intervene; The Duty to Bargain Runs Between the Union and the Employer and not Between Individual Employees and the Employer; the Union is the Only Entity with the Authority to Pursue Claims against the Employer Related to the Collective Bargaining Agreement.*

The Commission denied the proposed intervenors' Motion to Intervene and Motion for an Extension of Time to File Exceptions and Brief and adopted the ALJ's recommended order.

The ALJ concluded that the Detroit Public Schools (Employer) and Teamsters Local 214 (Union) entered into a concession agreement, which provided that employees' wages would be reduced until the expiration of the agreement. The ALJ found that the Employer failed to timely restore pre-concession wage rates to the employees after the agreement's expiration and failed to timely correct that deficiency upon the demand of the Union. The ALJ held that the Employer violated its duty to bargain by continuing to apply the wage reduction to the employees' wages after the expiration of the concession agreement. However, the ALJ did not recommend an award of back pay because, after the parties reached an impasse in negotiations, the Employer imposed the wage rate proposed by the Union. That wage rate took into account the Employer's failure to end the wage reduction as agreed and brought the bargaining unit into close parity with the concessions given by other units.

Neither the Employer nor the Union filed exceptions to the ALJ's Decision and Recommended Order. However, a group of employees in the bargaining unit represented by the Union sought to intervene and file exceptions to the ALJ's Decision and Recommended Order protesting the ALJ's refusal to award back pay. The proposed intervenors argued that their Union failed to adequately represent their interests in the charge against the Employer, persistently denied their requests for information, and rejected their efforts to have input in the dispute with the Employer.

In denying the motion to intervene, the Commission explained that under PERA §10(1)(e), the Employer has a duty to bargain with the representatives of its employees and not with the *individual* employees. It is the employees' bargaining representative, not the employees, that has the right to file an unfair labor practice charge against the employer for an alleged breach of the duty to bargain. Therefore, proposed intervenors have no standing to file a charge alleging that the Employer violated its duty to bargain by unilaterally extending the wage concession agreement and no right to intervene in the charge filed by the Union. Accordingly, the Commission denied the motion to intervene. In the absence

of timely exceptions by either of the parties, the Commission adopted the ALJ's recommended order.

#### **D. Statute of Limitations**

##### ***a. Traverse Area District Library -and- Margaret Kelly***

Case No. C11 G-121, issued May 15, 2012

*Unfair Labor Practice Not Found: Charge Barred by the Six Month Limitations Period Under PERA Section 16(a); Charging Party's Allegations of Wrongful Discharge Were Based on Conduct Occurring More Than Six Months Prior to the Filing of the Charge; Contractual Requirements to Undertake Internal Efforts to Remedy a Dispute Will Not Toll the Limitations Period for Filing a ULP Charge Under PERA.*

The Commission affirmed the ALJ's Decision and Recommended Order finding that the charge should be summarily dismissed based on the limitations period under PERA.

On July 29, 2011, Margaret Kelly filed a charge asserting that her Employer, Traverse Area District Library (Library), terminated her employment in retaliation for her efforts in support of a recent attempt by a union to recruit several employee positions in the Library. Kelly's employment contract required the parties to undergo mediation before seeking any outside remedy to a discharge dispute. Relying on the contract provision, Charging Party sought resolution of her discharge claim through facilitative mediation. Once the mediation process was complete but the outcome unchanged, Charging Party filed a charge with MERC alleging that the discharge was in retaliation for her protected concerted activity.

However, the ALJ found (and the Commission agreed) that since the charge was filed 6 months and 19 days following the date of discharge, the claim was time-barred under PERA § 16. The ALJ and Commission rejected Charging Party's contention that the limitations period was tolled while the internal requirement of mediation was being met.

