STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

STANDISH-STERLING EDUCATIONAL
SUPPORT PERSONNEL ASSOCIATION, MEA,
Labor Organization-Respondent,

Case No. CU14 B-002
-and- Docket No. 14-002293-MERC

MARK NORGAN,
An Individual-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young and Chiodini, P.C., by Jeffrey S. Donahue, James J. Chiodini, and Catherine Tucker for Respondent

John N. Radabaugh and Aaron B. Solem, National Right to Work Legal Defense Foundation, Inc., for Charging Party

DECISION AND ORDER

On August 29, 2014, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, the Standish-Sterling Educational Support Personnel Association, MEA (Union), violated § 10(2)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(a), by maintaining and enforcing its policy limiting union resignations to an August window period. The ALJ further found that Respondent violated § 10(2)(a) of PERA by refusing to accept Charging Party Mark Norgan's October 7, 2013 resignation from union membership, and by failing, after Norgan resigned, to timely send him the necessary information to give him the opportunity to pay a reduced agency fee for the 2013-2014 membership year. The Decision and Recommended Order of the ALJ was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Respondent filed exceptions to the ALJ's Decision and Recommended Order, and a supporting brief on October 30, 2014. Charging Party requested and received an extension of time and filed its cross exceptions and response to Respondent's exceptions, a supporting brief, and a request for oral argument on December 10, 2014. Respondent filed a brief in opposition to Charging Party's cross exceptions on January 13, 2015.

On exceptions, Respondent argues, among other things, that the ALJ erred (1) by concluding that the Commission has jurisdiction over this dispute, which Respondent contends is an internal union matter; (2) by concluding that the Legislature intended, when it enacted PA 349, to incorporate into PERA the "right to refrain" as it has been interpreted under the NLRA; (3) by determining that Respondent's August window period for union membership resignations violated § 10(2)(a) of PERA; (4) by finding that Charging Party did not waive his right to resign his union membership at will; and (5) by recommending that this Commission "unconstitutionally impair Respondent's existing contractual relationship with its members" by ordering that Respondent cease and desist from enforcing the policy restricting members resignations to the month of August and to either remove the policy from MEA bylaws or amend the bylaws to reflect that the policy cannot be enforced.

In his cross exceptions, Charging Party takes exception to the ALJ's conclusion that a union member can waive his or her right to resign at will and submits that the right to refrain may not be waived.

Charging Party has requested oral argument in this matter. After reviewing his cross exceptions and the briefs filed by both parties, we find that oral argument would not materially assist us in deciding this case. Therefore, Charging Party's request for oral argument is denied.

We have reviewed the exceptions filed by Respondent and find them to be without merit. We further find that it is unnecessary to address Charging Party's cross exceptions in order to resolve this case.

Factual Summary:

The facts in this case were set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Charging Party Mark Norgan is employed as a custodian by the Standish-Sterling Community Schools (the Employer) and is part of the bargaining unit represented by the Respondent Standish-Sterling Educational Support Personnel Association (SSESPA). The SSESPA is a local affiliate of the Michigan Education Association (MEA), and members of the SSESPA are also members of the MEA and the National Education Association (NEA) due to the organizations' unified membership structure.

On September 14, 2001, the Charging Party signed a "Continuing Membership Application" agreeing to join Respondent and authorizing the Employer to deduct union dues from his pay and transmit those funds to Respondent. On the application, there are two checkboxes, one for cash payment and one for payroll deduction. The language next to the cash payment checkbox states: "Membership is continued unless I reverse this authorization in writing between August 1 and August 31 of any year." The language next to the payroll deduction checkbox states: "I authorize my employer to deduct Local MEA and NEA dues, assessments and contributions as may be determined from time to time, unless I revoke this authorization in writing between August 1 and August 31 of any year." Charging Party checked the box for payroll deduction.

Article I of the MEA bylaws provides in relevant part: "The official membership year shall extend from September 1 through August 31 each year…Continuing membership in the Association shall be terminated at the request of a member when such a request is submitted to the Association in writing, signed by the member and postmarked between August 1 and August 31 of the year preceding the designated membership year."

Respondent and the Employer have been party to a series of collective bargaining agreements each of which contained a provision requiring members of Respondent's bargaining unit to authorize the Employer to deduct union membership dues or service fees from their paychecks. Both Charging Party and Respondent agree that all bargaining unit members were required to either join the union or pay a service fee. The most recent agreement was entered into on November 12, 2012, and expired on June 30, 2015.

2012 PA 53, which amended PERA, at MCL 423.10(1)(b), to prohibit public school employers from assisting labor organizations in collecting union dues or service fees, became effective March 16, 2012. Act 53 allowed the collection of dues and service fees pursuant to any collective bargaining agreement in effect on March 16, 2012, until the agreement expired or was terminated, extended, or renewed. On June 11, 2012, a U.S. District Court enjoined enforcement of Act 53. *Bailey v Callaghan*, 873 F Supp 2d 879, (ED Mich, 2012). On May 9, 2013, the Court of Appeals reversed and remanded to the District Court to dissolve the injunction. *Bailey v Callaghan*, 715 F3d 956 (CA 6, 2013). The record does not indicate whether the Employer ceased deducting dues and service fees from the paychecks of its employees after the injunction was dissolved in 2013.

On December 11, 2012, the Michigan Legislature passed 2012 PA 349, which, among other things, expressly provided that public employees have a right to refrain from union activity. Act 349 also prohibited employers and unions from agreeing, in contracts that take effect or are renewed or extended after March 28, 2013, to provisions that require employees to share in the financial support of their union.

On October 7, 2013, prior to the expiration of the 2012 agreement between Respondent and the Employer, Charging Party sent a letter to the MEA Uniserv Director resigning from the Union, 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 dues deduction authorization. On October 31, 2013, Respondent informed Charging Party that his resignation was not timely in light of the August window period for resignations.

Under Respondent's service fee collection procedures, the MEA, on or about November 30 of each year, sends nonmembers a notice that provides them with information about the union's expenditures. The notice gives them thirty days to choose from the following options: (1) join the union and pay dues; (2) pay an agency fee equal to the amount of dues less the cost of NEA members-only liability insurance; (3) pay an agency fee reduced by the amount of nonchargeable expenditures as determined by Respondent; or (4) pay the reduced agency fee into an escrow account and challenge Respondent's calculation of the reduced fee.

Because Respondent did not believe Charging Party's resignation was timely submitted, it did not send him the notice and information it sent to nonmembers on or about November 30, 2013.

Charging Party continued to pay full dues after receiving Respondent's October 31, 2013 letter and, on February 6, 2014, filed the instant unfair labor practice charge against Respondent.

Discussion and Conclusions of Law:

In brief, the issues before us are: (1) whether we have jurisdiction over this matter; (2) whether the Union violated PERA, as amended by Act 349, by restricting Charging Party's resignation to an annual one month period in August; (3) whether the Union violated PERA by refusing to allow Charging Party to immediately assert his objections to paying that part of the agency fee used for non-collective bargaining expenditures and pay a reduced agency fee; and (4) whether the remedy recommended by the ALJ is constitutionally permissible.

