

# Michigan Employment Relations Commission Case Highlights and Agency Updates January 2022 to January 2023

**Presenters:**

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State Bar of Michigan— Labor and Employment Law Section  
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MICHIGAN DEPARTMENT OF  
**LABOR & ECONOMIC  
OPPORTUNITY**

# MICHIGAN EMPLOYMENT RELATIONS COMMISSION

**PERA: Public Act 336 (1947)**

**ACT 312: Public Act 312 (1969)**

- PUBLIC SECTOR Workplaces (w/ exceptions)
- No Federal Employees
- No State Civil Service Employees

**LMA: Public Act 176 (1939)**

- PRIVATE SECTOR workplaces with limitations
- Labor Relations— only those outside NLRB jurisdiction
- Mediation Services— Private & Public Sectors
- Request of Any Party, Job Actions, MERC Initiated
- Concurrent with FMCS



# MICHIGAN EMPLOYMENT RELATIONS COMMISSION

## LABOR RELATIONS DIVISION

- Elections (UC, RC, RD, RM, SD)
- Unfair Labor Practices (CE, CU)
- Public School Strikes & Lockouts (SS, SL)

## MEDIATION DIVISION

- Labor Contract Negotiations (CB)
- Labor Contract Grievances (GM)
- Fact Finding & 312 Arbitration (CB hearings)
- Grievance Arbitrator Appointments (GA)



# AGENCY UPDATES

## LABOR RELATIONS

### VOLUNTARY MEDIATION

- Offered at ULP Case Initiation & after Election Conference Call
- 10-day acceptance period
- Either party can reject ASAP
- Requires acceptance by All
- Virtual Process Only
- 40% success during FY 2022.

## MEDIATION

### FAST TRACK MEDIATION (FTM)

- Grievances Only
- Virtual Process Only
- MERC Mediator is virtual
- Prefer same for all parties
- Mediation to start w/in 3 business days of case approval
- Email FTM requests to-- [merc-mediation@michigan.gov](mailto:merc-mediation@michigan.gov) with email copy to all party reps and including available dates/times.



# AGENCY UPDATES (CONT'D)

- **Rule Revisions:** process continues with Focus Groups to resume soon
- **New electronic processes:** reviewing e-signatures on SOI cards, e-voting, etc;
- **E- Filing**– MERC e-File and designated e-filing addresses on agency website;
- **ALE Lynn Morison:** returned recently now assists MERC and WHD;
- **Case Processing Enhancements:** Agency and MOAHR reviewing options for added efficiency, especially with case adjournments and dispositions.
- **MERC Monthly Meetings are now Virtual**  
See meeting agenda on website for details.
- **Open Positions:**  
*Commissioner Vacancy* – [www.michigan.gov/whitmer/appointments](http://www.michigan.gov/whitmer/appointments)  
*Labor Mediator*  
*End User Support Analyst*  
[www.michigan.gov/mdcs](http://www.michigan.gov/mdcs)
- **MERC Staff on hybrid work schedules**
- **General info:** [berinfo@michigan.gov](mailto:berinfo@michigan.gov)
- **MERC website:** [www.michigan.gov/merc](http://www.michigan.gov/merc)



# FORMAT OF TODAY'S CASE UPDATE

## A. ELECTION CASES (1 - 4)

## B. UNFAIR LABOR PRACTICES

1. Bargaining Issues (5 – 7, 10)
2. Procedural Issues (8 ,9)

## C. APPELLATE DECISIONS (11- 13)

***MATERIAL NOT OFFERED AS LEGAL GUIDANCE  
DOES NOT CHANGE or ALTER CASE RULINGS***



# ELECTION CASES (#1 & #2)

## Community of Interest

**#1: Richmond Cmty Schs & MEA**

*Case 21-D-0875-RC (6/15/2022)*

- ***Election Ordered***
- Overlap of duties established community of interest
- Other existing units not interested in adding petitioned-for employees
- Splitting employees into separate units would exacerbate Employer objection over “fragmentation” of units
- Decision advanced policy of PERA to allow employees to designate bargaining representative while avoiding fragmentation

## Accretion–Confidential Employee

**#2 Det. Pub Schools & DAEOE**

*Case 21-D-0915-UC-02 (7/15/2022)*

- ***Unit Clarification Petition Dismissed***
- Position sought to be accreted was in existence since 2017
- Previously excluded from unit due to “confidential” status
- Petitioner had knowledge of classification since 2018 but failed to seek unit clarification
- Petition found untimely



# ELECTION CASES (#3 & #4)

## Administrative Determination- Unsigned Ballot Envelope

### #3 *City of Richmond & MI Fraternal Order of Police & POA of MI-* *Case 22-C-0518-RC (8/9/2022)*

- Ballot rejected by Election Officer
- Ballot instructions not followed
- Longstanding practice of rejecting ballot where envelope not signed
- Rival Union won election 6-5, Incumbent Union objected claiming neither MERC rules nor PERA contain an election ballot signature requirement.
- Commission found no merit to the objections and upheld election results noting 50yr+ consistent practice of the signature requirement on envelope and that NLRB requires the same.