##### ***b. City of Detroit -and- AFSCME Council 25, Local 542***

MERC Case No. C07 B-030, issued March 15, 2012

*Amended Charge Dismissed: All Charges are Subject to Six Month Statute of Limitations; Where Amended Charge Does Not Relate Back to Original Charges Amendment Must Be Filed within Six Months of the Date the Charge Accrued; Amended Charge Did Not Relate Back to Original Charge Because It Raised Different Legal Issues and Was Based on Different Facts. Respondent's Post Hearing Brief Stricken from the Record: ALJ Has Authority to Reject Motions and Pleadings That Do Not Conform to Commission Rules; ALJ May Act on Own Motion to Order Party to Show Cause Why Party's Defective Documents Should Not Be Stricken from Record. Respondent's Refusal to Properly Respond to ALJ's Order is Act of Contempt.*

The Commission affirmed the ALJ's decision dismissing the amended charge filed by Charging Party AFSCME Council 25, Local 542 (Union) and striking Respondent City of Detroit's post hearing brief.

The parties did not except to the ALJ's findings that the Employer violated §10(1)(e) of PERA when it failed or refused to negotiate a supplemental agreement covering the bargaining unit represented by the Union. The exceptions were limited to procedural issues: the Union excepted to the dismissal of its amended charge; the Employer excepted to its post-hearing brief being stricken from the record and to the ALJ's finding that its failure to properly respond to his show cause order was contemptuous.

Charging Party represents a bargaining unit of nonsupervisory employees of the City of Detroit employed in several City departments, including the Recreation Department. Historically, the relationships between these employees and the City were governed by a master collective bargaining agreement covering city employees in various AFSCME locals, and a supplemental agreement covering employees in the Recreation Department. The parties' most recent supplemental agreement expired in 2001, but the parties generally continued to follow its terms. In October of 2006, the Union requested to begin bargaining with the Employer for a new supplemental agreement. The Employer offered to bargain over a supplemental agreement that would cover only the members of the bargaining unit remaining in the Recreation Department and refused to bargain for a new supplemental agreement covering the entire bargaining unit. In November 2006, the Employer announced the creation of a second shift, which it implemented without responding to the Union's bargaining demands on the matter.

On February 22, 2007, the Union filed an unfair labor practice charge alleging that the Employer violated its duty to bargain when it failed or refused to negotiate a supplemental agreement between the Recreation Department and Local 542. In the spring of 2007, the Employer created roving work crews that worked during the hours normally reserved for overtime employment, thereby depriving bargaining unit members of overtime work. On January 29, 2008, the Union filed an amended charge, which alleged that the Employer committed an unfair labor practice by unilaterally implementing new terms and conditions of employment, including a night shift and an overtime distribution system for newly created roving work crews.

The Commission agreed with the ALJ's conclusion that the amended charge was barred by the statute of limitations. On exceptions, Charging Party contended that since Commission Rule 153, which governs amendments of charges, does not address the timeliness of amendments, the six month statute of limitations does not apply. The Commission explained that Rule 153 and the limitations provision in PERA §16(a) must be read together. The Commission also rejected Charging Party's argument that the amended charge related back to the original charge. The Commission held that the amended charge alleging unilateral changes to terms and conditions of employment was significantly different from the original charge alleging failure to bargain, and did not relate back for the purposes of the statute of limitations. Because Charging Party's amended charge accrued more than six months before Charging Party filed its amended charge, the amended charge was time-barred.

The parties' post-hearing briefs were due July 20, 2009. Charging Party filed its brief on that date. The Employer faxed its brief to the ALJ, but did not file a proof of service or file the additional copies of its brief as required by the Commission's fax filing policy and the Commission Rules. Months later, Charging Party wrote a letter to the ALJ stating that it had never received the Employer's post-hearing brief, and asking that if the brief was not

timely filed, it be stricken from the record. The ALJ issued an Order to Show Cause, requiring the Employer to submit proof that it had properly and timely served a copy of its post-hearing brief on Charging Party and to address its failure to comply with Commission Rules. The Employer did not respond to the Order, and instead filed motions: to strike Charging Party's letter from the record; to quash the ALJ's Order to Show Cause; and to stay the due date of its response to the ALJ's motion to show cause. The ALJ denied the Employer's motions, struck its post-hearing brief from the record, and stated in his order that the Employer's response to the Order to Show Cause was contemptuous.

