Guide to Public Sector Labor Relations Law in Michigan

Law and Procedure before the
Michigan Employment Relations Commission

Dedicated to the memory of Hyman Parker

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DISCLAIMER

This Guide is offered as a public service to provide useful information to the reader. Its contents should not be assumed to be authoritative, current, complete or final. This Guide carries no legal authority and is not intended to serve as legal advice.

ACKNOWLEDGEMENT

FOREWORD TO 2024 EDITION (forthcoming)

FOREWORD TO 2013 EDITION

This publication, first prepared by former Bureau Director, Hyman Parker, has been updated several times over the years – the last update was made in 2011. This 2013 web-version reflects: 1) recent amendments to PERA, 2) changes in our Bureau's practices and procedures, and 3) various clarifications and/or corrections to the information provided in earlier editions.

Our appreciation is extended to staffs at the Bureau of Employment Relations and the Michigan Administrative Hearing System (MAHS) for their suggestions, endless revisions, and continued input. Special thanks are extended to Labor Mediator Sidney McBride for ensuring the completion of this project.

This material is intended to provide a summary of our State's labor relations laws and processes.

Please regularly peruse our agency's web-site at www.michigan.gov/merc where the most up-to-date version of this Guide, agency forms and other useful information will be posted.

Edward D. Callaghan, Chair
Michigan Employment Relations Commission

Ruthanne Okun, Director
Bureau of Employment Relations/MERC

December 2013

FOREWORD TO 2007 EDITION

This publication was originally the work of former Bureau Director, the late Hyman Parker, and has been updated several times over the years. The 2007 version reflects recent changes due to the Executive Order that transferred Administrative Law Judges of the Michigan Employment Relations Commission (MERC or the Commission) to the State Office of Administrative Hearings and Rules. It also contains minor revisions, including a clarification to the discussion on the certification bar to elections. Special appreciation is extended to former MERC Chairman Nora Lynch, Staff Attorney D. Lynn Morison, Elections Officer Robert Strassberg, and to Law Clerks Brendan Canfield, Christopher Bowman, and Sarah George for their comments and invaluable assistance in the drafting and editing of these revisions. It is our hope that the 2007 publication will continue to serve as a valuable introduction to MERC and its functions.

www.michigan.gov/merc

Christine A. Derdarian, Chair
Michigan Employment Relations Commission

Ruthanne Okun, Director
Bureau of Employment Relations

CHAIR AND DIRECTOR'S FOREWORD
From 2002 Edition

Our mission at the Michigan Employment Relations Commission (MERC) and the Bureau of Employment Relations (BER) includes: fostering peaceful and cooperative employer-employee relations through education and training. As a part of this mission, we have prepared this summary of the laws we administer and the practices and procedures of our agency and of the Employment Relations Commission. We hope that it assists you to understand what the laws mean to you and how MERC and our Bureau operate.

We have sought to involve persons from all facets of the labor relations community in this project. Former Bureau Director Hyman Parker prepared much of this text. We recognize Mr. Parker and extend our sincere appreciation to him, as well as to the following volunteer authors who so generously contributed their time to this project:

John Adam	Scott Hill-Kennedy	James Moore
James Amar	Denise Hinneburg	Doyle O'Connor
Donald Burkholder	James Kurtz	Margaret Paquet
Jeff Donahue	Freda Mills	Benjamin Wolkinson
Kevin Harty		

We also recognize our editor, former Bureau Director, Shlomo Sperka for his guidance and wisdom, as well as assistant editor, ALJ David M. Peltz, for his authorship, countless edits and invaluable suggestions. In addition, we thank persons in the Department of Consumer & Industry Services, with special thanks to CIS Director Kathy Wilbur and Deputy Director Kalmin Smith. We also thank members of the Michigan Employment Relations Commission, Commissioner Harry Bishop and Commissioner C. Barry Ott, and our Bureau staff for their patient efforts in completing this project. We particularly appreciate the assistance of Legal Specialist D. Lynn Morison and Law Clerk Kalyn Redlowsk, as well as the invaluable support staff assistance of Irene Schnotala and Mary Stiehl. Finally, our appreciation is extended to Director Theodore Curry, Professor Richard Block and Professor Catherine Lundy of the MSU School of Labor & Industrial Relations, who have provided guidance throughout this project and assisted with the publishing of the final document.

We hope that this booklet contains helpful information about the labor relations system in Michigan. If it does, we will have completed our job and furthered our mission.

Maris Stella Swift, Chair
Michigan Employment Relations Commission

Ruthanne Okun, Director
Bureau of Employment Relations

EDITOR'S NOTE
From 2002 Edition

This publication is based upon a booklet written by the late Hyman Parker, the first director of the Michigan Labor Mediation Board, which is now known as the Bureau of Employment Relations. That booklet, entitled *Michigan Public Employment Relations Act and Procedures*, was originally published by Michigan State University in 1971. It was reprinted and updated in 1973, 1975 and 1982, and has been out of print for some years. Current Bureau Director Ruthanne Okun recognized the need for a new edition and participated extensively in this latest publication.

The original text has been reorganized and updated. Some historical material has been omitted, and new information has been added. We have tried to create a book, in format and content, accessible to the layperson and useful for the labor relations professional.

Having assisted in the last revision and, until recently, in administering these statutes, the editor is pleased to have the opportunity to bring this publication to Michigan's public sector labor-management community.

Shlomo Sperka

GUIDE TO PUBLIC SECTOR LABOR RELATIONS LAW IN MICHIGAN
Law and Procedure before the Michigan Employment Relations Commission

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INTRODUCTION: THE COMMISSION AND THE LAWS IT ADMINISTERS

The Michigan Employment Relations Commission (MERC or the Commission) is an independent agency charged with administering various laws governing labor-management relations in the State of Michigan. The Commission is comprised of three members — one of whom is the designated chairperson — appointed for staggered terms of three years by the Governor with the advice and consent of the Senate. By statute, no more than two members may be of one political party.

