ANNUAL REVIEW OF MERC CASES

(March 2015 – February 2016)

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[1] Appreciation is extended to Ashley M. Olszewski, Seth Filthaut, Carl Wexel, and Ann Warner for their assistance with the preparation of these case summaries.

I. Unfair Labor Practice Charges Regarding the Duty to Bargain

A. The Publicly Funded Health Insurance Contribution Act - 2011 PA 152

a. ***Shelby Township –and- Command Officers Association of Michigan,*** Michigan Court of Appeals Docket No. 323491, issued December 15, 2015; MERC Case No. C12 D-067, decision issued August 18, 2014; 28 MPER 21.

In an unpublished opinion, the Court of Appeals affirmed MERC's finding that Respondent violated its duty to bargain by failing to bargain over a mandatory subject and by assessing employees higher costs for health insurance premiums than allowed under Act 152.

The parties' collective bargaining agreement expired in December of 2010. After Act 152 was passed in September 2011, the parties began discussing ways to minimize employees' premium share. During these discussions, the Union did not demand bargaining over which of the three options provided under Act 152 — the hard caps under § 3, the 80% employer share option under § 4, or the opt out under § 8 — would be used to determine the amount of the health insurance premium paid by the Employer and by bargaining unit employees. The Employer selected the 80% employer share option. The Union demanded bargaining over the computation method and total amount of employee contributions before the implementation of the new health care contribution amounts. The Employer advised the Union that it would not bargain regarding the employer share option. After the Union learned that the Employer had computed the total annual cost of the plan under a bundled rate, which included medical costs of both employees and retirees, the Union filed an unfair labor practice charge.

MERC ruled that the Employer did not violate its duty to bargain by unilaterally choosing the "percentage" option instead of the "hard cap" option under Act 152, because the choice of cost sharing options was a permissive subject of bargaining. However, MERC found that the Employer had a duty to bargain about the calculation of the union members' premium shares and that the Employer's inclusion of retirees' costs was expressly precluded by MCL 15.562(e). MERC concluded that the employer could not lawfully require the union's members to pay more than 20% of the unbundled rate. MERC ordered the Employer to recalculate the employees' premiums as of February 1, 2012 and refund any overpayments, as well as the increased cost in January 2012.

The Employer contended that MERC erred by concluding that the percentage allocation of premium health care contributions was a mandatory subject of bargaining. The Court disagreed and found that, consistent with its ruling in *Decatur Pub Sch v Van Buren Co Ed Ass'n*, 309 Mich 630 (2015), MERC correctly determined that Respondent did not have a duty to bargain about its choice of health care cost sharing options under PA 152, but it did have the duty to bargain over the percentages that specific employee groups would contribute. As such, the Court ruled that MERC did not err by concluding that health insurance costs are a mandatory subject of bargaining.

The Court disagreed with the Employer's assertion that MERC erred by finding that it improperly calculated the employees' premiums based on the bundled rates, including retirees' insurance costs. The Court stated that the definition of "medical benefit plan"

specifically excludes benefits to retired employees. Therefore, by calculating the employees' health insurance premiums based on the cost of retirees' health care benefits bundled together with the cost of employees' health care benefits, the employer violated PERA.

Further, the Court concluded that MERC was not bound by the Department of Treasury's FAQ's document, as "it does not supersede MERC's interpretation." Because MERC has the sole jurisdiction to resolve issues that involve unfair labor practices, it is not bound by Treasury's procedures.

Lastly, the Court found that the Employer failed to offer any authority that held that MERC lacked the authority to order recalculation and reimbursement of any healthcare overcharges as a remedy, and stated "MERC may impose any remedy that would make affected employees whole."

An application for leave to appeal was filed with the Michigan Supreme Court on January 26, 2016.

b. ***Decatur Public Schools –and- Van Buren County Education Association –and- Decatur Educational Support Personnel Association,*** Michigan Court of Appeals, Docket No. 320272, March 17, 2015, 309 Mich 630 (2015); 28 MPER 67; MERC Case Nos. C12 F-123 & 124, decision issued January 21, 2014; 27 MPER 41.

In a published opinion, the Court of Appeals affirmed MERC's dismissal of both unfair labor practice charges. The Court agreed with MERC's finding that the Employer did not violate its duty to bargain by implementing the hard cap cost sharing option under Act 152 before bargaining to agreement or impasse.

The collective bargaining agreements between Decatur Public Schools and each of the Unions was set to expire in June of 2012. In May 2012, the Employer sent a memorandum to members of the support unit, represented by Decatur Educational Support Personnel Association (DESPA) and to the teachers' unit members, represented by Van Buren County Education Association (VBCEA), informing them that it would implement the hard caps set forth in § 3 of 2011 PA 152 (Act 152) on July 1, 2012.

DESPA did not demand bargaining over the issue and the Employer implemented the hard caps on the support unit members' share of insurance costs. VBCEA requested to bargain with the Employer on cost sharing. However, after bargaining, the parties did not reach agreement. The Employer implemented the hard caps on health care costs effective July 1, 2012. Subsequently, both unions filed unfair labor practice charges alleging that the Employer violated its duty to bargain in good faith. The Unions contended that health insurance benefits are mandatory subjects of bargaining and that the Employer had a duty to maintain the terms and conditions of the expired collective bargaining agreement until the parties reached either agreement or impasse.

The ALJ found that there is a duty to bargain over the choice between the hard caps and the 80% employer share option under Act 152. However, the ALJ concluded that the Employer had no duty to bargain with DESPA because that union failed to make a bargaining demand. The ALJ further held that there was no merit to the charge filed by

VBCEA based on his finding that the expiration of the parties' collective bargaining agreement amounted to a "statutorily imposed impasse" under Act 152.

The Commission agreed with the ALJ's rationale for the dismissal of the charge filed by DESPA. However, the Commission concluded that the choice between cost sharing options under Act 152 is not a mandatory subject of bargaining. The Commission reasoned that while public employers may bargain over the choice of cost sharing options, they are not required to do so. The Commission noted that the ALJ's finding that the parties were at a statutorily imposed impasse was unnecessary because the choice between the hard caps and 80% employer share is not a mandatory subject of bargaining. However, the Commission agreed with the ALJ that since VBCEA and the Employer failed to reach agreement on the choice of cost sharing options before the collective bargaining agreement expired, the Employer was permitted to take unilateral action in implementing the hard caps and did not violate its duty to bargain.

On appeal, the Unions challenged MERC's finding that the Employer did not violate its duty to bargain. The Court of Appeals agreed with the Commission's finding that there is no conflict between PERA and Act 152. The Court found that the plain language of Act 152 does not give rise to an obligation to bargain with regard to the choice of cost sharing options. The Court stated that the limits imposed by Act 152 apply to the "total amounts" of contributions for all of an employer's employees and all bargaining groups. The Court concluded that this supports MERC's interpretation of Act 152 that it is the duty of the public employer to select one cost sharing option for all of its employees.

Once the Employer made its selection of the hard cap option, nothing prohibited collective bargaining on the issue of health insurance contributions. The Court explained that Act 152 does not remove health insurance benefits from the realm of mandatory bargaining. The Court agreed with MERC that Act 152 sets limits on the amount of health insurance benefits that an employer can pay for, but does not prevent bargaining up to the statutorily imposed limits. The Court noted that Act 152 expressly recognizes the right of collective bargaining in that it provides that the limits on employer payments for health insurance benefits do not take effect until after the expiration of a collective bargaining agreement that contains terms inconsistent with Act 152. Thus, employees may bargain up to the limits imposed by the employer whether the limit is in the form of the hard caps or the 80% employer share. Moreover, different bargaining units can bargain for different amounts that the employer will pay, up to the amount of the hard cap or the 80% employer share option that the employer has elected. The Court further emphasized that the fact that the public employer's governing body has the discretion to select the cost sharing option that sets the parameters of bargaining does not conflict with the public employer's duty to bargain under PERA

The Unions also challenged MERC's finding that the Employer was not required to delay implementation of its choice of hard caps until the parties bargained to agreement. The Court agreed with MERC that the Employer's implementation of the hard caps immediately upon expiration of the parties' collective bargaining agreement was not a violation of the duty to bargain. The Court explained that Act 152 clearly mandates that upon expiration of the collective bargaining agreement, the public employer is to comply with the statute. The Court stated that because the Employer had no duty to bargain over its choice between the hard caps and 80% employer share options, it was not precluded from unilaterally

implementing the plan on the date that the existing collective bargaining agreement expired. Moreover, the Court noted that § 15b of PERA, MCL 423.215b(1) makes it clear that it is the responsibility of the employees to bear any increase in the cost of health insurance after the contract has expired.

Accordingly, the Court found the issue of whether Act 152 created a "statutorily imposed impasse" to be moot because the Employer had no duty to bargain. The Court of Appeals affirmed MERC's decision to dismiss both charges.

c. ***Traverse Bay Intermediate School District -and- Traverse Bay Intermediate School District Education Association, MEA/NEA,*** MERC Case No. C12 G-129, decision issued October 20, 2015; 29 MPER 27.

The Commission reversed the ALJ's finding that the Employer violated PERA by implementing its choice of options under 2011 PA 152 upon the expiration of the parties' collective bargaining agreement instead of adhering to the terms of the healthcare provision in that agreement.

The Union represented a bargaining unit of full-time and regularly employed part-time certificated professional personnel employed by the Employer, including teachers and other professional employees. The parties' 2010-2012 collective bargaining agreement expired on June 30, 2012. That agreement contained Article XIII(E), which provided that the Employer's Board would continue to pay ninety percent of employee insurance premiums until August 31, 2012.

Act 152, which became effective September 27, 2011, was enacted to limit public employers' expenditures for employee medical benefit plans. Act 152's requirements did not apply to collective bargaining agreements executed before September 27, 2011, but became effective upon the expiration of such an agreement. A public employer that failed to comply with the requirements of the Act is subject to financial penalties, which, for public school employers includes the loss of their state aid payments.

The parties began negotiations for a successor contract sometime between November 2011 and January 2012. When they had not reached an agreement on June 11, 2012, the Employer notified the Union's members that, effective July 1, 2012, their contributions to their health care premiums would be increased in accordance with Act 152.

The Union argued that the Employer was obligated to adhere to the terms of the healthcare provision in the parties' agreement until August 31, 2012. The Employer, on the other hand, argued that it was justified in implementing its choice of options under Act 152 upon the agreement's expiration.

The Commission explained that it had already ruled on substantially similar issues in the *Bd of Ed of the Capac Community Schools*, 29 MPER 16 (2015) case. The Commission held that a public employer is free to implement its choice of options under Act 152 upon the expiration of the parties' collective bargaining agreement. The Commission found that the parties had a dispute over contract interpretation regarding whether Article XIII(E) obligated the Employer to pay 90% of employees' healthcare premiums until August 31, 2012.

The Commission found that with the issues of statutory interpretation regarding Act 152 settled, the parties' contractual issues were left to arbitration.

This case is currently on appeal to the Michigan Court of Appeals.

d. ***Board of Education of the Capac Community Schools –and- Capac Education Association,*** MERC Case No. C13 C-038, decision issued July 28, 2015; 29 MPER 16.

The Commission reversed the ALJ's Decision and Recommended Order and found that the Employer did not violate its duty to bargain with the Union.

The parties' collective bargaining agreement expired on August 20, 2012. The contract contained a clause stating that if a successor agreement were not reached at contract expiration, the Union's members would pay an additional health care premium of ten dollars per pay. The passage of the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 et seq., provided the Employer with options to help minimize its share of health care costs: the "hard cap" under § 3 and the 80% employer share under § 4. The Employer opted to select the 80% employer share option.

In June 2012, the Union's UniServ Director provided the Employer with a letter stating that the Employer was precluded from unilaterally imposing a 20% employee health care contribution at contract expiration by the clause contained in the collective bargaining agreement providing for the employee increase of ten dollars per pay. Upon contract expiration, the Employer imposed the 80% limit, resulting in an increase of premium costs for employees to 20% of costs. The Union then filed its unfair labor practice charge.

The ALJ found that the Employer and the Union were bound by the provision in their collective bargaining agreement that set the increase in the employees' share of health care costs at ten dollars per pay after the contract expired and until the parties reached a successor agreement. The ALJ determined that by unilaterally implementing the 80% employer share health cost sharing option under § 4 of Act 152, the Employer repudiated the parties contract, and violated § 10(1)(e) of PERA.

On exceptions, the Employer contended that the ALJ erred by failing to consider portions of the Department of Treasury's FAQ's that contained an example similar to the facts of this case. The Treasury FAQs indicated that an employer is required to implement the provisions of Act 152 at the point the prior contract expired, even if that contract contained language addressing health care benefits extending beyond the duration of the expired contract.

