STATE OF MICHIGAN
RICK SNYDER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN EMPLOYMENT RELATIONS COMMISSION
BUREAU OF EMPLOYMENT RELATIONS
RUTHANNE OKUN
DIRECTOR

SHELLY EDGERTON
DIRECTOR

April 17, 2018

Via Electronic Mail & U.S. Mail

Jeffrey S. Donahue
White Schneider, PC
1223 Turner Street, Suite 200
Lansing, Michigan 48906

Patrick J. Wright
Derk A. Wilcox
Mackinac Center Legal Foundation
140 W. Main Street
Midland, Michigan 48640

Re: Michigan Education Association, and its affiliate Ann Arbor Education Association, MEA/NEA -and- Ronald Shane Robinson
MERC Case No. CU16 B-008

Greetings:

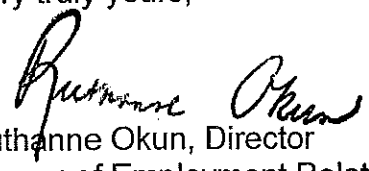
Enclosed is a True Copy of the Michigan Employment Relations Commission's Decision and Order in the above-entitled matter, which is being sent to you electronically, as well as by U.S. Mail. The date of mailing of the Decision should be considered the date of its issuance for purposes of an appeal.

Please note that this Order may be edited prior to publication in the Michigan Public Employee Reporter and posting on the MERC website. You are requested to immediately notify the MERC Labor Relations Secretary of any typographical errors or non-substantive errors, so that corrections may be made prior to formal publication and posting on the Commission's website. Please forward suggested revisions to merc-ulps@michigan.gov.

We anticipate that publication and posting will occur no earlier than five (5) days after the date of this letter; therefore, it is imperative that we receive your suggested revisions before that time.

Thank you for your cooperation and courtesies.

Very truly yours,



Ruthanne Okun, Director
Bureau of Employment Relations/MERC

cc: Michigan Education Association
Ronald Shane Robinson
casefile

TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION, and its affiliate
ANN ARBOR EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondents,

MERC Case No. CU16 B-008

-and-

RONALD SHANE ROBINSON,
Individual Charging Party.
_____/

APPEARANCES:

White Schneider P.C., by Jeffrey S. Donahue, for Respondents

Derk A. Wilcox and Patrick J. White, the Mackinac Center for Public Policy, for Charging Party

DECISION AND ORDER

On June 30, 2017, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order[1] on Motions for Summary Disposition in the above matter finding that Respondents, Michigan Education Association, and its affiliate Ann Arbor Education Association, MEA/NEA (Unions), violated § 10(2)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(a) by attempting to collect fees from Charging Party Ronald Shane Robinson after he had resigned his union membership. The ALJ also held that Respondents violated PERA by sending Charging Party a letter informing him that he was required to pay agency fees for the 2015-2016 school year. Respondents based their claim for agency fees on a March 18, 2013 memorandum of agreement (MOA) with Robinson's employer, which provided that bargaining unit members who were not union members would be considered agency shop fee payers. Based on the Court of Appeals decision in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017), the ALJ concluded that the agency fee provision was unlawful and unenforceable. She further found that Respondents' attempts to enforce the agency fee provision against Robinson unlawfully restrained or coerced Charging Party in the exercise of his § 9 right to refrain from financially supporting a labor organization and, thereby, violated § 10(2)(a) of PERA. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

[1] MAHS Hearing Docket No. 16-005071

After requesting and being granted an extension of time, Respondents filed exceptions and a brief in support of exceptions to the ALJ's Decision and Recommended Order on August 23, 2017. Charging Party also requested and was granted an extension of time. On October 3, 2017, Charging Party filed his brief in support of the ALJ's Decision and Recommended Order.

In their exceptions, Respondents contend that the ALJ erred by finding that Respondents' demands that Charging Party pay a service fee violated § 10(2)(a) of PERA. Respondents contend that she erred in her analysis and application of the Court of Appeals decision in *Taylor Sch Dist*, and by finding that this matter was not distinguishable from *Taylor*.

In its brief in support of the ALJ's Decision and Recommended Order, Charging Party contends that the ALJ findings were based on applicable law and should be affirmed.

We have reviewed the exceptions filed by Respondents and find that the arguments raised therein would not change the result in this matter.

Factual Summary:

The material facts in this case are not in dispute and are based on the documents submitted by the parties.

Charging Party is a teacher employed by the Ann Arbor Public Schools (the Employer). He is a member of the bargaining unit represented by Respondent, Ann Arbor Education Association, MEA/NEA (AAEA). On April 14, 1993, he joined the AAEA and signed a continuing membership application.

The AAEA entered into a collective bargaining agreement (Master Agreement) with the Employer covering the period of August 28, 2009 through August 30, 2011. The Master Agreement included an agency shop provision under Article 3.00 of the agreement, titled "Association Rights." Under the terms of Article 3.00 of the agreement, bargaining unit members who failed to submit a union membership form, would be considered agency shop fee payers. Article 3.00 required the employer to deduct membership dues or agency fees from employees' paychecks. Article 3.00 does not list any remedy for the union if the employer fails to deduct the dues or fees and the employee fails to remit the dues or fees[2]. On June 14, 2010, the AAEA and the Employer extended the collective bargaining agreement through the 2011-2012 school year.

On March 16, 2012, 2012 PA 53 (Act 53) was enacted and given immediate effect. Act 53 amended § 10(1)(b) of PERA, MCL 423.10(1)(b), by prohibiting public school employers from assisting labor organizations in collecting union dues or service fees. However, where the

[2] In our recent decision regarding union security/agency shop provisions, *Clarkston Cmty Sch*, 31 MPER 26 (2017), the collective bargaining agreement provided that if an employee failed to pay agency fees, the union could require the employer to begin proceedings to terminate the employee. There is no similar language in the provisions of the collective bargaining agreement, the MOAs, or the TAs between the Ann Arbor Public Schools and the Ann Arbor Education Association with which we have been provided.

public school employer collected dues or service fees pursuant to a collective bargaining agreement that was in effect on the effective date of Act 53, the prohibition did not apply until that contract expired.