MERC, formerly the Michigan Labor Mediation Board, was established in 1939 pursuant to the Labor Relations and Mediation Act (LMA). MERC is responsible for administering the LMA, which is the law governing labor relations for private sector employers and employees not within the exclusive jurisdiction of the National Labor Relations Act. The LMA provides for the mediation and arbitration of labor disputes and guarantees the right of employees to organize and bargain collectively with their employers through representatives of their own choosing.

The principal statute administered by MERC is the Public Employment Relations Act (PERA). This law, which was enacted in 1965, granted collective bargaining rights to public employees and defined public employer unfair labor practices. PERA was amended in 1973 to define unfair labor practices by labor organizations representing public employees. Under PERA, the jurisdiction of the Commission extends to all public employers and their employees throughout the State of Michigan, except for state classified civil service and federal government employees. MERC also administers statutes providing for compulsory binding arbitration of labor-management disputes for public police or fire department employees (Act 312 of 1969 as amended by Act 116 of 2011), and between the State of Michigan and the labor organization representing state police troopers and sergeants (Act 17 of 1980).

By statute, MERC's activities are conducted through two separate divisions of the Bureau of Employment Relations (BER): the Labor Relations and Mediation Divisions. BER is an administrative agency within the Department of Labor and Economic Opportunity (LEO). The Labor Relations Division of BER assists the Commission in resolving unfair labor practice charges and in determining appropriate bargaining units. The Division also holds pre-election conferences, and conducts and certifies representation and decertification elections. Hearings on union representation matters and unfair labor practice charges are conducted by Administrative Law Judges (ALJs) with the Michigan Office of Administrative Hearings and Rules (MOAHR). BER's Mediation Division assists in the settlement of contract negotiations and grievances in both the public and private sectors. Other services provided by BER include: fact finding, grievance arbitration, last offer elections, the establishment of labor-management committees, and training in collaborative negotiations.

This booklet summarizes the core provisions of PERA and Act 312, and briefly describes the practices and procedures of MERC. The practices and procedures under the LMA are essentially identical to those under PERA and will not be discussed in any detail.

SELECTION OF A BARGAINING REPRESENTATIVE: HOW EMPLOYEES CHOOSE A UNION

Section 15 of PERA mandates that a public employer must bargain collectively with representatives of its employees who have been selected by a majority of the employees in an appropriate unit. PERA also provides that MERC shall determine a bargaining unit that will best secure employees' right to collective bargaining. A bargaining unit is a group of employees who share a "community of interest" based on factors including: similarity of duties, supervision, work rules, compensation, benefits, skills, working conditions, classifications, physical location, and centralized labor relations. The "community of interest" standard provides a practical grouping for employees who will vote regarding representation and, ultimately, will bargain and reach a collective bargaining agreement between their bargaining agent and employer. The Commission has the duty to determine and approve an *appropriate unit*, although it does not require that a union seek the *most* appropriate unit.

PERA does not make mandatory the selection of a bargaining representative solely by election, but does require that the collective bargaining representative be the choice of a majority of the employees in an appropriate unit. Therefore, a public employer may voluntarily recognize a bargaining agent representing a majority of the employees in an appropriate unit without an election conducted by MERC.

Voluntary Recognition

To secure voluntary recognition, a labor organization must have the support of a majority of employees in the proposed bargaining unit. Generally, employees sign applications for membership stating that they wish a particular labor organization to represent them for the purpose of collective bargaining. The labor organization then notifies the employer that it represents a majority of the employees, and may request a meeting to establish its representative status. In this instance, the employer may ask to examine the membership cards or the petition in order to check the signatures on these documents against its own records. To protect the confidentiality of the employees who signed the membership cards, a neutral third party (outside of MERC) is generally agreed upon by the parties to validate the signatures. If the employer is satisfied that a majority of the employees have designated the labor organization as their representative, it may grant voluntary recognition. The document granting voluntary recognition may be a resolution by the public employer, an exchange of letters, or any other formal document stating that recognition has been granted and identifying the bargaining unit involved. Once granted recognition, the union has the same status as one certified by an election conducted by the Commission.

Elections

If a public employer does not grant recognition voluntarily, Section 12 of PERA authorizes the selection of a bargaining representative by means of a Consent Election or a Commission-Directed Election (CDE). Under either procedure, a petition for an election can be filed by a group of public employees, an individual, or a labor organization acting on their behalf. (See page 26, Petition for Representation Proceedings.)

PERA requires that documentary evidence be presented to the Commission establishing that at least 30 percent of the employees in the unit wish to be represented for the purpose of collective bargaining by the petitioner. This "showing of interest" must be submitted with the petition. Unless an original showing of interest is received within 48 hours of filing, the petition will be dismissed. Cards or petitions that merely request an election but do not designate the labor organization as the employees' agent for the purpose of collective bargaining are not a valid showing of interest.

Where a showing of interest has been established and the parties agree on the appropriate bargaining unit, they then may agree to a Consent Election. In such case, the parties sign a Consent Agreement authorizing the Commission to conduct an election at a designated time and place. (See page 27, Agreement for Consent Election) In some instances, another labor organization will request to be included on the ballot. The Commission will permit this rival organization to participate in the election if it establishes by a showing of interest that 10 percent of the employees in the unit wish to be represented by it. This labor organization, referred to as an "intervenor," merely has the right to be included on the ballot; it cannot contest the designation of the bargaining unit previously agreed upon by the petitioner and employer, or determined by the Commission.

