STATE BAR OF MICHIGAN
LABOR & EMPLOYMENT LAW SECTION
MID-WINTER & ANNUAL MEETING
Friday, January 20, 2023

Presentation Topic:
MERC Case Highlights & Agency Updates
January 2022 through January 2023

Presenters:
MERC Chair Tinamarie Pappas & BER Director Sidney McBride

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Disclaimer: The following case summaries are offered for academic purposes only. They do not constitute either legal advice or legal authority, and do not modify, supplement or replace the actual MERC decisions issued in these matters.

ELECTION CASES

Community of Interest:

1. ***Richmond Community Schools v Michigan Education Association,*** Case No. 21-D-0875-RC, issued June 15, 2022. The District operates a series of preschool and childcare programs at one of its elementary school locations. The MEA filed a petition seeking to represent a group of employees assigned to the Childcare, Great Start Readiness, and Tuition Preschool programs that included "lead teachers, aides and childcare providers". The District refused to consent to an election citing a lack of a community of interest among the positions, along with fragmentation concerns, and the supervisory status of the lead childcare provider. The Employer further contended that many of these positions more appropriately belonged in other existing units represented by the MEA and Teamsters organizations. The Commission disagreed and ordered an election in the petitioned-for unit. MERC concluded that the various positions possessed sufficient community of interest to be placed into a single bargaining unit. Further, the record revealed that the majority of duties performed by the respective positions had large areas of overlap, and that some individuals moved between different positions on a daily basis. MERC also determined that the Lead Childcare Provider position was not a supervisor because its "supervisory authority" primarily related to "making work assignments of a routine nature" and providing input on discipline or retention concerns that may or may not be followed. Regarding the District's fragmentation argument, MERC concluded the because the other existing bargaining units were not interested in representing these positions, a decision to not place these positions in a single new unit would result in multiple new units. Therefore, placing them into a single, separate unit satisfied a primary objective of PERA by advancing the right of public

employees to be represented by a bargaining representative of their choosing, and avoided the additional "fractionalization or multiplicity of bargaining units."

Unit Clarification Denied for Inclusion of Confidential Employee:

2. ***Detroit Public Schools Community District -and- Detroit Association of Educational Office Employees*****,** 21-D-0915-UC-02, issued July 15, 2022. *This action is a bifurcation of the parent case (21-D-0915-UC) for which the ALJ scheduled evidentiary proceedings as to the remaining positions related to the initial UC petition.* The Detroit Association of Educational Office Employees (DAEOE) represents a bargaining unit consisting of clerical and technical employees of the Detroit Public Schools Community District (District). The DAEOE filed a unit clarification seeking the accretion of the Executive Administrative Specialist (EAS) position, an unrepresented position, into its existing bargaining unit. The District contended that the petition was inappropriate because the EAS had been in existence since 2017 and had historically been excluded from the unit due to the position's status as "confidential". The President of the DAEOE testified that she had knowledge of the EAS classification since 2018 but offered no explanation for the reason why the DAEOE seek unit clarification at that time. On that basis, the Commission dismissed the portion of the petition relating to the placement of the EAS position into the DAEOE unit as untimely and inappropriate.

Administrative Decision re: Spoiled Election Ballot:

3. ***City of Richmond -and- Michigan Fraternal Order of Police Labor Council -and- Police Officers Association of Michigan***, Case No. 22-C-0518-RC, issued August 9, 2022. Petitioner Union (MFOP) sought to replace the Incumbent Union (POAM) as the certified exclusive bargaining representative of an existing bargaining unit comprised of all full and part time patrol officers employed by the City of Richmond. As of the deadline for receipt of the returned mail ballots in the election, the MERC Elections Officer had received 12 of 13 possible ballots. Of those received, 11 had signatures on the return envelopes while the twelfth was unsigned. The MERC Elections Officer deemed the twelfth ballot to be spoiled because its return envelope was unsigned and, therefore, not compliant with the agency's mail ballot instructions that accompanied each mail ballot. The tally of the 11 signed ballots revealed that Petitioner won the election by a single vote. Subsequently, the Incumbent Union objected to the exclusion of the 12th ballot arguing that neither PERA nor the Commission's rules require a signature on a return ballot envelope, and that the questionable ballot could be determinative of the election's outcome. The Commission upheld the rejection of the ballot relying on more than 50 years of mail ballot elections and the agency's consistent practices. The Commission also took notice of the a similar envelope signature requirement by the NLRB, the federal agency counterpart to MERC that facilitates representation elections in private sector workplaces.