## Contract Bar- Union Disclaimer; Supervisors

### #4 *Allegan County Road Commission & AFSCME Council 25* *Case 22-C-0591-RC (1/13/2023)*

- No Contract Bar - no valid CBA remained following Incumbent Union Disclaimer
- Unlike NLRB, PERA codifies Contract Bar Doctrine- Existence of Valid Contract
- Incumbent Union Disclaimed Interest Prior to Window Period of Contract
- Purpose and Policy of PERA to protect employee rights to select bargaining representative and to foster stability in labor relations
- Once Incumbent Disclaimed Interest, Stability in Labor Relations no longer an issue
- Policies of PERA contemplate a valid CBA is between Employer and Labor Organization
- Where Union abrogates CBA through Disclaimer, Purposes of PERA are not served if employees cannot select a new bargaining representative to enforce a CBA.





# ULP CASES – Bargaining (#5 & #6)

## Unilateral Change/Prohibited Subject

**#5 Hopkins Pub Schs & Hopkins EA**  
Case 21-A-0196-CE (6/2/2022)(No Exceptions)

- Bad Faith Bargaining Found by ALJ.
- Employer implemented policy denying wage scale advancement for teachers failing to achieve a certain rating on annual evaluations.
- Employer claimed no duty to bargain over “prohibited” subject of “performance based standard of compensation”.
- ALJ concluded that contractual wage scale remained a mandatory subject of bargaining despite 2011 amendments to PERA- and could not be unilaterally altered by Employer.
- With no exceptions filed, MERC adopted ALJ’s finding that the Employer’s unilateral implementation constituted bad faith bargaining.

## Arbitration- Overage Pay/Prohibited Subject

**#6 Van Buren Ed. Assn & Van Buren Pub Schs**  
Case 21 E-1225-CU (6/17/2022)

- No bad faith bargaining found by ALJ or MERC.
- Union sought to arbitrate grievance seeking overage pay under CBA for increased number of students 175+.
- Employer argued that increased student assignments were due to implementation of virtual “technology” and constituted a prohibited subject of bargaining.
- No record evidence that increased class load was due to virtual classes rather than reasons unrelated to the implementation of technology.
- Union did not seek to arbitrate the Employer’s use of virtual teaching medium, only the “wages” to be under the CBA- which are a mandatory subject.
- MERC also concluded that whether CBA’s overage compensation provisions were intended to apply to virtual learning involved a matter of contract interpretation, properly brought before an arbitrator, not MERC.



# ULP CASES – Bargaining (#7)

## *Prohibited Subject of Bargaining- Definition of “Teacher”*

*Kalamazoo Ed Assn & Kalamazoo Public Schs*

*Case 21- G-1465-CU (10/11/2022)*

- No prohibited subject of bargaining found by MERC.
- Union did not violate PERA by seeking to arbitrate grievance over Guidance Counselor’s reassignment to teaching position.
- Issue presented- whether a Guidance Counselor not employed as a “teacher” was governed by the bargaining prohibitions on “teacher placement” under Section 15(3)(j).
- Commission ruled - principals of statutory construction support conclusion that plain meaning of “teacher” within Section 15(3)(j) means an individual who possesses a teaching certificate and is employed as a teacher.
- Commission distinguished prior Garden City decision which involved issue of whether the employer’s denial of a coaching position constituted a “teacher placement” decision, rather than the issue of the “teacher” status of the affected individual.



# ULP-Procedural Dismissal (#8 & #9)

## Statute of Limitations

**#8 Allen Park Pub Sch & Allen Park Ed Assn**  
*Case 20-I-1406-CE (1/12/2022)*

- Charge dismissed as untimely filed.
- ALJ and MERC rejected Union's argument that Governor's COVID filing extension for civil and probate court matters should be extended to MERC filings.
- ALJ and MERC determined that Governor's COVID extension order was specific to civil and probate court matters only and there was no indication that the order was intended to extend to filings with administrative agencies.