Commission-Directed Elections

When the parties are in dispute about the composition of the bargaining unit, voter eligibility, or other issues, and are unable to agree to a Consent Election, the case is referred to an Administrative Law Judge (ALJ) from the Michigan Office of Administrative Hearings and Rules (MOAHR) who may hold a pre-hearing conference and/ or conduct a formal hearing. If a hearing is held, it will be public unless otherwise ordered by the ALJ. At a hearing, the parties have the right to appear in person or by a representative and give testimony and other evidence. They may present evidence concerning the proposed bargaining unit, challenging the community of interest standard, or the eligibility of specific positions to be included in, or excluded from, the bargaining unit. A party may assert that the bargaining unit improperly includes rank and file employees along with their "supervisors," or that employees who are "confidentials" or "executives," as those terms have been defined in labor relations cases, are improperly included in the bargaining unit. (See pages 14-15 for more discussion on bargaining unit determinations.) Following the hearing, the Commission will review the record, resolve all contested matters, and issue an order directing that an election be held in a defined bargaining unit (a Commission-Directed Election), or dismissing the petition. PERA provides for judicial review of a Commission order with respect to an election by the filing of an appropriate appeal to the Michigan Court of Appeals. Leave to appeal to the Michigan Supreme Court may later be requested.

Timing of Petitions & Elections: Contract and Election Bars

If another labor organization or a group of employees seeks to file a petition for an election in an existing unit where a collective bargaining agreement is already in effect, it must file the petition during a "open window period" prior to the termination of the collective bargaining agreement or after the contract's expiration. The open window period varies with the type of employer involved. In most public sector cases, the petition must be filed no earlier than 150 days and no later than 90 days prior to the termination date of the contract. In cases involving a public school district or a public educational institution in which the contract expiration date is between June 1 and September 30, the window period is between January 2 and March 31 of the year in which the contract expires. In private sector cases, the petition must be filed no earlier than 90 days and no later than 60 days prior to the contract termination. A petition filed outside of the window period will ordinarily be dismissed. If a contract renewal has not been agreed upon during the insulated period, however, a petition may be filed any time after the expiration date of the agreement.

PERA will not order an election within twelve months after a previous valid election has been held. Accordingly, when a labor organization wins the election and is certified as representative, no petition from a rival organization, or petition from employees to decertify their designated representative, will be accepted during the twelve-month period following the date of certification. This provides the parties with an opportunity to negotiate a collective bargaining agreement without interference. Alternatively, if no labor organization is certified as a result of the election, the Commission will not accept a petition for the same unit until 60 days prior to the end of the 12-month period following the election, and an election will not be conducted until the end of the 12-month period.

When a valid collective bargaining agreement is in effect, it bars an election for up to three years after execution of the agreement. To serve as a contract bar, the collective bargaining agreement generally must be in effect for a fixed duration of at least six months and must contain substantial terms for wages, hours, and working conditions.

Note: One exception to the contact bar theory occurs when an incumbent union disclaims interest in continuing to represent a bargaining unit and the disclaimer occurs during the active contract term. See Union Disclaimer below.

Employer Petitions

A public employer may also file a petition for an election (See page 26, Petition for Representation Proceedings) when one or more individuals or labor organizations claim to be representatives of the public employees involved. When such a demand for recognition is presented, the public employer may prefer to resolve the matter as promptly as possible. When a petition for an election is filed by a public employer, the labor organization is not required to demonstrate a formal showing of interest as long as the organization has previously requested recognition.

Election Procedures

Upon receipt of a Petition for Representation Proceedings, a MERC Elections Officer will request that the employer furnish the names and addresses of other interested parties, copies of any presently existing or recently expired collective bargaining agreements, and an alphabetical list of employees. The parties, including any intervenor, will be required to participate in a teleconference call or appear for an informal conference, so that the Elections Officer may conduct a preliminary investigation.

Prior to the conference, the Elections Officer will confidentially check the alphabetical list of employees supplied by the employer against the cards or petition(s) presented to establish the required "showing of interest." If the comparison indicates that the showing of interest is less than 30 percent, the petition will be dismissed.

The time, date, place and manner of the election will be determined by the Election Officer after consultation with the parties. At least seven business days prior to the date set for mailing the ballots or conducting an on-site election, MERC and the labor organization(s) must receive from the employer an alphabetical list of the names and addresses of all eligible voters. Notices of Election and sample ballots must be posted five business days prior to the election in prominent places in and about the employer's establishment. The Notice of Election indicates the time, date, place, manner and purpose of the election. (See pages 28-29, Notice of Election and Official Ballot.)

Absentee ballots may be used by eligible individuals who are unable to be present at the time of the election because of sickness, military leave or physical disability. A voter must request an absentee ballot from the Commission and must return the ballot to MERC no later than the specified deadline date. Absentee ballots may also be provided for other circumstances as agreed to by the parties with the approval of the Commission or its agent.

The parties to the election may each designate a representative to observe that the ballots are properly cast and votes are properly counted. An observer, who cannot be a supervisor or full-time labor organization representative, may challenge the eligibility of voters. MERC will automatically challenge a voter whose name does not appear on the voter eligibility list. In such cases, the challenged voter will be permitted to vote, but the ballot will be set aside. If the challenged ballots are necessary to decide the results of the election, the Commission will determine the merits of those ballots after a formal hearing before an ALJ.

Voting in the election is by secret ballot. In most cases, the ballots are counted by the Commission agent or agents as soon as the polls are closed, and anyone who wishes to do so may observe the count. The Commission agent will announce the results of the election as soon as the tabulation of the ballots is completed. The labor organization receiving a majority of the valid ballots cast is certified by the Commission as the exclusive collective bargaining representative of the bargaining unit. (See page 30, Certification of Representative). If a majority of the valid ballots has not been cast for any labor organization appearing on the ballot, a Certification of Results is issued. (See page 31, Certification of Results of Election).

Run-off elections are held when there are more than two choices on the ballot, and none of the choices receive a majority of the votes cast. In such case, the run-off election will be conducted between the two choices receiving the largest number of valid votes.