The Commission agreed with the Employer and reasoned that the FAQ's are to be of assistance to the public in determining the effect of Act 152 on the duty to bargain. The Commission determined that pursuant to § 5 of Act 152, the requirements of §§ 3 and 4 do not apply where parties are covered by a collective bargaining agreement that was in effect prior to September 27, 2011. However, since the parties collective bargaining agreement expired in August 2012, the Commission found that it was the Employer's obligation to ensure compliance with Act 152 at contract expiration. As such, the Employer did not violate its duty to bargain with the Union by increasing the health care premiums for its members per the requirements of § 4 of Act 152.

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

a. ***Bedford Public Schools –and- Bedford Education Association, MEA/NEA,*** Michigan Supreme Court, Docket No. 149718, April 3, 2015; Michigan Court of Appeals, Docket No. 314153, June 10, 2014, 28 MPER 2; MERC Case No. C11 L-211, decision issued December 14, 2012; 26 MPER 35,

The Supreme Court denied the Union's leave to appeal citing that it was not persuaded that the Court should review the questions presented in the matter.

The Court of Appeals affirmed MERC's finding that the Employer did not breach its duty to bargain by failing to comply with a provision contained in the parties' expired collective bargaining agreement that required the payment of wage increases to teachers based on educational achievements. Prior to the enactment of 2011 PA 54, provisions in an expired collective bargaining agreement regarding mandatory subjects of bargaining continued to be binding until the parties reached a new agreement or impasse. However, 2011 PA 54 prohibits public employers from paying wages greater than the wage rate in effect on the expiration date of the collective bargaining agreement. Therefore, the Court of Appeals agreed that the Employer was prohibited from paying any lane change increases after the collective bargaining agreement expired.

The Union asked the Supreme Court to review the issue of whether the bar on wage increases extended to lane change wage increases. In his concurring opinion, Justice Bernstein reasoned that because the clear language of 2011 PA 54 precludes any wage increase during the time in which a successor collective bargaining agreement is not in place, any lane change increase would ultimately increase the teachers' wages, and therefore, be in violation of the statute. The Justice further added that the legislative history of 2011 PA 54 supports the contention that the Legislature intended to bar any and all to employee pay increases between contract expiration and the effective date of a successor agreement.

C. Prohibited Subjects of Bargaining

a. ***Ionia Public Schools –and- Ionia Education Association,*** Michigan Court of Appeals Docket No. 321728; July 28, 2015, 29 MPER 7; MERC Case No. C12 G-136, April 22, 2014, 27 MPER 55.

In a published opinion, the Court of Appeals affirmed MERC's finding that the Employer did not violate its duty to bargain with the Union regarding teacher placement when it failed to hold a "bid-bump" meeting.

Ionia Public Schools and the Ionia Education Association were parties to a collective bargaining agreement that expired in August 2011. The agreement contained a provision referred to by the parties as "bid-bump," a procedure for assigning vacant teaching positions. For approximately 27 years, the parties observed the past practice of meeting in April, May, or June to permit teachers to bid on open positions.

In June 2011, 2011 PA 103 (Act 103) became effective and added § 15(3)(j) to PERA. Act 103 added several prohibited subjects of bargaining between public school employers and

its employees. Among those additions, Act 103 prohibited bargaining with regard to teacher placement. As a result, in the spring of 2012, the Employer did not hold its bid-bump meetings despite repeated requests, and the Union filed its unfair labor practice charge.

The Commission agreed with the ALJ's findings that the Employer did not breach its duty to bargain by failing to hold bid-bump meetings and dismissed the Union's charge. The Commission did not find merit in the Union's exceptions and found that the ALJ did not err by interpreting the language of Act 103 to give broad discretion to public school employers to make all decisions related to teacher placement.

On appeal, the Union questioned the intent of the legislature in enacting Act 103. The Court stated that "the salient issue in this case is whether § 15(3)(j) and the prohibition on bargaining over 'any decision' regarding 'teacher placement' applies to the bid-bump procedure." The Court of Appeals reasoned that it must adhere to the plain and broad language of the statute. The Court stated that Act 103 provides that there is no duty to bargain over teacher placement, nor its impact, and found the Union's arguments to be without merit. Given the broad language of the statute, the Court reasoned that because Act 103 included any decision regarding teacher placement as a prohibited subject of bargaining, teacher placement cannot be the subject of a collective bargaining agreement. The Court concluded that the language of Act 103 precludes bargaining over the parties' bid-bump procedure, or any procedure that involves teacher placement.

The Court of Appeals also disagreed with the Union's contention that MERC erred by not conducting an evidentiary hearing, nor permitting oral argument. Since there were never any disputed factual issues, the Court determined that MERC did not abuse its discretion when it declined to hold an evidentiary hearing. Additionally, the Court reasoned that, consistent with its rules, MERC has discretion over whether to grant oral argument after an ALJ's decision and recommended order has been issued, and its rules do not require, or guarantee, that any party be allowed to make oral argument.

b. ***Pontiac School District -and- Pontiac Education Association,*** Michigan Court of Appeals Docket No. 321221, issued September 15, 2015; MERC Case No. C12 D-070, decision issued March 17, 2014; 27 MPER 52.

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the Union's unfair labor practice charge, which alleged that the Employer violated its duty to bargain.

The collective bargaining agreement between the Employer and the Union expired on August 31, 2011. Subsequently, two issues arose over which the Union filed unfair labor practice charges. In December 2011, the Union learned that the Employer planned to distribute a questionnaire to students to elicit students' opinions about their teachers. The Employer informed the Union that the student questionnaire would not be used for evaluative purposes. The Union filed its charge with MERC contending that the Employer had made a unilateral change in terms and conditions of employment. In January 2012, the Employer transferred a teacher, Threlkeld-Brown, to a different school after the teacher was accused of inappropriate conduct. The Union contended that the Employer violated the parties' past practice, which permitted unilateral transfers only in the context of a reduction in force.

MERC found that the Employer did not violate § 10(1)(a) or (e) of PERA when it distributed the questionnaires to students because it had no duty to bargain over the use of questionnaires to obtain student opinions about teacher performance under § 15(3)(l). MERC also found that because teacher placement is a prohibited subject of bargaining under § 15(3)(j), the Employer did not violate PERA by involuntarily transferring a bargaining unit member.

On appeal, the Court agreed with MERC and found that the Union failed to provide any legally sufficient basis to support its claims that implementation of the questionnaires constituted an increase in workload, such that it became a mandatory subject of bargaining. The Court did not find merit to the Union's contention that the Employer was required to comply with the collective bargaining agreement after its expiration in August 2011, or the Union's contention that the Employer continued to be bound by past practices. The Court agreed with MERC that following the enactment of 2011 PA 103, provisions of the parties' expired collective bargaining agreement that applied to subjects over which 2011 PA 103 prohibits bargaining are no longer mandatory subjects of bargaining. Those provisions are now prohibited subject of bargaining. The same is true of past practices that may have modified those parties' expired collective bargaining agreement if those past practices apply to subjects over which bargaining was prohibited by 2011 PA 103. The Court added that upon the expiration of a collective bargaining agreement, the terms and conditions of that contract continue based on the statutory obligation to bargain, not on the content of the agreement.

The Union also argued that the involuntary transfer of Threlkeld-Brown did not qualify as a "teacher placement" decision because the decision was not made by a "public school employer," but rather, by a school administrator. The Court found that because the Union did not raise that issue earlier, it failed to preserve the issue for appeal. The Court explained that placement decisions covered by § 15(3)(j) of PERA are made by school administrators acting on behalf of a public school employer. The Union failed to allege or provide evidence that the administrator who made the transfer lacked the authority to do so, and, therefore, failed to establish that the Employer violated PERA by transferring Threlkeld- Brown.

c. Calhoun Intermediate Education Association MEA/NEA –and- Calhoun Intermediate School District, Michigan Court of Appeals Docket No. 323873, issued January 7, 2016; 29 MPER 42; MERC Case No. CU12 B-009, decision issued September 15, 2014; 28 MPER 26.

In a published opinion, the Michigan Court of Appeals affirmed MERC's finding that Respondent Union violated its duty to bargain in good faith by insisting that prohibited subjects of bargaining be included in the parties' successor collective bargaining agreement.

The Calhoun Intermediate Education Association and the Calhoun Intermediate School District were parties to a collective bargaining agreement covering the years 2009 to 2011. The collective bargaining agreement was set to expire on June 30, 2011 and the parties were in negotiations for a successor contract. Articles 4-7 of the 2009-2011 collective bargaining agreement contained terms that gave first consideration to bargaining unit members when filling vacancies; governed employee evaluation procedures; required that

there be just cause for any discharge, demotion, or other involuntary change in an employee's employment status; established layoff and recall procedures; set out the order in which employees were to be laid off, and required employees to be recalled in order of seniority.

On July 19, 2011, 2011 PA 103 (Act 103) went into effect, and amended § 15(3) of PERA by adding subsections 15(3)(j)-(p). These amendments prohibited bargaining between public school employers and the unions representing their employees over matters such as teacher placement, employee evaluations, decisions over layoff and recall, etc.

Consequently, the enactment of Act 103 made Articles 4-7 of the parties' prior collective bargaining agreement unenforceable, as the language in those provisions covered matters that had become prohibited subjects of bargaining. The Employer notified the Union of its refusal to enter into a successor collective bargaining agreement that included provisions addressing prohibited subjects of bargaining. The Union responded by stating that language from the previous contract could not be "removed" without bargaining and that it would not bargain over prohibited subjects of bargaining.

The Union suggested that the provisions addressing prohibited subjects of bargaining be moved to an appendix. The Employer rejected that suggestion. Subsequently the Union submitted a package proposal including the disputed provisions in a letter of agreement attached as an appendix to the collective bargaining the proposed collective bargaining agreement. The Union further proposed that the disputed language would be moved back into the contract if Act 103 was found to be invalid, was repealed, or was modified by the Legislature. After the Employer's rejection of proposal, the Union withdrew it.

Subsequently the Employer cautioned the Union that further proposals including prohibited subjects of bargaining would be considered a violation of the duty to bargain in good faith. Nevertheless, the Union submitted another package proposal including the disputed language. The Employer reiterated its refusal to enter into an agreement containing provisions covering prohibited subjects. After the parties met with mediator, the union filed a fact finding petition. Subsequently, the Employer filed an unfair labor practice charge contending that the Union violated PERA by insisting on including unenforceable language in the successor collective bargaining agreement. Shortly after the Employer filed the unfair labor practice charge, the Union submitted another package proposal to the Employer containing the disputed language.

The Commission found that the Union violated its duty to bargain in good faith by repeatedly insisting on including provisions in the successor collective bargaining agreement that were prohibited under § 15(3), despite the Employer's caution that it considered further demands for bargaining over prohibited subjects to be a breach of the duty to bargain in good faith.

On appeal, the Union argued that provisions pertaining to prohibited subjects could be included in a successor collective bargaining agreement; the Court of Appeals disagreed. While parties may discuss prohibited subjects of bargaining, they may not bargain over them, the Court held. Once the Employer made it clear that it was not going to include provisions from the expired collective bargaining agreement that related to prohibited subjects of bargaining, the Court found that the Union "had no authority to continue to insist that the language or any modification of it was maintained in the successor collective

bargaining agreement." The union's repeated insistence on maintaining prohibited language in the successor collective bargaining agreement supported MERC's finding that that the Union was acting in bad faith and, therefore, in violation of PERA.

The Union also argued that since its insistence on maintaining the provisions in dispute did not result in an impasse, there was insufficient basis to find an unfair labor practice. The Court reasoned that because the issue was not a mandatory subject of bargaining, there was no basis to require that the parties bargain to impasse. Moreover, the Employer did not need to wait until impasse before filing its charge. The Court concluded that, "Demanding that the right to discuss a prohibited subject of bargaining extend to a requirement that the discussion continue until it results in a bargaining impasse is fundamentally a demand for bargaining."

d. Pontiac School District -and- Pontiac Education Association,
Michigan Court of Appeals Docket No. 322184, September 15, 2015, 29 MPER 19; MERC Case No. C13 B-033, decision issued May 21, 2014, 27 MPER 60.

In an unpublished opinion, the Michigan Court of Appeals affirmed the Michigan Employment Relation Commission's dismissal of the Union's unfair labor practice charge alleging that the Employer violated PERA by repudiating the parties' settlement agreement.

The Union and the Employer were parties to a collective bargaining agreement that required the Employer to fill all teaching positions with certificated teachers. In 2008, the Union filed a grievance protesting the Employer's practice of filling permanently vacant teaching positions with long-term substitute teachers. The grievance resulted in a settlement agreement. In March 2012, the Union filed another grievance, this time alleging that the Employer violated the parties' collective bargaining agreement and the 2008 settlement agreement by employing long-term substitute teachers instead of highly qualified, certificated teachers. The parties entered into yet another settlement agreement. The agreement acknowledged the recall rights of certain grievants but waived any rights to back pay. The following week, the Employer rescinded the settlement and tendered back all consideration received under the agreement.

