



MERC BASICS

A Brief Overview of Key Points and Services

Designed for the Novice Management or Labor Representative

Michigan Employment Relations Commission
Bureau of Employment Relations
www.michigan.gov/merc

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OVERVIEW OF MERC BASICS

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MERC / BER

- **MERC: Michigan Employment Relations Commission**
 - Edward Callaghan, Chair
 - Robert LaBrant
 - Natalie Yaw
- **BER: Bureau of Employment Relations**
 - Ruthanne Okun, Director
- **BER: Administrative Arm of the Commission**

MERC/ BER Services

Labor Relations Division

- ULPs
 - Employers
 - Unions
 - Individuals

- Elections
 - R petitions
 - UC petitions
 - Union Audits

Mediation Division

- Labor Mediation
 - Contract Negotiations
 - Grievances
 - Public & Private Sectors
 - Collaborative Bargaining

- Fact Finding

- Act 312 Arbitration

- Grievance Arbitration
 - Arbitrator Appointments only

MERC Authority & Jurisdiction

LMA (1939)

- Mediate Labor Disputes
- Management & Labor
- Private Sector
- ULPs and Elections
(outside of NLRB)
- Created MERC

PERA (1965)

- Successor to Hutchinson Act
- Extends Collective bargaining to Public Sector employees (excl. Federal & State employees)
- Freely choose an Exclusive Bargaining Representative
- Redress for Employer or Union violations of PERA (e.g., ULPs)

Public Employment Relations Act (PERA)

- Extends right to organize to public sector employees
- Establishes a duty to bargain (negotiate) in good faith
- Prohibits strikes and lockouts in the public sector
- Establishes certain misconduct as ULPs
- Permits employees to choose union representation
- Identifies certain subjects as prohibited subjects of bargaining
- Amended several times since inception, especially recently

UNION SELECTION (R & UC Petitions)

Representation Petition

- Employees vote for an exclusive bargaining representative
- Petition filed with at least 30% supporting signatures
- Majority vote WINS
- Generally, used to pick a union or switch unions (RC); or end union representation (RD)
- Filing window periods apply

Unit Clarification

- Dispute exists over where a position should be placed (*e.g., Union A, Union B or No Union*)
- New or substantially modified position(s)
- MERC decides based on multiple factors (*e.g., community of interest; bargaining history, etc.*)
- “Community of interest” analysis examines similarities in duties, skills, working conditions, wages, benefits, reporting relationships and more.

Union Selection-- continued

EXCEPTIONS

- MERC does not recognize a 1 person unit
[Int'l Union of Bricklayers, 5 MPER 23096 (1992)]
- Executive and Confidential positions excluded
- NO mixing Non- Supervisors with their Supervisors
(Caveat 1: Ok if unit of fire fighters (PERA Sec 13))
(Caveat 2: Unit of multi level supervisors is OK)
- NO mixing Act 312 eligible and Non Act 312 eligible
(Caveat: Existing 'mixed' units mostly grandfathered)
[Oakland Co (Sheriff), 20 MPER 63 (2007) on 8-7-07]

Unfair Labor Practices (ULPs)

TYPE	Filing Party (Charging Party)	Alleged Offender (Respondent)	General Claim
Anti-Union Animus (Discrimination)	Individual, Union	Employer	Retaliation/ interference due to protected concerted activity
Duty of Fair Representation	Unit Member(s)	Union	Breach of standard owed to member
Duty to Bargain	Union, Employer	Employer, Union	Breach of “good faith” standard

ULPs continued....

2 Key Factors:

- 6 months to file or too late (statute of limitations--SOL)
 - SOL starts when party knew or should have known of violation
 - ULP charge must be **filed and served** on party by SOL deadline
 - Pursuit of outside remedies does not toll or extend the SOL
 - SOL cannot be waived *[Traverse Area District Library, 25 MPER 82 (2012) on 5-5-12]*
- ULP **must** allege a violation of PERA (or LMA if applicable)
 - PERA section 10
 - MERC does not investigate claims; ULP must indicate relevant detail
 - Not responding to a Show Cause order can result in ULP dismissal

[Detroit Fed of Teachers, 21 MPER 3 (2008) on 1-9-08]

Duty of Fair Representation (DFR)

Applies Against Unions Only. 3 Key Elements*:

