STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNITED STEELWORKERS UNION, LOCAL 15301,
Labor Organization-Respondent

MERC Case No. CU17 H-028

-and-

BAY COUNTY MEDICAL CARE FACILITY,
Public Employer-Charging Party,

_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard, for Charging Party

DECISION AND ORDER

On January 18, 2018, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: March 20, 2018

[1] MAHS Hearing Docket No. 17-017328

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

BAY COUNTY MEDICAL CARE FACILITY,
Public Employer-Charging Party,

Case No. CU17 H-028
-and- Docket Number. 17-017328-MERC

UNITED STEELWORKERS UNION, LOCAL 15301,
Labor Organization-Respondent
_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard, for the Public Employer-Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON ORDER TO SHOW CAUSE

On August 21, 2017, the Bay Center Medical Care Facility (Charging Party or Employer) filed the present unfair labor practice charge against the United Steelworkers Union, Local 15301 (Respondent or Union). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the above captioned case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

Charging Party alleges that the Union violated Sections 9(2)(a) and 10(2)(a) of PERA when, on or about June 19, 2017, it posted a memorandum on a bulletin board at Charging Party's facility which stated:

> The following people (person) are freeloaders in our Union, not members, and not helping with the cost of our representation. We encourage any and all scabs to rejoin and become members again:
>
> Faith Aviles

The memorandum was signed by the Union's Financial Secretary Chris Stevens and dated June 19, 2017.

After careful review of the filing, it appeared that dismissal of the charge might be warranted as Charging Party lacked standing to assert a claim under the Section of PERA set forth in the charge. By order dated September 12, 2017, I directed Charging Party to show cause in writing why its charge should not be dismissed without a hearing for the reason that it lacked standing. Charging Party filed its response on October 3, 2017.

Discussion and Conclusions of Law:

In December of 2012, the Legislature adopted and the Governor signed Public Act 349 (PA 349), known as "Right to Work" or "Freedom to Work." PA 349 amended PERA and, among other things, essentially abolished union security clauses in the public sector.[2]

PA 349 amended several sections of PERA. Particularly Section 9 of the Act was amended by the addition of subdivision (b) to subsection 9(1). Section 9(1)(b) expressly grants public employees the right to refrain from union activity. PA 349 further amended Section 9 to add subsections (2) and (3). Subsection (2) states:

> 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.
> >
> > (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.
> >
> > (d) Pay the costs of an independent examiner verification as described in section 10(9).

Newly added subsection (3) provides that any person that violates subsection (2) is liable for a civil fine of up to $500.

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 Section 10(3)(a) prior to the adoption of PA 349, is now codified in Section 10(2)(a) of PERA.

[2] At the same time PA 349 was enacted, Public Act 348 of 2012, its sister bill impacting the private sector in the same fashion was also made law.

Pursuant to Section 16 of PERA, a violation of Section 10 of the Act is deemed an unfair labor practice and provides the authority by which the Commission, or its designee, may issue a complaint and set the matter for hearing.

Rule 165 of the Commission's General Rules, 2002 AACS, 2014 MR 24, R 423.165, states that the Commission, or an administrative law judge designated by the Commission may, on their own motion or on a motion by any party, order dismissal of a charge without a hearing for the grounds set out in that rule, including that the charge does not state a claim upon which relief can be granted under PERA. See, *Oakland County and Sheriff*, 20 MPER 63 (2007); aff'd *282* Mich App 266 (2009); aff'd 483 Mich 1133 (2009); *MAPE v MERC*, 153 Mich App 536, 549 (1986), lv den 428 Mich 856 (1987).

Whether a charging party has standing depends on whether the individual has a substantial interest that will ensure sincere and vigorous advocacy. *Detroit Fire Fighters Ass ' n v Detroit*, 449 Mich 629, 633 (1995). There must be a showing that a substantial interest of the litigant will be detrimentally affected in a manner different from the public at large or that the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010).

Arguably, the most common standing issue arising under PERA typically involves attempts by individual bargaining unit members to bring failure to bargain charges against their employer. The Commission dismisses those charges under the premise that PERA's statutory duty to bargain exists between the public employer and the authorized bargaining representative and not any individual unit members. See *Detroit Pub Sch,* 25 MPER 77 (2012). In other words, only parties to the statutory obligation, in this case bargaining, may bring an action for an alleged violation thereof.

Standing issues, as they relate to PA 349, have become a more frequent question, as more public employees have sought to exercise their right under Section 9 to refrain from union activity. In *Taylor School District,* 28 MPER 66 (2015), aff'd *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017), the Commission majority addressed whether individual unit members possessed standing to challenge the enforceability of a union security clause entered into on the eve that PA 349 became effective. The Commission concluded that, despite not being signatories to the collective bargaining agreement or the security clause, the individuals had the requisite standing as third-party beneficiaries of the contract, as well as because they would be harmed by its enforcement. Third-party beneficiary status supported the notion that the charging parties possessed "a substantial interest that will ensure sincere and vigorous advocacy" as outlined above in *Detroit Fire Fighters Ass'n.* Similarly, as set forth in *Lansing Sch Ed Ass'n,* also above, a substantial interest of charging parties, their Section 9 rights, would have been detrimentally affected had the security agreement been enforced.