Within five business days after the election results have been tabulated and furnished to the parties, objections to the conduct of the election may be filed with the Commission by any interested party. Objections must be in writing and contain a statement of facts upon which the objections are based and the specific reasons for the objections. Objections must be served upon the other party or parties. The most frequent types of objections involve employer or union conduct or speeches that allegedly coerce employees, promises by the employer or union of special benefits, conduct that creates fear of reprisals, or conduct that interferes with the employees' free choice of a representative. Another type of objection pertains to campaigning by a party within the sight or sound of the polling place while the election is being conducted, which is prohibited by MERC.

Objection cases are heard by an ALJ at MOAHR, and subsequently a decision is rendered by the Commission. If the objections to the election are sustained, a new or re-run election is ordered.

Decertification

PERA contains a provision allowing public employees, or anyone acting on their behalf, to file a petition asserting that their certified or recognized representative is no longer their representative. The petition must be signed by at least 30 percent of the employees in the unit, stating that they no longer wish to be represented for the purpose of collective bargaining by their current bargaining representative. (See page 26, Petition for Representation Proceedings.) The Commission will conduct a decertification election according to the election procedures described on pages 12-13 of this booklet. A rival organization may intervene so that the employees may choose to vote for the current labor organization, the intervening labor organization, or neither.

Unit Clarification

An employer or labor organization may file a unit clarification (UC) petition (See page 26, Petition for Representation Proceedings) to resolve disputes regarding the unit placement of one or more positions or classifications without an election. Individual employees cannot file a UC petition. The unit clarification procedure is only appropriate to resolve ambiguities in the unit placement of newly created positions, or positions that have undergone recent and substantial changes in job duties or responsibilities so as to raise doubt about their inclusion or exclusion from the bargaining unit. The fact that a contract may be in effect generally will not bar the filing of a UC petition. Unit clarification is not appropriate for adding historically excluded positions to a bargaining unit. The Commission will not entertain a UC petition to alter the composition of a bargaining unit within one year following a consent election. The conference and hearing procedures previously described on pages 12-13 also apply to unit clarification proceedings.

Bargaining Units

By statute, the Commission has the sole and exclusive authority to determine an appropriate bargaining unit. Through prior decisions, the Commission has established a number of principles regarding the proper composition of bargaining units, some of which include:

Establish the largest bargaining unit that is consistent with the purpose of joining together employees with common interests for representation and bargaining. The Commission favors larger units over multiple smaller units and seeks to avoid undue fragmentation.

Bargaining history is respected. The Commission typically leaves existing units undisturbed unless they violate statutory prohibitions. Thus, units established along departmental lines or multiple bargaining units, which the Commission might not have initially found to be appropriate, may be permitted to exist in light of a lengthy bargaining history.

Regular, part-time employees will be included in a unit of full-time employees to avoid fragmented or multiple units. Regular, part-time employees are those who perform sufficient work on a regular basis to demonstrate a substantial and continuing interest in wages, hours, and working conditions of the unit so as to maintain a community of interest with full-time employees. Casual or temporary employees (as opposed to "regular, part-time employees") are individuals with greatly fluctuating work hours or who lack a continuing expectation of employment.

A unit of professional and non-professional employees may be appropriate; however, such a unit usually will not be appropriate in a public school district. Public school district bargaining units frequently include separate units of administrators, professionals, and support staff personnel. The latter unit may include clerical, paraprofessional, custodial, transportation, and food service workers.

Residual units of unrepresented employees are appropriate. Employees who have been historically excluded from existing bargaining units may form a residual unit. This is a means of providing all employees with an opportunity to seek representation.

A unit that includes non-supervisory employees, along with their supervisors, is inappropriate. A supervisor is an employee who has an effective role in carrying out or making recommendations regarding discipline, evaluation, or other personnel matters. Employees who make recommendations to their supervisors on these topics are supervisors for purposes of PERA if their

recommendations are generally accepted without independent investigation. An employee who possesses only routine responsibility to direct or assign work, but has no other characteristics of supervisory authority, is not a supervisor under MERC's definition. Typically, the Commission will place all supervisors in a single unit unless the supervisors perform such a wide range of functions that their interests are too diverse to permit effective representation and bargaining.

Executive status employees are excluded from the right to bargain collectively and therefore cannot form or be included in a bargaining unit recognized by MERC. "Executive employees" under MERC's definition are individuals who are high level policy-makers, exercise substantial authority pursuant to statute or charter, or determine or effectuate management policy on an employer-wide basis. Public school superintendents, college and university presidents, elected officials, police and fire chiefs, and heads of major city or county departments are examples of employees found to be executive employees.

Confidential employees are excluded from a bargaining unit. Confidential employees are individuals who formulate management policies regarding labor relations or provide assistance to these individuals. Employees who fall within this category are typically clerical employees, but the exclusion may also apply to employees at varying levels of the organization. The Commission does not favor widespread exclusion of employees from a bargaining unit based on the confidential designation, As such only a limited number of employees will be allowed to be excluded under the confidential employee exception.

A *severance election* occurs when a sub-group of employees currently included in an existing bargaining unit seek to sever and form a separate and distinct unit. The Commission rarely will permit a severance and only where an "extreme" divergence of "community of interest" is shown. The most recent instances have involved the separation of Act 312 eligible positions from non- 312 eligible positions in a "mixed" unit.

Union Disclaimer of Interest

In 2023, the Commission decided that if an incumbent union disclaims interest in representing a unit during the term of a collective bargaining agreement, the agreement will not serve as a bar to a representation petition or election. See *Allegan County Road Commission*, 36 MPER 20 (2023).

UNFAIR LABOR PRACTICES
Unfair Labor Practices by Public Employers

To protect the right of public employees to form a union, PERA sets forth various employer and union unfair labor practices. Section 10(1)(a) of PERA declares it unlawful for a public employer to interfere with, restrain, or coerce public employees in the exercise of their right to organize together or to form, join, or assist in labor organizations, to engage in lawful concerted activities, and/or to negotiate or collectively bargain. Under this prohibition, for example, employers may not threaten employees with loss of jobs or benefits if they join or vote for a union, nor may they interrogate employees about their union activities or membership under circumstances that tend to restrain or coerce them. Public employers are also prohibited from unilaterally granting salary increases or other benefits that are deliberately timed to discourage employees from forming or joining a union.