Union Disclaimer and Contract Bar:

4. ***Allegan County Road Commission -and- AFSCME Council 25,*** 22-C-0591-RC, issued January 13, 2023. AFSCME Council 25 filed a RC petition seeking to represent various positions, including forepersons employed by the Allegan County Road Commission. The unit had been previously represented by SEIU until it disclaimed interest in January 2022. At the time of SEIU's disclaimer of interest there was a collective bargaining agreement in effect with an expiration date of December 31, 2022. The Employer refused to consent to an election arguing that the petition was untimely filed prior to either the open window period or contract expiration. The Employer also challenged the inclusion of 6 positions-(foremen and chief mechanic classifications) on the basis of supervisory status. The Union disagreed asserting no contract bar

existed once the SEIU disclaimed interest, and that all of the positions were non-supervisory and appropriate based on the unit's longstanding existence. In a case of first impression, MERC held that SEIU's disclaimer of interest effectively nullified the CBA such that no valid contract existed for purposes of Section 14(1) of PERA. Accordingly, no contract bar existed as of the date the petition was filed. The Commission further concluded that the challenged individuals had historically been included in the unit, and that the Employer failed to present evidence of sufficient supervisory authority to warrant their exclusion from the unit.

UNFAIR LABOR PRACTICE CASES

ULP: BARGAINING CASES

School District Policy Change /Unilateral Implementation/Prohibited Subject

5. ***Hopkins Public Schools -and- Hopkins Education Association, MEA/NEA,*** Case No. 21-A-0196-CE issued June 2, 2022 (no exceptions). The ALJ concluded the District committed an unfair labor practice by unilaterally implementing a policy which precluded any teacher from advancing on the negotiated wage scale if he or she was rated ineffective on their annual performance evaluation, or received a minimally effective rating for two consecutive years. The District argued that it had the right to implement the policy because it covered a prohibited subject of bargaining under Section 15(3)(o) of PERA. The ALJ determined that while Section 15(3)(o) allows a school district a wide range of latitude to develop and implement a performance based standard of compensation, the negotiated wage scale remained mandatory subject of bargaining since "wages" were unaffected by the 2011 amendments to PERA. The ALJ noted that such a conclusion was consistent with the amended language of the State School Aid Act, which confirmed the requirement for school districts to bargain in good faith over wages. The ALJ determined that District's unilateral implementation/contract repudiation constituted bad faith bargaining in violation of PERA. He further concluded that the District's conduct during negotiations constituted additional bad faith bargaining. The ALJ rejected the District claims of equitable estoppel and waiver.(MERC adopted the ALJ's conclusions and recommended order as neither party filed exceptions.)

Prohibited Subject of Bargaining:

6. ***Van Buren Education Association MEA/NEA & Van Buren Public Schools***, Case No. 21-E-1225-CU, issued June 17, 2022. The parties' existing CBA agreement provided for "overage" compensation to any teacher with a semester enrollment that exceeded 175 students as of the official count day. After the onset of the COVID-19 pandemic, the District implemented virtual instruction for students. The Union filed a grievance on behalf of a teacher seeking overage compensation under the terms of the CBA, asserting the 175 student threshold applied to overall student enrollment regardless of in-person or virtual classes. The Employer denied the grievance asserting that it involved a prohibitive subject, specifically the decision to implement a pilot program involving new technology. The Union advanced the grievance to arbitration, and the Employer filed an unfair labor practice charge alleging that the Union's advancement of the grievance to arbitration implicated a prohibited subject because the teacher's increased workload was an impact or effect of its decision to use technology to deliver educational programs and services. The ALJ disagreed, finding the grievance and attempt to arbitrate did not violate PERA

because the Union's grievance did not challenge the District's implementation of the virtual teaching medium but only sought to enforce payment under the overage compensation provision in the CBA. The District filed exceptions challenging the ALJ's findings. The Commission first determined that any issue over whether the overage compensation provision in the CBA was intended to apply to virtual teaching assignments was a matter of contract interpretation to be resolved through grievance arbitration. The Commission further determined that the record contained no evidence that the higher enrollment assigned to this teacher was an "impact" or result of the implementation of technology through the virtual learning program, as opposed to some other factor such as teacher attrition. Consequently, the Commission adopted the ALJ's decision finding the Union's enforcement of the "overage pay" provision through grievance arbitration was not violative of PERA as it did not implicate a prohibited subject of bargaining.