The Union filed an unfair labor practice charge alleging that the Employer's repudiation of the settlement agreement was unjustified and constituted a violation of PERA. The ALJ recommended that the Commission dismiss the charge because the provision in the grievance settlement was unenforceable, since it constituted a prohibited subject of bargaining under § 15(3)(j) of PERA. The Commission agreed that since the subject matter of the settlement agreement was teacher placement, a prohibited subject under § 15(3)(j), the facts alleged by the Union failed to support a finding that the Employer breached its duty to bargain and dismissed the charge.

On appeal, the Court of Appeals concluded that MERC did not err when it held that the settlement agreement contained a prohibited subject of bargaining. The Court explained, "Once reduced to writing [the agreement] could not form the basis of an unfair labor practice charge because it was unenforceable." In its analysis, the Court noted that § 15(3)(j) makes any decision made by the public school employer regarding the placement of teachers, or the impact of that decision on an individual employee or

bargaining unit, a prohibited subject of bargaining. Since the agreement at issue pertained to the prohibited subject of teacher placement, the Court agreed that the settlement agreement was unenforceable, and affirmed MERC's dismissal of the unfair labor practice charge.

D. Transfer of bargaining unit work and subcontracting

a. Tri County Area Schools -and- Tri County Custodial/Maintenance Association, MEA/NEA, MERC Case No. C13 E-081, decision issued February 12, 2015.

In its decision, the Commission agreed with the ALJ that the Employer did not breach its duty to bargain by subcontracting the work of noninstructional support employees. Under § 15(3)(f) of PERA public school employers may subcontract the work of noninstructional support employees without bargaining over the issue with the union, if the union is given the opportunity to bid on the work on an equal basis with other bidders. The Commission found that the Union did not demonstrate that it was denied an opportunity to bid on an equal basis as other bidders. The Union also failed to establish that the Employer's decision to subcontract the work was motivated by anti-union animus. In addition, the Union failed to demonstrate that the Employer violated its duty to bargain in good faith or engaged in direct dealing.

The Union represented custodial and maintenance employees. Pursuant to the collective bargaining agreement, there was an annual seniority-based bidding system for certain jobs. The Employer wished to eliminate this system, in part, to cut costs. The Employer issued a Request for Proposals for a contract to perform custodial and maintenance services. The Union submitted a bid. However, the Employer rejected the bid because it did not meet the requirement that bidders include estimated costs for services on a Proposal Pricing Form. The School Board selected another bidder to perform the bargaining unit work.

During bargaining for a successor agreement, the Employer made a proposal that it would not subcontract four of the seven bargaining unit positions if the Union would agree to eliminate seniority-based bidding for job assignments so the Employer could assign jobs based on each employee's qualifications. The Union rejected the offer. Three Union members met separately with their supervisor to review their performance evaluations. During each meeting, the supervisor stated, "If they didn't allow the District the ability to place them where we thought they could benefit us, they could be outsourced." When the Employer ultimately subcontracted the bargaining unit work, all but one of the seven bargaining unit members were laid off.

Section 15(3)(f) of PERA prohibits public school employers and the unions representing their employees from bargaining over the decision of whether or not to subcontract noninstructional support services so long as the bargaining unit is given an opportunity to bid on the contract on an equal basis as other bidders. The Commission agreed with the ALJ that, because the Union's bid stated that it was not bidding as a third party contractor, and that if its bid were accepted the Employer would remain the employer, the bid did not comply with the RFP. The bid was also non-compliant because it did not include estimated costs. The Commission found that the Union had the opportunity to bid on an equal basis.

The Union also claimed that the Employer set preconditions to bargaining by informing the Union, at the first bargaining session, that the Board had made the decision to subcontract unit work. The Union argued that this precondition demonstrated that the Employer had no desire to reach an agreement. However, the Commission agreed with the ALJ that because the Employer had no duty to bargain over whether to subcontract, it did not set a precondition to bargaining.

The Union also took exception to the ALJ's finding that the Employer's decision to subcontract was not motivated by anti-union animus. An employer's decision to subcontract noninstructional support services, even if not subject to a duty to bargain, may nevertheless be unlawful if motivated by anti-union animus. However, the Commission agreed with the ALJ that the Union did not offer sufficient evidence from which to make a reasonable inference that anti-union animus was a substantial or motivating factor in the Employer's decision to subcontract. The Commission found that the Employer's desire to match employee skill sets with specific job requirements, and its need to reduce costs, were legitimate business concerns and it was those concerns that motivated the decision.

Finally, the Commission agreed that the Employer did not engage in direct dealing. It agreed with the ALJ that the supervisor's comments during performance evaluations were merely the supervisor stating his opinion regarding the Employer's business concerns. The comments did not indicate that the supervisor was trying to circumvent negotiations or undercut the Union's role. Additionally, the supervisor was not the decision maker; the School Board made the decision to subcontract.

E. Other Allegations of Breach of the Duty to Bargain

a. Wayne County -and- Michigan AFSCME Council, AFL-CIO, MERC Case No. C10 J-266, decision issued May 19, 2015; 29 MPER 1.

The Commission concluded that the Union failed to establish that the Employer repudiated the collective bargaining agreements with the two of the three units it represented in violation of§ 10(1)(e) of PERA. The Commission dismissed the charge to the extent that it applied to those two bargaining units. However, MERC found the Employer breached its duty to bargain by making unilateral changes to a mandatory subject of bargaining without giving notice and an opportunity to bargain to the Union while the parties were in mandatory negotiations following fact finding with regard to the third unit.

The Union represented the supervisory unit, the nonsupervisory unit, and the sergeants and lieutenants unit employed by the Employer. At the time of the actions leading to the charge, the supervisory unit and the sergeants and lieutenants unit had collective bargaining agreements with the Employer covering the years of 2008 through 2011. The most recent collective bargaining agreement between the Employer and the nonsupervisory unit covered the years 2004 through 2008; the parties were unable to reach a subsequent agreement until December 2011.

In 1986, the Employer established the Inflation Equity Reserve Fund (IEF), which provided funding for a "thirteenth check" to replace cost of living payments that the Employer had occasionally given to retirees prior to 1984. The Retirement Commission would annually determine whether a distribution would be made to retirees and the

percentage of the IEF's balance that would be distributed. Unlike payments made under a defined benefit pension plan, the amount of the thirteenth check was not based on the amount of wages earned during employment. The Employer and the Union never negotiated the amount of the thirteenth check, its funding, or the formula by which it would be calculated. Nothing guaranteed that retirees would receive a thirteenth check.

In addition to the amendment to the Retirement Ordinance in 1986, that created the IEF and the thirteenth check, the Ordinance was amended in 1994 and 2000. The Union supported the amendment in 2000, but there is no evidence that the parties negotiated over any of the amendments that applied to the IEF and the thirteenth check.

On September 30, 2010, less than two weeks after the parties received the fact finder's report for the non-supervisory unit, the Employer enacted Ordinance No. 2010-514, which would allow the Employer to reduce the funding for the thirteenth check. The following day, the Union filed the unfair labor practice charge. In December 2011, the parties reached a successor agreement for the non-supervisory unit. The agreement added the language "All employees hired on or after December 1, 2010 shall not be eligible for a 13th check upon retirement" but made no other reference to the thirteenth check or its funding

The Union alleged that the Employer violated its duty to bargain in good faith by seeking to amend the Retirement Ordinance to eliminate the thirteenth check. The Employer contended that the Commission had no jurisdiction because the matter involved retirement benefits. The Commission explained that it has no jurisdiction over issues regarding retirees' claims with respect to the thirteenth check, since retirees are no longer public employees. However, the Commission does have jurisdiction over benefits that have been promised to active employees as a term or condition of employment; those benefits are mandatory subjects of bargaining. Therefore, the Commission's findings were limited to review of the effects of the 2010 amendment to the Retirement Ordinance on active employees.

The Commission explained that where retirement benefits have been promised to active employees, those benefits are mandatory subjects of bargaining. A public employer, generally, may not lawfully make a unilateral change to a mandatory subject of bargaining during the term of the collective bargaining agreement. Moreover, a topic need not be specifically mentioned in the collective bargaining agreement to be covered by it.

The Commission has repeatedly held that it will not exercise jurisdiction over a good faith dispute over contract interpretation where the parties' contract provides a mandatory binding procedure for dispute resolution. It is only where the parties have not agreed to a mandatory binding procedure that the Commission would exercise jurisdiction over such a dispute.

The Union argued that the parties' past practice amended the contract to prohibit the Employer from amending the Retirement Ordinance. However, the Commission found that the Union failed to demonstrate a meeting of the minds where both parties agreed that the Employer would not amend or change the Retirement Ordinance. Because the Union did not show that the parties' dispute was anything more than a difference in contract interpretation, the Commission held that the Union failed to establish that the

Employer repudiated the parties' collective bargaining agreement with respect to the supervisory unit or the sergeants and lieutenants unit. Thus, the Commission found that the charge should be dismissed to the extent that it applied to those two units.

With respect to the nonsupervisory bargaining unit, since the parties collective bargaining agreement had expired, the parties had no binding arbitration procedure in effect. Therefore, even though the matter involved a good faith dispute over contract interpretation, the Commission examined the Employer's actions with respect to the nonsupervisory unit to determine whether the Employer breached its statutory duty to bargain.

Before making a unilateral change in a mandatory subject of bargaining, an employer must give the union notice and an opportunity to bargain. The Commission concluded that the Employer had a duty to give notice to the Union of its intention to change the funding for the thirteenth check by amending the Retirement Ordinance. The Employer's failure to give that notice during the post-fact finding mandatory negotiations period was a breach of the Employer's duty to bargain.

Where an employer has a duty to bargain, the employer is not required to initiate bargaining. An employer's duty to bargain is conditioned upon there being a demand for bargaining by the union. The union's obligation to demand bargaining is waived if such a demand would have been futile. The Commission found that the Union offered no evidence to show that a bargaining demand would have been futile. Although the Employer did not give notice to the Union of its plan to change the Retirement Ordinance, evidence in the record established that the Union was aware of the Employer's efforts to amend the Ordinance. Therefore, the Commission noted that while the Employer had a duty to give the Union notice of the amendment to the Retirement Ordinance before its enactment, the Employer's failure did not entitle the Union to remain idle after it learned of the amendment.

Despite finding that the Employer breached its duty to bargain with respect to the nonsupervisory bargaining unit, the Commission refused to issue a bargaining order in this matter due to the discretionary nature of the thirteenth check and the Union's failure to demand bargaining over the amendment or its effects.

This case is currently on appeal to the Michigan Court of Appeals.

b. ***River Rouge School District –and– River Rouge Education Association,*** MERC Case No. C09 J-202, decision issued March 26, 2015, 28 MPER 72.

The Commission agreed with the ALJ that the Union failed to demonstrate that the Employer repudiated the contract. The Union did not allege facts that demonstrate that the dispute arose from anything other than a difference in contract interpretation and failed to allege facts that, if true, would show that any breach of contract had a significant impact on the bargaining unit.

Two teachers were laid off and awaiting recall when the Employer retained substitute teachers to teach the courses formerly taught by the laid off teachers. The contract between the parties defined vacancy as "the resulting full school or remainder of school year (of a semester or more) bargaining unit opening that exists after all consideration of

teacher requested change of assignments, and reassignments have been completed." One of the teachers was laid off effective June 12, 2009, and a substitute taught her courses from September 1, to September 24, 2009, when she was recalled. The other teacher was laid off on June 19, 2007, and a substitute began teaching his courses in September 2009; he was notified in December 2009 that he would be recalled to teach effective January 4, 2010.

The Union argued that the two teachers should have been recalled at the time the Employer decided to offer classes that they were certified and qualified to teach. However, the Employer countered that it did not fail to recall either to a "vacancy" as defined by the contract. The Employer argued that a position is not "vacant" until it is open for an entire school year, or a period of a full semester or more. Since the teacher's classes were not vacant, the Employer contended that it did not violate the collective bargaining agreement by temporarily assigning substitutes to teach their classes.

The Union claimed the ALJ erred in finding that the Employer did not repudiate the contract and did not fail to bargain in good faith. The Commission explained that although it does have the authority to interpret contracts to determine whether an unfair labor practice has been committed, it will not exercise jurisdiction over every contract dispute. An alleged contract breach is not an unfair labor practice unless the contract has been repudiated. The Commission finds repudiation when a breach is substantial, it has a significant impact on the bargaining unit, and there is no bona fide dispute over contract interpretation. Additionally, the Commission will not exercise jurisdiction over a contract interpretation dispute when the contract provides for binding arbitration.