Commission Jurisdiction

Respondent contends that the ALJ erred by concluding that the Commission has jurisdiction over this matter. Section 16 of PERA provides that violations of § 10 "shall be deemed to be unfair labor practices remediable by the commission." Charging Party contends that Respondent violated § 10(2)(a), which prohibits a labor organization or its agents from restraining or coercing "public employees in the exercise of the rights guaranteed in section 9." Charging Party asserts that Respondent breached its duty of fair representation and restrained or coerced him by unlawfully refusing to recognize his resignation from the Union and by refusing to allow him to immediately assert his objections to paying that part of the agency fee used for non-collective bargaining expenditures. Respondent contends that the Commission has no jurisdiction over this matter because the window period for membership resignation is an internal matter which has no impact on the terms or conditions of Charging Party's employment.

A union's duty of fair representation extends to union conduct in representing employees in their relationship with their employer, such as negotiating a collective bargaining agreement or resolving a grievance, and in related decision-making procedures. *Wayne Co Cmty Coll Fed'n of Teachers, Local 2000, AFT*, 1976 MERC Lab Op 347. See also *Org of Classified Custodians*, 1996 MERC Lab Op 181, 183 (no exceptions); *Lansing Sch Dist*, 1989 MERC Lab Op 210. The duty, however, does not apply to matters that are strictly internal union affairs, which do not impact the relationship of bargaining unit members to their employer.

In *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004), schoolteacher Frank Dame sought to resign his union membership and become an agency fee payer. Dame contended that the union's refusal to allow him to resign his union membership outside the window period was a breach of the duty of fair representation. The union argued that the issue raised by the charge was an internal union matter over which the Commission had no jurisdiction. The Commission noted that the duty of fair representation "does not apply to matters that are strictly internal union affairs, which [do] not impact the relationship of bargaining unit members to their employer." However, the Commission explained that under circumstances where the law permits an agency

shop, "the collection of agency fees from nonmembers cannot be characterized as purely an internal union matter, since it can only be accomplished pursuant to a negotiated contract provision, and there is a potential impact on employment should the nonmember refuse to pay." Therefore, the Commission held that it did have jurisdiction over that matter.

Further, courts have found that a union's collection and use of agency fees implicates the duty of fair representation. In *Communications Workers v Beck, 487 US 735 (1988),* the U.S. Supreme Court found that exactions of agency fees from objecting nonmembers beyond those necessary to finance collective bargaining activities violated a union's duty of fair representation as well as the nonmembers' First Amendment rights. See also *Government Employees Labor Council,* 27 MPER 18 (2013); *Lansing Sch Dist,* 1989 MERC Lab Op 210; *Bridgeport-Spaulding Cmty Sch*, 1986 MERC Lab Op 1024; and *California Saw and Knife Works, 320 NLRB 224 (1995).*

In this case, as in *West Branch-Rose City Ed Ass 'n*, the collection of agency fees from nonmembers is accomplished pursuant to a collective bargaining agreement with a union security clause that was negotiated prior to the effective date of Act 349, and there is a potential impact on Norgan's employment should he refuse to pay. Accordingly, we have jurisdiction to determine whether Respondent committed an unfair labor practice under § 10(a)(2) when it refused to allow Charging Party to resign his union membership and refused to allow him to immediately assert his objections to paying that part of the agency fee not used for collective bargaining expenditures and have the amount of the fee reduced accordingly.

Notwithstanding this, we recently addressed the issue of our jurisdiction over unfair labor practice charges alleging restraint or coercion in the exercise of public employees' right to refrain in *Saginaw Ed Ass'n,* 29 MPER 21 (2015). As we explained in that decision, Act 349, which became effective March 28, 2013, amended § 9 of PERA by adding subdivision (b) to subsection 9(1) and by adding subsections (2) and (3). Subdivision (b) of subsection 9(1) expressly gives public employees the right to refrain from "join[ing], or assist[ing] in labor organizations." The prohibition against labor organizations "restrain[ing] or coerc[ing] public employees in the exercise of the rights guaranteed in section 9," that had been included in § 10(3)(a)(i) prior to the adoption of Act 349, is now in § 10(2)(a) of PERA.

Therefore, as in *Saginaw Ed Ass'n,* we have 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. Accordingly, we have jurisdiction to determine whether Respondent's actions in refusing to allow Charging Party to resign from the Union outside the designated window period and to assert his objections to paying that part of the agency fee used for non-collective bargaining expenditures were an unlawful restraint on Charging Party's right to refrain from union activity.

Respondents' Policy Limiting Union Resignations to the Annual August Window Period

Under the provisions of PERA in effect at the time of *West Branch-Rose City Ed Ass'n,* and before the adoption of Act 349, Charging Party would have been required to wait until the

month of August following his decision to resign before he could submit a valid resignation to Respondent.

In *West Branch-Rose City Ed Ass'n*, the collective bargaining agreement between the charging party's employer and the union contained a standard union security clause requiring all bargaining unit members to either join the union or pay a service fee. At that time, union security clauses in the collective bargaining agreements were lawful pursuant to § 10(2) of PERA. As in this case, the charging party's bargaining representative, the West Branch-Rose City Education Association, was the local affiliate of the MEA and the NEA; union membership was on a continuing basis and could only be terminated by the employee upon a written request during the month of August. In that case, charging party Dame submitted his request to resign from the union in the month of April and was told that he had to wait until August to resign and to assert his right, under *Communications Workers v Beck*, 487 US 735 (1988), to object to paying an agency fee greater than that necessary to finance collective bargaining activities. When considering the issue of whether the union's refusal to accept resignations outside the August window period constituted an unfair labor practice, we found persuasive the reasoning of the U.S. Court of Appeals for the Seventh Circuit in *Nielsen v Int'l Ass'n Machinists & Aerospace Workers, Local Lodge 2569*, 94 F3d 1107, 1116 -17 (CA 7 1996) *cert den* 520 US 1165 (1997). In *Nielsen*, the court held:

> Nothing in the NLRA or in Beck confers a right to instantaneous action, regardless of the administrative burden the union might bear in implementing these requests.
>
> It is not unreasonable for a union to require existing members or full fee nonmembers to voice their objections in a timely fashion, and to be aware that the price of not doing so will be to wait at most ten or eleven months before implementing their new status. Life is full of deadlines, and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of the law. Other courts that have considered "window periods" have come to the same conclusion. See *Abrams*, 59 F3d at 1381-82; *Tierney v City of Toledo*, 824 F2d 1497, 1506 (6th Cir 1987) (requiring non-union members to object by January 31 of a given year permissible if the union makes appropriate disclosures before objections must be made); *Andrews v Education Ass ' n of Cheshire*, 653 F Supp 1373, 1378 (D Conn 1987), aff 'd, 829 F 2d 335 (2d Cir 1987); *Kidwell v Transportation Communications Int'l Union*, 731 F Supp 192, 205 (D Md 1990), aff 'd in part and rev 'd in part on other grounds, 946 F 2d 283 (4th Cir 1991), cert denied, 503 US 1005, 112 S Ct 1760, 118 L Ed 2d 423 (1992).