The Employer excepted to the ALJ's decision to strike its post-hearing brief and to the ALJ's finding that the Employer was contemptuous in its reply to the ALJ's Order. The Commission held that the ALJ is authorized to reject, on his own motion, any document or pleading not properly filed or served and that the ALJ acted within his discretion in issuing the Order to Show Cause. The Employer's post-hearing brief was not properly filed and served, and because the Employer failed to respond to the show cause order, the ALJ did not err in striking the Employer's post-hearing brief from the record. The Employer admitted in its exceptions that it purposely withheld its post-hearing brief because it had not received Charging Party's post-hearing brief. Based on that, and on the Employer's refusal to comply with the ALJ's order, the Commission concluded that the Employer had shown it was willing to follow the ALJ's orders and Commission Rules only when it found them convenient. Thus, the Commission agreed with the ALJ that the Employer's response to the Order to Show Cause was indeed contemptuous.

*c. Michigan State University Administrative Prof Assoc. -and- Danny Layne,*

Case No. CU10 I-040, issued February 17, 2012.

Post Decision Motions Denied: Allegations Time Barred and Failed to Set Forth Adequate Grounds for Relief under PERA or Commission's General Rules; Future Filings by Charging Party Based on Allegations Stemming from Respondent's Representation Efforts in His 2010 Job Loss Will be Administratively Dismissed Without Further Processing.

Charging Party filed an unfair labor practice charge and several other pleadings between 2010 and 2011 against Respondent Union that pertained to his job loss in 2010. His charge alleged that Respondent breached its duty of fair representation by not arbitrating a grievance that challenged the outsourcing of his prior position with Michigan State University. In its Decision and Order issued September 16, 2011, the Commission adopted the ALJ's recommendation and summarily dismissed the charge for lack of an actionable claim within MERC's jurisdiction. Layne filed subsequent pleadings, which the Commission treated as a motion for reconsideration of its decision. On November 15, 2011, MERC issued a Decision and Order dismissing Layne's "motion for reconsideration" as it failed to present grounds for reconsideration under Rule 167, and merely restated arguments presented in his earlier submissions. Layne subsequently filed two additional motions seeking reversal of MERC's prior orders and requesting that relief be granted in his favor. MERC denied these latest motions as being untimely and outside of its jurisdiction under PERA and MERC's General Rules. MERC advised that no further remedies existed within its authority on these matters, and cautioned that future filings by

Layne involving Respondent's representation efforts as to his 2010 job loss would be administratively dismissed without further processing.

## **E. Intervention in Election Cases**

### ***a. University of Michigan –and – Graduate Employees Organization/AFT,***

Case No. R11 D-034, issued December 16, 2011.

*Reconsideration Granted – Matter Remanded for Hearing; Petitioner Submitted Affidavits Attesting to Facts Not Previously Available to Commission; Representation Proceedings Are Investigatory Proceedings; the Commission Has the Obligation to Determine the Facts; Facts Proffered with Motion for Reconsideration Indicate That There May Be Reasonable Cause to Find That There Is a Question of Representation. Attorney General's Motion to Intervene Denied – Attorney General's Right to Intervene Is Not Unlimited; Intervention for Purpose of Denying Statutory Rights Is Inimical to the Public Interest and Cannot Be Allowed. Motion to Intervene by Proposed Intervenor Students Against GSRA Unionization Denied – Intervention in an Election Proceeding Is Only Granted When a Rival to the Labor Organization Seeking Representative Status Wishes to Be Included on an Election Ballot and Makes a Proper Showing of Interest; Proposed Intervenor Did Not Seek Placement on the Ballot and Did Not Have Authorization Cards Establishing Showing of Interest.*

In a split decision, the Commission Majority granted reconsideration of its September 14, 2011 decision, which dismissed the petition for a representation election filed by the Graduate Employees Organization/AFT (GEO or Petitioner). The Commission Majority also denied the Attorney General's motion to intervene in the proceedings and denied the motion by Students Against GSRA Unionization to intervene. The dissenting Commissioner agreed with the Majority's decision to deny the motion for intervention filed by Students Against GSRA Unionization, but would have also denied reconsideration.