On July 11, 2012, the AAEA and the Employer entered into a memorandum of agreement covering certain aspects of their relationship during the 2012-2013 school year. That agreement did not address the Association Rights language of the 2009 to 2011 Master Agreement.

Act 349

On December 11, 2012, the Michigan Legislature passed 2012 PA 349 (Act 349), which became effective March 28, 2013. Act 349 amended § 9 of PERA by adding subdivision (b) to subsection 9(1) and by adding subsections (2) and (3). Subdivision (b) of subsection 9(1) expressly gives public employees the right to refrain from union activity. Section 9 as amended provides in relevant part:

> (1) Public employees may do any of the following:
>
> > (a) Organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice.
> >
> > (b) Refrain from any or all of the activities identified in subdivision (a).
>
> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> > (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
> >
> > (b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.
> >
> > (c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.
>
> (3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

Act 349 also amended § 10 of PERA by eliminating the language previously contained in § 10(1)(c) and § 10(2). Before the enactment of Act 349, § 10(1)(c) included the following language:

> However, this act or any other law of this state does not preclude a public employer from making an agreement with an exclusive bargaining representative as described in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

Before Act 349 was enacted § 10(2) of PERA provided:

> It is the purpose of 1973 PA 25 to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee that may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

The above quoted language from § 10(1)(c) and § 10(2) was eliminated when Act 349 was adopted. Section 10 as amended provides in relevant part:

> (2) A labor organization or its agents shall not do any of the following:
>
> > (a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. This subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.
> >
> > (b) Restrain or coerce a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.
> >
> > (c) Cause or attempt to cause a public employer to discriminate against a public employee in violation of subsection (1)(c).
> >
> > (d) Refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees, subject to section 11.
>
> (3) Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:

(a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.

(b) Become or remain a member of a labor organization or bargaining representative.

(c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.

(d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

* * *

(5) An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after March 28, 2013.

* * *

(8) A person, public employer, or labor organization that violates subsection (3) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

* * *

(10) Except for actions required to be brought under subsection (6), a person who suffers an injury as a result of a violation or threatened violation of subsection (3) may bring a civil action for damages, injunctive relief, or both. In addition, a court shall award court costs and reasonable attorney fees to a plaintiff who prevails in an action brought under this subsection. Remedies provided in this subsection are independent of and in addition to other penalties and remedies prescribed by this act.

Agreements between the Respondents and the Employer after the Enactment of Act 349

On March 18, 2013, Robinson's employer and the AAEA executed and ratified a memorandum of agreement (2013 MOA) in which the parties agreed to provisions covering several issues including potential changes in the health insurance plan, a change in the grievance procedure, a 3% salary reduction for bargaining unit members during the 2013-2014 school year, and several other changes. Part of the agreement provided that the agency shop provision

in the parties' last collective bargaining agreement would be effective immediately upon ratification of the MOA and would continue in effect through June 30, 2016.

According to separate affidavits signed by the Union's president, Linda Carter, and the Employer's deputy superintendent of human resources, David A. Comsa, they were each involved in the negotiations for the 2013 MOA. Ms. Carter asserts that they "did not intend to circumvent, violate, or delay any state statute or law. To the contrary, the parties intended to fully comply and faithfully act in accordance with the law that was in effect at the time they reached their agreement." Similarly, in his affidavit, Mr. Comsa asserts that "the parties intended to fully comply and faithfully act in accordance with the law that was in effect at the time they reached their agreement."

The parties entered into a subsequent MOA in 2014 that addressed certain issues affecting terms and conditions of employment for the 2014-2015 school year. That agreement did not address the agency shop provision in the collective bargaining agreement, nor did it mention the 2013 MOA.

In 2015, the parties entered into another MOA, which took effect on July 1, 2015 and expired June 30, 2016. The 2015 MOA was entered into on the same day as a tentative agreement addressing certain issues affecting terms and conditions of employment and adopting the Agency Shop provisions of the last expired agreement. The 2015 MOA provided that the Agency Shop agreement previously entered into continues until June 30, 2016.

Charging Party Ronald Shane Robinson

On or about August 1, 2015, Charging Party sent two letters to the Respondents. One letter was dated August 1, 2015 and gave notice that he was no longer a member of the AAEA, the MEA, or the NEA as of August 1, 2015. In the other letter, which was undated, Robinson stated that he was seeking to exercise his rights under Michigan's Right to Work law, was terminating his membership in the MEA and its affiliates and was revoking any previous dues authorization or continuing membership form that he may have signed. Robinson further stated that if the collective bargaining agreement did not allow him to take advantage of his rights under the Right to Work law, he wanted to be considered an agency fee payer.

In a letter dated August 31, 2015, the MEA informed Charging Party that his resignation from membership in the MEA and its local and national affiliates was accepted effective September 1, 2015, and that he owed the MEA $1363.47 for dues accrued through the effective date of his resignation. By letter dated December 18, 2015, the MEA notified Robinson that his collective bargaining agreement contains a provision requiring him to join the union or pay a service fee. Accompanying the letter was a thick packet of information regarding the calculation of the MEA service fee and the NEA service fee, along with a service fee election form, a payroll deduction form, and an Association membership form. The letter also included instructions for Robinson to return the signed service fee election form, along with either the completed payroll deduction form or payment for the pro rata amount of the service fee, by January 19, 2016.

Respondents contend that Robinson could have checked the box indicating that he objected to the payment of fees for non-collective bargaining purposes and that he would pay a reduced agency fee by checking a box on the service fee election form. Respondents also assert that Robinson could have challenged the amount of the reduced agency fee by indicating that he would submit to the challenge procedure described in materials included with the December 18, 2015 letter. Robinson did not do so. Respondents claim that as of April 6, 2016, Robinson owes the MEA "approximately $577.92 in service fees for the 2015-2016 school year."