The Commission agreed with the ALJ that the Union did not allege facts that demonstrate that the dispute arose from anything other than a difference in contract interpretation. Therefore, the proper forum for resolving the dispute is binding arbitration. The Commission also agreed that even if the Employer's failure to timely recall the two teachers was a breach of contract, the breach was isolated and did not have a significant impact on the bargaining unit. Finally, the Commission agreed with the ALJ that the teachers were not entitled to back pay, as back pay is a remedy for an unfair labor practice, which the Union was unable to demonstrate. Therefore, the Commission dismissed the charge.

This case is currently on appeal to the Michigan Court of Appeals.

c. ***Wayne County Airport Authority -and- Michigan AFSCME Council 25 and Its Affiliated Local 953,*** MERC Case No: C13 B-037, decision issued July 27, 2015; 29 MPER 14.

The Commission affirmed the ALJ's Decision finding that the Employer did not violate § 10(1)(e) of PERA when it refused to grant the Union president's request for paid time off to conduct union business.

The parties' collective bargaining agreement provided for a mandatory procedure for binding arbitration. The agreement also had provisions that specifically addressed the availability of paid and unpaid time off for the Local Union president to conduct union business. M became Local Union President sometime in July 2012. Prior to becoming president, he was the vice-president and acting committeeperson. As vice-president and committeeperson he was granted paid time off to conduct union business on 19 occasions

between February 2012 and July 2012 and then six more after becoming President, in August 2012. The Employer denied two requests that he submitted on August 26, 2012.

The Union argued that the Employer's history of granting M's release time requests established a past practice that became a new term of their agreement, which the Employer then unilaterally altered without providing the Union an opportunity to bargain. The Employer argued that its denial of M's requests was authorized by provisions in the agreement covering paid and unpaid union release time. The Employer contended that the parties' dispute is one of contract interpretation, and is therefore not within the Commission's jurisdiction.

The Commission explained that paid time to engage in union activities during working hours is a mandatory subject of bargaining and a public employer who makes a unilateral change to a mandatory subject of bargaining breaches its duty to bargain. However, the Commission will find an unfair labor practice based on an alleged breach of contract only where the charging party is able to show that the respondent has repudiated the agreement. There is no breach of the duty to bargain where the provisions of the collective bargaining agreement can reasonably be relied on for the parties' actions.

The Commission explained that although a past practice can create a new term or condition of employment that the parties will have to bargain over before changing, an arbitrator and not the Commission is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment.

The Commission agreed with the ALJ that since the parties had a good faith dispute regarding contract interpretation and had in place a mandatory procedure for binding dispute resolution, the details and enforceability would be left to the arbitrator. The Commission adopted the ALJ's recommended order and to dismiss the charge in its entirety.

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

A. Duty of Fair Representation

a. ***Saginaw Education Association –and Michigan Education Association –and- Kathy Eady-Miskiewicz –and- Matt Knapp –and- Jason LaPorte – and- Susan Romska,*** MERC Case Nos. CU13 I-054, CU13 I-055, CU13 I-056, CU13 I-057, CU13 I-058, CU13 I-059, CU13 I-060, CU13 I-061, decision issued September 23, 2015, 29 MPER 21

The Commission affirmed the ALJ's Decision and Recommended Order finding that the Respondents violated § 10(2)(a) of PERA by refusing to accept the Charging Parties' union resignations outside of the Respondents' the month of August, to which Respondents' policy restricted union resignations.

Charging Parties were employed as teachers by the Saginaw Public Schools. At the time of their hire, each of the Charging Parties signed a "Continuing Membership Application" agreeing to join the Michigan Education Association (Respondent MEA) and its local affiliate, the Saginaw Education Association (Respondent SEA). By signing the Continuing Membership Applications, Charging Parties authorized dues deductions and

acknowledged that in order to resign their membership or revoke their dues deduction authorization, they must do so in writing between August 1 and August 31 of any year.

On March 16, 2012, 2012 PA 53 (Act 53), became effective. That amendment to PERA prohibited public school employers from deducting union dues or fees from employee wages. At that point, Respondents established an e-dues program to allow members to pay their union dues electronically.

On March 28, 2013 Michigan's right to work statute, 2012 PA 349 (Act 349), took effect. It expressly provided that public employees have a right to refrain from union activity and made agency shop illegal for most public employees.

In September 2013, Charging Parties Eady-Miskiewicz, LaPorte, and Romska sent letters to Respondents to resign from the Unions and revoke their dues deduction authorizations. In October 2013, Charging Party Knapp orally informed Respondents that he was not interested in continuing to pay dues. Charging Party Knapp also sent an email to Respondent explaining that he assumed that he was no longer a union member when he did not sign up for the e-dues program. Respondents notified Charging Parties of the August window period and did not accept their resignations. As a result, Charging Parties filed unfair labor practice charges.

On exceptions from the ALJ's decision, Respondents questioned the Commission's jurisdiction over the matter. Section 10(2)(a) prohibits labor organizations from restraining or coercing public employees in the exercise of their rights under PERA. Accordingly, the Commission has jurisdiction over matters in which a public employee chooses to refrain from engaging in activities protected under PERA, but is unlawfully restrained from doing so.

The Commission reasoned that because Charging Parties now have the right to refrain pursuant to Act 349, and because were not subject to a union security agreement, their union memberships were voluntary and could be revoked any time after the effective date of Act 349 (March 28, 2013). The Commission stated that while it understands that Respondents have legitimate business reasons for maintaining their August window periods, their reasons do not take precedent over public employees' right to refrain from membership. The Commission found that any union rule, such as Respondents' August window period, that restricts a public employee's right to refrain from union activity is a violation of § 10(2)(a).

Respondents also took exception to the ALJ's recommendation that the Commission order Respondents to cease and desist from enforcing their August window period, and to remove language regarding the window period from their bylaws. Respondents contended that such an order would "unconstitutionally impair Respondents' existing contractual relationship with its members." The Commission disagreed, and found that there is a significant and legitimate public purpose in requiring Respondents to eliminate the policy restricting membership resignations to the month of August. The Commission went on to explain that the language of the ALJ's recommended order is reasonably related to protecting public employees' right to refrain from union activity. Therefore, the Commission concluded that the ALJ's recommendation that Respondents be required to amend their bylaws by removing the language that restricts public employees' right to

refrain from union activity did not create an unconstitutional impairment of Respondents' contractual rights.

The Commission did not find merit to either of Charging Parties' cross exceptions. Charging Parties contended that the ALJ erred by finding that Respondents did not have a duty to provide Union members with more information on how to resign from membership than they had provided. The Commission determined that Respondents did not violate their duty of fair representation because they provided sufficient information to their members about the resignation process, and provided the necessary information to any requesting member.

The Commission also found that a member's failure to pay dues is not sufficient to provide the Unions with notice of resignation because an individual can fail to pay dues for any number of reasons: negligence, inability to pay, a desire not to pay, etc. Thus, the Commission held that a union's requirement that a member's notice of resignation be in writing is not unreasonable, and does not constrain an individual's right to refrain from union activity.

This case is currently on appeal to the Michigan Court of Appeals.

b. Teamsters Local 214 –and- Pauline Beutler, MERC Case No. CU13 I-037, decision issued December 11, 2015; 29 MPER 46.

Charging Party Pauline Beutler was employed by the Livingston Educational Service Agency as a bus driver and was a member of a bargaining unit represented by the Respondent, Teamsters Local 214. Beutler signed a membership application and a Checkoff Authorization and Assignment, which stated that her authorization for monthly dues deduction was voluntary and not conditioned on present or future membership in the union. Her checkoff authorization contained a specific window period in July, in which she was able to revoke her dues obligation.

On September 9, 2013, outside of the Union's window period for resignations, Beutler sent a letter to Teamsters Local 214 requesting to opt out of the Union. The Union asserted that Beutler had a continuing obligation to pay dues per the Checkoff Authorization she signed upon joining. Also in September 2013, after the passage of 2012 PA 53 (Act 53), which prohibited public school employers from deducting union dues from union members' pay checks, Beutler's employer ceased deducting union dues from employees' wages. Beutler did not make any financial contributions to the Union after that time. While the Union mentioned the possibility of initiating civil action against members who refused to fulfill their dues obligations, it did not take any such action against Charging Party.

The ALJ concluded that the Commission lacks jurisdiction over this matter and recommended that the Commission dismiss Beutler's unfair labor practice charge. On exceptions filed by Beutler, the Commission explained that pursuant to § 10(2)(a), the Commission has jurisdiction over matters in which a labor organization restrains or coerces public employees in their exercise of § 9 rights, including the right to refrain from protected concerted activities. Accordingly, the Commission has jurisdiction to determine whether Respondent's response to Charging Party's letter of resignation was an unlawful restraint on her right to refrain from union activity.

The ALJ found, and the Commission agreed, that there was no credible evidence in the record to suggest that the Union took action to reject Charging Party's resignation or to prevent her from resigning her union membership. MERC held that her letter of September 9, 2013, was effective to end her union membership. Accordingly, the Commission found no basis to conclude that the Union restrained Beutler from exercising her right to refrain from membership in the Union.

The Commission also agreed with the ALJ's finding that the Union did not violate PERA by refusing to permit Charging Party to revoke her agreement to pay union dues at a time outside the designated window for her dues checkoff revocation. Since Charging Party voluntarily signed the Checkoff Authorization and Assignment, acknowledging that her payment of dues was not conditioned on present or future union membership, the Commission held that she obligated herself to continue paying dues until she terminated that obligation in accordance with her agreement with the Union. The Commission found that the language contained in the checkoff authorization was a clear and unmistakable waiver of Charging Party's right to refrain from financially supporting the union. Although Beutler's notice of her revocation of her dues deduction authorization was not submitted within the designated window period, the Commission held that the Union must treat notice of her revocation as effective no later than July 6, 2014, which is the beginning of the next window period following the date of the notice.

MERC disagreed with Charging Party's assertion that the ALJ erred by failing to consider her argument that Act 53 invalidated her Checkoff Authorization and Assignment. Since Act 53 did not alter the obligation of employees to pay dues pursuant to a separate lawful agreement, the Commission found that Act 53 did not invalidate Charging Party's Checkoff Authorization and Assignment. Further, the Commission determined that because the Union did not collect any dues from Charging Party after her resignation from the Union, and because there had been no effect on Charging Party's employment, the Union did not violate § 10(2)(a) of PERA.

This case is currently on appeal to the Michigan Court of Appeals.

c. Teamsters Local 214 –and- James A. Cottrell, MERC Case No. CU13 K-067, decision issued January 14, 2016; 29 MPER 47.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent Teamsters Local 214 violated § 10(2)(a) of PERA by failing to acknowledge Charging Party's status as an objecting fee payer.

Charging Party, James A. Cottrell, was employed by the Lenawee Intermediate School District as a bus driver and was a member of a bargaining unit represented by Teamsters Local 214. The collective bargaining agreement Cottrell's employer and Teamsters Local 214 was in effect prior to March 28, 2013, the effective date of Michigan's Right to Work law, 2012 PA 349 (PA 349), and was set to expire on June 30, 2014. The collective bargaining agreement contained a union security clause that required members of the bargaining unit to either become union members or pay a service fee to the Union. The collective bargaining agreement also required the employer to deduct dues and service fees from employees' paychecks.

On November 18, 2013, Cottrell signed his union membership application and a Checkoff Authorization and Assignment in which he agreed to have his dues deducted from his paycheck. Like Beutler, in the previous case, Cottrell signed a membership application and a Checkoff Authorization and Assignment, which stated that his authorization for monthly dues deduction was voluntary and not conditioned on present or future membership in the Union. The Checkoff Authorization and Assignment restricted Cottrell from revoking his dues authorization at any time other than a window period from September 3 to September 18.

On October 20, 2013, Cottrell sent Respondent a letter resigning his membership, acknowledging his obligation to pay a service fee, and objecting to paying dues or fees used for political or non-bargaining activities. In response, Teamsters Local 214 sent Cottrell a letter stating that he could only revoke his financial obligation by certified letter during the period from September 3 to September 18. The Union did not notify Cottrell of the amount of the agency fee he was required to pay. Since Cottrell knew that under the union security clause he was obligated to continue to support the Union, he continued to pay monthly dues to the Union.

Cottrell filed an unfair labor practice charge alleging that Teamsters Local 214 violated of § 10(2)(a) for failing to recognize him as an objecting non-member fee payer, failing to allow him to cease paying dues for non-chargeable expenses, and by demanding that revocation of his dues obligation be submitted via certified mail.

The ALJ found that Teamsters Local 214 breached its duty of fair representation by failing to acknowledge Cottrell's status as an objecting nonmember as of his resignation from the Union in October 2013. The ALJ stated that by not allowing Cottrell to pay a reduced service fee from the point of his resignation until the contract's expiration, the Union violated § 10(2)(a). The ALJ concluded that Cottrell should not have been required to pay the service fee after the collective bargaining agreement expired on June 30, 2014.