## Failure to State a Claim

**#9 Washtenaw CC & Kimberly Dosey**  
*Case 20-L-1801-CE (2/10/2022)*

- Charge dismissed for failure to state a claim for relief under PERA.
- Charging Party alleged the Employer terminated her due to her age. The record evidence failed to demonstrate any improper conduct by the College that could have constituted a violation under Section 9 or 10 of PERA.
- Commission upheld ALJ dismissal and further determined the Charging Party's exceptions failed to comply with the requirements of Rule 176.



# ULP CASES – Bargaining (#10)

## *Frustration of Act 312-- Compulsory Arbitration Process*

*City of Wayne & Wayne Prof. FF Union, Local 1620*

Case 20 L-1801-CE (5/10/2022)

- Violation of duty to bargain found.
- Union 312 Final Offer included vested lifetime healthcare stipend.
- Employer objected and filed civil action to enjoin 312 proceedings and challenge arbitrator authority to award such benefits
- Commission determined future arbitrator could consider cost of lifetime healthcare stipend as part of employer's "ability to pay" criteria.
- Well established federal and state case law support the legality of including lifetime healthcare benefits in a CBA for employees retiring under that agreement.
- ALJ and MERC agreed the Court action was outside of any Section 312 statutory remedy and frustrated the bargaining process. (*MERC decision on appeal*).



# APPELLATE DECISIONS (#11 & #12)

## **#11 City of Detroit Fire Dept. and Detroit Fire Fighters Assn. Local 344 Case 19-C-0479-CE**

- On February 2, 2022, the COA reversed MERC's finding of a violation.
- MERC had found that the new equipment produced new data and that the Employer could not use such new data to impose discipline without first bargaining with the Union.
- The COA disagreed with MERC's factual finding, and instead found that the data being utilized for discipline had been available from the prior equipment as well, such that no unilateral change had occurred.
- Notably, the COA did not determine that a bargaining obligation would not exist if previously unavailable data was produced by the new equipment.
- On 3-8-2022, MERC issued a new decision consistent with the COA order.

## **#12 Regents of Univ. of Michigan and Michigan Nurses Assn. Case 21-C-0630-RC**

- On July 21, 2022, COA dismissed as moot the Incumbent Union's challenge to MERC Director's administrative determination on the sufficiency of an election petition and show of interest filed by a rival labor organization.
- The Director had administratively denied MNA's motion to dismiss the rival petition. Thereafter an RC election was conducted and incumbent MNA was certified as the bargaining representative.
- The Court of Appeals ruled that the appeal was moot because MNA had won the election and remained the bargaining representative, which was what had been effectively sought by seeking the dismissal of the petition, and that no further remedial relief was available or appropriate.



# APPELLATE DECISIONS (#13)

## *Professional Personnel of Van Dyke Schs and Van Dyke Schs. Case 20-C-0554-CU*

- On September 15, 2022, the COA upheld MERC's decision dismissing the employer's bad faith bargaining charge against the Union for seeking to arbitrate a teacher's grievance over unpaid wages stemming from an extra duty lunchroom assignment.
- The COA agreed with MERC that the grievance did not challenge the prohibited subject of "teacher placement", but rather, sought only the enforcement of a contractual wage stipend, which was a mandatory subject of bargaining.
- The COA deferred to MERC's findings of fact and conclusions of law with regard to whether the Union's actions constituted a bad faith attempt to subvert the bargaining prohibitions contained in the 2011 amendments.



# ***MI Supreme Court Update***

## ***Technical, Professional and Officeworkers Assn of Michigan v. Daniel Lee Renner (MERC Case CU 18-J-034)***

- On October 13, 2022, the MI Supreme Court heard oral argument on the application by TPOAM for leave to appeal.
- By Order dated December 9, 2022, the Court granted leave to appeal the January 7, 2021 judgement of the COA.
- The Court has directed the parties and amici to address the following in their briefs on appeal:
  - ✓ ***What is the difference between the common-law analysis of the duty of fair representation and the statutory analysis of “coercion and restraint” under PERA, and whether the outcome in the case would differ based on which analysis is used?***
  - ✓ ***Whether the fee schedule maintained by TPOAM violates Sections 9 and 10 of PERA?***
  - ✓ ***Whether the TPOAM fee schedule violates the common law duty of fair representation?***
- The case remains relevant regardless of whether Michigan’s Freedom to Work statute is repealed (HB 4004/ SB 0005) in light of the U.S. Supreme Court’s decision in *Janus v AFSCME* as it relates to public sector employees.