Discussion and Conclusions of Law:

Respondents contend that the Court of Appeals decision in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017) is not relevant to this case because Charging Party has not filed a charge against the Ann Arbor School Board. Respondents argue that there are other factual distinctions between this and the *Taylor* case. Respondents assert that Charging Party's arguments are based on whether the 2014 and 2015 memoranda of understanding were extensions or renewals of the agency shop clause from the prior 2013 MOA.

According to Respondents, § 10(5) of PERA makes lawful any union security agreement that was in effect prior to the effective date of Act 349. Respondents note that the *Taylor* majority held that § 10(5) only applies to agreements that violate § 10(3) of PERA. Respondents contend that such a reading of § 10(5) renders it meaningless.

Respondents Contention That the *Taylor* Court's Reading of § 10(5) Renders It Meaningless

In *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017), the Court of Appeals concluded that § 10(5) only applies to agreements that violate § 10(3). Section 10(5) provides:

> An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after March 28, 2013.

In analyzing the second sentence of that provision, the *Taylor* majority explained, "'This subsection' is MCL 423.210(5), which by its terms expressly applies only to agreements that violate subsection (3) of section 10, MCL 423.210(3)." *Taylor Sch Dist* at 631. Noting that MERC did not find a violation of § 10(3), the Court stated:

> Moreover, the fact that the Legislature expressly restricted the applicability of that statutory limitation to agreements that violate MCL 423.210(3) speaks volumes. A judicial extension of that limitation to *all* agreements made before the effective date of 2012 PA 349 that violate *any* provision of PERA would contravene the plain language of the statute. *Id.* at 631-632.

Therefore, in enacting § 10(5) it is evident that the Legislature recognized it was likely that there were collective bargaining agreements in effect at the time of the adoption of Act 349

that would violate the newly enacted language of § 10(3). Apparently, the Legislature enacted § 10(5) to avoid invalidating collective bargaining agreement provisions that made payment of union service fees a condition of employment and that were adopted in reliance on § 10(2) of PERA as that provision was worded prior to the adoption of Act 349. Given the wording of § 10(2) at the time that Act 349 was enacted, it appears that the Legislature wanted to allow the union security provisions in those pre-Act 349 collective bargaining agreements to be lawful until the agreed upon expiration date of those agreements.[3]

Section 10(5) provides that an agreement that violates § 10(3) and takes effect, is extended, or is renewed after March 28, 2013, is unlawful and unenforceable. Therefore, if an agreement requires a public employee "as a condition of continuing public employment," to "become or remain a member of a labor organization or... pay any dues, fees, assessments, or other charges, or expenses of any kind or amount," that agreement is unenforceable unless it took effect prior to March 28, 2013.

To determine whether the 2013 MOA is lawful pursuant to § 10(5), we must determine whether enforcement of the 2013 MOA would constitute a violation of § 10(3). That requires a closer look at the language of the 2013 MOA, which purports to make the Association Rights provision of the 2009-2011 Master Agreement effective for the period of March 18, 2013 through June 30, 2016. The 2013 MOA adopts the language of the Association Rights provision, with some additional language, and states in relevant part:

> 3.000 ASSOCIATION RIGHTS
>
> 3.100 Membership Fees and Payroll Deductions
>
> 3.110 Payroll Deductions, Membership or Representation Fees
>
> 3.111 Teachers shall either submit a membership form or shall be considered agency shop fee payers to Association.
>
> 3.112 Agency shop fees shall be determined by the Michigan Education Association in accordance with the law and Federal Court Decisions, and shall be reported by the Association as provided below. Any challenge by a bargaining unit member regarding the payment of service fees, or the amount thereof, shall be subject to the Association's internal appeal process for determining the appropriate fees and shall not involve the employer in any

[3] We note that we have encountered two kinds of union security agreements in cases involving Act 349. In some cases, the union security agreements have provided that if the employee fails to pay union dues or fees, the union can require the employer to initiate proceedings to terminate that employee's employment. See e.g. *Clarkston Cmty Sch*, 31 MPER 26 (2017), where we found that a union security agreement that was entered into by the union and employer after Act 349 became effective and authorized the employer to terminate the employment of employees who failed to pay union dues or fees was unlawful. In other cases, the union and the employer entered into the union security agreement before the effective date of Act 349, but the agreement did not violate § 10(3) because nothing in the union security agreement conditioned continued employment on payment of union dues or fees. That is the type of union security agreement present in this case and in *Ann Arbor Ed Assn*, Case Nos. CU15 K-040 & CU16 B-006, which is being issued concurrently with this decision.

manner. The hold harmless provisions of Sections 3.11 5.1 through 3.11 5.4 are hereby specifically incorporated into this Section

***

3.114 Payment of membership dues or financial responsibility fees shall be made in twenty (20) equal deductions beginning the second paycheck in September and continuing through the twentieth (20th) consecutive paycheck. Payroll deductions on one's assessments and for a teacher shall cease upon termination of said teacher's employment.

3.115.1 In the event of any action against the Board brought in a court or administrative agency because of its compliance with Section 3.110 of this agreement, including but not limited to any and all actions brought pursuant to Michigan's "Right to Work" legislation, MCL 423.209 and 423.210, the Association agrees to defend such action, at its own expense and through its own counsel ...

***

3.120 Remittance of *Deductions*

3.121 *The Board shall within ten (10) days after each deduction is made, remit to the Association the total amount deducted for that period, including dues, assessments and fees for the Association,* MEA, and NEA, accompanied by a list of teachers from whose salaries the deduction has been made.

3.122 The Board shall not be responsible for collecting any such dues, assessments, or fees not authorized to be deducted under Section 3.110

3.123 Notwithstanding any other provision of this Agreement, *in the event that Michigan law prohibits the employer from assisting in collecting dues or service fees from wages then the law will supersede any and all provisions to the contrary and collection of dues or service fees shall be within the exclusive province of the Association* without any further obligation/liabilities attributable to the employer (emphasis added).