The University of Michigan Board of Regents and the GEO consented to an agreement providing that an election would be held for the Graduate Student Research Assistants (RAs) at the University of Michigan to vote on whether they wished to be represented by the GEO for purposes of collective bargaining. The GEO submitted a resolution by the University's Board of Regents purporting to recognize the RA's as employees, and the consent election agreement, in support of its petition for a representation election. However, the GEO did not offer any evidence in support of its contention that the RA's are public employees. In a decision issued September 14, 2011, the Commission dismissed the petition for a representation election. In light of the Commission's decision in *Regents of the University of Michigan*, 1981 MERC Lab Op 777, which held that RAs are not public employees entitled to the benefits and protection of PERA, the Commission declined to conclude that the RAs had become employees based on the University's current willingness to recognize them as such and held that it had no jurisdiction to conduct an election in this matter. Subsequently, the GEO moved for reconsideration of the Commission's decision. Both the Students Against GSRA Unionization and the Michigan Attorney General moved to intervene.

Explaining that intervention in a representation proceeding is limited to organizations seeking placement on the ballot that have at least a 10% showing of interest, the Commission denied the motion to intervene filed by Students Against GSRA Unionization.

The Michigan Attorney General claimed the right to intervene based on MCL 14.28. The Commission Majority found that the right of the Attorney General to intervene is not unlimited and may be restrained where such intervention is clearly inimical to the public interest. In support of its motion to intervene, the Attorney General argued that unionization of the University's RAs "may negatively affect" the University's reputation and competitiveness. The Majority held that it is merely the Commission's responsibility to determine whether the RA's are public employees. If they are public employees they have a statutory right to organize if they choose to do so. The Majority noted that it was not appropriate for it to consider speculation as to the impact on the University by the RAs potential exercise of the statutory rights of public employees. The Majority determined that the Attorney General's opposition to the exercise of a statutory right is inimical to the public interest.

The Majority also pointed out that it was apparent that the Attorney General's motion was motivated by opposition to the Regents' resolution recognizing the RA's as employees who may determine for themselves whether they will organize. The Majority stressed that it is not bound by the Regents' assessment of the RA's status under PERA and that a Commission proceeding is not the proper forum for a debate on the correctness of the Regents policy decision, especially when the Regents' decision cannot determine the results of the Commission's investigation in this matter. Finding that intervention by the Attorney General would be unduly disruptive of the proceedings and inimical to the public interest, the Majority denied the Attorney General's motion to intervene.

The Majority also explained that unless the same factual and legal issues are being litigated, the doctrine of *res judicata* does not apply to a representation matter, which is an investigatory and not an adversarial proceeding. However, unless the Commission is presented with evidence of a substantial and material change of circumstance, it is bound by the 1981 decision. Before the Commission's September 14, 2011 decision, the Petitioner had not offered evidence or specific allegations of fact sufficient to indicate that there had been a material change in the circumstances of the RAs' relationship with the University in the thirty years since the decision was issued in *Regents of the University of Michigan*. However, with its motion for reconsideration, the Petitioner submitted an affidavit attesting to facts that the Majority found may provide a basis for concluding that there has been a substantial material change in the RAs' status. The Majority found that in light of that submission, the Commission has a statutory obligation to refer the matter to an administrative law judge to conduct an evidentiary hearing at which the Petitioner will have the opportunity to attempt to show that there has been a substantial and material change in circumstances since *Regents of the University of Michigan* was issued. The Commission Majority emphasized that it is the Petitioner's burden to show that there has been such a change and that it is a heavy burden to meet.

The dissenting Commissioner concluded that neither the representation petition nor the Petitioner's motion for reconsideration was persuasive on the question of whether there has been "a substantial and material change of circumstance" since the Commission's 1981 decision. He noted that statements made to the Board of Regents by the University's

president and members of the University faculty indicated that the essential nature of the mentor-mentee relationship between students and faculty members that is at the core of the university research function remains unaltered. It is the nature of that relationship that formed the basis for the 1981 decision finding that RAs are not public employees. The Dissent also noted that affidavits submitted by the University in response to the motion for reconsideration stress the importance of the RAs' work in the graduate students' educational process. Pointing out that those affidavits make it clear that the graduate students' work as RAs is an integral part of gaining the knowledge and skills necessary for them to earn their doctorate degrees, the Dissent found that the statement in the Commission's 1981 decision that "RAs are substantially more like the student in the classroom [than employees]" remains true today.