We went on to note that "the Association's one-month window period is a reasonable rule that is justified by the union's administrative and budgetary needs. In order to successfully perform its role of exclusive representative of bargaining unit employees and to fulfill its statutory mission to bargain collectively on behalf of public employees, a union must be able to effectively budget and allocate its resources." Finding that the 30-day annual window period

was reasonable and was justified by the union's budgetary and administrative needs, we concluded that the 30-day window period did not violate the union's duty of fair representation and dismissed the unfair labor practice charge.

In *West Branch-Rose City Ed Ass'n*, we rejected the rationale of the National Labor Relations Board (NLRB or Board) in *Polymark Corp*, 329 NLRB 9, (1999), in which the Board found that the union violated its duty of fair representation when it refused to honor *Beck* objections filed outside the designated window period. We pointed out that the issue was distinguishable from cases under the NLRA, stating, "In its decisions, the Board relies on the 'right to refrain' from union activity found in Section 7 of the NLRA. The analogous section of PERA, Section 9, does not contain this language and we will not infer it in the absence of clear legislative intent. While, clearly, union membership cannot be required under PERA, in this case Dame joined the Union voluntarily."

Significantly, now that the right to refrain from union activity has become part of PERA, in § 9(1)(b), the rationale we applied to this issue in *West Branch-Rose City Ed Ass ' n*, no longer applies. Moreover, since public employees now have the express right to refrain from union activity, we agree with the ALJ that it is appropriate to look to NLRB decisions for guidance with respect to the right to refrain. In short, the NLRA and PERA are now analogous on this critical issue and each allow employees to resign their union memberships at will and to immediately assert their objections to paying that part of their agency fee that is not used for collective bargaining expenditures and have the amount of their fee reduced accordingly.

Labor Organization Rules With Respect to the Acquisition or Retention of Membership

We agree with the NLRB that where employees have a right to refrain from union activity, the union may not make rules interfering with or restraining employees in the exercise of that right.

Respondent contends that Charging Party has a contractual obligation to the Union to pay union dues until he resigns within the August window period. Respondent argues that, by accepting union membership, a union member agrees to be governed by the union's bylaws and constitution, citing *Cleveland Orchestra Committee v Cleveland Federation of Musicians, 303 F2d 229, 230 (CA 6, 1962)*. There, the court states that union members agree to be governed by the "union constitution, bylaws, and rules, *not inconsistent with rights and procedures established by the Act* [Labor-Management Reporting and Disclosure Act of 1959, § 101, 29 USC 411]" (emphasis added.) Id. Indeed, as with other voluntary associations, it is generally recognized that members of unions have a contractual relationship with the union that is set by the union's bylaws and constitution. See e.g. *NLRB v Allis-Chalmers Mfg Co*, 388 US 175, 182-83; 87 S Ct 2001, 2007-08 (1967); *Arnold v Burgess*, 241 AD 364, 369; 272 NYS 534, 539 (1934). Within that contractual relationship, unions are free to enforce properly adopted rules that reflect legitimate union interests, impair no policy imbedded in the relevant labor laws, and are reasonably enforced. *Scofield v NLRB* , 394 US 423, 430; 89 S Ct 1154, 1158 (1969); *Bossert v Dhuy*, 221 NY 342, 365; 117 NE 582, 587 (1917). It should, therefore, be clear that unions' rights to set terms governing the relationship with their members remain subject to the members' rights to engage in protected concerted activity and to refrain from such activity. See,

for example *Ballas v McKiernan*, 41 AD2d 131, 133-34; 341 NYS2d 520 (1973), where the court refused to uphold fines assessed by a union against three of its members for supporting a rival union in a representation election. The court found the fines were not validly imposed since the union members' activities were protected by the free speech provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC 411(a)(2).

On exceptions, Charging Party argues that the ALJ erred when she concluded that the right to resign at will can be waived. We need not, and do not, decide that issue here as we have concluded that Charging Party's resignation from the union, though outside the window period, was sufficient to end his membership.

The enactment of Act 349 gave Charging Party an express right to refrain from union activity. As we stated in *Saginaw Ed Ass'n*, 29 MPER 21 (2015):

> Thus, under § 9(1)(b) of PERA, if a public employee is not a member of a union, the right to refrain means that he or she cannot be required to become a member of a union. If he or she has no financial obligation to support a labor organization, he or she cannot be required to begin supporting a labor organization. It is also evident that refraining from union activity includes ceasing union activities that the employee has already begun. Therefore, if a public employee is a member of a labor organization, he or she has the right to resign from that organization. If a public employee has undertaken a financial obligation to support a labor organization and is not subject to a lawful union security agreement, he or she has the right to terminate that financial support obligation.

We note that § 9(1)(b) does not indicate when public employees' right to refrain entitles them to stop supporting labor organizations if they have already joined such organizations. However, there is nothing in § 9(1)(b) that limits or authorizes placing limits on the right to refrain. While we agree that Respondent had legitimate business reasons for establishing the annual window period for membership resignation, those reasons cannot take precedence over public employees' statutory rights. Charging Party was subject to a union security agreement that required him to either join the union or pay a service fee. Nonetheless, under Act 349, Charging Party had the right to immediately resign his membership. The imposition of a window period for filing *Beck* objections on individuals who resign operates as an arbitrary restriction on the right to be free to resign from union membership because employees are effectively compelled to pay the equivalent of full dues and fees even though they are no longer union members. *Pattern Makers League of North America, AFL-CIO v NLRB*, 473 US 95, 105, 112-114; 105 S Ct 3064 (1985); *Polymark Corp.*, 329 NLRB 9 (1999); *California Saw & Knife Works*, 320 NLRB 224 (1995); *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984). Under § 9(1)(b), Charging Party had the right to resign his union membership at will and to immediately become an objecting nonmember. Respondent, therefore, violated PERA by restricting Charging Party's resignation to an annual one month period in August and by failing to immediately allow Charging Party to file *Beck* objections and to pay a reduced agency fee for the 2013-2014 membership year.

The Question of an Unconstitutional Impairment of Respondent's Contractual Rights

Respondent contends that the ALJ erred by recommending that we order Respondent to cease and desist from restricting membership resignations to the month of August. Respondent asserts that such an order would be an unconstitutional impairment of pre-existing contractual obligations. It is Respondent's contention that the newly enacted right to refrain can only be applied to allow union members to resign from their union if their union membership agreements were entered into after the effective date of Act 349, as only those membership agreements could violate the rights of public employees under § 9(1)(b).

