# Update on Michigan Employment Relations Commission Cases

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II. MERC Cased Reviewed by Appellate Courts

A. *Calhoun Intermediate Education Association MEA/NEA v Calhoun ISD*, No. 323873 (January 7, 2016)

The Michigan Court of Appeals issued a published decision that cleared up any possible lingering issues about including prohibited subjects of bargaining in a collective bargaining agreement by making it clear that a union may not insist as a condition of its agreement to a contract that a school district agree to include provisions pertaining to a prohibited subject. This would include, for example, the suggestion of moving the disputed provisions to an appendix.

Additionally, the Court affirmed that a union violates its duty to bargain in good faith, and obstructs and impedes the bargaining process when it continues to make proposals dealing with prohibited subjects after an employer refuses to bargain over the proposals.

In this case, the District clearly indicated that it would not negotiate prohibited subjects of bargaining by including the following statement in a proposal to the Union:

> *Nothing is this proposal should be regarded as indicating that the Board of Education proposes or otherwise intends to continue any provisions of the… Master Agreement which pertains to prohibited subjects of bargaining in the successor*

> *collective bargaining agreement to the extent that such provisions pertain to prohibited subjects of bargaining. Further, the…Association is hereby notified that the Board of Education will not enter into or execute any successor collective bargaining agreement…which contains provisions embodying or pertaining to any prohibited subject of bargaining….*

The Union, however, responded that the language could not be removed without bargaining and that it would not bargain over prohibited subjects. It then submitted a proposal that indicated the provisions governing prohibited subjects of bargaining had been removed from the contract, but were included in a letter of agreement as a an appendix, which provided that the language would be moved back into the contract if laws on the prohibited subjects were found to be invalid, repealed, or modified by the Legislature.

After the Union ignored additional warnings about negotiating the prohibited subjects, the District filed an Unfair Labor Practice charge, claiming that it was a violation of the Public Employment Relations Act to insist on including unenforceable language in a successor contract. MERC upheld the charge and ordered the Union to cease and desist from making proposals involving the prohibited subjects of bargaining. The Union then appealed this decision to the Michigan Court of Appeals.

In reaching its decision to affirm the MERC decision, the Court of Appeals noted that the Union was free to "discuss" the prohibited subject s of bargaining, but once the District made it clear that the successor contract wouldn't include the unenforceable provisions, the Union violated its duty to bargain in good faith by continuing to make proposals dealing with the prohibited subjects.

B. *Shelby Twp v. Command Officers Assoc of Mich,* No. 32349 (Dec. 15, 2015)

In this case, the Township imposed contribution limits for employer-provided health care as required by the Publicly Funded Health Insurance Contribution Act, (2011 PA 152) without bargaining the issue. The Union filed an unfair labor practice charge against the Township, arguing that employers have a duty to bargain in good faith over mandatory subjects of bargaining, including the cost allocation of health insurance under PA 152. The Township implemented the percentage-limit option under MCL 15.564, which prohibits a public employer from paying more than 80% of the total annual costs of all of the medical benefit plans it offers.

On review, the MERC decided that the Township's choice between the hard caps and the 80/20 option was not a mandatory subject of bargaining. Even though the Commission decided that Public Employment Relations Act (PERA) did not obligate the Township to bargain over which options to select under Act, it decided that PERA obligated the Township to bargain over the calculation and allocation of the employee

premium share on the premise that PERA, as dominant legislation, demanded this conclusion. MERC also found that the Township violated PERA by incorrectly calculating the employees' share of the health insurance plan costs, by using the "unbundled" health insurance plan rates that included retiree health insurance costs to calculate the employee contributions.

The court of appeals affirmed the decision, emphasizing that MERC has sole jurisdiction to resolve issues involving unfair labor practice involving compliance with PA 152.

C. *Pontiac School Dist v Pontiac Education Assoc,* No. 322184 and No. 321221 (Sept. 15, 2015)

Case No. 322184 began with the Union filing a grievance protesting the District's practice of filing permanently vacant teaching positions with long-term substitute teachers. After multiple failed attempts to settle the grievance, the Union filed an unfair labor practice charge, alleging that the District violated a letter of agreement that provided: "All teaching positions covered by this agreement shall be staffed by teachers."