7. ***Kalamazoo Education Association, MEA/NEA -and- Kalamazoo Public Schools,*** Case No. 21-G-1465-CU, issued October 11, 2022. The Kalamazoo Public Schools (District) notified an employee who had worked exclusively as a Guidance Counselor that upon her return from FMLA leave, she would be transferred to a classroom teaching position. The Kalamazoo Education Association (Union) filed a grievance challenging the transfer, and alleging that it violated the parties' agreement which permits an individual to return to her pre-leave position. When the Union demanded arbitration, the District filed a charge maintaining that the grievance involved "teacher placement," a prohibited subject of bargaining, and that the Union's attempt to arbitrate the grievance violated Section 10(2)(d). The ALJ agreed with the District and found a violation by the Union, primarily on the basis of his conclusion that in a prior decision, the Commission had adopted the definition of "teacher" as set forth in the Teacher Tenure Act. On exception by the Union, the Commission reversed the ALJ's findings that the Union violated 15(3)(j) and 10(2)(d), and found that no "teacher placement" decision was implicated. The Commission concluded that the plain and ordinary definition of a "teacher" within the phrase "teacher placement" under Section 15(3)(j) means a certificated individual employed by the involved school district as a teacher. The Commission clarified that contrary to the ALJ's conclusions, it had not adopted the definition of "teacher" set forth in the Teacher Tenure Act. Rather, its prior decision addressed whether an action by a school district constituted a "teacher placement" action and did not involve the definition of "teacher". The Commission ruled that the District's transfer of an individual who possessed a teaching certificate but was employed for the entirety of her employment as a Guidance Counselor and not as a teacher, was not a "teacher placement" decision under Section 15(3)(j). Therefore, the Union did not violate Section 10(2)(d) by attempting to arbitrate the grievance.

ULP: PROCEDURAL CASES

Statute of Limitations & COVID Based Filing Extension:

8. ***Allen Park Public Schools -and- Allen Park Education Association of Michigan,*** Case No. 20-I-1406-CE issued January 14, 2022. The Union filed a charge challenging the District's unilateral elimination of the consult hour previously allowed for certain special education high school teachers. The Employer responded that the matter was untimely filed; that the Union failed to make a bargaining demand; and that the change was permitted under the terms of the parties' existing contract. The ALJ held the charge was time barred and rejected the Union's contention that the statute of limitations under PERA had been extended by one of the Governor's COVID-19 executive orders that extended filing deadlines and/or statutes of limitations for civil and

probate court matters. Although the Union argued that it did not have notice of the change until a date within the six-month statute of limitations, the ALJ concluded that there was sufficient notice to the Union of the change more than six months prior to the filing of the charge based on the meetings and other communications between local union representatives and district managers. The ALJ further ruled that the Governor's COVID-19 order did not extend to MERC filings. The Union filed exceptions on the same grounds presented to the ALJ. The Commission rejected the exceptions and upheld the ALJ's dismissal due to the Union's failure to file the charge within the six-month statute of limitations under PERA.

Failure to State a Claim Under PERA:

9. ***Washtenaw Community College -and- Kimberly M. Dosey,*** Case No. 20-J-1938-CE, issued February 10, 2022. Charging Party was employed by Washtenaw Community College (Respondent) as a Recruitment and Outreach Specialist. Respondent terminated Charging Party for alleged misconduct stemming from her inappropriate sharing of restricted student data. Charging Party filed a charge alleging that her discharge was unfair, and based on age discrimination. ALJ Peltz recommended the charge be dismissed for failing to state a valid claim under PERA. Charging Party filed exceptions challenging the ALJ's conclusions. The Commission found Charging Party's claim that she was terminated due to her age to fall outside the jurisdiction of PERA, and further concluded that the exceptions were deficient because they failed to comply with Commission Rule 176.