We recently addressed this issue in *Saginaw Ed Ass'n*, 29 MPER 21 (2015). As we explained in that decision, the Commission has no jurisdiction to resolve questions regarding the constitutionality of legislative enactments. *Michigan State Univ*, 17 MPER 75 (2004). We must decide matters before us based on the language of PERA and its amendments. *Waverly Cmty Sch*, 26 MPER 34 (2012). Our review of the ALJ's Decision and Recommended Order in this case persuades us that the ALJ's decision properly interprets PERA, as amended by Act 349, and her recommended order is consistent with that interpretation. However, we cannot adopt her recommended order if by doing so we would impair constitutionally protected contract rights.

Before the enactment of Act 349, PERA did not contain an express right to refrain from union activity. See, *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004), n 5. The enactment of Act 349 gave Charging Party an express right that he had not previously enjoyed. The fact that the right to refrain is a new statutory enactment distinguishes this matter from cases under the NLRA, which has long contained a right to refrain. In *West Branch-Rose City Ed Ass 'n*, we found an MEA policy limiting union members' resignations to the month of August to be lawful. That policy is the same one that is before us in this case. The policy that was lawful before Act 349 was enacted is no longer lawful. Therefore, Respondent clearly cannot enforce that policy against any union member who joined the Union on or after the effective date of Act 349, March 28, 2013. Thus, to the extent the ALJ's recommended order applies to the Union's members who joined on or after March 28, 2013, there is no question of an unconstitutional impairment of contract rights. We agree that, with respect to any union member who joined the Union on or after March 28, 2013, Respondent can be ordered to "cease and desist from enforcing this policy and either remove Article I from its bylaws or amend Article I to reflect that the August window period, as reflected in the last sentence of that article, cannot be enforced."

Thus, as in *Saginaw Education Association*, the question to be addressed is whether application of Act 349 to a Union member who joined before the effective date of Act 349 is an impairment of Respondent's constitutional rights. The Michigan Constitution, at art. 1, § 10, as well as the United States Constitution, art. I, § 10, prohibits the enactment of legislation that impairs contractual obligations.

> Both the federal and state constitutions prohibit the enactment of state law that impairs existing contractual obligations. The language contained in our state constitution, virtually identical to that used in the federal constitution, provides: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." The purpose of the Contract Clause is to protect bargains

> reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements.

Studier v Michigan Pub Sch Employees' Ret Bd, 260 Mich App 460, 474; 679 NW2d 88, 97 (2004) aff ' d in part, rev ' d in part 472 Mich 642; 698 NW2d 350 (2005).

We do not presume that the Legislature intended to impair provisions of existing union membership agreements in existence at the time Act 349 was enacted. However, to determine the Legislature's intent, we must apply principles of statutory construction. See *Casco Twp v Sec'y of State*, 472 Mich 566, 571 (2005). A statute is enacted and is meant to be read as a whole. *Metropolitan Council 23, AFSCME v Oakland Co (Prosecutor's Investigators)*, 409 Mich 299, 317-318 (1980). Any provision that is in dispute must be read in the light of the general purpose of the act. *Romeo Homes, Inc v Comm'r of Revenue*, 361 Mich 128, 135 (1960).

When we examine Act 349 to determine the Legislature's intent in the light of the Contract Clause, we note that the language of § 10(5) indicates that the Legislature intended to make it clear that the changes to PERA in § 10(3) were not to impair existing contracts:

> (5) An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. *This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after the effective date of the amendatory act that added this subsection.* (Emphasis added.)

Although we might presume that the Legislature did not intend the addition of § 9(1)(b) to be applied in a manner that could impair existing contracts, we find it more likely that the Legislature's specific limitation on the applicability of § 10(3) indicates that it only intended to limit the application of § 10(3) and no other provision of Act 349, based on the principle of statutory construction "expressio unius est exclusio alterius." Under that principle, the U.S. Court of Appeals for the Sixth Circuit explained, "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *In re Robinson*, 764 F3d 554, 562 (CA 6 2014) *cert den sub nom. Robinson v United States*, 135 S Ct 2372; 192 L Ed 2d 148 (2015), quoting *Andrus v Glover Constr Co*, 446 US 608, 616—17, 100 S Ct 1905, 64 L Ed 2d 548 (1980). See also *Loughrin v United States*, 134 S Ct 2384, 2390; 189 L Ed 2d 411 (2014); *Smitter v Thornapple Twp*, 494 Mich 121, 136-37; 833 NW2d 875, 884-85 (2013). Therefore, we do not believe the Legislature intended to limit union resignations based on the right to refrain under § 9(1)(b) to those public employees who became union members after the effective date of Act 349. See *Saginaw Education Association*, 29 MPER 21 (2015).

While the language of the Contract Clause of the U.S. and Michigan constitutions may appear absolute, the prohibition against the impairment of contract rights must be balanced against the State's inherent police power. *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 410-13; 103 S Ct 697, 704-05 (1983); *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 22-23; 367 NW2d 1, 14 (1985). In *Health Care Ass'n*

Fund v Dir of the Bureau of Worker's Comp, 265 Mich App 236, 241; 694 NW2d 761, 765-66 (2005) the Court of Appeals explained the balancing test as follows:

> A three-pronged test is used to analyze Contract Clause issues. The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. *In re Certified Question; (Fun 'N Sun RV, Inc. v Michigan*), 447 Mich 765, 777, 527 NW2d 468 (1994); *Studier*, supra at 474— 475, 679 NW2d 88. In other words, if the impairment of a contract is only minimal, there is no unconstitutional impairment of contract. However, if the legislative impairment of a contract is severe, then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to the public purpose. *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 163—164, 658 NW2d 804 (2002), citing *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 23, 367 NW2d 1 (1985).

As Charging Party points out, Respondent's brief on exceptions does not discuss the test that is used to determine whether there is a violation of the Contract Clause. Nor does Respondent argue that an order requiring it to stop restricting membership resignations to the month of August would be a substantial impairment of its contractual rights under its agreements with current members. However, for the sake of this discussion, we will assume that a substantial impairment of Respondent's contract rights would be created by requiring it to eliminate the restriction on membership resignations to the August window period for all members, including those who joined the Union prior to the effective date of Act 349. Then, we must look at whether there is a significant and legitimate public purpose in requiring Respondent to eliminate the policy restricting membership resignations to the month of August. The elimination of the August window period is designed to ensure that Respondent's members are able to act on their right to refrain from union activity. 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 by the federal government in the NLRA at 29 USC 157. We, therefore, find a legitimate public purpose in requiring the immediate application of the right to refrain. Without the remedy recommended by the ALJ, Charging Party would be denied his right to refrain. The recommended order, requiring Respondent to recognize Charging Party's membership resignation and requiring Respondent to either amend its bylaws to remove the language that restricts public employees' right to refrain from union activity or inform its members that said language is unenforceable, is reasonably related to protecting public employees' right to refrain from union activity. Therefore, we find the order recommended by the ALJ does not create an unconstitutional impairment of Respondent's contractual rights. Inasmuch as the language in Respondent's bylaws restricting membership resignation to the month of August is no longer a lawful restraint on membership resignation, Charging Party's membership obligations to Respondent, including the obligation to pay more than a reduced service fee, end at the point that Charging Party provided the Union with effective notice of his resignation.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. We, therefore, affirm the ALJ's decision, except as noted herein, and adopt the Order recommended by the ALJ.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 15, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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White, Schneider, Young and Chiodini, P.C., by Jeffrey S. Donahue, James J. Chiodini, and Catherine Tucker for Respondents