It is clear from the wording of the Association Rights provision, as adopted by the 2013 MOA, that the provision is about the Employer's obligation to deduct union membership dues and agency fees from the paychecks of bargaining unit members. The Employer is only authorized to make those deductions if doing so is lawful. At the time that the parties entered into the 2013 MOA, 2012 PA 53 (Act 53), § 10(1)(b) of PERA, had been enacted and public school employers were prohibited from deducting union dues or fees from employees' wages. Accordingly, to the extent that the Association Rights provision in the 2013 MOA requires the Employer to deduct dues or fees from public school employees' wages, § 10(1)(b) of PERA makes it unenforceable.

Section 10(3) of PERA prohibits requiring an individual to "become or remain a member of a labor organization or . . . [p]ay any dues, fees, assessments, or other charges, or expenses of any kind or amount," as a condition of obtaining or continuing public employment. The Association Rights provision categorizes those teachers who do not submit a membership form as "agency shop fee payers." It sets the means by which agency shop fees are determined and provides for payroll deduction of those fees unless the law prohibits the Employer from deducting such fees from employees' wages. Since the Employer is prohibited under Act 53 from deducting agency fees from employees' wages, it is up to the Union to collect any dues or fees to which it is entitled. The Association Rights provision does not provide any mechanism by which the Union is to collect dues or fees. Nothing in the Association Rights provision authorizes the Employer or the Union to take any action affecting the employment of a bargaining unit member who fails or refuses to pay union dues or fees. Therefore, the Association rights provision does not make payment of dues or fees to the Union a condition of continued employment and is not a violation of § 10(3). Accordingly, we agree with the ALJ's comments in footnote in 3 of her Decision and Recommended Order.

The language of the Association Rights provision in this case is very different from the union security language in the Commission's most recent decision regarding union security/agency shop provisions, *Clarkston Cmty Sch*, 31 MPER 26 (2017). In *Clarkston*, the union security language in the collective bargaining agreement specifically provided "Notification from the Association President of failure to pay the service fee will result in employment termination at the close of the school year." Therefore, a school employee who failed or refused to pay union dues or fees, while that union security clause was lawful, could have been discharged from employment with the Clarkston Community Schools. In *Clarkston*, we found that the union security provision at issue violated § 10(3) of PERA. There is no similar language in the collective bargaining agreement, the 2013 MOA, or in other documents submitted into the record of this case. If the union security provision at issue in *Clarkston* had been entered into before Act 349 was enacted, the second sentence of § 10(5) would have been applicable and the union security provision would have been lawful. It is, therefore, apparent that § 10(5) is not meaningless; the Legislature merely chose to limit its applicability to specific circumstances.[4]

Respondents would have the Commission find that the 2013 MOA is lawful pursuant to § 10(5), because the 2013 MOA was adopted prior to March 28, 2013. However, § 10(5) specifically applies to agreements between a public employer and a labor organization or bargaining representative that were lawful when the agreements were entered into but would now be unlawful under § 10(3) but for the Legislature's intention to allow such agreements to continue until their original expiration date. Regardless of the date that the MOA was entered

[4] We recognize the incongruity of finding that a union security agreement entered into before the effective date of Act 349 that does not jeopardize employment is unlawful, when another union security agreement entered on the same date would be both lawful and enforceable because that agreement conditions continued employment on the payment of union dues or fees. However, on this issue, we are required to follow the opinion of the Court of Appeals majority in *Taylor Sch Dist v Rhatigan*, 318 Mich App 617 (2017).

into in this case, it does not violate § 10(3). Therefore, § 10(5) does not apply and does not render the 2013 MOA lawful.

Differences between This Case and the *Taylor* Case

Respondents point to the fact that in the *Taylor Sch Dist v Rhatigan,* 318 Mich App 617 (2017), the Court majority concluded that the union breached its duty of fair representation under § 10(2)(a) and (c) and specifically noted that the union executed a ten-year union security agreement "almost contemporaneously with a CBA that included a 10% reduction in wages, suspension of pay increases, and other conditions that negatively impacted the wages and benefits of the teacher employees of the school district." *Taylor* at 642. Considering the circumstances, the Court majority found that it was reasonable for MERC to conclude that the union breached its duty of fair representation by entering into the union security agreement to its own financial advantage though it would "essentially subvert and undermine the plain language and intent of state law in a manner that was reckless and indifferent to the interests of persons to whom it owed a duty of fair representation." *Taylor* at 642-643.

Clearly there are factual differences between this case and *Taylor*. In this case, the MOA containing the agency shop provision was for just over three years, not 10 years as in *Taylor*. Additionally, while there were changes to employees' wages, those changes are not nearly as detrimental as the 10% wage reduction and suspension of pay increases in the *Taylor* case. Here employees were subjected to a 3% wage reduction for the 2013-2014 school year but continued to move up the salary schedule. Moreover, it is not evident from the record that the changes to employees' wages in this case were the quid pro quo for the three-year agency shop provision.[5] However, despite the differences between this matter and the *Taylor* case, Respondent's actions are unlawful.

Respondents further contend that contrary to the *Taylor* majority's finding regarding the intent of the respondents in that case, Respondents herein did not intend to limit their members' rights to refrain from financially supporting the union. Respondents point to the two affidavits signed by the Union's president, Linda Carter, and the Employer's deputy superintendent of human resources, David A. Comsa, in which they assert that they "intended to fully comply and faithfully act in accordance with *the law that was in effect the time they reached their agreement*" (emphasis added). The former § 10(2) of PERA was in effect at the time they reached their agreement. At that time, that provision was merely days away from being repealed and replaced by the language of Act 349.

[5] In our decision in *Ann Arbor Ed Assn*, Case Nos. CU15 K-040 & CU16 B-006, which is being issued concurrently with this decision, we discuss the facts, present in the record in this case and in that one, regarding the changes in the terms and conditions of employment that occurred during between 2010 and 2015. We found that the evidence indicated that the wage reductions were bargained in the context of the financial difficulties experienced by the Employer and did not support a conclusion that Respondent AAEA agreed to reductions in employee compensation to obtain the Employer's agreement to the union security provision. Since there was no finding in this case that the union put its own interests before those of bargaining unit members, we see no need to address the issue in depth in this decision.