Section 10(1)(b) of PERA declares it an unfair labor practice for a public employer to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. This provision outlaws so-called "company unions," which are unions dominated by employers. Public employers may not take an active part in organizing a labor organization or bring pressure on employees to join a union. It also prohibits an employer from contributing money to a labor organization or giving one union advantages that the employer denies to rival organizations. After previously being prohibited, in February 2024, the prohibition against public school employers using school resources to collect union dues or service fees was repealed (it is important to note, however, that requiring payment of union dues or service fees remains subject to the U.S. Supreme Court's decision in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448).

Section 10(1)(c) of the Act declares it unlawful for a public employer to discriminate with regard to the hiring of employees or in their terms or conditions of employment in order to encourage or discourage membership in a labor organization. The types of discrimination prohibited under this section include: an employer's refusal to hire an employee; the discharge, demotion, or reassignment of an employee to a less desirable job; or the withholding of benefits from an employee in order to discourage or encourage membership in a union. However, PERA does not prohibit a public employer from taking disciplinary action, discharging, transferring or laying off a public employee for good cause or economic reasons.

Section 10(1)(d) of PERA declares it an unfair labor practice for a public employer to discriminate against a public employee who has given testimony or instituted proceedings under this Act. This section protects public employees who attempt to exercise their PERA rights. Thus, public employers are prohibited from discharging, laying off, or engaging in any discriminatory conduct against employees because they have filed unfair labor practice charges, participated in filing a petition for an election, or testified in proceedings against the public employer or against a union.

Section 10(1)(e) of PERA makes it unlawful for a public employer to refuse to bargain collectively with the representatives of its employees. The duty of a public employer to bargain includes the obligation to meet with the union at reasonable times and to confer in good faith with respect to "wages, hours, and other terms and conditions of employment". Such subjects are referred to as "mandatory subjects of bargaining." An employer may not take unilateral action to change or alter a mandatory subject of bargaining without negotiating those changes to impasse. An impasse occurs when the parties have exhausted all means of reaching an agreement on a particular subject. However, the duty to bargain does not require either party to agree to a proposal or make a concession. If a violation of this section is alleged, the employer's entire course of conduct will be

examined to determine whether it is negotiating in good faith and with the intention of reaching an agreement.

Matters not considered mandatory subjects of bargaining are classified as permissive or prohibited subjects. The parties may bargain by mutual agreement, but neither the union nor the employer may insist on bargaining a permissive subject to the point of impasse. Examples of permissive subjects of bargaining include a proposal to provide benefits to current retirees or to include the union insignia on employer products.

A prohibited subject of bargaining is one that is unlawful under a collective bargaining statute or other law. While the parties are not forbidden from discussing a prohibited subject during bargaining, any contract provision containing such a subject is unenforceable.

PERA lists a number of "prohibited" subjects of bargaining that apply only to public school employers and their bargaining representatives. Between 2011 and 2014, the list of prohibited subjects was expanded. However in 2024, several of the newly added prohibited subjects of bargaining were eliminated. Generally, prohibited subjects of bargaining include such matters as: the policyholder of an employee group insurance benefit; establishment of the starting day for the school year; use of volunteers to provide services at schools; and decisions concerning use and staffing of experimental or pilot programs and decisions concerning the use of technology to deliver educational programs and services and staffing to provide that technology.

Additionally, each collective bargaining agreement entered into after March 16, 2011 between public employers and public employees must include a provision allowing an emergency manager appointed under the Local Government and School District Fiscal Accountability Act to reject, modify, or terminate the collective bargaining agreement as provided in that law.

The duty to bargain in good faith also requires an employer to provide the bargaining agent with information that the agent needs to fulfill its responsibilities to negotiate and administer the collective bargaining agreement. This may include information about the employer's financial condition.

Unfair Labor Practices by Labor Organizations

Section 10(2)(a) of PERA provides that it is unlawful for a labor organization or its agents to restrain or coerce public employees in the exercise of their rights under the Act. However, labor organizations have the right to prescribe their own rules concerning membership. Illegal restraint or coercion by a union includes threats to retaliate against employees who will not join or are not dues-paying members of the union or threats to employees if they refuse to support union activities.

Based on this sub-section, a union also has a duty to represent the members of the bargaining unit whether or not the member is a dues paying union member . This duty of fair representation (DFR) extends to both contract negotiations and administration.. To satisfy its obligations, the union must serve the interests of all members of the bargaining unit that it represents without hostility or discrimination, exercise its discretion in complete good faith and honesty, and avoid arbitrary conduct. With respect to grievance processing, a union has considerable discretion and is permitted to consider various factors in deciding how far to carry a grievance and which cases should proceed to arbitration. The union may consider the burden on the grievance procedure, the significance of the grievance, the likelihood of success, and the expense involved.

Under Section 10(2)(b), a union may not restrain or coerce a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

Section 10(2)(c) of PERA declares it to be an unfair labor practice for a labor organization "to cause or attempt to cause a public employer to discriminate against a public employee." For example, it is unlawful for a union to cause an employer to discharge an employee for speaking against a tentative agreement reached by the union, or to enter into a contract requiring that an employer hire only union members or employees satisfactory to the union.

Section 10(2)(d) of PERA states that it is unlawful for a labor organization "to refuse to bargain collectively with a public employer." This requires good faith in bargaining. Examples of violations of this section include refusing to sign a written contract after an agreement is reached or refusing to meet with the representative selected by the employer.