John N. Radabaugh and Aaron B. Solem, National Right to Work Legal Defense Foundation, Inc., for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On February 6, 2014, Mark Norgan, employed as a custodian by the Standish-Sterling Community Schools (the Employer), filed an unfair labor practice charge with the Michigan Employment Relations Commission alleging that his collective bargaining representative, the Standish-Sterling Educational Support Personnel Association (SSESPA) and the Michigan Education Association (MEA), violated §§9 and 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, by refusing to accept his resignation from membership in that labor organization and his requests to become an agency fee payer and object to paying that portion of his fee used for purposes not germane to collective bargaining, contract administration or grievance adjustment. The charge was assigned for hearing to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

On May 12, 2014, Charging Party filed a motion for summary disposition. On May 28, 2014, Respondent filed a brief in opposition to the motion in which it asserts that the charge should be dismissed for the reasons stated in its brief. Charging Party filed a reply brief on June 9, 2014.

Based on the facts set out in the charges and pleadings and not in dispute, and on the arguments made by the parties in the motions and briefs, I make the following conclusions of law and recommend that the Commission issue the following order.[1]

The Unfair Labor Practice Charge:

Norgan became a member of Respondent on September 14, 2001, and, in his membership application, authorized the Employer to deduct union dues and assessments from his paycheck. Respondent and the Employer have been party to a series of collective bargaining agreements containing provisions requiring members of Respondent's bargaining unit to authorize the Employer to deduct union membership dues or service fees from their paychecks. The most recent agreement was entered into on or about November 12, 2012 and expires on June 30, 2015. On October 7, 2013, Norgan sent a letter to the MEA resigning his membership and stating that he wanted to pay only those union dues and fees that he could lawfully be compelled to pay as a condition of his employment. On October 31, 2013, the MEA sent Norgan a letter stating that his resignation was ineffective because it was not submitted during the MEA's August window period.

Norgan alleges that Respondent's refusal to accept his resignation and allow him to become an objecting nonmember outside of the August window period violated §10(2)(a) of PERA because it constituted unlawful restraint and coercion of his right under §9 of PERA to refrain from joining or assisting a labor organization. He also alleges that Respondent violated its duty of fair representation under §10(2)(a) of PERA by refusing to allow him to exercise his rights as a nonmember not to be compelled to contribute union expenditures other than those for collective bargaining, contract administration, and grievance adjustment. *Abood v Detroit Bd of Ed*, 431 US 209 (1977); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v Hudson*, 475 US 292 (1986).

Facts:

The MEA's Window Period Policy and Continuing Membership Application

The MEA is a private voluntary membership organization incorporated as a private non-profit corporation under the laws of the State of Michigan, and a 501(c)(4) social welfare organization under the Internal Revenue Code. Membership is open to all non-supervisory personnel employed by an educational institution or agency in Michigan. Local affiliates of the MEA, of which the BCEA and GBCA are two, are the basic units of self-governance within the MEA. However, the MEA and its affiliates have a "unified membership structure," which means that membership in a local affiliate includes membership in both the MEA and the National Education Association (NEA).

[1] See also my Decision and Recommended Orders in *Saginaw Ed Assn and MEA (Eady-Miskiewicz et al)*, Case Nos. CU13 I-054-CU13 I-06/Docket No 13-013125-MERC through 13-013134-MERC, and *Grand Blanc Clerical Assn, MEA and Battle Creek Educational Secretaries Assn (Carr and Snyder)* Case Nos. CU14 C-020/ Docket No. 14-006843-MERC and CU14 C-009/Docket No. 14-004413-MERC, issued this same date.

The MEA has had some form of a continuing membership policy since the 1950s and an August window period for resignations has been part of its bylaws since 1973. Article I of the current version of the MEA bylaws reads as follows:

> Membership year and payment of dues
>
> The official membership year shall extend from September 1 through August 31 each year. The terminal dates for other than full-year membership shall be the same as for full-year members. All membership dues shall be paid on or after September 1 of each year but may be paid earlier according to Administrative Policies as established by the Board of Directors. *Continuing membership in the Association shall be terminated at the request of a member when such a request is submitted to the Association in writing, signed by the member and postmarked between August 1 and August 31 of the year preceding the designated membership year*. [Emphasis added]

In order to become a member of the MEA and a local affiliate, an employee must complete, sign, and submit a document entitled "Continuing Membership Application." Standard practice dictates that each member receive a copy of his or her Continuing Membership Application when it is submitted. The MEA maintains a database of all Continuing Membership Applications, and members can obtain copies of their membership applications by contacting an MEA representative.

The MEA does not accept a member's resignation unless it is made in writing during the month of August as provided in Article I of the bylaws. Case-by-case exceptions are made where appropriate extenuating circumstances exist.

On September 14, 2001, Norgan signed a form entitled "Continuing Membership Application- Local-MEA-NEA Membership – Michigan NEA-R Membership." His membership application included the following:

> Please check one (1) below:
>
> [Box] Cash Payment – Membership continued unless I reverse this authorization in writing between August 1 and August 31 of any year.
>
> [Box] Payroll Deduction – I authorize my employer to deduct Local MEA and NEA dues, assessments and contributions as may be determined from time to time unless I revoke this authorization in writing between August 1 and August 31 of any year. I also authorize my employer to deduct Michigan NEA-dues, if so indicated above, from my wages.

Norgan checked the box for payroll deduction.

2012 PA 53 and 2012 PA 349

On March 16, 2012, the Legislature passed 2012 PA 53 (PA 53), which amended §10(1)(b) of PERA to make it unlawful for a public school employer "to assist a labor organization in collecting dues or service fees from wages of public school employees." PA 53 allowed the collection of dues and service fees pursuant to any collective bargaining agreement in effect on March 16, 2012 until the agreement expired or was terminated, extended, or renewed. On June 11, 2012, a US District Court enjoined enforcement of PA 53. *Bailey v Callaghan,* 873 F Supp 2d 879, (ED Mich, 2012). On May 9, 2013, the Court of Appeals reversed and remanded to the District Court to dissolve the injunction. *Bailey v Callaghan*, 715 F3d 956 (CA 6, 2013).