Inasmuch as the Dissent would deny reconsideration, the dissent would have dismissed the Attorney General's motion to intervene as moot. However, the dissenting Commissioner explained that if he agreed with the decision to grant reconsideration, he would find the Attorney General's intervention appropriate. Given the parties agreement on the underlying issues, the Dissent expressed concern that the relevant experiences of the University president, numerous deans and faculty members, and hundreds of RAs might not be presented without the Attorney General's intervention. Therefore, the dissenting Commissioner would have granted the Attorney General's motion to intervene for the purpose of ensuring that both sides of this issue were fully and fairly examined.

#### **IV. Representation and Unit Placement**

##### **A. Act 312 Eligibility**

*a. Michigan State University (Police Department) -and- Capitol City Lodge No. 141, Fraternal Order of Police,*

Case No. UC12 A-001, issued February 27, 2013

*Unit Clarification Petition and Compulsory Arbitration Petition Dismissed; Act 312 does not apply to Police Officers Employed by a Public University; Recent Amendment to Act 312 Extended Coverage to Authorities Created by One or More Municipalities. University Police Department was Not Created by a Municipality*

The Commission dismissed the petition for unit clarification and petition for binding arbitration under Act 312 filed by Fraternal Order of Police Capitol City Lodge No. 141 (Petitioner) which sought to apply Act 312 compulsory arbitration to police officers employed by Michigan State University (Employer). The Commission concluded that Act 312, as amended, does not apply to police officers employed by a public university.

Petitioner contended that recent amendments to Act 312, 2011 PA 116, expanded the coverage of the Act to include police officers employed by colleges and universities. The Employer asserted that the 2011 amendments could not be construed as applying to police officers employed by a public university.

Section 1 of Act 312 specifies that employees of public police and fire departments are eligible for compulsory arbitration. Prior to 2011, Act 312 defined such departments as a

department of a city, county, village or township. Consequently, in *Ypsilanti Police Officers Ass'n v Eastern Michigan Univ*, 62 Mich App 87 (1975), the Court of Appeals held that police officers employed by Eastern Michigan University were not eligible for compulsory arbitration under Act 312.

The Commission found that the 2011 amendments to Act 312 did not expand the scope of coverage beyond police and fire departments created by municipalities. Rather, Section 2(1) of the Act was amended merely to ensure that employees of an authority created by one or more municipalities were eligible for compulsory arbitration. Given the absence of any evidence suggesting that the MSU Police Department was an authority created by one or more municipalities, the Commission dismissed the petitions.

## **B. Supervisor Status**

### *a. City of Warren -and- AFSCME Council 25 and its Affiliated Local 1971 -and- AFSCME Local 1250,*

Case No. UC11 I-014, issued January 16, 2013

*Unit Clarification Petition Dismissed; Supervisory Status Not Found; Supervisory Status Determined by the Employee's Authority in Personnel Matters; Senior Payroll Technician Did Not Have the Authority to Hire, Discharge, Discipline, Transfer, Evaluate, or Reward Any Employee or to Effectively Recommend Any of These Actions; Senior Payroll Technician Position was Appropriately Placed in the Unit of Nonsupervisory Employees.*

The Commission dismissed the unit clarification petition filed by AFSCME Council 25 and its affiliated Local 1917 (Petitioners) which sought to include the position of senior payroll technician in their bargaining unit of City of Warren (Employer) supervisory employees. The Commission concluded that placing the senior payroll technician in Petitioners' bargaining unit of supervisory employees would not be appropriate because the position does not have supervisory authority.

After the retirement of the payroll supervisor, the Employer created the position of senior payroll technician. The payroll supervisor had been in Petitioners' supervisory unit, while the newly created senior payroll technician position was placed in a bargaining unit of full-time nonsupervisory employees represented by AFSCME Local 1250. The senior payroll technician assumed many of the duties of the former payroll supervisor.

Petitioners contended that since the senior payroll technician performs some of the same duties formerly performed by the payroll supervisor, the position should be included in Petitioners' unit of supervisory employees. The Employer denied that the senior payroll technician is a supervisor.