On exceptions, the Commission found that Cottrell's October 20, 2013 letter was sufficient to end his union membership, and agreed with the ALJ that the facts alleged by Cottrell did not support a finding that Teamsters Local 214 refused to allow him to resign from the Union. The Commission agreed with the ALJ that the Union breached its duty by failing to acknowledge his status as an objecting nonmember.

Further, the Commission found that Cottrell did not have the right to refrain from financially supporting the Union because there was a lawful union security provision in effect, which obligated him to financially support the Union until the collective bargaining agreement expired on June 30, 2014. However, Cottrell was not bound by the provisions of the Checkoff Authorization and Assignment requiring him to continue to pay union dues unless and until he revoked his dues obligation during the September window period. Unlike Beutler in the earlier case, since Cottrell was subject to a union security clause, his agreement to support the Union could not be considered voluntary.

Further, the Commission found that Cottrell was entitled to be promptly informed of the amount of the adjusted service fee he was required to pay, less the amount utilized for expenses not attributable to collective bargaining, contract administration, and grievance adjustment. Teamsters Local 214 failed to provide that information to Cottrell and therefore, violated § 10(2)(a). Additionally, the Commission reasoned that because the

Union continued to accept Cottrell's full payment of dues after ignoring his request to become an objecting fee payer in October 2013, the Union had obtained an involuntary loan from Cottrell, in violation of § 10(2)(a) of PERA.

The Commission also found that the Respondent could not lawfully require employees to provide notice of their dues checkoff revocation via certified mail. The Commission agreed with the National Labor Relations Board in *California Saw and Knife Works*, 320 NLRB 224, 237; 320 NLRB No. 11, (1995) that a union's requirements that objections be sent by certified mail constitutes an arbitrary restriction on the employee's exercise of the right to be an objecting fee payer. Lastly, the Commission found that the ALJ did not err by failing to conduct an evidentiary hearing because there were no material facts in dispute.

Respondent was ordered to refund to Charging Party the dues he paid between the date he resigned from the Union and the date the contract expired, less the amount of the reduced service fee Charging Party would have paid for that period as an objecting non-member. Respondent was also ordered to refund any dues that Charging Party paid after the collective bargaining agreement expired as his only obligation to support the Union came from the union security clause.

d. ***Standish-Sterling Educational Support Personnel Association, MEA – and- Mark Norgan,*** MERC Case No. CU14 B-002, issued January 15, 2016, 29 MPER 52.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Respondent violated § 10(2)(a) of PERA by failing to permit Charging Party to become an objecting fee payer.

Charging Party, Mark Norgan, was employed by the Standish-Sterling Community Schools (Employer) as a custodian, and was a member of Respondent, Standish-Sterling Educational Support Personnel Association. The collective bargaining agreement between Charging Party's employer and Respondent, which contained a union security clause, was entered into on November 12, 2012, and expired on June 30, 2015. Upon joining the Union on September 14, 2001, Charging Party signed a Continuing Membership Application agreeing to become a Union member, and authorizing the Employer to deduct union dues from his paychecks. The Continuing Membership Application stated that members were permitted to revoke their dues authorization only during the month of August.

On October 7, 2013, Charging Party sent a letter to Respondent resigning his membership, notifying the Union that he would only pay those dues and fees he could lawfully be compelled to pay as a condition of employment, and revoking his authorization for dues deductions. Respondent notified Charging Party on October 31, 2013 that his resignation was untimely, as it was outside of the August window period.

The ALJ found that because Michigan's "Right to Work" law, 2012 PA 349 (Act 349) amended § 9 of PERA to grant employees the right to resign their union memberships at will, any union rule or policy, such as Respondent's August window period, that restricts that right violates § 10(2)(a) of PERA. The ALJ also found that Respondent violated § 10(2)(a) by refusing to accept Charging Party's membership resignation, and by failing

to timely send him the necessary information to give him the opportunity to pay a reduced agency fee for the following membership year.

On exceptions, Respondent contended that the ALJ erred by finding that the Commission has jurisdiction over the matter, and by finding that its window period violated § 10(2)(a). Citing its decision in *Saginaw Ed Ass'n*, 29 MPER 21 (2015), the Commission disagreed and stated that it has jurisdiction over matters in which a public employee chooses to refrain from engaging in activities protected under § 9(1)(a), but is unlawfully restrained from doing so by a labor organization. The Commission found that under § 9(1)(b), Charging Party had the right to resign his union membership at will and to immediately become an objecting nonmember. The Commission concluded that by restricting Charging Party's resignation to an annual one-month period in August and not allowing him to pay a reduced agency fee for the following membership year, Respondent violated PERA.

The Commission stated that because Act 349 added the right to refrain language to PERA, it became analogous to the NLRA on the issue, and therefore, it was appropriate to look to National Labor Relations Board decisions for guidance with respect to the right to refrain. Both the NLRA and PERA now allow employees to resign their union memberships at will. Where a lawful union security clause applies, employees who are no longer union members may immediately assert their objections to paying that part of the agency fee that is not used for collective bargaining expenditures and have their fee reduced accordingly.

The Union contended that the ALJ's recommendation that the Commission order the union to cease and desist from restricting membership resignations to the month of August was an unconstitutional impairment of pre-existing contractual obligations. The Commission noted that although it has no jurisdiction to resolve questions regarding the constitutionality of legislative enactments, it could not adopt the ALJ's recommended order if doing so would impair constitutionally protected contract rights. The Commission explained that the Contract Clause prohibition against the impairment of contract rights must be balanced against the state's inherent police power. In applying the three-pronged test used analyze Contract Clause issues, the Commission found that the ALJ's recommended order requiring the union to cease and desist from restricting membership resignations to the month of August, did not unconstitutionally impair the union's contractual rights. The Commission found that the ALJ's order was "reasonably related to protecting public employees' right to refrain from union activity." The Commission stated that "while the right to refrain from union activity has not been expressly recognized in Michigan until recently, it has long been recognized in many other states…" and therefore, "…found a legitimate public purpose in requiring the immediate application of the right to refrain."

This case is currently on appeal to the Michigan Court of Appeals.

e. ***Teamsters Local 214 –and- Tina House,*** MERC Case No. CU14 C-010, issued February 10, 2016.

The Commission affirmed the ALJ's Decision and Recommended Order finding that Charging Party failed to state a claim upon which relief can be granted under PERA.

Charging Party Tina House was employed by Lapeer County as a secretary and was a member of the bargaining unit represented by Respondent, Teamsters Local 214. In early August 2000, Charging Party signed an application for Union membership and a Checkoff

Authorization and Assignment, authorizing her employer to deduct union dues from her wages. The Checkoff Authorization and Assignment provided that it was irrevocable unless Charging Party gave written notice to her employer and the Union within a 15-day window period.

The collective bargaining agreement between the Charging Party's employer and Respondent was in effect prior to March 28, 2013, the effective date of Michigan's Right to Work law, 2012 PA 349 (Act 349). It was set to expire on December 31, 2013. The collective bargaining agreement contained a union security clause that required employees to pay either dues or a service fee to the Union as a condition of employment, and required that the Charging Party's employer deduct the dues or service fees from the wages of employees who authorized the employer to do so.

On December 4, 2013, Charging Party sent a letter to Respondent resigning her union membership, revoking her Checkoff Authorization and Assignment, and stating that she was only willing to pay dues and fees that she could lawfully be compelled to pay as a condition of her employment. Charging Party sent a copy of that letter to her employer at the same time. In response, on December 13, 2013, the Union sent Charging Party a letter stating that she could not revoke her financial obligation to the union at that time and that the proper time for doing so was from June 1 to June 16 by a certified letter to the Local Union president. After receiving the letter, Charging Party's employer stopped deducting dues from her pay and Charging Party paid no additional dues or fees to Respondent after December 4, 2013. Subsequently, Charging Party filed an unfair labor practice charge alleging that Respondent violated § 10(2)(a).

The ALJ found that Respondent's letter did not violate § 10(2)(a), even if it arguably contained an implied threat to take legal action to collect monies from her. Since Respondent had ceased collecting dues from Charging Party, the ALJ found that she failed to state a valid PERA claim.

Citing its decision in *Teamsters Local 214 (Cottrell)*, 29 MPER 47 (2016), the Commission noted that Respondent should have immediately informed Charging Party of the amount of her pro rata share of the Union's chargeable expenses for collective bargaining, contract administration, and grievance adjustment. However, the Commission concluded that Respondent's failure to do so did not adversely harm Charging Party since she paid no dues after sending her December 4, 2013 resignation.

The Commission concluded that Respondent's letter merely stated its position with respect to Charging Party's financial obligation and was not an unlawful attempt or threat to collect funds to which Respondent was not entitled. Moreover, the Commission explained that because it had not issued a decision interpreting the effect of Act 349 before this charge was filed, it "will not interpret a union's mere statement that funds are owed to it as an unlawful demand." The Commission refused to presume that Respondent should have known that its letter, asserting that Charging Party continued to have a financial obligation to the Union until the following June, could be considered unlawful. On this basis, the Commission found that Charging Party failed to allege that Respondent took any action to collect either agency fees or union dues for any period after she submitted her resignation.

The Commission noted that in *Cottrell* it found that the union's requirement that notice of the revocation of a Checkoff Authorization and Assignment be sent via certified mail

constituted an arbitrary restriction on an employee's exercise of the right to resign their union membership or make objections to payment for nonchargeable expenses. As in *Cottrell*, Charging Party in this case failed to allege harm resulting from Respondent's demand for notice via certified mail. Accordingly, the Commission found that Charging Party failed to state a claim upon which relief could be granted under PERA.

This case is currently on appeal to the Michigan Court of Appeals.

f. ***Grand Blanc Clerical Association, MEA, and Michigan Education Association -and- Mary Carr -and- Battle Creek Educational Secretaries Association, MEA and Michigan Education Association -and- Alphia Snyder,*** MERC Case Nos. CU14 C-020 & CU14 C-009, decision issued February 11, 2016.

The Commission affirmed the ALJ's Decision and Recommended Order as modified, finding that Respondents violated § 10(2)(a) of PERA by refusing to accept Charging Parties' union resignations outside of their August window period.

Charging Party Mary Carr was an employee of the Grand Blanc Community Schools and became a member of Respondents, Grand Blanc Clerical Association (GBCA) and the Michigan Education Association (MEA) in 1997. The collective bargaining agreement between Respondent GBCA and Carr's employer contained a union security agreement and a dues check-off provision and expired on June 30, 2013.

Charging Party Alphia Snyder was an employee of the Battle Creek Public Schools and became a member of Respondents, Battle Creek Educational Secretaries Association (BCESA) and the MEA. The collective bargaining agreement between Snyder's employer and BCESA also contained a union security agreement and expired sometime prior to April 2013.

Upon joining their respective unions, each Charging Party signed a Continuing Membership Application, authorizing that dues be deducted from their paycheck, and acknowledging that revocation of their authorization must be done in writing between August 1 and August 31 of any year.

Subsequent to the expiration of the governing collective bargaining agreements, both Charging Parties attempted to resign their Union memberships and revoke their dues check-off authorizations. Respondents notified Charging Parties that their resignations were untimely as they were not submitted during the annual August window period. Charging Party Carr was also notified that if her 2013-2014 dues were not paid, her debt would be sent to collections. As a result, Charging Parties filed unfair labor practice charges.

The ALJ found that because of the right to refrain language added to PERA by Michigan's Right to Work statute, 2012 PA 349 (Act 349), Respondents' enforcement of their August window period violated § 10(2)(a) of PERA because it restricted the right of employees to resign their union memberships at will. The ALJ also found that because the Commission does not have jurisdiction to find an unfair labor practice based on a union's attempts to enforce the terms of a private agreement when the attempts do not affect the individual's employment, Respondents did not violate § 10(2)(a) by threating Charging Party Carr to hire a debt collector.

In their exceptions, Respondents contended that Charging Party Snyder's charge was untimely. The Commission agreed with the ALJ that Charging Party Snyder's e-mail correspondence to Respondents occurred within the six-month statute of limitations period. The Commission also disagreed with Respondent's assertion that MERC lacked jurisdiction in the matter. Citing its decision in *Saginaw Ed Ass'n*, 29 MPER 21 (2015), the Commission reiterated that it has jurisdiction over matters in which a public employee chooses to refrain from engaging in activities protected under § 9(1)(a), but is restrained by their labor organization from doing so.

Respondents also argued that Charging Parties had a contractual obligation to pay dues until they resigned during the August window period. Further citing its decision in *Saginaw Ed Ass'n*, the Commission explained that where employees have a right to refrain from union activities, the union is prohibited from making rules to interfere with that right. On this basis, the Commission stated, "Charging Parties' membership obligation to Respondents, including their obligation to pay dues, ended at the point the Charging Parties provided the Unions with notice of their resignations."