On December 11, 2012, the Legislature passed 2012 PA 349 (PA 349). The law, which became effective on March 28, 2013, substantively altered both §9 and §10 of PERA.

Section 9 sets out the rights of public employees that are protected by PERA. Prior to PA 349, §9 read as follows:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Section 9 was modeled on §7 of the National Labor Relations Act (NLRA), 29 USC 150 et seq. However, §7 of the NLRA, as amended by the 1947 Taft-Hartley amendments, includes an explicit "right to refrain" from engaging in §7 activities. The Michigan Legislature did not include a "right to refrain" from §9 activities when it adopted PERA in 1965, and it did not add this language to §9 when it amended PERA in 1973 to add provisions making certain conduct by labor organizations unfair labor practices under the Act. Among the statutory changes effected by PA 349, however, was the addition, in §9(1)(b), of the "right to refrain" language that had been part of §7 of the NLRA since 1947. Section 9, therefore, now explicitly gives employees the right "to refrain from any or all of the activities identified in subdivision (a).[2]

---

[2] Section 9 now also contains subsections (2) and (3), which read as follows:

> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
>
> (b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.

Section 10 of PERA, which was modeled on §8 of the NLRA, sets out the conduct by employers and labor organizations which constitute unfair labor practices under the Act. Section 10(2)(a), like §8(b)(1)(A) of the NLRA, makes it unlawful for a labor organization or its agents to "restrain or coerce public employees in the exercise of rights guaranteed in §9 [or §7 of the NLRA]." Like §8(b)(1)(A) of the NLRA, §10 also states that the "restrain or coerce" language in §10 does not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."

In addition to adding "right to refrain" language to §9, PA 349 removed provisions in §10 making union security agreements lawful and added the following new language as §10(3):

> (3) Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:
>
> > (a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.
> >
> > (b) Become or remain a member of a labor organization or bargaining representative.
> >
> > (c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.
> >
> > (d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

Subsection (4) states that subsection (3) does not apply to public police or fire department employees or state troopers.

> (c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.
>
> (3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

Per §16(a), violations of §10 are unfair labor practices remediable by the Commission. As noted above, the penalty for a violation of §9(2) is a civil fine.

Norgan Resigns His Membership

In November 2012, when Respondent and the Employer entered into their current collective bargaining agreement containing a provision requiring unit members to authorize "deductions of Association membership dues assessments [or a service fee]," PA 53, which makes such deductions unlawful, had been enjoined. The pleadings do not indicate whether the Employer ceased deducting dues and service fees from the paychecks of its employees after the injunction was dissolved in 2013.

On October 7, 2013, Norgan wrote the following letter to MEA Uniserv Director Ron Parkinson:

> I, Mark Norgan, am employed by Standish Sterling Community Schools in the Right to Work state of Michigan. I write to notify you that I do not want to be a member of the union. If your records indicate that I am currently a union member, I hereby resign my membership in the union and all of its affiliates effective immediately.
>
> I also notify you that I want to pay only those union dues and fees that I can be lawfully compelled to pay as a condition of my employment under Michigan law, and nothing more.
>
> Thus, if I can currently be lawfully compelled to pay union fees under Michigan law as a condition of my employment, I hereby object to the collection and expenditure by the union of any fee used for political, ideological, organizing or other nonchargeable purposes, as is my right under Abood v Detroit Board of Education, 431 US 209 (1977) and Chicago Teachers Union v Hudson, 475 US 292 (1986). This objection is permanent and continuing in nature. I also revoke any dues deduction authorization that I may have signed that authorizes the deduction of full union dues from my paycheck.
>
> If you refuse to accept this letter as an effective resignation, objection and/or revocation, please inform me promptly, in writing, of your reasons for doing so.

On October 31, 2013, MEA Executive Director Gretchen Dziadosz sent Norgan this reply:

> Your signed membership form, in concert with Association governance documents approved by Association members elected to our Representative Assembly, forms a contract between you and the Association, wherein we provide services in exchange for payment of dues. Enforcement of contracts is at the core of who we are as an organization. As such, we strive every day to hold up our end of that contract by providing our members with excellent service and benefits, just as we work every day with our members' employers to ensure they comply with contracts with our members.

After quoting Article I of the MEA bylaws, Dziadosz continued:

> The MEA governance documents are available on the MEA website at www.mea.org. The continuing membership agreement that you signed also provides that written notice of resignation of membership must be made in writing during August for the following fiscal year.
>
> Since the Association's membership and fiscal year is August 1 through August 31 and the nature of school employment is generally continuous from year to year starting around that time frame, the contract formed between us stipulates that you may resign your membership pursuant to the MEA Bylaws and your membership agreement by making a written request to the Association between August 1 and August 31 of any year. When you became a member of the Association, you entered into that contract which includes a dues obligation for the membership year in return for which you obtained the rights and benefits of membership in the Association, including liability insurance coverage for the year, which cannot be canceled for a refund after the beginning of the membership year.
>
> Your membership was postmarked (either by the U.S. Postal service or by your email server, depending on how you contacted us) after the August 31 deadline and therefore your membership automatically renewed for the 2013-2014 membership year.

Norgan continued to pay dues after receiving this letter, although the pleadings do not indicate by what method.

Respondent's Service Fee Collection Procedures

In *Abood,* cited by Norgan in his letter to Respondent, the Supreme Court held that the First Amendment prohibits public-sector unions from using objecting nonmembers' service fees for ideological purposes not germane to the union's collective-bargaining duties. In *Chicago Teachers v Hudson,* the Court established certain procedural requirements that public sector unions must observe to ensure that an objecting nonmember can keep his fees from being used for such purposes. A public sector union must have in place procedures that comply with *Hudson* before it can constitutionally compel objecting nonmembers to pay service fees under a collective bargaining agreement that requires the payment of service fees as a condition of employment.

The MEA's service fee collection procedures were approved in 1989 by the Federal District Court in *Lehnert v Ferris Faculty Assn,* 707 F Supp 1490 (WD Mich, 1989), aff'd 893 F2d 111 (CA 6, 1989) after over a decade of litigation. The procedures are set out in the District Court's decision. The procedures require Respondents, after the close of their fiscal year in August, to calculate their total expenditures for chargeable and non-chargeable expenditures, i.e., expenditures for purposes that are germane to the union's collective bargaining duties and expenditures that are not, for that fiscal year. Respondents then calculate the reduced agency fee an objecting nonmember is to be required to pay for the upcoming fiscal year based on these