- A Union must:
 1. Serve the interests of all members without hostility or discrimination toward any
 2. Exercise its discretion in complete good faith and honesty
 3. Avoid arbitrary conduct

**[Refer to Goolsby v Detroit, 419 Mich 651, 348; NW2nd 856 (1984)]*

- Only applies to policies and procedures having a direct impact on terms and conditions of employment, and not the internal matters of the union *[Teamsters Local 214, 26 MPER 43 (2013) on 2-26-13]*

Duty of Fair Representation (continued) – Grievance Processing

- Union's duty is to the Membership OVERALL
- Union need not pursue every grievance
- Union need not follow dictates of the grievant(s)
- Union can exercise wide discretion on what action to take
- Union may weigh its decision on factors such as:
 - Likelihood of success
 - Expense to the Union
 - Burden on contractual grievance machinery

Duty to Bargain

PERA, Section 15:

...to bargain collectively is the performance of the mutual obligation...to meet at reasonable times and confer in good faith with **respect to wages, hours, and other terms and conditions of employment**, or the negotiation of an agreement, or any question arising under the agreement,...and the execution of a written contract...**BUT** this obligation **does not compel either party to agree** to a proposal or require the making of a concession.

Duty to Bargain (continued) -

- Party must make a “DEMAND” to bargain *[Lakeview Sch, see slide 34]*
 - “Duty” applies to mandatory subjects of bargaining
 - Merely complaining about a pending change is not sufficient
 - Demand or request must be unambiguous
 - Reasonable notice required on new/ changed areas not covered by CBA. If no demand, then bargaining duty is waived.

- Good Faith Bargaining *[DPOA v Detroit, 391 Mich 44 (1974)]*
 - Party must have open mind and desire to reach an agreement
 - Based on the overall conduct of a party

- Once a CBA is ratified, no obligation exists to negotiate over a ‘mid-term modification’ during life of the contract.

[St Clair Intermediate Sch v IEA, 458 Mich 540, 565-66 (1999)]

Subjects of Bargaining-- 3 Categories

- Mandatory
- Permissive
- Prohibited



Permissive Subject of Bargaining

- **May** negotiate, but not required to do so.
- Must bargain over the “effect” or “impact”, if requested.

Examples:

- Employer’s choice of hard cap or 80/20 split on health insurance premium contribution
[Decatur Pub Sch, 27 MPER 41 (2014) on 1-21-14 interpreting 2011 PA 152]
- Employer’s decision to provide overtime work & how much
(Core of entrepreneurial control) *[City of Detroit, 23 MPER 30 (2010) on 4-29-10]*
- Creating new positions within the bargaining unit
[Menominee Pub Sch, 1977 MERC Lab Op 666]

Permissive Subject of Bargaining (cont.)

Examples -continued:

- Elimination of bargaining unit positions
[Centerline Sch Dist, 1982 MERC Lab Op 756; City of Detroit, 23 MPER 30 (2010) on 4 -29-10]
- Routine work assignments within the scope of an employee's normal job duties *[City of Saginaw, 1973 MERC Lab Op 975]*
- Ground Rules, such as, use of recording devices during negotiations or grievance meetings
[Charter Township of Flint, 17 MPER 54 (2004) on 8-9-04]

Prohibited/ Illegal* Subject of Bargaining

Parties may discuss, but unenforceable if in a CBA or LOA:

Examples:

- Outsourcing non-instructional support services in public schools (1994 PA 112)
- Retroactive payment of higher wages & benefits after CBA expiration (2011 PA 54) [CAVEAT: Does not apply to 312 eligible groups]
- Decisions by a public school employer regarding teacher placement such as hiring, layoff and recall (2011 PA 103)
[*Pontiac Sch Dist, 27 MPER 52 (2014) on 5-20-14*]

* NOTE: *The terms “Prohibited” or “Illegal” subject of bargaining are used synonymously for collective bargaining purposes.*
[*Michigan State AFL-CIO v MERC, 453 Mich 362,380 (1996)*].

Effect of attempting to bargain over a permissive or prohibited/illegal subject

- A party violates its duty to bargain by insisting on negotiating a non-mandatory subject of bargaining (permissive or prohibited/illegal) over the clear and express refusal to bargain that subject by the other party.
[Calhoun ISD, 28 MPER 26 (2014) on 9-15-14, ALJ citing Laredo Packing Company, 254 NLRB 1, 18 (1981)]
- However, if requested, a party must bargain over the effects or impact of a decision made on a permissive subject of bargaining *[Ecorse Bd of Ed, 1984 MERC Lab Op 615 on 6-4-84]*

LABOR MEDIATION

- Contract
- Grievance

Where do Mediators come from?