Respondents also contended that the ALJ erred by recommending that that the Commission order Respondents to cease and desist from enforcing their August window period. Respondents argued that such an order would unconstitutionally impair Respondents' existing contractual relationship with its members. Again, following the rationale used in *Saginaw Ed Ass'n*, the Commission applied the three-pronged test used to analyze Contract Clause issues and concluded, "[A] legitimate public purpose is served by requiring the immediate application of the right to refrain."

In their cross exceptions, Charging Parties contended that the ALJ erred by finding that the Commission does not have jurisdiction to find a PERA violation based on threats to hire a debt collector. The Commission explained that it has jurisdiction to determine whether threats to use a debt collector to collect unpaid dues unlawfully restrain an employee in their right to refrain from union activity. The Commission concluded that a union's threats to use a debt collector to collect dues to which the union was not entitled, such as the dues that Respondent MEA contended accrued after Carr's resignation from the Union, were unlawful. However, since this case was prior to the Commission's decision in *Saginaw Ed Ass'n*, MERC concluded that it could not find that Respondent MEA knew, or should have known, that it was unlawful to attempt to collect dues that accrued after Charging Party Carr resigned, since her resignation was outside the window period. The Commission pointed out that such a threat made in the future would be considered a violation of § 10(2)(a).

This case is currently on appeal to the Michigan Court of Appeals.

g. ***AFSCME Council 25, Local 2394 –and- Neil Sweat,*** Court of Appeals Docket No. 323933, issued February 2, 2016; MERC Case No. CU10 I-039, decision issued September 11, 2014, 28 MPER 25.

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the unfair labor practice charge, which alleged that Respondent violated its duty of fair representation.

Charging Party Neil Sweat, a member of the bargaining unit represented by AFSCME Local 2394, was an employee of the Detroit Housing Commission. In his position,

Charging Party was solely responsible for the timely processing of rent checks. After leaving rental checks in his desk drawer on multiple occasions, resulting in the assessment of $750 in late fees for which the employer was responsible, Charging Party was suspended, and eventually terminated. He filed his unfair labor practice charge alleging that Respondent violated its duty of fair representation by failing to pursue his requests for arbitration.

The ALJ found that Charging Party failed to provide any evidence to prove that Respondent violated its duty of fair representation, and failed to allege facts showing that Respondent's decision to not advance the grievance to arbitration was arbitrary, discriminatory or in bad faith. The Commission agreed with the ALJ's findings and dismissed the charge.

On appeal, the Court found that Respondent did not breach its duty of fair representation by failing to advance Charging Party's grievances to arbitration. After a recitation of the law concerning duty of fair representation claims, the Court stated that a union has "considerable discretion" to determine which grievances it should arbitrate, and has the right to assess each grievance on its individual merit. Finding that the ALJ correctly noted that Sweat's employer was entitled to suspend Charging Party in 2008, and to terminate him one year later, the Court found sweat failed to demonstrate a contract breach by his employer. Further, the Court explained that without demonstrating a contract breach, Sweat could not prevail on his duty of fair representation claim against the Union. The Court found that Charging Party did not provide evidence to demonstrate that Respondent was hostile, discriminatory, arbitrary, or acting in bad faith regarding his grievances concerning either his suspension or his termination.

B. Alleged Employer Interference with or Discrimination for Protected Concerted Activity

a. Grandvue Medical Care Facility -and- Janet Renkiewicz and Tamara Wood, Michigan Court of Appeals Docket No. 319699, issued March 17, 2015; 28 MPER 68; MERC Case No. C10 C-084, decision issued December 16, 2013, 27 MPER 37.

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the unfair labor practice charge. The charge alleged that the Charging Parties were disciplined for engaging in protected concerted activity, and that the Employer violated their rights to act collectively when it implemented a no-discussion rule.

Charging Parties were employed in the Horizonvue unit of a long-term care facility operated by Respondent. Renkiewicz was a nurse/manager responsible for Horizonvue and Wood was a social worker at Horizonvue. A Horizonvue resident reported being sexually assaulted by a male employee and a male visitor. Neither of Charging Parties reported the incident to the Employer's director, because they did not believe the allegations. A second claim of sexual assault was entered into the central nursing notes but also was not reported to the director. Upon learning of the sexual assault allegations, the director held a meeting with the staff, at which he explained that the chain of command required that someone report the allegations and that the Employer's policy required an immediate report of the allegations, regardless of whether employees deemed them plausible.

Following the meeting, the director asked Charging Parties not to discuss the incident with any other employees, including each other, pending the outcome of an investigation. He testified that he wished to avoid "groupthink" or hearsay influencing employees' first-hand accounts of the incident.

Two days later the Employer concluded that Renkiewicz had violated the no-discussion order. She was fired following a brief termination meeting. The Employer's director testified that Renkiewicz's violation of the no-discussion order was not a motivating factor in her termination. He told her that she was being discharged for two previous resident rights violations that led to a state investigation, as well as the systematic failure to report allegations. Wood was disciplined for not reporting the sexual assault allegations. Subsequently, she was terminated for spending a significant amount of time at work sending and reading personal emails.

After being terminated, Charging Parties filed unfair labor practice charges against the Employer. The ALJ recommended dismissal of the charges and MERC affirmed, adopting the ALJ's findings and concluding that there was no merit to Charging Parties' exceptions.

The Court of Appeals affirmed MERC's finding that the Charging Parties failed to show that protected conduct was a motivating factor in the Employer's decision to discipline them. The Court held that while the no-discussion order impaired the Charging Parties' right to concerted activity, the order did not violate PERA because the Employer met its burden of demonstrating legitimate and substantial business justifications for the order. Noting that the Employer had a duty to protect its residents and an interest in ensuring a reliable investigation, the Court found that the diminution of the Charging Parties' rights was outweighed by the Employer's interests.

Finally, the Court rejected Charging Parties' argument that the ALJ erred in denying their motion to amend the charge by adding a claim concerning another nurse who had been disciplined. The Court found no error in MERC's refusal to allow an amendment to add a new party's claim that was barred by the statute of limitations. The Court explained that the relation-back doctrine does not apply to the addition of new parties.

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

a. City of Saline -and- Christopher Boulter, MERC Case No. C14 B-021, decision issued January 19, 2016; 29 MPER 53.

The Commission reversed the ALJ's decision and found that the Employer did not violate § 10(1)(a) of PERA when its Police Chief demanded at the outset of an investigatory interview that Charging Party Christopher Boulter's union representative act only as an observer of the proceedings.

Boulter was employed by the City of Saline's Police Department as a sergeant. On November 22, 2013, the Employer's Police Chief sent an email to him scheduling an interview to discuss Boulter's alleged romantic relationship with another department employee and the alleged violation of certain department rules. At the onset the interview, Charging Party's labor representative was told that he could only act as an observer during the interview. Although the labor representative objected to being instructed to act as an observer, the interview continued and Charging Party admitted that he was engaged in a

relationship with another department employee. At the conclusion of the interview, both Charging Party and his representative were allowed to make a closing statement.

On December 3, 2013, the Employer's Police Chief informed Charging Party that the investigation into his actions had established that he had violated department rules. The Chief offered Charging Party the opportunity to resign from the position of sergeant or to remain a sergeant and be subject to discipline. Subsequently, Charging Party resigned from the position of sergeant and assumed the position of patrol officer.

The ALJ found that the Employer violated § 10(1)(a) of PERA when its Police Chief demanded at the outset of the investigatory interview that Charging Party's union representative act as an observer only. The ALJ further found, however, that the Employer did not violate § 10(1)(a) of PERA when the Chief subsequently offered Charging Party the opportunity to resign from his position as sergeant or be subject to further disciplinary action. On exceptions, the Employer argued that the ALJ erred in concluding that the Employer violated Charging Party's *Weingarten* rights during the November 27, 2013 interview.

In reversing the ALJ's decision, the Commission noted that the Employer provided the Charging Party with notice of the purpose of the interview and the alleged rule violations/charges five days prior to the interview, that the Charging Party was notified of his right to union representation and that Charging Party consulted with his union representative prior to the interview. The Commission also noted that the union representative testified that he was not limited in any way from discussing the situation with Charging Party, that he was given permission to speak during the interview, and that he conducted the interview as he would have done in the absence of the Chief's directive. Consequently, the Commission, relying on its prior decision in *City of Oak Park*, 1995 MERC Lab Op 576, found that the Charging Party was given the representation rights contemplated by *Weingarten*.

D. Other Unfair Labor Practice Charges Alleging Discrimination for Protected Concerted Activity

a. ***Detroit Housing Commission –and- Neil Sweat,*** Court of Appeals Docket No. 323453, issued February 2, 2016; MERC Case No. C11 C-051, decision issued August 14, 2014, 28 MPER 10.

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the unfair labor practice charge and found that Charging Party Neil Sweat failed to state a claim upon which relief could be granted under PERA.

Sweat was an employee of the Detroit Housing Commission and a member of a bargaining unit represented by AFSCME. In 2008, after failing to complete his job duties adequately, Charging Party was placed on a thirty-day suspension. In 2009, Charging Party was terminated by Respondent for failing to timely process rental checks, resulting in $750 in late fees assessed to Respondent. It was not until March 2011 that Charging Party filed his unfair labor practice charge alleging that his termination was wrongful and that he had been discriminated against due to his age and disability.

The ALJ dismissed the charge as untimely because Charging Party had been fired by Respondent in May 2009, but did not file his charge until March 2011. Charging Party asserted that his claim was timely, as he had to exhaust his internal union remedies before

filing a charge. Since the six-month limitations period is statutory, the Commission concluded that Charging Party was time barred from filing a charge. Additionally, the Commission agreed with the ALJ's conclusion that Charging Party failed to state a valid PERA claim and dismissed the charge.

Charging Party contended that the Commission erred in failing to find an unfair labor practice, and appealed to the Court of Appeals. Agreeing with the Commission's findings, the Court found that Charging Party failed to state a cognizable claim under PERA. The Court pointed out that Charging Party did not assert that he was engaged in PERA protected activity, and failed to plead any facts to establish that his Union activity resulted in his termination. The Court explained that an employee may be discharged for any reason or no reason as long as the employee is not discharged for engaging in rights protected by § 9 of PERA.

Charging Party also contended that the Commission erred in dismissing his charge because he raised a hybrid claim alleging that his employer violated the collective bargaining agreement. The Court found no merit to that claim explaining that treating Sweat's charge as a hybrid claim does not give MERC jurisdiction with claim does not involve an unfair labor practice under PERA. The Court stated that MERC was not the appropriate venue to make determinations on Charging Party's claims of age or disability discrimination, and again, found that Charging Party's pleadings failed to demonstrate that his termination constituted a violation of PERA. The Court concluded that no factual development justify Sweat's claim for relief under PERA.

Having decided that Charging Party failed to state a claim upon which relief could be granted under PERA, the Court noted that did not need to address the statute of limitations issue.

III. Act 312 & 2012 PA 436

a. ***Wayne County & Wayne County Sheriff –and- AFSCME Local 3317,*** Case No. D14 A-0018, issued October 16, 2015; 29 MPER 26.

The Commission granted the County and the Sheriff's motion to dismiss the petition for Act 312 arbitration filed by the union.

AFSCME Local 3317 filed a petition for Act 312 arbitration on August 19, 2014, after the union and the employers were unsuccessful in their efforts to negotiate a new collective bargaining agreement. Subsequently, the parties agreed that the terms of their collective bargaining agreement would be extended, and the Act 312 petition would be withdrawn until after the election for the new County Executive in November 2014. On October 1, 2014, the parties entered into a memorandum of agreement (MOA) providing that the Act 312 petition would be dismissed without prejudice, but could be refiled on a date after the November 2014 election, but no later than December 15, 2014. The MOA provided that upon refiling, the case "shall be reinstated and proceed to hearing as provided under Act 312." The parties subsequently amended the MOA on December 12, February 17, March 13, April 22, and June 1 to extend its duration. In June 2015, the Union requested to reinstate the Act 312 petition; the request was granted, and the matter proceeded to arbitration with hearing dates scheduled to occur between September 10, 2015, and October 13, 2015.

On August 21, 2015, Wayne County entered into a consent agreement with the State Treasurer pursuant to § 8 of the Local Financial Stability and Choice Act, 2012 PA 436 (Act 436). Pursuant to Act 436, on September 20, 2015, thirty days after the date the County entered into the consent agreement, the employers' duty to bargain with the union ceased.