It is apparent that Respondents tried to prolong the applicability of the version of § 10(2) that was repealed by Act 349. However, Respondents' intent is immaterial. Act 349 does not contain a scienter requirement. As we said in *Clarkston Cmty Sch*, 31 MPER 26 (2017):

> Respondents' motives in entering into unlawful union security provisions that violate the PERA-protected rights of public employees are not relevant to the determination of whether Respondents required Charging Party to pay service fees to a labor organization as a condition of continuing public employment.

In this case, Respondents did not attempt to require Charging Party to pay service fees as a condition of continuing public employment. Nevertheless, they did attempt to require Charging Party to pay service fees after Charging Party had resigned his union membership and after Act 349 became effective.

Conclusion

Act 349 had been in effect for over two years when Respondents demanded that Charging Party pay agency fees to the Unions on December 18, 2015. Since March 28, 2013, Charging Party has had the right under § 9 of PERA to refrain from financially supporting a labor organization unless he is covered by a lawful union security agreement or he has willingly and knowingly waived his right to refrain from financially supporting that labor organization. Neither of those things occurred. Charging Party ended his membership in the Unions and had no further obligation to pay union dues. In the absence of a lawful union security provision, Charging Party had no obligation to pay agency fees, and Respondents cannot legally require him to pay such fees. Accordingly, by demanding that Charging Party pay agency fees that he does not owe, Respondents have unlawfully restrained or coerced him in the exercise of his right under § 9 of PERA to refrain from financially supporting a labor organization. By so doing, Respondents have violated § 10(2)(a) of PERA.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we find Respondents' exceptions to be without merit and affirm the Administrative Law Judge's decision. Accordingly, we issue the following Order.

ORDER

Respondents Michigan Education Association and Ann Arbor Education Association, their officers, agents, and representatives, are hereby ordered to cease and desist from:

1. Restraining or coercing Ronald Robinson in the exercise of his right guaranteed by § 9 Section 9 of PERA to refrain from contributing to the financial support of a labor organization by demanding that he pay them a service fee for the 2015-2016 school year after he resigned his union membership in August 2015.

2. Post the attached notice to members in all places on the premises of the Ann Arbor Public Schools where notices to bargaining unit members are customarily posted for a period of 30 consecutive days or, in the alternative, mail copies of this notice to all unit members within 30 days of the date of this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: APR 17 2018

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY RONALD SHANE ROBINSON, AN INDIVIDUAL, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **MICHIGAN EDUCATION ASSOCIATION AND THE ANN ARBOR EDUCATION ASSOCIATION** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY THE MEMBERS OF OUR BARGAINING UNIT THAT:

WE WILL NOT restrain or coerce Ronald Shane Robinson in the exercise of his right guaranteed by § 9 of PERA to refrain from contributing to the financial support of a labor organization by demanding that he pay a service fee for the 2015-2016 school year after Robinson resigned his union membership in August 2015.

MICHIGAN EDUCATION ASSOCIATION AND ANN ARBOR EDUCATION ASSOCIATION

By: _____

Title: _____

Date: _____

If this notice is not mailed to members, it must remain posted for a period of 30 consecutive days and must not be altered, defaced, or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. CU16 B-008

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION, and its affiliate
ANN ARBOR EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondents,

Case No. CU16 B-008
Docket No.16-005071-MERC

-and-

RONALD SHANE ROBINSON,
Individual Charging Party.
/

APPEARANCES:

White Schneider P.C., by Jeffrey S. Donahue, for Respondents

Derk A. Wilcox and Patrick J. White, the Mackinac Center for Public Policy, for Charging Party

DECISION AND RECOMMENDED ORDER
ON MOTIONS FOR SUMMARY DISPOSITION

On February 26, 2016, Ronald Shane Robinson, who is employed as a teacher by the Ann Arbor Public Schools (the Employer), filed an unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against his collective bargaining representative, the Michigan Education Association (MEA) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. The charge was later amended to add Respondent's local affiliate, the Ann Arbor Education Association, MEA/NEA (AAEA), as co-Respondent. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On April 20, 2016, Respondent MEA filed a position statement in response to the charge and a motion for summary dismissal. On June 3, 2016, Robinson filed a response in opposition to Respondent's motion and a counter-motion for summary disposition. He also amended his charge to add the AAEA as Respondent. On August 16, 2016, Respondents filed a response in opposition to Robinson's motion. I held oral argument on both motions on August 29, 2016.

Based on facts as set forth below and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

As stated above, Robinson is employed as a teacher by the Employer and is a member of a bargaining unit represented by Respondents. Robinson was a member of Respondents from 1993 until he resigned his membership in August 2015. Respondent MEA acknowledged Robinson's resignation by letter dated August 31, 2015. However, on December 18, 2015, the MEA sent Robinson a copy of the form letter and information packet that it sends annually to individuals covered by collective bargaining agreements with so-called "agency fee" clauses and who have chosen not to be union members. The letter Robinson received stated that his collective bargaining agreement contained a provision which required him to either join Respondents or pay a service fee, but did not include any details about this agreement. Included in Robinson's packet was a form that Robinson was to fill out that gave him several options for either becoming a member or paying a service fee. Robinson did not return the form. On February 15, 2016, Robinson received a bill from the MEA for $495.36, the amount that Respondents claimed he owed as a service fee for the 2015-2016 school year. Robinson alleges that Respondents violated Section 10(3)(c) of PERA, and its duty of fair representation under Section 10(2)(a), by demanding that Robinson pay a service fee after he resigned his union membership.