expenditures. By November 30, Respondents must provide all nonmembers who are obligated under the terms of a collective bargaining agreement to pay Respondents an agency or service fee with a notice that includes: (1) a list of expenditures, by major category, made by the NEA, MEA and, if applicable a local association, verified by an independent auditor; (2) a statement of whether each major category of expense, or a particular portion thereof, is chargeable to objectors; (3) the amount of the reduced agency fee as calculated by Respondent; (3) the method used to calculate the agency fee; and (4) a statement of the MEA's procedures for collecting agency fees from objectors. Nonmembers then have a thirty-day window period in which to notify Respondents of their decision, for the current fiscal year, to do one of the following: (1) join the union and pay dues; (2) pay an agency fee equal to the amount of dues less the cost of NEA members-only liability insurance; (3) pay the reduced agency fee as determined by Respondents; or (4) pay the reduced agency fee into an escrow account and challenge Respondents' calculation of the reduced fee. Collection of the service fee from nonmembers does not begin until after this thirty-day window period has expired. If the nonmember does not respond in a timely fashion within the window period, he or she is charged an agency fee in the amount of dues less the cost of the NEA liability insurance. If objecting nonmembers challenge Respondents' calculation of the reduced fee, the challenges are consolidated and heard together by an impartial arbitrator. Per the procedures, the arbitrator's decision with respect to the reduced fee is rendered no later than May 1. After the arbitrator's decision, the funds in the escrow account, including interest, are disbursed to the challengers. If a challenger has not paid enough into the escrow account, to cover the reduced fee as determined by the arbitrator, he or she is responsible for the deficit.

The service fee procedures require Respondents to provide separate notice, as set out above, to nonmembers who become part of a bargaining unit with an agency fee provision after the November 30 notice is sent. These individuals are then given a thirty-day period to make the choice to become a member, to remain a nonmember and pay an agency fee equivalent to dues, to become an objecting nonmember and pay the reduced fee as calculated by Respondent, or to pay the reduced fee into an escrow account while challenging the calculation. Non-members hired after November 30 who become challengers are allowed to participate in the hearing before the impartial arbitrator unless their challenges come too late for them to participate.

Discussion and Conclusions of Law:

As discussed in the companion decisions I have issued this same day, *Saginaw Ed Assn and MEA (Eady-Miskiewicz et al)*, Case Nos. CU13 I-054-CU13 I-06/Docket No 13-013125-MERC through 13-013134-MERC, and *Grand Blanc Clerical Assn, MEA and Battle Creek Educational Secretaries Assn (Carr and Snyder)* Case Nos. CU14 C-020/ Docket No. 14-006843-MERC and CU14 C-009/Docket No. 14-004413-MERC, I conclude that when the Legislature amended §9 in PA 349 to add a right to refrain from §9 activities to the rights protected by PERA, it gave public employees the same rights accorded private sector employees covered by the National Labor Relations Act (NLRA), 29 USC 150 et seq, under identical language in that statute. That is, I conclude that PERA now gives public employees the right to resign their union memberships at will, and makes it unlawful, under §10(2)(a), for a union to restrict that right. I conclude, as I did in those cases, that Respondent violated §10(2)(a) of PERA by maintaining and enforcing its August window period for resignations.

As discussed in those decisions, I conclude that the right to resign at will can be waived. However, like other waivers of statutory rights, a waiver of the right to resign at will must be clear, explicit and unmistakable. This means, as discussed in *Saginaw Ed Assn* and *Grand Blanc Clerical Assn,* that to be valid the waiver must be contained in an individual agreement between the member and the union. I also find that to constitute a valid waiver the agreement between the union and member must clearly state that "membership" is limited to the obligation to pay dues and fees. Norgan's Continuing Membership Agreement merely authorized his employer to continue to deduct union dues and assessments unless he revoked the authorization in August. I find that Norgan did not clearly, explicitly and unmistakably waive his right to resign his union membership at will. I conclude, therefore, that Respondents also violated §10(2)(a) of PERA by refusing to accept Norgan October 7, 2013 resignation.

However, unlike the Charging Parties in *Saginaw Ed Assn* and *Grand Blanc Clerical Assn et al,* Norgan does not assert that after his resignation he had no further financial obligation toward Respondents. Rather, he asserts that Respondents were required, after accepting his resignation, to grant him the rights under *Abood* and *Hudson* afforded to nonmembers covered by union security agreements as set out in the MEA's service fee collection procedures. That is, Norgan should have received a copy of the November 30 notice the MEA annually sends to nonmembers providing them with information about the union's expenditures and giving them thirty days to choose among options. These options, as discussed above, include becoming an objecting nonmember and paying a reduced fee as calculated by Respondents or becoming an objecting nonmember and paying the reduced fee into escrow while challenging the Respondents' calculations.

As the Commission held in *West Branch Rose City Ed Assn, MEA,* 17 MPER 25 (2004) (on remand), the collection of agency fees from nonmembers cannot be characterized as purely an internal union matter because it can only be accomplished pursuant to a negotiated contract provision, and there is a potential impact on employment should the nonmember refuse to pay. The Commission has held that a union's duty of fair representation requires a union to acknowledge the *Abood* rights of agency fee payers and that a union's failure to implement procedures adequate to safeguard an employee's *Abood* rights violates the union's duty of fair representation. *Government Employees Labor Council¸* 27 MPER 18 (2013); *Lansing Sch Dist,* 1989 MERC Lab Op 210; *Bridgeport-Spaulding Cmty Schs,* 1986 MERC Lab Op 1024.

In *West Branch,* the Commission held that the MEA did not commit an unfair labor practice by refusing a member's request to resign and assert his *Abood* rights outside of the August window period. In an earlier decision, *West Branch Rose City EA, MEA,* 2000 MERC Lab Op 333, the Commission found, contrary to the ALJ, that the MEA violated its duty of fair representation under §10(2)(a)'s predecessor, §10(3)(a)(i), by refusing the charging party's request to resign his membership in April and immediately become a service fee payer. The charging party had argued, both to the ALJ and on exceptions to the Commission, that the MEA's maintenance and enforcement of its August window period for resignations constituted an unlawful limitation on his right to resign and also violated his First Amendment rights. The Commission, however, based its finding of a violation on other grounds. It concluded that the union had violated its duty of fair representation by refusing to allow the charging party to

terminate his membership because the union had failed to notify the charging party of his right under PERA not to join the union when he was first hired and also failed to provide adequate notice of its August window period. The Commission concluded that under these circumstances it was unnecessary for it to decide the legitimacy of the MEA's window period policy restricting the right to resign.

On appeal, the Court of Appeals held that the Commission erred by basing its decision on an issue which was not specifically addressed in the exceptions. On remand, the Commission affirmed the conclusion of the ALJ that the union did not violate its duty of fair representation by maintaining and enforcing the August window period. The Commission agreed with the ALJ that the annual window period was reasonable and necessary and that the Union had provided adequate and valid administrative justifications for its policy including budgeting, auditing, and programming requirements. The Commission found that to successfully perform its role of exclusive representative of bargaining unit employees, and to fulfill its statutory mission to bargain collectively on behalf of public employees, a union must be able to effectively budget and allocate its resources. It concluded that utilization of a reasonable window period to achieve these ends was not arbitrary and did not violate the Union's duty of fair representation.