An Administrative Law Judge (ALJ) concluded, without a hearing, that Section 15(3)(j) of PERA should be "broadly interpreted to make all decisions over teacher placement prohibited subjects of bargaining," and, thus, a provision in a grievance settlement that embodies a prohibited subject of bargaining is unenforceable. The ALJ noted:

> *Had the parties merely agreed that [the District] would hire teachers to fill…vacancies instead of using long-term substitutes, the settlement agreement would not have constituted an agreement on a prohibited subject of bargaining. However, the agreement commits [the District] to place particular individuals in vacant positions, including positions vacant at the time of the agreement and positions to become vacant in the future.*

MERC agreed with the ALJ, holding that the settlement agreement was not binding, and the District's decision to rescind it was not a breach of its duty to bargain, because § 15(3)(j) provides that teacher placement is a prohibited subject of bargaining. The Commission emphasized, "providing recall rights to designated individuals" was not a subject that could be lawfully bargained.

The Court of Appeals affirmed MERC's decision, holding that "the settlement agreement contained a prohibited subject of bargaining, and once reduced to writing could not form the basis of an unfair labor practice charge because it was unenforceable.

In Case No. 321221, MERC rejected an unfair labor practice charge alleging that the District violated a collective bargaining agreement by distributing

questionnaires to students to elicit their aggregated opinions on teacher performance. The claim also alleged that the District violated PERA by involuntarily transferring a teacher.

After the collective bargaining agreement expired, the District required its teachers to participate in a student questionnaire program. The District stated that it would not use the questionnaire for evaluation purposes, but would use it to obtain student opinions about teacher performance. The distribution and collection of the questionnaire was a new requirement for teachers.

Simultaneously, the District involuntarily transferred a middle school teacher who engaged in misconduct. The Union claimed that past practice permitted unilateral transfers only in the context of a reduction in force, and not for disciplinary reasons.

An ALJ dismissed both claims, finding that both matters involved prohibited subjects of bargaining. MERC affirmed the ALJ's decision.

In upholding the decisions of MERC and the ALJ, the Court of Appeals concluded:

(1) The Union failed to meet its burden of proof as to whether the questionnaires increased the workload of their members such that the questionnaires became a mandatory subject of bargaining as they directly related to a term or condition of employment.

(2) The Union failed to provide a sufficient legal basis to reverse MERC's conclusion that provisions in an expired collective bargaining agreement are no longer mandatory subjects of bargaining and not enforceable due to being prohibited subjects of bargaining as a result of amendments to PERA.

(3) Placement decisions in relation to §15(3)(j) will necessarily be made by school administrators. There is no allegation or evidence that the administrator who transferred the middle school teacher lacked the authority to make that decision on behalf of the public school employer.

## III. Recent MERC Opinions

### A. Duty to Provide Information

***Wayne County and Michigan AFSCME Council 25 and its Affiliated Local 25,*** Case No: C13 E-090, September 26, 2014

In its decision and Order, MERC reversed the ALJ's finding that the County breached its duty to bargain by refusing to supply a copy of a photograph, related to an employee's discipline.

A photograph was used in a disciplinary hearing regarding a bargaining unit member to prove that the member assaulted another individual during the course of his work. The Union was able to view the photograph at the hearing, but the County refused to provide an unredacted copy of it unless the Union signed a non-dissemination agreement, which it refused to do. The Union was requesting a copy of the photo for the purposes of possibly pursuing a grievance in regard to the disciplinary action. When the photograph was not provided, the Union filed an unfair labor practice claim.

The ALJ found that the County violated its duty to bargain by refusing to supply the Union with an unredacted copy of the photograph.

On exceptions, MERC agreed with the County that by affording the Union multiple opportunities to view the original color photograph, and by agreeing to release the redacted photograph upon receipt of a signed non-dissemination agreement, it fulfilled its duty to bargain. MERC determined the County was justified in trying to preserve the photographed individual's privacy and the confidentiality of the photograph.

***County of Macomb and Michigan AFSCME, Council 25, AFL-CIO, and its Affiliated Local 411***, Case No. C11 L-215, September 26, 2014.

MERC reversed the ALJ's finding that the County violated its duty to bargain by refusing to provide the Union with copies of employment interview questions.

While the County was filling an employment position, a member of the bargaining unit represented by the Union interviewed for the position. Upon completion of the interview process, the bargaining unit member was notified that he wasn't selected for the position. In response to the decision, the Union filed a grievance contending that pursuant to the terms of the parties' collective bargaining agreement, the bargaining unit member should've received the position, based on his seniority.