More recently, in *Clarkston Community Schools*, 31 MPER 26 (2017), the Commission was once again faced with the question of whether an employee had standing to challenge the enforcement of a union security clause. There the Commission recognized public employees' absolute right to protect and exercise their Section 9 rights. The Commission stated:

> PERA implicitly gives public employees, such as Charging Party, the right to challenge actions by the labor organization representing the bargaining unit in which they are employed or by their public employer, if those actions interfere with, coerce, or restrain their exercise of § 9 rights. Indeed, we have long permitted individual bargaining unit members to challenge actions by the labor organizations representing their bargaining units and to challenge actions by their public employers on the grounds that the respondents' actions interfered with, restrained, or coerced the charging party/public employee in the exercise of his or her rights under § 9 of PERA. [Internal Citations Omitted].

Additionally, while the Commission in both *Taylor Public Schools* and *Clarkston Community Schools*, addressed the charging parties' likelihood for harm in order to confer standing, it is clear that the harm was directly or proximately caused by the violation of the employees' Section 9 rights. In this case, Charging Party alleges that it is or could suffer harm as a result of the Respondent's posting of the "scab" list. Charging Party states in its response to my Order to Show Cause, "[s]urely the Employer has an interest in the conduct that is directed at its employees on its premises." The Employer claims that "the posting has the potential to chill labor relations between the Employer and the Union" and that "the posting with its intimidating and coercive message has the potential to create a coercive and hostile work environment for Ms. Aviles and other employees; precisely the type of work environment [PA 349] sought to eliminate." Even accepting the conceivability of harm to the Employer, such harm is not a direct or proximate result of the Employer's Section 9 rights being violated as the Employer possesses no such rights.

Charging Party correctly notes that PERA does not limit who can file an unfair labor practice charge. Equally true is its assertion that Rule 101(f) of the Commission's General Rules provides a broad definition of "charging party" as "person, public employer, labor organization or duly authorized agent or party representative thereof, who files a charge alleging an unfair labor practice under LMA or PERA." However, that the legislation did not explicitly prohibit a public employer from pursuing an unfair labor practice charge based on a union's alleged violation of an employee's Section 9 right does not confer standing absent some sort of statutory scheme implying the lawmakers intended to do so. One of the fundamental principles of statutory construction is a presumption that the legislature is presumed to act with knowledge of statutory interpretations by the courts and by the administrative bodies charged with statutory enforcement. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506 1991); *Melia v Appeal Bd of Michigan Employment Sec Comm*, 346 Mich 544, 565-566 (1956). As such, I find that it should be presumed that the legislature, in enacting PA 349, understood that the proper party to allege an unfair labor practice predicated on the violation of an employee's Section 9 rights would be the employee themselves. Accordingly, it follows that if the legislature wanted a public employer to possess standing to assert a claim it would not ordinarily be presumed to have, the violation of an employee's Section 9 rights, it would have explicitly done so.[3]

[3] I note that the legislature, in Public Act 194 of 2016, did explicitly extend "standing" for purposes of initiating Commission action in an alleged strike by one or more public school employees in violation of Section 2 of the Act, to not just the public school district, but also to "a parent or legal guardian of a child who is enrolled in the school district" where the alleged strike occurred. MCL 423.202a. No similar language expanding standing exists here.

Ignoring the issue of standing, I believe dismissal of the charge would nonetheless be appropriate. While the issue of a "scabs" or "freeloader" list may be relatively new with respect to PERA and the passage of PA 349, in *Hart Public Schools*, 1989 MERC Lab Op 950, (no exceptions), an employer brought charges that the union had violated PERA by allegedly publicly posting pictures, under the title of "SCABS", of bargaining unit members who exercised their Section 9 rights to refrain from union organized picketing.[4] The ALJ, while first noting that "situations involving actual or threatened economic reprisals or physical violence" by a union have been found to violate Section 10(3)(a)(i), the pre-cursor to Section 10(3)(a) and 10(2)(a), nonetheless concluded that dismissal of the charge would be appropriate and stated:

> I find that the Union's attempt to embarrass or insult teachers who did not participate in the illegal strike by publicly labeling them "scabs" does not constitute restraint or coercion within the meaning of the Act.

Under federal labor law, the term "scab" enjoys protection under Section 7 of the National Labor Relations Act (NLRA). See *Linn v United Plant Guard Workers of America, Local 114*, 383 US 53, 60-61 (1966). The Court later reiterated its stance regarding the term "scab" in *Letter Carriers Local 496 v Austin*, 418 U.S. 264 (1974), and stated at 283:

> *Linn* recognized that federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. Indeed, the Court observed that use of this particular epithet is common parlance in labor disputes and has specifically been held to be entitled to the protection of [Section 7] of the NLRA.

The preceding protections notwithstanding, both *Linn* and *Letter Carriers Local 496*, recognized that the use of the term "scab" and others like it could still be pursued under state libel laws, but only if the statements were made "with knowledge of its falsity, or with reckless disregard of whether it was true of false." *Linn* at 61; *Letter Carriers Local 496* at 281.

Accordingly, it is my finding that posting the names of individuals who refuse to join the union and identifying them as a "scab" or a "freeloader" is neither restraint nor coercion towards that individual's free exercise of their Section 9 rights. Additionally, while some might question the Union's intention in making such a statement, the instant case contains no allegations that the Union knowingly made a false statement.

I have considered all other arguments as set forth by the Charging Party in its filing and have concluded such does not warrant a change in the result. Accordingly, based upon the above rationale it is the opinion of the undersigned that the Charging Party lacks standing in the present matter and that the charge fails to state a claim under PERA. I therefore recommend that the Commission issue the following order:

[4] Curiously the issue of standing was not addressed by the ALJ in her Decision and Recommended Order.

Recommended Order

The unfair labor practice charge filed by the Bay Center Medical Care Facility against the United Steelworkers Union, Local 15301, is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 18, 2018