Refusal to Bargain- Filing of Civil Suit in lieu of Participation in Section 312 Arbitration:

10. ***Wayne Professional Fire Fighters Union, Local 1620, International Association of Fire Fighters -and- City of Wayne,*** Case No. 20-L-1801-CE issued May 10, 2022. As part of an ongoing Act 312 arbitration proceeding, the Parties submitted their respective Final Offers of Settlement to the Act 312 Arbitrator. The Union's offer included a vested, lifetime, non-modifiable healthcare "stipend" to any eligible current member who retires under the term of the new contract. The Employer objected and filed an action in Circuit Court to (i) stay the Act 312 proceeding and (ii) challenge the 312 Arbitrator's authority to award a lifetime healthcare benefit. The Union responded by filing the instant charge asserting that the City's filing in Circuit Court violated section 10(1) (a) and (e) of PERA. The charge asserted that the Employer refused to bargain by seeking an outside remedy (Circuit Court) rather than participating in the Act 312 process authorized under PERA and Act 312. The ALJ concluded that a 312 Arbitrator is authorized to consider the Union's non-modifiable healthcare stipend proposal, and that the Employer violated its bargaining duty by initiating legal action in Circuit Court in lieu of proceeding with the 312 arbitration process. On exceptions, the Employer challenged the ALJ's conclusions. The Commission agreed with the ALJ's findings that the Employer violated its duty to bargain by frustrating the bargaining process. The Commission found that under well-established federal and state case law, a CBA may vest unalterable lifetime retirement healthcare benefits for employees retiring during the term of that agreement provided that the agreement is explicit and unambiguous, and, that contrary to the Employer's assertion, a Section 312 arbitrator could consider the cost to the Employer of such a benefit in rendering a 312 award. (NOTE: Case on appeal since 8-14-2022.)

APPELLATE DECISIONS

11. ***City of Detroit (Fire Department) -and- Detroit Fire Fighters Association, Local 344***, Case No. 19-C-0479-CE, On February 2, 2022, Michigan Court of Appeals reversed the Commission's prior decision in this case. MERC's decision found that the City violated PERA by unilaterally changing the terms and conditions of employment when it used data available from its newly acquired Zoll X Heart Monitor to discipline two bargaining unit employees without having first bargained with the Union over the use of the data. In that regard, MERC determined that because discipline was a mandatory subject of bargaining, the Employer was obligated to bargain with the Union before adding a new source of data based upon which it could impose discipline. The Court of Appeals disagreed with MERC's finding that the Zoll monitor data was "new" and concluded that the same data was already available from the prior monitoring equipment, and therefore, its use did not constitute a unilateral change of a mandatory subject of bargaining. On this basis, the Appellate Court remanded the case for MERC to issue a new order in favor of the City. Notably, the Appellate Court refrained from deciding whether the use of previously unavailable data from the new Zoll Monitor for disciplinary purposes would constitute a mandatory subject of bargaining. MERC issued a decision on remand on March 8, 2022 that was consistent with the appellate court's ruling.

12. ***Regents of the University of Michigan*****,** MERC Case No. 21-C-0630-RC. On July 21 2022, the Michigan Court of Appeals dismissed as moot the Michigan Nurse Association's challenge to MERC's Administrative determination on the sufficiency of an election petition and accompanying show of interest filed by a rival labor organization.

13. ***Professional Personnel of Van Dyke Schools & Van Dyke Schools***, MERC Case No. 20-C-0554-CU. On September 15, 2022, the Michigan Court of Appeals upheld the Commission's decision finding that the Union had not bargained in bad faith by seeking to arbitrate a grievance over compensation provided by the CBA for lunchroom duty. The Court of Appeals affirmed MERC's findings that the Union's grievance was directed only at an issue relating to compensation, which was a mandatory subject of bargaining. Like MERC, the Court of Appeals rejected the Employer's argument that because the Union had previously sought to negotiate over the assignment of teachers to such duties, its subsequent grievance was a subterfuge to mask an otherwise prohibited subject of bargaining, i.e. teacher placement. Both MERC and the Court of Appeals agreed that the Union had the right to enforce a contract provision relating to wages to be paid employees, because wages are a mandatory subject of bargaining.