Union Security Agreements

A union security agreement is a provision in a collective bargaining agreement requiring all members of the bargaining unit to either join or financially support the union. In 2012, Michigan's Freedom to Work law in prohibited "agency shop" provisions to exist and be enforced in the labor agreements. A Union Security Clause generally provides that each employee in that bargaining unit is required to either become a union member and pay full union dues, or pay a "service fee" to the union. On June 27, 2018, however, the United States Supreme Court, in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, held that public sector agency shop arrangements violate the First Amendment of the United States Constitution. As such, union security clauses in public sector workplaces were deemed unconstitutional. This means public sector employers and unions cannot agree or enforce any provision that requires employees to join or financially support a union as a condition of obtaining or continuing employment.

Fast forward, in 2023 , Michigan repealed its FTW laws in 2023 PA 009. The repeal is subject to ither a ruling by the US Supreme Court that reverses or limits the *Janus* decision or an amendment to the United States Constitution that allows an employer and union to require a public employees to pay fees to the union as a condition of employment.

Generally, employees who opt out of union membership or financially supporting a union through service fee(s) are entitled to the same contract benefits as full union members. The union must represent all members of the bargaining unit fairly and without discrimination or reprisal. Thus, all bargaining unit members will receive the benefit of all contract provisions, as well as union representation during grievance proceedings regardless of their union member status. The union may reserve some rights only to union members such as voting to ratify a collective bargaining agreement serving as a union official, and voting for union officers.

Membership dues and service fees, when authorized by an employee, are usually collected in the form of a dues check-off. A dues check-off authorizes the employer to automatically deduct dues or service fees from the employee's paycheck. Once a collective bargaining agreement has expired, an employer has no obligation to continue dues check-off. The employer and the union, however, may mutually agree to continue to deduct union dues during negotiations for a new contract.

Section 10(4) of PERA requires that by July 1st of each year, any labor organization that represents public employees in Michigan must file with MERC an independent audit of all expenditures attributable to the costs of collective bargaining, contract administration and grievance adjustment

during the prior calendar year. The filed audits are made available for public review on MERC's website via MERC eFile system.

Unfair Labor Practice Procedures

Unfair labor practice charges under PERA may be filed (1) by a labor organization or public employee against a public employer or, (2) by a public employer, public employee, or labor organization against a labor organization. The charge must be filed with the Commission on an official Charge Form (See page 32, Charge Form) or in MERC eFile and the person or party filing ("charging party") must serve a copy of the charge and other documents on the other party ("respondent"). There is a strict six-month statute of limitations for the filing of charges, and a charge alleging an unfair labor practice occurring more than six months prior to the filing and service of the charge will be dismissed.

The charge must contain a clear and concise statement of the alleged violation and the facts supporting the charge, such as the dates, times, places of occurrence, names of persons involved, and the sections of PERA allegedly violated. The charge may be transferred to the Michigan Office of Administrative Hearings and Rules (MOAHR) to be assigned to an ALJ, who will forward a copy to all parties, along with a notice of the next step of the process. The Commission does not investigate charges. If the facts described in the charge do not allege a violation of PERA, the Commission may dismiss the charge without taking evidence but, if requested, must allow the charging party the opportunity to present oral argument against the dismissal. If the ALJ finds that adequate information to allege a PERA violation has been asserted, the parties will be provided with a notice that a formal hearing has been scheduled.

The respondent may file an original and four copies of an answer to the charge and, if it does so, must serve a copy on the charging party or parties. If the charge is vague, the respondent may file a motion requesting an order that the charging party provide more specific information.

Charges may be withdrawn or amended with the approval of the Commission or the ALJ assigned to the case. The Commission encourages settlements by the parties and, at any point prior to the issuance of a final order, the parties may negotiate a settlement of the unfair labor practice charge. If the matter is not settled, however, a formal hearing before an ALJ may be held. These formal hearings are usually held in Detroit or Lansing and are open to the public, unless otherwise ordered by the ALJ. At the hearing, the parties have the right to appear in person and to be represented by counsel, to examine and cross-examine witnesses, and to introduce documentary evidence. The charging party ordinarily presents its case first. It has the right to call witnesses, who may be examined and cross-examined by an attorney or other representative of each party. The respondent has the same opportunity to present witnesses and submit documentary evidence in its own defense. The ALJ has the authority to issue subpoenas, administer oaths, take testimony, hold pretrial conferences, examine witnesses, and regulate the entire course of the hearing. Closing arguments may be presented at the conclusion of the hearing and post-hearing briefs are typically filed.

Based on the evidence and arguments presented at the hearing, the ALJ issues a "Decision and Recommended Order" containing findings of fact and conclusions of law, reasons for the conclusions, and a recommended order that the Commission may adopt. If the allegations are not supported by the evidence, the ALJ may recommend dismissal of the charges. If the ALJ finds a violation, he or she may issue a recommended order that a party cease and desist from the unlawful activity and take affirmative action, such as reinstatement of the discharged employee and/or the payment of back pay.

Within 20 days after a recommended order has been issued by the ALJ, either party may appeal that decision by filing with the Commission an original and four copies of exceptions to the ALJ's decision and recommended order. The exceptions must be accompanied by two copies of all

exhibits submitted at the hearing and a statement that the exceptions and brief have been served on the opposing party. The exceptions must identify and explain in detail the questions of procedure, fact, or law in the ALJ's decision and recommended order that are alleged to be erroneous. Briefs are usually filed with the exceptions, and the opposing party may file a brief in response and/or cross exceptions. When exceptions are filed, the Commission reviews the entire case and issues an appropriate order either adopting, modifying, or reversing the ALJ's decision and recommended order. If no exceptions are filed within 20 days, the ALJ's recommended order becomes the order of the Commission. Disputes over the application or interpretation of the remedy in the Commission's order may be resolved by a compliance hearing before an ALJ. If the respondent refuses to comply with a Commission order, the charging party may seek enforcement in the Court of Appeals. A party who disagrees with the Commission's final order may file an appeal with the Court of Appeals. Ultimately, review by the Michigan Supreme Court may also be available.