2012 PA 349:

2012 PA 349 (Act 349) Act 349 was adopted by the Legislature and signed into law by Governor Rick Snyder in December 2012, with an effective date of March 28, 2013. Act 349 amended multiple sections of PERA, including Sections 9 and 10. Section 9 of PERA sets out the rights of public employees protected by PERA. These include the rights to form, join, or assist a labor organization. Act 349 added to this section an explicit right to refrain from engaging in any or all of the other activities listed in Section 9. It also added a new Section 9(2) and 9(3), which read as follows:

> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> > (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
> >
> > (b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.
> >
> > (c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

(3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

Section 10(1)(c) of PERA prohibits an employer from discriminating with respect to terms and conditions of employment in order to either encourage or discourage union membership. Act 349 removed the proviso to Section 10(1)(c) of PERA stating that public employers were not precluded by this section or any law of this state from making an agreement with the exclusive bargaining agent requiring employees to pay a service fee to a union as a condition of employment.

Act 349 also added a new Section 10(3), which reads:

(3) Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following[1]:

(a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.

(b) Become or remain a member of a labor organization or bargaining representative.

(c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.

(d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

New Sections 10(8) and 10(10) state that persons, public employers or labor organizations that violate Section 10(3) are liable for a civil fine of not more than $500, payable to the state treasury, and that a person who suffers injury as a result of a violation or threatened violation of Section 10(3) can bring a civil action for damages and/or injunctive relief.

Finally, Section 10(5), another new subsection, states:

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[1]Section 10(4) allows the employers of public safety employees, and their bargaining representatives, to continue to enter into agreements requiring employees to contribute to the financial support of their bargaining representative.

(5) An agreement, contract, understanding, or practice between or involving a public employer, labor organization, or bargaining representative that violates subsection (3) is unlawful and unenforceable. *This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after the effective date of the amendatory act that added this subsection.* [Emphasis added]

Facts:

The 2013 MOA and Background

In 2009, Respondent and the Employer entered into a collective bargaining agreement, titled "Master Agreement," with an expiration date of August 30, 2011. Section 3.00, titled "Association Rights," included the following language:

3.000 ASSOCIATION RIGHTS

3.100 Membership Fees and Payroll Deductions

3.110 Payroll Deductions, Membership or Representation Fees

3.111 Teachers shall either submit a membership form or shall be considered agency shop fee payers to [the] Association.

3.112 Agency shop fees shall be determined by the Michigan Education Association in accordance with the law and Federal Court Decisions, and shall be reported by the Association as provided below.

***

3.114 Payment of membership dues or financial responsibility fees shall be made in twenty (20) equal deductions beginning the second paycheck in September and continuing through the twentieth (20^{th}) consecutive paycheck. Payroll deductions on one's assessments and for a teacher shall cease upon termination of said teacher's employment.

3.115.1 In the event of any action against the Board brought in a court or administrative agency because of its compliance with Section 3.110 of this agreement, the Association agrees to defend such action, at its own expense and though its own counsel ...

***

3.121 The Board shall within ten (10) days after each deduction is made, remit to the Association the total amount deducted for that period, including dues, assessments and fees for the Association, MEA, and NEA, accompanied by a list of teachers from whose salaries the deduction has been made.

3.122 The Board shall not be responsible for collecting any such dues, assessments, or fees not authorized to be deducted under Section 3.110.

On or about June 14, 2010, the Employer and Respondent entered into an agreement that substantially altered a number of provisions in the Master Agreement. This agreement also extended the amended agreement Master Agreement through the 2011-2012 school year and subsequent school years until the Employer's revenues rose by a stated amount. The June 14, 2010, agreement did not alter Section 3.000.

In March 2012, PERA was amended to make it unlawful for a public school employer, like the Employer, to deduct union dues or fees from the paychecks of employees.

In December 2012, Act 349 was passed by the Legislature and signed into law. Because the Legislature did not vote to give Act 349 immediate effect, it did not become effective until March 28, 2013.

On March 18, 2013, Respondent and the Employer entered into a MOA which embodied their agreement on a number of mandatory bargaining subjects, including an across-the-board three percent salary reduction beginning with the 2013-2014 school year. The 2013 MOA included these paragraphs:

4. The parties agree to the 3.00[sic] Association Rights amendments. If the parties ratify this memorandum of agreement on or before March 27, 2013, Article 3.00 shall be effective immediately upon ratification of the agreement by both parties and shall continue in effect through June 30, 2016.

* * *

7. This memorandum does not supersede or replace the agreement between the AAEA and AAPS [District] entered into on or about June 14, 2010.

***

9. The parties agree that should any legislation or administrative rule(s) be passed which would result in any penalties to the District (financial or otherwise) as a result of entering into the 3 year extension of Article 3.00, Article 3.00 will be modified or if necessary deleted, so that it complies with and is not in violation of any legislation or administrative rule(s) so that any penalties (financial or otherwise) will not impact the District in any manner.

Attached and made a part of the 2013 MOA was a redrafted Section 3.000. The redraft stated that in the event that Michigan prohibited the employer from assisting in collecting dues or service fees from wages this law would supersede any and all provisions to the contrary, and the collection of dues and service fees would be the exclusive responsibility of Respondents. Also added was language stating that Section 3.000 would be effective upon ratification of the 2013 MOA agreement and continue in effect through June 30, 2016.

2014 and 2015 Agreements

On June 20, 2014, Respondent and the Employer executed another MOA which incorporated their agreement on certain subjects for the 2014-2105 school year only. The June 2014 MOA did not mention Section 3.000, agency shop, or service fees. In August 2015, the Respondent and Employer signed three documents. All three were dated August 11, 2015. The first document, titled tentative agreement, began with a statement that the Respondent and Employer had reached a successor agreement for the 2015-2106 school year, the term of which was to be July 1, 2015, to June 30, 2016. This was followed by nine numbered paragraphs incorporating their agreement on various subjects. The final paragraph of this first document said, "In all other respects, excluding prohibited subjects, except as stated herein or in the accompanying letter of agreement, the terms and conditions of the expired agreement shall continue." The second document was a MOA stating that the parties agreed that Respondent was permitted and encouraged to give input on and participate in the development of policies pertaining to prohibited subjects of bargaining. The third document, another MOA, stated that the parties agreed that "the Agency Shop Agreement, previously entered into continued until June 30, 2016."