Initially the new senior payroll technician position was assigned most of the duties formerly performed by the payroll supervisor. However, the position was not given any supervisory responsibilities. The Employer had already designated two employees to perform supervisory functions in the human resources department and had given them the authority to: supervise all employees in Local 1250's unit; monitor attendance, approve time off; enforce work rules and issue discipline to payroll employees. As of the date of

the hearing, the senior payroll technician was on a medical leave of absence. Her duties had been assigned to the administrative clerical technician, O, who had previously performed payroll work under the direction of the senior payroll technician. While the senior payroll technician was on leave of absence, O was in charge of preparing payroll, but was required to submit all her work to the human resources department director for review. Although she was authorized to ask others in the human resources department for help with payroll and to direct and review their work when she needed it, O testified that she understood that if she had any problems with any employee whose work she oversaw, she was to bring this to the attention of the human resources director and that she herself did not have the authority to terminate or discipline any employees.

In *East Detroit School District*, 1966 MERC Lab Op 60, the Commission adopted the National Labor Relations Act's definition of supervisor as someone who has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend such action. The Commission stressed that the exercise of such authority is not simply of a routine or clerical nature but requires use of independent judgment. Employees who merely assign or oversee the performance of work by others on a routine basis are not supervisors. In the present case, the Commission found no evidence that the senior payroll technician had the authority to hire, discharge, discipline, transfer, evaluate or reward any employee or to effectively recommend any of these actions. Therefore, the position of the senior payroll technician did not come within the Commission's definition of supervisor and was properly included in the bargaining unit of nonsupervisory employees represented by AFSCME Local 1250 rather than in the unit represented by Petitioners.

### C. Executive Status

#### *a. District Department of Health No.2 -and- Professional Management Association,*

Case No. UC11 J-020, issued January 15, 2013

*Bargaining Unit Clarified - Exclusion of Finance Director from Bargaining Unit Based on Executive Status not Warranted Where Finance Director's Duties are not Policy Making in Nature; Employer Sought to Exclude Finance Director and Administrative Secretary As Confidential Employees; Employer Failed to Show a Need for More Than One Employee to Assist with Confidential Labor Relations Duties; Finance Director Performs Confidential Labor Relation Duties When She Costs out Employer Proposals in Preparation for Collective Bargaining Agreement. Employer may Exclude as Confidential Either the Position of Finance Director or the Position of Administrative Secretary.*

The Commission granted the petition of the District of Health Department No. 2 (Employer) to clarify the bargaining unit represented by Professional Management Association (PMA or the Union). The bargaining unit consisted of the administrative secretary and four department directors, including the finance director. The Commission held that the Employer may elect to exclude from the bargaining unit as confidential either the position of finance director or the position of administrative secretary.

The Employer argued that the finance director position was an executive and was therefore inappropriately included in the unit. The Union argued that the finance director is neither an executive nor confidential employee because she does not make policy or participate in formulating labor relations policies.

The Employer is governed by an eight member board and operates under the direction of its Health Officer. The finance director heads the Employer's finance department and is responsible for planning and directing the Employer's accounting and management information systems. She is responsible for preparing and submitting financial and other reports to the Health Officer and the board. As head of the finance department, the finance director has access to all employee payroll records, attendance reports, and deferred compensation data as well as financial data. The finance director's responsibilities include but are not limited to interpreting financial data to the board members, auditors, local and state agencies, and departmental employees. The finance director makes recommendations on fiscal operations, including formulating and recommending policies on employee travel and the use of credit cards. If expenditures rise too much during the fiscal year or if funding is cut for programs during the year, the finance director may be asked to give advice on how the departments should cut their budgets. However, the Health Officer makes the final decision on the cuts that are to be implemented.

Prior to the formation of the PMA bargaining unit, the finance director compiled information on, and made recommendations, with respect to health insurance plans prior to the Employer's contract negotiations with one of the Employer's other bargaining units. The Employer's bargaining committee determines the proposals that will be presented at the bargaining table. Before the bargaining committee formulates its proposals, the finance director provides the bargaining committee with information about the financial status and situation of the Employer. She is also responsible, at the bargaining committee's request, for costing out proposals. The finance director has never been part of the bargaining committee. Before 2010, when the Union's bargaining unit was organized, the finance director participated in the bargaining committee's discussions of the Employer's proposals.