In its decision on remand, the Commission discussed, and criticized, an NLRB case, *Polymark Co*, 329 NLRB 9 (1999). In *Polymark*, the NLRB majority found an unfair labor practice based on a union's refusal to honor *Beck* objections made outside of the union's annual window period for raising such objections.[3] By the time *Polymark* was decided, it was settled law that union members have a right under the NLRA to resign their union membership at will. The Board concluded, as it had in *California Saw and Knife*, 320 NLRB 224, 235 (1995), that the imposition of a window period limitation on the filing of *Beck* objections by employees who had recently resigned violated the union's duty of fair representation because it operated as an arbitrary restriction on the right to resign from union membership. Although two Board members in *Polymark* sharply criticized the majority's conclusion that requiring ex-members to wait until the next window period to make their *Beck* objections restricted their right to resign at will, *Polymark* has remained good law. Under the NLRA, therefore, a union must not only recognize its members' right to resign at will, but must permit newly-resigned members to assert their *Beck* objections immediately and reduce the amount of their agency fees accordingly.

In the *West Branch* decision on remand, at n 5, the Commission noted that PERA lacked the right to refrain language contained in the NLRA and stated that it would not infer a right to refrain in the absence of clear legislative intent. PERA now includes that right. I conclude, as discussed in *Saginaw Ed Assn*, that the Legislature intended to incorporate in PERA the right to refrain as it has been interpreted under the NLRA, including what union conduct constitutes unlawful restraint or coercion of the exercise of that right. I find that the latter includes refusing to allow newly-resigned members to immediately assert their objections to paying that part of their agency fee used for non-collective bargaining expenditures and have the amount of their fee reduced accordingly. I agree with Norgan, therefore, that in addition to accepting his resignation on October 7, 2013, Respondent had an obligation to send him the notice and information it sent

[3] In *Communications Workers of America v Beck*, 487 US 735 (1988), the Supreme Court held that nonmembers had a statutory right under the NLRA not to be compelled to contribute to the support of their bargaining agent's activities that were not germane to collective bargaining, contract administration, or grievance adjustment.

to other nonmembers on or about November 30, 2013, to give him the opportunity within the 30-day period following November 30, 2013 to become an objecting nonmember, and, if he elected to do so, to reduce the amount of his agency fee for the 2013-2014 membership year.

Proposed Remedy

In accord with my conclusion that Respondent violated §10(2)(a) of PERA by maintaining and enforcing its August window period policy on resignations because this constituted unlawful restraint or coercion of their members' right to resign their memberships at will, I will recommend to the Commission, as I have in *Saginaw Ed Assn* and *Grand Blanc Clerical Assn et al,* that it order Respondent to cease and desist from enforcing this policy and either remove Article I from the MEA bylaws or amend it to reflect that the August window period, as reflect in the last sentence of that article, cannot be enforced.

In accord with my conclusion that Respondent violated §10(2)(a) of PERA by refusing to accept Norgan's October 7, 2013, resignation from his union membership, I will recommend to the Commission that it order Respondent to cease and desist from this conduct and notify Norgan in writing that his October 7, 2013 resignation has been accepted.

As discussed above, I have concluded that Respondent violated §10(2)(a) of PERA by failing, after Norgan resigned on October 7, 2013, to send Norgan the notice and information it sent to other nonmembers on or about November 30, 2013, and to give him the same opportunity it gave to other nonmembers to object to the payment of fees for non-collective bargaining purposes and pay a reduced agency fee for the 2013-2014 membership year. Had Norgan been provided proper notice under the MEA's approved procedures for collection of service fees, he would have been permitted, within a 30 day period after November 30, 2013, to assert his objection to paying service fees used for non-collective bargaining purposes and either: (1) accept the reduced fee as calculated by Respondent, or (2) pay the amount of the reduced fee into escrow while challenging Respondent's calculation of the fee in a consolidated proceeding before an impartial arbitrator. As a remedy for Respondent's failure to provide Norgan with this opportunity, I will therefore recommend that Respondent refund to Norgan the amount of the Local, MEA, and NEA dues he paid to Respondent for the 2013-2014 membership year, plus interest, but less the amount of the reduced service fee as determined by an impartial arbitrator in the spring of 2014. If no such determination was made, Norgan's refund shall be reduced by the amount of the reduced service fee for the 2013-2014 membership year as calculated by Respondent prior to November 30, 2013.

RECOMMENDED ORDER

Respondent Standish-Sterling Support Personnel Association, its officers and agents, are hereby ordered to:

1. Cease and desist from restraining and coercing employees in the exercise of their right under §9 of PERA to refrain from joining or assisting labor organizations by:

a. Maintaining or enforcing the rule contained in Article I of the MEA's bylaws prohibiting members from resigning their union memberships except during the month of August;

b. Refusing to accept Mark Norgan's October 7, 2013 resignation from his union membership;

2. Take the following affirmative action to effectuate the purposes of the Act:

a. Remove the last sentence of Article I from the bylaws or amend the bylaw to reflect the fact that the last sentence of Article can no longer be enforced as written;

b. Affirmatively notify Mark Norgan that his October 7, 2013 has been accepted;

c. Refund to Norgan the dues and assessments he paid to Respondent for the 2013-014 membership year, plus interest, less the amount of Respondent's reduced service fee for that membership year as determined by an impartial arbitrator in the spring of 2014 or, if no such determination was made, less the amount of the reduced service fee for that membership year as calculated by Respondent on or before November 30, 2013.

d. With the agreement of Norgan's employer, the Standish-Sterling Public Schools, post the attached notice to union members in conspicuous places on the employer's premises, including all places where notices to members of the Standish-Sterling Support Personnel Association's bargaining unit are normally posted, for a period of 30 consecutive days; within 60 days of the date of this order, publish the attached notice in both the print and online editions of the MEA *Voice* and email or mail copies of this edition of the *Voice* to all members who normally receive the *Voice*.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 29, 2014

NOTICE TO UNION MEMBERS

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **STANDISH-STERLING EDUCATIONAL SUPPORT ASSOCIATION, MEA** TO HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT restrain and coerce employees in the exercise of their rights under §9 of PERA to refrain from joining or assisting in labor organizations.

WE WILL NOT maintain or enforce a rule that prohibits members from resigning their union memberships except during the month of August;

WE WILL NOT refuse to accept Mark Norgan's October 3, 2013 resignation from his union membership.

WE WILL affirmatively notify Norgan in writing that his October 3, 2013 resignation from union membership has been accepted.

WE WILL refund to Norgan the dues and assessments he paid for the 2013-014 membership year, plus interest, less the amount of the reduced service fee paid by objecting nonmembers for that membership year as determined by an impartial arbitrator in the spring of 2014, or, if no such determination was made, less the amount of the reduced service fee for that membership year as calculated by the MEA on or before November 30, 2013.

STANDISH-STERLING EDUCATIONAL SUPPORT ASSOCIATION, MEA

By: _____

Title: _____

Date: _____

Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case Nos. CU14 B-002/14-002293-MERC