Demand that Robinson Pay a Service Fee

As stated above, Robinson was a member of Respondents until he sent Respondents a letter, on August 1, 2015, resigning his membership. On August 31, 2015, Respondent sent Robinson a letter acknowledging his resignation. The letter told Robinson he owed $1,363.47 in unpaid dues that had accrued before the date of his resignation. Respondent did not tell Robinson in this letter that he continued to have an obligation, as a non-member, to pay a service fee. Robinson paid the amount in the letter.

On December 18, 2015, Respondent sent Robinson a copy of the form letter and information packet it sent annually to non-members required to pay a service fee. Robinson's letter stated that his collective bargaining agreement contained a provision which required him to join Respondent or pay a service fee. Along with financial statements and information about Respondent's expenditures, the packet included a document entitled "Service Election Form" with four options: (1) becoming a member and paying stated amount of dues; (2) paying a "full" service fee to Respondent in a stated amount; (3) paying a "reduced" service fee in a stated amount; and (4) paying a "reduced" service fee and challenging the amount of that fee. For individuals not paying by cash or check, the form had a spot for authorizing payment by bank draft or credit card. Robinson did not return the form. On February 15, 2016, Robinson received a bill from the MEA for his "full" service fee for the 2015-2016 school year. Nine days later, he

filed the instant charge. When the oral argument was held on the motions in this case in August 2016, Respondents had not yet referred Robinson's account to a collection agency or taken any legal action to collect this bill.

Discussion and Conclusions of Law:

Respondents maintain that their actions were lawful because they entered into a lawful union security agreement on March 18, 2013, which obligated unit members to pay dues or a service fee through June 30, 2016. They argue that this agreement was lawful and enforceable under Section 10(5) of PERA because: (1) the agreement was entered into prior to the effective date of Act 349 and was not extended or renewed by subsequent agreements; and (2) the agreement extended the agency fee obligation for the reasonable length of time of three years. Respondents distinguish *Taylor Sch Dist,* 28 MPER 66 (2015), aff'd *Taylor Sch Dist and Taylor Federation of Teachers, AFT Local 1085 v Nancy Rhatigan and Rebecca Metz,*____ Mich App _____ (2016), (Docket No. 326128, issued December 13, 2016) on the basis that the union security agreement in that case was for ten years, a length of time the Commission found to be "excessive and unreasonable." Since the March 2013 union security agreement was lawful and enforceable, Respondents had the right to enforce it by demanding that Robinson pay a service fee for the 2015-2016 school year. In response, Robinson argues that the length of the agreement in *Taylor* was only one of the factors upon which the Commission relied in *Taylor* to find that agreement unlawful, and that this was not the determinative factor. Robinson also argues that the 2014 and 2015 agreements, because they modified the underlying collective bargaining agreement in effect on March 28, 2013, extended or renewed the 2013 MOU. The union security agreement was not enforceable under Section 10(5) of PERA, Robinson asserts, because it was extended or renewed after the effective date of the statute. Therefore, Respondents were prohibited by Section 10(2)(a) and Section 10(3)(c) of PERA from demanding that he pay a service fee for the 2015-2016 school year after he resigned his union membership.

The Act 349 amendments, known as the "Right to Work" or "Freedom to Work" amendments, substantially changed the landscape of public sector collective bargaining in Michigan. Since those amendments took effect, the Commission and the Court of Appeals have issued several decisions interpreting those amendments. Among these decisions was *Taylor,* which, like the instant case, involved a union security agreement entered into by an employer and union after the amendments were signed into law but before their effective date. The Commission issued its decision in *Taylor* before the motions in the instant case were filed and after I heard oral argument. However, the case was pending on appeal before the Court of Appeals which had not yet issued a decision. The parties in the instant case, therefore, framed their arguments in terms of the Commission's decision. On December 16, 2016, the Court of Appeals issued an unpublished decision in *Taylor,* but the decision was approved for publication on February 9, 2017. As discussed below, the Court's holdings make some of the arguments made in the instant case irrelevant.

In *Taylor,* the Commission majority held, first, that the ten year duration of the union security agreement in that case was excessive and unreasonable. It noted that the agreement was intended to delay the application of Act 349 for ten years beyond its effective date, and that "in so doing Respondents have effectively compelled unwilling union members, in violation of

Section 9 of PERA, to financially support the Union for the next decade." The Commission then suggested that some limit had to be set by the Commission on the length of any agreement between a union and public employer, because union representatives and school boards should not be allowed to bind their successors indefinitely. It asked, "Is fifty years, twenty-five years, or fifteen years acceptable?" However, the Commission did not indicate the length of agreement that it might consider reasonable, but turned its focus to the respondents' motives for entering into the agreement in *Taylor*. It stated:

> The answer is not found in the length of the contract, but in whether the employer has violated Section 10(1)(a) and (c) of PERA by interfering with, restraining, or coercing public employees in the exercise of rights guaranteed by Section 9 *in order to encourage membership in a labor organization."* [Emphasis in original].

The Commission then held that in entering into the agreement in *Taylor*, the employer school district violated Section 10(1)(a) of PERA by interfering with its employees' rights under Section 9 not to support a union. It also held that by entering into the agreement, the employer unlawfully discriminated against employees in order to encourage membership in a labor organization, in violation of Section 10(1)(c) of PERA. The Commission concluded that the employer had demonstrated hostility toward the employees' protected rights by entering into an agreement that compelled them to support the union after the effective date of Act 349. The Commission majority also concluded that the union violated its duty of fair representation, and attempted to cause the employer to unlawfully discriminate against employees, by entering into this agreement. It held:

> The Union acted arbitrarily, in a manner that discriminated against some bargaining unit members, and was indifferent to the interest of those members. It was aware that PA 349 was pending when it negotiated for and ratified a Union Security Agreement that it knew would compel unwilling members to support it financially for ten years. The Union asserts that it was acting in the interest of all members and supports that contention by noting that the majority of the membership ratified the agreement and was, therefore, satisfied with the Union's conduct. We disagree. Imposing a lengthy financial burden on bargaining unit members, in order to avoid the application of a state law for ten years, is arbitrary, indifferent and reckless.