In determining whether the position of finance director is an executive, the Commission relied on factors articulated in *Leelanau & Leelanau Co Sheriff*, 24 MPER 18 (2011) including but not limited to, the extent of authority, the number of executive positions relative to the size of the organization, the extent of budget responsibilities, responsibility for preparation of departmental rules and regulations, the degree of participation in labor relations and the formulation of collective bargaining policy. Taking those factors into account, the Commission concluded that the finance director does not formulate, determine, or effectuate policy on a sufficiently high level to be classified as an executive employee.

However, the Commission noted that by costing out the Employer's proposals in preparation for negotiations, the finance director had access to information about the Employer's bargaining strategy and, therefore, performed confidential labor relations duties. Inasmuch as the Employer had previously indicated that it had designated the administrative secretary as its confidential employee, and the administrative secretary had not previously performed confidential labor relations duties, the Commission determined that the Employer could choose to exclude either the administrative secretary or the

finance director as a confidential employee. The Employer could not exclude both employees as confidential since the Employer failed to offer evidence that both employees actually performed confidential labor relations work and that the Employer needed to assign more than one employee to assist the Health Officer and board with the preparation and handling of bargaining proposals.

*b. City of Ishpeming -and- AFSCME Council 25,*

Case No. UC09 I-028, issued April 17, 2012

*Petition for Unit Clarification Dismissed - Burden to Show That Employee is an Executive is on Party Seeking to Exclude Employee from PERA's Protections. Executive Exclusion Depends on Scope of Responsibilities, Extent of Authority, and Interchangeability of Functions With Other Executives. Where Employee's Policy Decisions are Limited to Assigned Department, and City Council and/or City Manager Approval is Required for Most Decisions Employee Does Not Have Sufficient Policy-Making Authority to be Excluded From Bargaining Unit as an Executive.*

The Commission concluded that the position of public works director/city engineer is a supervisory position properly included in the bargaining unit represented by AFSCME. The Commission found that the position did not qualify as an executive and therefore, was not excluded from the right to collective bargaining under PERA.

The Commission determines whether a position is an executive based on the existing duties and responsibilities of the position. The City of Ishpeming (City or Employer) eliminated the bargaining unit position of superintendent of public works and created the public works director/city engineer position in 2009. The City then filed a unit clarification petition seeking to exclude the public works director/city engineer from the bargaining unit as an executive. None of the witnesses for either party were able to articulate any significant differences between the public works superintendent and the current public works director/city manager position.

The public works director/city engineer is responsible for the management and operations of the City's public works department, which includes maintenance, water, cemetery, parks, and recycling. The public works director/city engineer also acts as the liaison between certain other state and local departments, such as the Michigan Department of Transportation. The public works director/city engineer attends city council meetings, but mainly to provide updates from the department of public works. The public works director/city engineer has the discretion to make spending decisions and contract for services as long as they are provided for in the budget, or below \$3,000 (\$10,000 for emergency expenditures). Any other expenditure requires approval from the city council through the city manager. The public works director/city engineer does not have direct access to or influence on the city council; all proposals and requests go through the city manager.

The most significant factors to be considered in determining whether a position is executive are the scope of responsibilities, the extent of authority, and the interchangeability of functions with other executives. Any policy decisions the public works director/city engineer made were limited to the department of public works, and are

subject to the approval of the city manager and city council. The Commission examined these factors and determined that the public works director/city engineer does not have the requisite policy-making functions to be an executive.

#### **D. Voter Eligibility in Representation Elections**

*a. Leelanau County and Leelanau County Sheriff -and- Teamsters Local 214 -and- Command Officers Association of Michigan*

Case No. R11 F-050, issued April 17, 2012

*Challenged Ballot to be Counted - Revised Tabulation of Results to be Issued Reflecting the New Count; Employees Who are Employed on Both the Date Established for Eligibility Purposes and the Date of the Election are Eligible to Vote in That Election.*

The Commission found that A, the law enforcement commander in the Leelanau County Sheriff's Department (Employer) was part of the bargaining unit in question and an eligible voter at the time of the election. Based on that finding, the Commission directed that A's ballot be opened and counted and a revised tabulation of election results be issued reflecting the new count.