- Labor Relations & Mediation Act of 1939 (LMA)
- Established MERC's authority to intervene in contract negotiations and to mediate labor disputes
- MERC Labor Mediators are employees of the State of Michigan in the Bureau of Employment Relations

Assignment of MERC Mediators

- MUST file a notice on the status of negotiations with MERC at least 60 days prior to CBA expiration
- MERC automatically assigns a Labor Mediator
- Parties cannot pick their own MERC mediator
- Parties contact assigned mediator when the time is right

When to call in the Labor Mediator?



Not too soon . . .

- Best for parties to try resolving issues w/o intervention
- Labor Mediator is called to assist in reaching settlement
- Labor Mediators do not advocate for either side
- FYI: a cooperative, professional working relationship needs to exist long after negotiations/ mediation ends

. . . . Not too late

- Parties frustrated and progress has stalled, BUT...
- Parties are not locked into their positions
- Arrive open to explore possible alternatives
- Remain open to compromise and possible settlement

Initiating MERC Mediation

- Assigned mediator's info is on notice sent by BER

- Assignment Notice contains:
 - MERC Case number
 - Name of Labor Mediator
 - Mediator's Contact number
 - Mediator's Email address

- Either party can initiate mediation

- Initiation does not require mutual agreement

Contract Mediation

- Purpose
 - Assist in resolution of disputes in negotiations
 - Operative word is “Assist”

- Mediators **cannot**:
 - Decide or set the terms of your CBA
 - Order a party to change positions

- Mediators **can**:
 - Arrange for, hold & adjourn meetings
 - Discuss disputed issues & explore options
 - Assist in negotiating & drafting agreements

Grievance Mediation

- Purpose:
 - Assist parties to resolve grievance disputes
 - Operative function is “Assist”
 - Save \$\$\$ and Preserve Relationships

- FYIs:
 - Confidential, Non-binding if no settlement occurs
 - Mediators lack authority to issue decisions
 - Mediators cannot force a party to change its position

- Mediators will:
 - Arrange for, hold & adjourn meetings
 - Discuss the issues in dispute
 - Assist in seeking and drafting agreements

Mediation Expectations

- Applies to CBA bargaining and Grievance disputes
- Mediators are neutral 3rd parties
- Process is confidential & non-binding
- Mediators seek to understand the respective positions
- Mediators seek to identify areas of compromise

Fact Finding

- After mediation, when apparent remaining CBA disputes might settle if facts were determined and made public
- MERC appoints a neutral 3rd party (Fact Finder) to hear both sides of the remaining disputed issues
- Written recommendation is produced to help parties settle
- If no settlement; **Employer** may implement terms of LBO
[Redford Union Sch Dist, 23 MPER 32 (2010) on 4-15-10]
- Applies to Public Sector CBA Bargaining only
- Service is fully paid by the State

Act 312 Arbitration

- Binding resolution of CBA disputes in certain public safety groups
- **Only** applies to public police or fire department employees of a city, county, village or township engaged as:
 - Police officer
 - Fire fighting, or subject to the hazards thereof
 - Emergency telephone operator, if directly employed by a public police or fire department
 - EMS employees employed by a public police or fire department
 - Includes those under a public authority created by 1+ municipalities (2011 PA 116)
- Does not apply to:
 - Colleges or Community colleges [EMU, 62 Mich App 87 (1975); MSU (Police), 26 MPER 44 (2013)]
 - 911 authority of consolidated dispatch
 - Grievance disputes
 - Non-public safety employees
 - Private sector employees
- Arbitrator's fees are paid by the Parties

Grievance Arbitration

- Neutral 3rd party rules on CBA grievance
- Final ruling binding-- subject to CBA language
- MERC provides appointment service using a list of approved grievance arbitrators
- Parties pay nothing to use MERC's appointment service
- Parties pay the grievance arbitrator's costs and fees
- Use of MERC's service subject to CBA or other agreement