MEDIATION PROCESS AND PROCEDURE

Contract Mediation

Section 7 of PERA authorizes the bargaining representative or the public employer to request that the Commission intervene and mediate matters, including disputes concerning new contracts, contract renewals, and grievances. Mediation is a non-binding process in which a neutral third person assists the parties to resolve their dispute. In collective bargaining, the parties should seek to resolve as many issues as possible by themselves; however, when it becomes apparent to one or both parties that they are unable to reconcile their differences or are not making adequate progress towards doing so, mediation may be appropriate.

PERA discusses the mediation process and provides: "At least 60 days before the expiration date of a collective bargaining agreement, the parties shall notify the commission of the status of negotiations." To notify the Commission, public sector entities file the Notice of Status of Negotiations — Public Employment form. (See page 33) Private sector entities must file with the Commission, utilizing a form furnished by the Federal Mediation & Conciliation Service. Shortly thereafter, a mediator will be assigned to the case and remain in contact with the parties to monitor the progress of negotiations.

When either party requests assistance, the mediator will schedule a conference in order to provide the parties with an opportunity to completely discuss the issues in dispute. The mediator may meet separately with each party to discuss the issues and explore areas of compromise. The mediator has no authority to impose a settlement or issue a directive on disputed issues. However, by virtue of his or her objectivity, neutrality, and experience, the mediator frequently is in a better position than the parties to probe and explore areas of compromise and to offer suggestions as to how the dispute may be resolved. The mediator can restore or improve the lines of communication that are sometimes disrupted or destroyed during contentious negotiations. He or she is able to control the mechanics of negotiations so that neither party may seek or avoid a meeting as a bargaining tactic. A mediator also may present new approaches and create an atmosphere that is more conducive to resolving the dispute. In separate caucuses, the mediator can point out weaknesses, encourage a change in positions, and recommend alternatives. In essence, mediation is an extension of the collective bargaining process with the addition of a neutral third party.
The Commission has consistently required that all mediation conferences be private. Otherwise, instead of trying to resolve the dispute, the parties might speak for the record, seeking to obtain favorable publicity, or might be restricted in their statements when the public and the press are present.

To make effective use of the services of a mediator, parties must be willing to share all information with him or her. Information disclosed to a mediator in the performance of his or her duties is strictly confidential and may not be divulged. This rule protects the parties in their disclosures to the mediator and assures the strict confidence necessary to the mediation process.

Grievance Mediation

Mediation is often used to resolve grievances arising under a collective bargaining agreement, either as the final step in the grievance procedure or as a step prior to arbitration. The Commission offers grievance mediation at no charge to the parties. (See page 34, Grievance Mediation Request form.) A mediator is generally available within a few weeks of the request for mediation assistance. The process is flexible, since the parties may develop a remedy without being bound by the contract language, as an arbitrator would be. If the contract language is ambiguous, a mediator may assist in developing a mutually agreeable resolution of the dispute. A mediator has no authority to render a binding decision. Parties are able to avoid the expense and rigidity of the grievance arbitration process by mutually resolving contract grievances with the aid of MERC labor mediators.

Collaborative Bargaining

Many employers and labor organizations believe that a cooperative approach to collective bargaining is more effective than the traditional adversarial approach. Cooperative bargaining is identified under several terms, including “principled bargaining,” “mutual gains,” “best practice,” “integrative,” “win-win,” “collaborative,” and “interest-based” bargaining. In addition to traditional mediation, the Commission has adopted a collaborative approach to collective bargaining, referred to as the “Collaborate to Contract” process. The collaborative approach is intended to avoid a situation in which one party wins only if the other loses. The process focuses on open and frank discussions, free exchange of information, an examination of issues, interests, and mutual concerns, and the use of agreed-upon standards to judge options. The ultimate goal is to improve the overall bargaining relationship, while the more immediate goal is to resolve the particular contract dispute at issue. In most cases, bargaining teams are jointly trained in the process. The collaborative bargaining process utilizes a facilitator during the course of bargaining. In some cases, the parties will contract with a facilitator who is familiar with the collaborative bargaining process to perform that role. Typically, however, facilitation of the bargaining process is done internally by the parties themselves. Following training by a MERC mediator, the mediator who provided the training may be scheduled to assist during the initial collaborative bargaining sessions as a resource person while parties become comfortable with utilization and facilitation of the collaborative bargaining process. A request for training well before contract expiration is recommended.

FACT FINDING

If bargaining and mediation have failed to result in a final agreement, either or both parties may petition for fact finding. The neutral fact finder, following the process described below, will issue a non-binding recommendation for settlement of the contractual dispute. Since strikes are prohibited in the public sector, fact finding is the final impasse resolution procedure available to public sector employees, except for public safety personnel who are subject to Act 312 arbitration. (See discussion in next section.)

Under Section 25 of the Labor Mediation Act, either party may initiate the fact finding process, or the Commission, on its own motion, may do so. The petition for fact finding should be on a Commission-approved form. (See page 35, Petition for Fact Finding) Commission Rules require that an answer to the petition be filed and served on the other party.

After a petition is filed and docketed, the Commission will appoint a fact finder from its panel of neutrals, who will conduct a hearing relating to all of the facts in dispute. The hearing will be conducted in public, unless otherwise directed by the fact finder. The purpose of the hearing is to permit the parties to present facts and witnesses in support of their positions. No formal record is made of the proceedings; however, post-hearing briefs are often filed. Ultimately, the fact finder will issue written recommendations on those contract provisions in dispute. The value of fact finding is that after a formal hearing, the parties receive an objective and professional evaluation of their bargaining positions. While the fact finder's report is not binding, the parties may accept his or her recommendations in whole or in part. Parties often return to negotiations or mediation after fact finding and are frequently able to resolve their differences.