In their motion to dismiss the Act 312 arbitration, the employers contended that this case was similar to the Commission's decision in *City of Detroit*, 27 MPER 6 (2013). The employers contended that pursuant to Act 436, the County was in a state of financial emergency and was required to enter into a consent agreement with the State of Michigan on August 21, 2015. As a result, the employers contended that they had no duty to participate in Act 312 arbitration and that the arbitration petition should be dismissed

The Commission found that since the County had entered into a consent agreement, this matter was distinguishable from *City of Detroit*, where the employer was in receivership under an emergency manager. The Commission explained that under § 12(1)(k) of Act 436 an emergency manager may, if certain criteria are met, "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement." Based on this authority granted to an emergency manger, the Commission found that because the Act 312 award serves as the parties' collective bargaining agreement, under conditions set forth in Act 436, § 15(8) of PERA and § 12(1)(k) of Act 436 would permit an emergency manager to reject, modify, or terminate the terms of an Act 312 award. Therefore, the Commission concluded that it seemed doubtful that the Legislature would have intended an employer in receivership to be subject to Act 312 arbitration proceedings.

The Commission noted that where the employer is a party to a consent agreement, as in this case, there is no emergency manager and the employer does not have the power to "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement." In fact, § 8 of Act 436 specifically prohibits granting powers provided to emergency managers under § 12(1)(k) to employers operating under a consent agreement.

The Commission concluded that the employers' duty to participate in Act 312 arbitration depends on its duty to bargain. Since the County was subject to a consent agreement pursuant to Act 436, its duty to bargain was suspended thirty days after the effective date of that agreement. The Commission explained that if the employers' duty to bargain has been suspended, their refusal to bargain does not violate § 10(1)(e) of PERA. There cannot be a breach of a duty if there is no duty.

However, the union argued that the consent agreement under which the employers sought to have the Act 312 arbitration proceeding dismissed, did not give the County authority to stop the Act 312 proceeding. Among other arguments, the union also asserted that the employers contractually agreed to the arbitration process in the MOA and based on promissory estoppel, should be required to proceed to arbitration.

The Commission rejected the union's argument that the doctrine of promissory estoppel requires the employers to uphold their promise to proceed with the Act 312 arbitration. The Commission noted that even if it assumed the facts to be as alleged by the union, the Commission does not have the authority to interfere with the rights and obligations that the County assumed upon entering into the consent agreement with the State Treasurer for the

purpose of taking remedial measures to address the County's financial emergency. Further, the Commission explained that while the County does not have the power under § 12(1)(k) of Act 436 to reject, modify, or terminate a collective bargaining agreement, the County does have the power under § 12(1)(j) of Act 436 to "[r]eject, modify, or terminate 1 or more terms and conditions of an existing contract." The Commission reasoned that while the parties' memorandum of agreement may be related to collective bargaining, it is not a collective bargaining agreement. Thus, the Commission found that the memorandum of agreement is a contract that the County had the power to "reject, modify or terminate" pursuant to § 12(1)(j).

IV. Representation and Unit Placement

A. Timeliness of Representation Petitions – Contract Bar

a. 17th Judicial Circuit Court –and- Technical, Professional and Officeworkers Association of Michigan (TPOAM) –and- United Auto Workers (UAW) Local 2600 –and- Kent County -and- 63rd District Court –and- Kent County Probate Court, MERC Case No. R15 I-081, decision issued December 11, 2015; 29 MPER 43.

On September 18, 2015, the Petitioner, Technical, Professional and Officeworkers Association of Michigan (TPOAM) filed a petition for a representation election for a bargaining unit consisting of all full-time and regular part-time employees employed by 17th Judicial Circuit Court. The employees were represented by the Incumbent, United Auto Workers Local 2600, and covered by a collective bargaining agreement between the UAW and Kent County, the 17th Judicial Circuit Court, the Kent County Probate Court, and the 63rd Judicial District Court. The collective bargaining agreement became effective on November 29, 2012 and continued in effect through December 31, 2015.

The UAW asserted that because the agreement was longer than three years, the window period for filing a petition under Rule 141(3)(b) of the Commission's General Rules was between 90 and 150 days prior to the three-year anniversary of the effective date of the agreement. On those grounds, the UAW contended that the petition was filed late and should be dismissed as untimely. The TPOAM contended that its petition was filed within the appropriate window period, or between 90 and 150 days before the agreement's expiration date, as per the Commission's General Rules.

The Commission stated that there was no dispute that when the duration of the collective bargaining agreement is three years or less, employees and rival unions have two opportunities to file representation petitions; during the appropriate window period before the contract expires, or after the expiration of the contract. The Commission explained that when a collective bargaining agreement is longer than three years, the meaning of the term "expiration date" is not as clear. By allowing employees covered by contracts longer than three years to file their petitions in a window period between 90 and 150 days prior to the third year anniversary date of their contracts, the Commission found that they are provided with the same opportunities the window period rule offers to employees covered by shorter contracts.

TPOAM filed its petition less than ninety days prior to the third year anniversary date of the contract between the Employer and the UAW, and, therefore, outside the appropriate

window period. The Commission noted that while the petition had to be dismissed as untimely, the contract could not serve to bar the TPOAM from immediately refiling its petition after its third year anniversary date, which had already passed.

Subsequently, TPOAM filed a timely petition, an election was conducted, and TPOAM was certified as the bargaining representative for the 17th Judicial Circuit Court employees.

B. Community of Interest

a. ***Delhi Charter Township -and- Delhi Township Firefighters, International Association of Firefighters Local 5359,*** Michigan Court of Appeals Docket No. 320637, issued April 21, 2015, 28 MPER 73; MERC Case No. UC11 J-018, decision issued October 31, 2013, 27 MPER 28; MERC order denying reconsideration issued February 14, 2014; 27 MPER 49.

In an unpublished opinion, the Court of Appeals affirmed MERC's order granting the Union's petition for unit clarification.

The Employer, Delhi Township operates a fire department. The Union was the exclusive bargaining representative of the full-time firefighters and paramedics/EMS. Around July 2011, the Employer received a grant from the Federal Emergency Management Agency (FEMA) to facilitate the training and recruitment of part-time paid-on-call firefighters, which resulted in the decision to create a new position, entitled recruitment and retention coordinator (RRC). The Employer selected a full-time firefighter/paramedic and member of the bargaining unit represented by the Union to fill this new position.

The Union filed a petition with MERC to clarify the bargaining unit to include the newly created position. MERC subsequently granted the petition.

On appeal, the Employer raised several issues. First, it argued the order created an inappropriate bargaining unit because there was no community of interests between the full-time firefighters/paramedics and the RRC position. The Court stated that MERC's objective is not to find the optimum bargaining unit and that its finding that the RRC position has a community of interest with the existing bargaining unit is supported by competent, material, and substantial evidence. The Court emphasized that the bargaining unit does not have to be optimal, just appropriate and that it is the Commission's policy "to avoid leaving positions unrepresented, especially isolated ones."

The Court also found that MERC did not err by concluding that the difference in wages and hours was not a basis to preclude the requested unit clarification. It explained that the differences in wages and hours were mandatory bargaining subjects to be addressed during bargaining between the Union and the Employer.

The Court was also not convinced by the Employer's assertion that the RRC position was a management position and, therefore, exempt from placement in the bargaining unit. Citing MCL 423.213, the Court explained that MERC is prohibited from classifying as a supervisor anyone employed by a fire department who is "subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator." Since it was undisputed that the RRC reported directly to the fire chief, the

Court found that the RRC could not be classified as exempt from the Union as a supervisor.

The Employer then argued that MERC erred by concluding that the Union's policy of members working secondary employment as part-time paid-on-call firefighters was not relevant in determining whether the RRC position, which involved recruiting and working with paid-on-call firefighters, should be included in the bargaining unit. The Court admitted that the demands of the RRC position could arguably conflict with the policy but again noted that the bargaining unit does not need to be optimum, just appropriate. It explained that there is no statute or case law that required MERC to consider the ideology or policy positions of the bargaining unit's representative when determining which employee classifications belong in a particular bargaining unit. The Court, in rejecting the Employer's argument, noted that the Employer did not provide any applicable case law in support of its position and explained, "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims."

The Employer also argued on appeal that the ALJ improperly limited testimony at the hearing. However, the Court explained that there is no requirement that an evidentiary hearing be conducted in every case. The Court concluded that MERC did not err in its finding and that the ALJ reviewed each asserted disputed material fact and properly limited testimony to exclude the RRC's subjective beliefs. Further, MERC specifically referenced this testimony in its order but found it to be irrelevant.

Finally, the Employer argued that because 2012 PA 349 does not apply to public police or fire department employees that MERC should be required to review a union's constitution and by-laws to determine whether they conflict with the classification's job requirements before placing it in a bargaining unit. However, the Court again noted that the Employer failed to provide any authority in support of this argument and explained that it would "not rationalize the basis for this claim nor search for authority to support [it]." The Court considered this issue abandoned.

The Michigan Supreme Court denied the Employer's application for leave to appeal on February 2, 2016.

b. ***Saginaw Valley State University -and- Michigan Education Association,*** MERC Case No. R14 E-036, issued October 21, 2015; 29 MPER 28.

In its decision, the Commission directed an election pending an additional showing of interest by Petitioner. Petitioner, the authorized bargaining representative for the University's Support Staff Association (Association), filed a Petition for Certification of Representative seeking to accrete certain Technology Services Department (IT Department) classifications and Media Services/Library classifications at the University into the bargaining unit represented by the Association. Petitioner argued that the positions it sought to accrete to the bargaining unit shared a community of interest with the positions already in the bargaining unit. The University objected on several grounds, arguing that: (1) there is a difference in pay calculation for the positions sought and those in the bargaining unit; (2) there is a long-standing history of division between the unit and the positions sought; (3) the positions sought have distinct qualifications that are unlike any of the employees in the bargaining unit; (4) the Association's contract provides means of compensation that are not available to the positions sought; and (5) there is a potential

for conflicts of interest between the IT positions sought and current bargaining unit members. At hearing, Petitioner clarified that, except for the positions already in the bargaining unit, its petition sought to accrete all positions in the Library Department that do not require a masters of library science and all positions within the IT Department, with the exception of programmer/analyst positions.

The positions Petitioner sought to accrete to the bargaining unit from the IT Department included: senior systems administrator, systems administrator, network engineer, senior technology specialists, technology specialist, senior instruction technology specialist, instructional technology specialist, video production technology specialist, lab coordinator, senior enterprise application specialists, enterprise application specialist, and the database administrator/security officer. From the Library Department, the classifications sought included: library computer tech, archives specialist, and media services/ inter-library loan assistant.

Current bargaining unit positions include secretarial and clerical, custodial and ground and building maintenance classifications, as well as skilled trade classifications, such as HVAC or electrician positions. No position within the bargaining unit required a four-year degree and all unit positions were paid biweekly on an hourly basis. In addition, bargaining unit members were compensated for overtime beyond forty hours in a week. They received medical, dental, vision, and disability benefits, and some qualified for group life insurance.

The positions included in the petition were all salaried positions, with full-time positions exempt from the overtime requirements of the Fair Labor Standards Act. The positions that were sought under the petition also had different sick time, vacation time, and health insurance than unit employees.

The Commission noted that it must first determine whether a community of interest existed between the bargaining unit and the positions sought by the petition. It explained its primary objective is to constitute the largest unit which is most compatible with the effectuation of the purposes of the law and which includes within a single unit all employees sharing a community of interest. The Commission determines whether a community of interest exists by examining a number of factors, including similarities in duties, skills, and working conditions; similarities in wages and employee benefits; amount of interchange or transfer between groups of employees; centralization of the employer's administrative and managerial functions; degree of central control of labor relations; common promotion ladders; and common supervision. The Commission explained further that it is not required to find the "optimum" or "most" appropriate unit but, rather, only a unit appropriate for collective bargaining based upon the facts of each case. Absent a showing of extreme divergence of community of interest between an existing unit and a residuum of unrepresented employees, the Commission's policy is to allow accretion, rather than leave the unrepresented employees without collective bargaining representation.

The Commission found a community of interest despite the differences in terms of pay, benefits, and working conditions. The Commission explained that none of these differences rose to the level of creating a significant divergence of interest. It noted further that the existence of a dispute concerning the Employer's contractual obligations to such a position is of no relevance to the underlying issue of community of interest. Additionally, the Commission explained that differences in educational requirements and qualifications

alone are not necessarily determinative of whether to include a position in a particular bargaining unit.

The Commission pointed out that there is some overlap and similarity between the bargaining unit positions and the positions the Union seeks to accrete to the bargaining unit, and noted that some of them even work together on various projects. For the above reasons, the Commission concluded that there existed a community of interest between the positions sought by Petitioner and the bargaining unit.