KEY MERC AUTHORITY

▪ CBA Expiration

- Generally, Mandatory Subjects of Bargaining continue and unilateral changes cannot occur prior to impasse. *[36th District Ct, 21 MPER 19 (2008) on 4-9-08]*
- Exceptions exist such as recent legislation like 2011 PA 54 and 2011 PA 152
- No wage increases during CBA expiration; includes steps, lanes and retro pay *[Waverly Sch, 26 MPER 34 (2012) on 12-14-12]*
- Increases in insurance costs pass to employees during CBA expiration
- NOTE: Limits under PA 54 and PA 152 do not apply to 312 eligible groups

▪ DFR *See slides 11-12*

▪ Duty to Bargain

- Information requests: Party entitled to information reasonably related to bargaining & grievance purposes *[DFT, Local 231, v Detroit Bd of Ed, 406 Mich 579 (1979)]*
- Demand Required: Must make a request to bargain before obligation arises *[City of Dearborn, 20 MPER 110 (2007) on 1-9-07]*
- Prohibited Subjects of Bargaining: *See slides 19-20*

KEY MERC AUTHORITY-- continued

- **Effects Bargaining**

Employer can decide non-mandatory areas, but often must bargain “the impact” if requested (See slide 20):

- Hard cap or 80/20 option u/ 2011 PA 152 [Decatur Sch, 27 MPER 41 (2014) on 1-21-14]
- Outsource non-instructional support staff in Public Sch (1994 PA112; 2009 PA 201) [Pontiac Sch, 23 MPER 81 (2010) on 9-22-10; Lakeview Sch, 25 MPER 37 (2011) on 5-11-11; and Rochester Cmty Sch, 26 MPER 17 (2012) on 7-20-12]
- Reorganization of Work Departments [Wayne County Community College 20 MPER 89 (2007) on 9-25-07; City of Detroit, 23 MPER 30 (2010) on 4-29-10]

- **Emergency Manager (2012 PA 436)**

- Employer can decline to participate in bargaining (including Act 312 Arbitration) during State declared financial emergency.

[City of Detroit, 27 MPER 6 (2013) on 6-14-13]

KEY MERC AUTHORITY-- continued

- **Freedom to Work (FTW) (2012 PA 348, 349)**
 - Employees who do not join the union cannot be required to pay an agency fee as a condition of employment
 - Several cases currently pending on FTW interpretation such as window period opt out and pre-effective date changes
 - Does not apply to 312 eligible groups (See slide 32)

- **Weingarten Rights**

Employee entitled to union representation at investigatory interview if reasonably believes discipline may result. Employee must request.

[NLRB v Weingarten, 429 US 251 (1976); City of Dearborn, 25 MPER 69 (2012) on 3-16-12]

Miscellaneous

- Public school employers can not assist in dues check off (2012 PA 53)
- Public sector unions must file annual audit with MERC (2012 PA 53)

MERC WEBSITE www.michigan.gov/merc

- Invaluable Resource for MERC/BER information
- Readily available– 24 hours 7 days
- FAQs, Forms, MERC Decisions, “What’s New” etc....
- Agency Policies such as Fax- Email Transmissions
- MERC Guide has overview of agency processes & history

Michigan Employment Relations Commission

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GLOSSARY OF ACRONYMS

TERM	MEANING
AFL – CIO	American Federation of Labor and the Congress of Industrial Organizations
BER	Bureau of Employment Relations
CBA	Collective Bargaining Agreement
DFR	Duty of Fair Representation
FAQs	Frequently Asked Questions
LARA	Michigan Department of Licensing and Regulatory Affairs
LBO	Last Best Offer
LMA	Labor Relations and Mediation Act (1939 PA 176)
LOA	Letter of Agreement
LOU	Letter of Understanding (Also referred to as a MOU, Memorandum of Understanding)
MERC	Michigan Employment Relations Commission

GLOSSARY OF ACRONYMS (CONT.)

TERM	MEANING
MERC Lab Op	MERC Labor Opinions (published MERC Decisions until 2002)
MPER	Michigan Public Employee Reporter
NLRA	National Labor Relations Act (Private Sector)
NLRB	National Labor Relations Board (Administers the NLRA)
ULP	Unfair Labor Practice (Often referred to as a “Charge”)
PA	Public Act (e.g., 2011 PA 54)
PERA	Public Employment Relations Act (1947 PA 336)
RTW	Right to Work (also known as FTW)
SOL	Statute of Limitations