ACT 312–COMPULSORY ARBITRATION FOR POLICE AND FIRE DEPARTMENTS

In 1969, the Michigan Legislature enacted Act 312 to provide employees of municipal police and fire departments "an alternate, expeditious, effective and binding procedure" for the resolution of labor disputes. To that end, Act 312 provides for compulsory arbitration of unresolved contract disputes for employees entitled to its coverage. The Act 312 statute was amended significantly by Act 116 of 2011. It now provides for binding arbitration of contract disputes for "public police or fire department employees." This includes employees of a city, county, village, or township, engaged as a police officer, in firefighting or subject to the hazards thereof. The law also covers emergency medical service personnel and emergency telephone operators, but only if directly employed by a public police or fire department. Also covered by Act 312 under the 2011 amendments are employees of certain authorities, districts, boards, or other entities created by those local units of government. On January 22, 2024, Act 312 coverage was extended to corrections officers employed by a county sheriff's department and police officers and fire fighters employed by "higher education institutions."

Act 312 is not intended to replace the collective bargaining efforts that take place between the parties; instead, it is the final step in that process, and the parties bring to the Act 312 forum only those issues that were previously considered during bargaining and mediation. The resolution of contract grievances is expressly excluded from the Act 312 process.

Thirty days after submission of a dispute to mediation, either the employer or the labor organization may initiate binding Act 312 arbitration by filing with the Commission a Petition for Act 312 Arbitration, and serving a copy on the opposing party. (See page 36, Petition for Act 312

Arbitration.) The petition must include a list of the issues remaining in dispute and a copy of the most recent labor agreement.

Within 7 days of the filing, the Commission selects three nominees from its arbitration panel and provides those names to the parties. Each party has five days to strike one name. The Commission designates from the remaining names, an impartial panel member to serve as panel chairperson. At any time before the Commission makes an appointment, the parties may mutually agree to select an individual from the Commission's panel of arbitrators or someone eligible for membership on the panel to act as chairperson and must notify the Commission of their selection.

Within 10 days of the filing of the petition, each party must select one person to be its delegate to complete the three-member arbitration panel that is called for in the statute. Significantly, while arbitration proceedings are pending, neither party may change existing wages, hours or other conditions of employment without the consent of the other side.

Within 15 days from appointment, the panel chairperson will open the hearing by conducting a scheduling conference with the parties to discuss matters such as identifying resolved and unresolved issues; the time and manner of exhibit exchange; the date and manner of the exchange of last offers of settlement on each economic issue; and dates, times, and location of the hearing at which oral and documentary evidence will be taken. If necessary, a procedural hearing will be scheduled prior to the evidentiary hearing, at which the issues may be identified as economic or non-economic and other preliminary issues, such as contract duration, may be decided. At both the procedural hearing, if held, and at the evidentiary hearing, a court reporter will be present to prepare a verbatim record of the proceedings. At any time prior to the issuance of an award, the chairperson may remand the dispute to mediation for a period not to exceed three weeks if it is believed that further negotiations might facilitate a settlement of all or part of the unresolved issues. The hearing must conclude and post-hearing briefs may be filed within 180 days after it begins with the scheduling conference, with up to an additional 3 weeks if there is a remand to mediation.

Within 30 days after the hearing concludes (or up to 60 additional days if the chairperson so decides), the panel makes written findings on each issue presented by the parties, along with a written opinion and order. The arbitration panel shall base its findings, opinions and orders based on several factors that are set forth in the statute, with priority given to the financial ability of the unit of government to pay. The statute requires that the arbitration panel compare the wages, hours, and conditions of employment of the employees involved in the arbitration with other employees of the unit of government in question. Regarding economic issues, the panel must adopt the last offer of settlement that, in its opinion, most nearly complies with the factors set forth in the statute. The panel is not authorized to reject both of the final offers and craft its own award on economic issues or to order each party to compromise on its positions. Non-economic issues are not subject to the last offer requirement, and the arbitration panel is free to impose any award it deems appropriate based on the statutory criteria. The majority decision of the arbitration panel is binding on the parties and enforceable in circuit court, if the conclusions are supported by competent, material, and substantial evidence on the overall record.

GRIEVANCE ARBITRATOR SELECTION

Pursuant to its authority to aid parties in resolving labor disputes, MERC assists parties in selecting a skilled arbitrator to perform grievance arbitration in the field of labor relations. (See page 37, Petition for Grievance Arbitration.) Parties may utilize the service subject to the terms of their labor contract or by mutual written agreement. MERC's involvement is limited to assisting in the appointment of a grievance arbitrator. While there is no charge to the parties for MERC's role in the process, the daily rate set by each arbitrator is paid by the parties, along with any other costs associated with the arbitration process. MERC does not enforce or vacate awards, and will not collect fees.

STRIKES AND LOCKOUTS IN THE PUBLIC SECTOR

Work stoppages in the public sector in Michigan are illegal. The Hutchinson Act, which was passed in 1947, prohibited strikes by one or more public employees and required automatic discharge whenever any public employee engaged in a strike. PERA, enacted in 1965, continued the prohibition against strikes by public employees, but eliminated automatic discharge penalties. In 2016, the legislature amended PERA by enactment of Public Act 194. This amendment, which applies only to public school employees, strengthened enforcement of the strike prohibition and made lockouts by public school employers unlawful as well. Act 194 imposes a fine on the employee of one day's pay for every day that a public school employee is on strike.

Act 194 Procedures

The enforcement provisions of Act 194 are initiated by the filing of a notice. (See page 38, Notice of Public School Employee Strike; and page 39, Notice of Public School Employer Lockout.) Upon receipt of a notice of an illegal strike or lockout filed in accordance with Commission rules, together with required affidavits, the Commission will serve notice of a hearing on the parties within two days and schedule a hearing in not less than 10 days from the date of service by mail. Any answer to the petition must be filed within 7 days of service of the notice of hearing. A hearing will be held, and the Commission must issue its decision within 3 days of the close of the hearing.

Refer to the MERC Website— www.michigan.gov/merc for the following links:

- **MERC e- File System**
- **Designated Filing Email Addresses**
- **Various Forms for Case Filing**