The University argued that the petition would result in fragmentation due to Petitioner's exclusion of programmer/analyst positions from its petition. The Commission noted that it is its policy, whenever possible, to avoid leaving positions unrepresented, especially isolated ones. It explained that when a position shares a community of interest with a unit that seeks to include it, the Commission will accrete the position to the existing unit rather than leave it with a residual group of unrepresented employees. The University argued that there is no rational basis for the exclusion of the programmer/analyst positions from a unit containing the rest of the IT Department administrative professional classifications. The Commission agreed and directed an election that includes those programmer/analyst positions with the rest of the positions sought in the petition.

The Commission found a question of representation existed within the meaning of Section 12 of PERA. It ordered the Petitioner to provide an additional showing of interest for the expanded unit including the programmer/analyst positions. Upon Petitioner's timely showing of interest, the Commission directed an election of all administrative professional positions within the IT Department and all administrative professional positions within Media Services that do not require a masters of library science degree that are not already represented by the Association.

c. ***University of Michigan -and- University of Michigan Skilled Trades Union -and- AFSCME Council 25, Local 1583,*** MERC Case No. UC13 K-015, decision issued September 24, 2015; 29 MPER 23.

The Commission found that the Petitioner, University of Michigan Skilled Trades Union (UMSTU), failed to establish that the Environmental Protection Equipment Specialist (EPES) position was new or substantially changed. The Commission also found that, even if it were to conclude that the unit clarification was properly brought before it, Petitioner failed to provide sufficient cause for the Commission to question the University's decision to place the EPES position in the AFSCME unit.

Petitioner has been the authorized bargaining agent representing skilled trade employees at the University since the mid to late 1960's. Intervenor, AFSCME Council 25 and its affiliated Local 1583, represents various service-maintenance employee classifications, including the newly created EPES classification. The EPES classification was created to handle the maintenance, upkeep, repair, and other work relating to the mechanical systems and hazardous waste associated with two University labs. Many of the duties associated with this position were previously handled by an AFSCME Maintenance Mechanic.

The EPES classification was created when P, the Maintenance Mechanic who performed the duties ultimately assigned to the position, requested that the University review his current classification for the purpose of updating his duties and salary. It was P's contention that many of the duties he was currently required to perform were duties that

were not included in the maintenance mechanic job description and had not typically been done by the maintenance mechanic classification. The Employer reviewed P's job duties and reclassified his position as an EPES.

Petitioner argued that the EPES had a community of interest with the UMSTU unit. The Employer and Intervenor similarly argued that the EPES had a community of interest with the AFSCME unit. In addition, the University argued that the unit clarification petition should be dismissed because the EPES was not a new position nor was it substantially changed.

The Commission agreed with the University that the EPES was not new or substantially changed and thus the unit did not require clarification. However, the Commission went on to say that, even if it were to conclude that the unit clarification was properly brought before it, Petitioner failed to provide sufficient cause for it to question the University's decision. The Commission noted that where a position shares a community of interest between opposing bargaining units, it will defer to the employer's good faith decision as to unit placement.

Accordingly, the Commission dismissed UMSTU's unit clarification petition.

d. ***Ogemaw County and the Ogemaw County Sheriff -and- Teamsters Local 214,*** MERC Case No. UC14 E-007, decision issued May 19, 2015; 28 MPER 84.

The Commission denied the petition of Ogemaw County and the Ogemaw County Sheriff to clarify the bargaining unit represented by Teamsters Local 214 by dividing it into two units, one consisting of Sheriff's deputies eligible for arbitration of labor disputes under Act 312 and the other comprising all other positions currently included in the bargaining unit. The Commission refused to split the bargaining unit, and dismissed its petition for unit clarification as inappropriate.

The bargaining unit consisted of eleven deputies and twenty-two corrections officers, including fourteen part-time officers, cooks, and one secretary. The deputies worked from the Ogemaw County Sheriff's Office. The other employees worked at the Ogemaw County Correctional Facility, located across the street from the Sheriff's Office. The parties agreed that the deputies constituted Act 312 eligible employees and the other employees were not Act 312 eligible. Due to the difficulty of negotiating contracts that include both groups of employees, Petitioners proposed that the parties bargain separately for Act 312-eligible and non-eligible employees. The Union rejected the proposal.

Changes to PERA in 2012 created several distinctions between Act 312-eligible and non-eligible employees. Section 10(4)(a)(i) of PERA exempts Act 312-eligible employees, and those who seek to become employed in Act 312-eligible positions from the prohibition against requiring employees, as a condition of continued employment, to pay dues, fees, assessments, or provide anything of value to a labor organization. Also, § 15b permits the parties to agree in their collective bargaining agreement to give deputies a retroactive wage increase, but they may not do so with the remainder of the unit. In addition, § 15b prohibits Petitioners from paying step increases to non-Act 312-eligible employees during the interim between two contracts, while deputies are entitled to any step increases provided for in the expired contract. Lastly, under § 15b(1) Petitioners are required to pass along to non-Act312 eligible employees the full amount of any increase in the cost of their

health benefits occurring in the period between collective bargaining agreements, even if this raises the employees' contribution to their health costs above the "employee's share" for that medical benefit plan coverage year as set out in Subsections 3 and 4 of the Publicly Funded Health Insurance Contribution Act, MCL 15.561-15.569. However, § 15b(4)(b) caps the amount of deputies' contributions at their "employee share."

Petitioners filed the petition for unit clarification in May 2014 but continued to bargain toward a single contract. No agreement was reached and the Union filed a petition for fact finding and Act 312 arbitration in November 2014. The major barrier to reaching an agreement was the parties' inability to agree on health insurance, a benefit provided equally to both groups. The parties reached a settlement in both cases and presumably reached a contract in February 2015.

The Commission noted that since the 1980's, it has recognized the availability of Act 312 arbitration to be a significant factor in defining the appropriate unit. It explained that it had previously held that police and fire fighters had "an extreme divergence in community of interest" which justified permitting them to sever from non-public safety units. Despite its reluctance to disturb existing bargaining units, the Commission has entertained representation petitions by unions seeking to sever Act 312-eligible employees from units including non-eligible employees and represent the Act 312-eligible classifications as part of another existing unit of Act 312-eligible employees. However, the Commission also stated that units comprised of Act 312-eligible and non-eligible employees are not per se inappropriate.

The Commission explained that while it has expressed a preference for separate units of Act 312-eligible and non-eligible employees, neither PERA nor Act 312 includes any prohibition on such mixed units. The Commission referred to *Oakland Co & Oakland Co Sheriff*, 20 MPER 63 (2007), the only case in which it granted an employer's petition to split an existing bargaining unit of Act 312-eligible and non-eligible employees. The Commission split the unit because the divergence of interests in the mixed unit disrupted the collective bargaining process to such an extent that the process had essentially broken down, thus depriving employees of their right to collective bargaining.

The Commission found that the facts of this case did not resemble those in *Oakland Co.* Moreover, the Commission noted that Petitioners did not contend that the collective bargaining process broke down because the bargaining unit includes both types of employees. The Commission found that Petitioners' arguments that a mixed unit, may lead to internal strife were speculative, and observed that the fact that one group within a bargaining unit finds a particular contract offer unacceptable does not necessarily mean that the employees within the unit lack a community of interest. .The Commission also noted that while recent amendments to PERA may make separate units even more preferable, the question of whether separate units would be preferable was not before the Commission. The only question before the Commission was whether, in the absence of extraordinary circumstances, it should create an exception for Act 312 mixed units to the rule that unit clarification is not appropriate for upsetting an agreement of the parties or established practice concerning unit placement. The Commission found that such an exception would clearly affect bargaining units other than the one in this case. Accordingly, the Commission held that the petition was inappropriate because Petitioners

failed to establish that either effective collective bargaining has become impossible or that this is the inevitable outcome of statutory changes.

C. Bargaining unit exclusions based on status as a supervisor or confidential employee

a. Faust Public Library –and- AFSCME Council 25, Court of Appeals No. 318467; issued July 23, 2015; 29 MPER 6; MERC Case No. R09 D-053, decision issued September 16, 2013; 27 MPER 19.

AFSCME Council 25 filed an election petition seeking to represent a unit of employees of the Faust Public Library. An election was conducted and a majority of the employees rejected the Union. The Union then filed an unfair labor practice charge alleging that the Employer had retaliated against employees from engaging in union activity and interfered with the election. To settle the matter, the Union and the Employer agreed that a new election would be held in which the Employer promised to remain neutral. A new election was conducted, with thirteen eligible voters for the Union and thirteen eligible voters against the Union. The Employer challenged the ballots of three employees, K, M and H, asserting that each employee was a supervisor who should be excluded from the unit. The Union did not dispute that two of these employees, K and M, were supervisors. The only position whose supervisory status remained in dispute was H, the head of children's services.

The Commission found that the head of the children's services department position, held by H, did not qualify as a statutory supervisor because she did not perform duties that made her a supervisor. She was not involved in hiring or firing, never disciplined an employee, and was not involved in wage setting. The Commission ordered that her ballot be opened and counted with the election results. On appeal, the Employer challenged MERC's findings, but the Court of Appeals agreed with MERC and found that there was "competent, material, and substantial evidence" that H's position was non-supervisory.

The Employer also argued that MERC erred by rejecting its contention that the three department head positions must all be deemed either supervisory or nonsupervisory. The Employer contended that MERC failed to let it present evidence that the duties and authority of the three department head positions were identical. The Court of Appeals agreed, found that MERC was obligated to separately determine whether each of the three department heads were eligible voters, and found that MERC erred by precluding the Employer from presenting evidence relevant to the supervisory or non-supervisory status of K and M. As a result, the Court vacated the portions of MERC's decision that refused to consider the Employer's alternative claim. The Court remanded the matter to MERC for it to consider the merits of the remaining two challenged ballots, and decide whether each individual is an eligible voter.

b. ***Detroit Transportation Corporation-and-Michigan Fraternal Order of Police Labor Council,*** MERC Case No. UC15 C-007, decision issued January 15, 2016; 29 MPER 49**.**

The Commission denied the petition of the Michigan Fraternal Order of Police Labor Council to exclude the position of investigator from the bargaining unit of nonsupervisory transit police officers.

Petitioner represents a bargaining unit of nonsupervisory transit police officers employed by the Detroit Transportation Corporation. After the Employer posted a new position with the title of investigator, Petitioner sought an order excluding the position from its unit on the basis that the position is confidential and/or supervisory. According to Petitioner, the position has duties that create a conflict of interest that preclude its inclusion in the unit. These duties include conducting internal investigations into complaints of transit officer misconduct; submitting reports to the Employer's executive sergeant, deputy chief, and chief that include recommendations on whether criminal or other misconduct has occurred; and engaging in confidential discussions with supervisors about the investigations.

According to the Employer, the work performed by the investigator is work that transit officers have traditionally performed and the investigator shares a community of interest with Petitioner's bargaining unit. The Employer maintained that the position is neither supervisory nor confidential as the Commission defines those terms.

Transit police officers typically conduct investigations at incident scenes, including sometimes interviewing witnesses. They may also arrest or issue tickets to civilians at the scene when appropriate and prepare incident reports for submission to their supervisors. Before 2014, if an incident required further investigation of possible criminal conduct, the matter was referred to the Detroit Police Department. In 2014, the Employer and the Detroit Police Department agreed that, from that point on, incidents requiring further investigation would be handled by the Employer. The Employer began assigning these investigations to two transit police officers who were former police officers with experience conducting investigations. Subsequently, one of these individuals was given full responsibility for the investigations. His role also included investigating misconduct complaints filed against other transit officers. When investigating complaints of possible officer misconduct, the investigator prepares a report including factual findings and a discussion and recommendation as to whether the officer violated work rules or internal policies. The investigator is not responsible for recommending possible discipline. The investigators report is reviewed by his superior, who then makes a recommendation and forwards it to the Deputy Chief, who makes his own recommendation and forwards the report to the Chief.

The Commission rejected Petitioner's argument that the investigator should be excluded from its bargaining unit as a confidential employee. The Commission noted that a confidential employee is one who formulates, determines, and effectuates management policy with regard to labor relations or who assists in a confidential capacity to such a person. In this case, the investigator has no involvement with collective bargaining or labor relations. Although the investigator is privy to information regarding ongoing disciplinary investigations that is not available to other unit members, or to Petitioner, the Commission held that this does not make the position confidential or justify its exclusion from the bargaining unit.

The Commission also rejected Petitioner's argument that the investigator is a supervisor. The Commission noted that a supervisor is an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively recommend such action. In this case, the Commission found that, although the investigator makes recommendations concerning personnel decisions, there was no

evidence that the investigator the authority to effectively recommend that an employee be found guilty of a rule or policy violation or be disciplined.

The Petitioner also argued that the investigator should be excluded from its unit because, in the internal affairs section of the Detroit Police Department, investigations into police officer misconduct are only carried out by supervisors. The Commission held that it is not bound to consider the voluntary practices of other police agencies in making unit determinations.