The COAM represented a bargaining unit originally consisting of all regular full-time law enforcement sergeants in the Employers' Sheriff's Department. In April 2009, the Employers created a new position, law enforcement commander, to oversee the sergeants and deputies in the law enforcement division. Following the creation of the new position, COAM made a demand to bargain over the wages, hours, and terms and conditions of employment of the position. After the Employers refused to do so, claiming that the position was an executive, COAM filed a unit clarification petition seeking to have the law enforcement position included in its bargaining unit. The sheriff selected A to fill the position. Once the unit was clarified to include the law enforcement commander, the COAM renewed its demand to bargain over the wages, hours and terms and conditions of employment of the position. This time, COAM also demanded that the Employers remove A and leave the position vacant until bargaining had taken place on the appropriate process for filling the position. Shortly thereafter, Teamsters Local 214 (Petitioner) filed a petition for a representation election. The Employers then refused to bargain with the COAM until the question concerning representation was resolved. As a result of the Employer's refusal to bargain, the COAM filed an unfair labor practice charge, which was subsequently dismissed by the Commission. The Commission then directed an election in the unit of all regular full-time command officers in the law enforcement division of the Sheriff's Department. The COAM challenged A's ballot alleging that he was not eligible to vote because he was not properly part of the bargaining unit. In addition to the reasons asserted earlier for contending that A should not be allowed to remain in the position, the COAM asserted that it had learned that A had announced his intentions to retire months prior to the election and had retired from the Sheriff's Department. The COAM argued that A's retirement, as well as the other issues surrounding his appointment to the position, put the legitimacy of his ballot in question.

The Commission explained that employees who are employed both on the date established for eligibility purposes and on the date of the election are eligible to vote in that election. The Commission found that A was eligible to vote in the election, since there was no dispute that he was employed during the payroll eligibility period and through the date that the mail ballots were counted, regardless of his prior decision to retire. Therefore, the Commission directed that A's ballot be opened and counted and a revised tabulation of election results be issued reflecting the new count.

*b. Leelanau County and Leelanau County Sheriff –and- Teamsters Local 214 –and- Command Officers Association of Michigan,*

Case No. R11 F-050, issued December 20, 2011.

*Direction of Election-Where There Is No Dispute over the Scope of the Bargaining Unit and No Dispute That a Question of Representation Exists, an Election Must Be Directed: An Individual Holding a Position in the Bargaining Unit Has the Right to Vote in the Commission Directed Election to Determine the Unit's Bargaining Representative; The Parties Dispute As to Whether the Individual Should Fill the Position That He Occupies Is It Not a Matter to Be Determined in the Context of a Representation Election.*

The Commission directed an election in a bargaining unit of supervisory command officers, when the parties agreed that a question of representation exists and there was no dispute over the scope of the bargaining unit.

Prior to the filing of the representation petition by Teamsters Local 214, the Employer created the new position of law enforcement commander. In an earlier unit clarification case filed by the Incumbent Union, Command Officers Association of Michigan, the Commission included the position of law enforcement commander in the bargaining unit of supervisory command officers. The Incumbent Union contended that the Employer had a duty to bargain over the terms and conditions of employment of the law enforcement commander position. The Incumbent Union asserted that the position should remain vacant until filled through a promotional process agreed to by the parties. The Employer disagreed and filled the position.

The Incumbent Union would not consent to the election while the position was occupied by someone unilaterally chosen by the Employer. The Incumbent Union filed a charge contending that the Employer violated its duty to bargain by refusing to remove the individual from the position of law enforcement commander. The Commission denied the Incumbent Union's request that the charge block the representation election.

Inasmuch as there was no dispute over the scope of the bargaining unit, no dispute that a question of representation existed, and no dispute that an individual holding the position in a bargaining unit has the right to vote in a Commission directed election to determine the bargaining representative for that unit, the Commission ordered the holding of an election. The Commission concluded that the question of whether the individual currently in the law enforcement commander position should remain in that position is not a matter that should be determined within the context of a petition for a representation election.