During the course of pursuing the grievance, the Union requested a copy of the interview questions, as well as any written notes that interviewers made during Green's interview. The County was willing to allow the Union to review, but not photocopy, the interview questions. The Union didn't like that compromise and filed an unfair labor practice charge.

The ALJ found that the County was obligated to supply the requested information in order for the charging party to move forward in processing its grievance.

MERC reversed the ALJ's decision. It concluded that the County's offer to permit the Union to physically see, but not photocopy, the interview questions was reasonable, and reasoned that the offer both satisfied the Union's information request, and preserved the confidentiality of the interview questions by ensuring they were not shared with bargaining unit members outside of the Union's leadership.

Thus, the Union was unable to show that physical copies of the questions or interview notes were relevant and necessary to processing the grievance.

B. Right to Work Issues

***Taylor School District and Taylor Federation of Teachers, AFT, Local 1085 and Nancy Rhatigan, Rebecca Metz and Angela Steffke,*** Case Nos. C13 G-133 & CU13 G-029, February 13, 2015

Three employees of the Taylor School District challenged a bargaining agreement that included a Union Security agreement requiring bargaining unit members to pay either union dues or union service fees from February 7, 2013 to July 1, 2023. The agreement did not contain any other terms and conditions of employment for the bargaining unit.

MERC reversed the ALJ's finding that the employer did not violate § 10(1)(a) and (c) of PERA by entering into a ten-year Union Security Agreement. MERC held that the duration of the agreement was excessive and unreasonable, and it coerced the employees to financially support the Union, in addition to discriminating against them in an attempt to encourage membership in a labor organization.

MERC also determined that by imposing a lengthy financial burden on bargaining unit members in order to avoid the application of a law, the Union acted arbitrarily and recklessly, in violation of the duty of fair representation.

The case is currently on appeal to the Michigan Court of Appeals.

***Saginaw Education Association and Michigan Education Association and Kathy Eady-Miskiewicz, et al,*** Case No. CU13 I-054/13-013125-MERC and CU13 I-055/13-013127-MERC

In this case, MERC held that any union rule or policy that restricts a public employee's right to terminate union membership is a violation of PERA.

Essentially, this case involved a challenge to the MEA's August opt-out window. Article I of the MEA bylaws provides in relevant part: "The official membership year shall extend from September 1 through August 31 each year…Continuing membership in the Association shall be terminated at the request of a member

when such a request is submitted to the Association in writing, signed by the member and postmarked between August 1 and August 31 of the year preceding the designated membership year."

In its decision, MERC ordered the MEA to cease and desist from restraining and coercing employees in the exercise of their rights under §9 of PERA to refrain from joining or assisting labor organizations by maintaining or enforcing the rule contained in Article 1 of the MEA's bylaws, prohibiting members from resigning their union memberships except during the month of August.

The MEA has appealed this case to the Michigan Court of Appeals.

## IV. Orders Issued by Administrative Law Judges

### A. Wage Reopeners and Public Act 54.

***South Haven Public Schools and South Haven Bus Drivers Association,*** Case No. C14 L-144, Docket No. 14-035603- MERC

In this case, the Union filed an unfair labor practice charge claiming that the District froze wage step increases despite there being a collective bargaining agreement in effect. However, the agreement included a wage reopener during its term. The District treated the wage reopener as an expiration of the wage provision of the agreement and that under Public Act 54 it had to freeze the wages, including step increases, until a successor agreement over wages was reached and agreed to between the parties.

Public Act 54 states the following:

> [*A]fter the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases.*
>
> *"Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.*

The ALJ found the language in Public Act 54 is unambiguous and it only applies to the expiration of a collective bargaining agreement.

The ALJ concluded his recommended order with the following statement:

> [T]he primary objective of PERA is the prompt effectuation of labor peace, achieved through the existence of a mutually accepted collective bargaining agreement. Labor peace in the present matter, the primary objective of PERA, was accomplished through a multi-year collective bargaining agreement which included wage reopener clauses. I conclude that a literal application of [Public Act 54], in which the statute's prohibitions are not triggered absent the expiration of a collective bargaining agreement does not produce an unjust or absurd result contrary to the purpose of policy of PERA.

V. Conclusion.