The respondents in *Taylor* argued that Section 10(5) of Act 349 expressly permitted parties to create, retain, and enforce, after Act 349 took effect, union security provisions which were in effect prior to the statute's effective date. [2] The Commission did not discuss Section 10(5) of PERA in its *Taylor* decision. However, the Court of Appeals in its decision squarely rejected the respondents' interpretation of Section 10(5). First, the Court noted that the limitation contained in the last sentence of Section 10(5), by its terms, expressly applied only to agreements that violated Section 10(3) of Act 349, but that the Commission had not found a violation of Section 10(3). Rather, as noted above, the Commission found that by entering into the agreement

[2] I was the ALJ in *Taylor*, and held in my Decision and Recommended Order in that case that Act 349 clearly and explicitly permitted the enforcement, after March 28, 2013, of union security agreements entered into before that date.

the school district violated Section 10(1)(a) and 10(1)(c), and the union Section 10(2)(a) and 10(2)(c). Extending the limitation in Section 10(5) to "*all agreements* made before the effective date of Section 349 that violated *any provision* of PERA," the Court held, would contravene the plain language of the statute. [Emphasis in original].Thus, the Court concluded, Act 349 "is not limited to agreements entered into after the effective date of the statutory amendment."

The Court went on to explain:

> Having said that, we recognize that statutes and statutory amendments generally apply prospectively, absent specific language of the Legislature to the contrary. *Brooks v Mammo,* 254 Mich App 486, 493, 657 N.W. 2d 793 (2002). In this case, however, as discussed above, the Legislature explicitly adopted (in Section 10(5) of 2012 PA 49,) a *limited* prospectivity, and thus at least implicitly indicated some retrospective applicability of 2012 PA 349 (outside the scope of that limitation.) See *STC, Inc.,* 257 Mich App at 536, 669 N.W. 2d 594. [Emphasis in original] We note, however, that retrospective applicability is a term that generally is used to denote applicability to "a pre-enactment cause of action." *In re Certified Questions (Karl v Bryant Air Conditioning Co),* 416 Mich 558, 331 N.W. 2d 456 (1982). Here there was no "cause of action" before 2012 PA 349 was enacted or even before its effective date. Moreover "a statute is not regarded as operating retrospectively [solely] because it relates to an antecedent event." *Hughes v Judges' Retirement Board,* 407 Mich 75, 86, 282 N.W.2d 160 (1979). And 2012 PA 349 did not "take [ ] away or impair [ ] vested rights acquired under existing laws, or create [ ] a new obligation and impose [ ] a new duty, or attach [ ] a new disability with respect to transactions or considerations already past" *Id.,* at 85; *Ballog v Knight Newspapers, Inc* 381 Mich 527, 533-534, 164 N.W. 2d 19 (1969). Therefore, we are persuaded that at least some retrospective applicability of 2012 is appropriate in the instant case and called for by the plain language of the legislation itself. . . . *We need not decide in this case just how far that retrospective applicability extends, but at a minimum conclude, under the circumstances before us, that 2012 PA 349 properly applies to agreements entered into after the enactment of that statutory amendment but before its effective date.* [Emphasis added].

Thus, the Court in *Taylor* held that Section 10(5) of Act 349 did *not* authorize parties to enter into union security agreements between the date Act 349 was enacted and that statute's effective date, and did *not* make these agreements enforceable after Act 349 took effect.

The Court then reviewed the Commission's unfair labor practice findings. The Court held that the school district in *Taylor* violated Section 10(1)(a) by enforcing the union security agreement after Act 349 took effect. It also affirmed the Commission's conclusion that the district violated Section 10(1)(c) of PERA by entering into and enforcing that union security agreement.

The Court also agreed with the Commission that the union in *Taylor* violated Section 10(2)(a) and (c) by entering into the union security agreement in that case. The Court noted that "the union's execution and ratification of the 10-year union security agreement occurred after the

passage and signing into law, and shortly before the effective date of, a significant state law that greatly impacted labor relations and that rendered such a requirement unlawful." The Court also noted that the agency fee agreement was signed at almost the same time as a collective bargaining agreement that included a 10 percent reduction in wages, suspension of pay increases, and other changes that negatively impacted bargaining unit members. The Court concluded:

> Under these circumstances, it was indeed reasonable for MERC to conclude that the union took deliberate action, in entering into the union security agreement to its own financial advantage, that would essentially subvert and undermine the plain language and intent of state law in a manner that was reckless and indifferent to the interests of persons to whom it owned[sic] a duty of fair representation [citation omitted]. ... Under the circumstances of this case, and given the timeline of events leading up to the execution of the union security agreement under the wire of the effective date of 2012 PA 349, and the signing of a CBA that substantially negatively impacted union members... MERC's conclusion that the union's conduct rose to the level of arbitrary, discriminatory and indifferent conduct in violation of its duty of fair representation found support in the record and was not based on a substantial and material error or law.

I find that, in light of the Court's decision above, the only question properly before me is whether the circumstances in this case are sufficiently distinguishable from those in *Taylor* to warrant a conclusion different from that reached in that case. As was the case with the union security agreement in *Taylor,* Respondents executed and ratified the 2013 MOA after Act 349 was passed and signed into law, and shortly before the statute's effective date. As in *Taylor,* Respondents unquestionably understood, when they entered into the 2013 MOA, that the Legislature's intent was to make union security agreements unlawful, at least prospectively. As with the union in *Taylor,* Respondents also knew that they were limiting the ability of members of their bargaining unit to exercise a right explicitly conferred upon them by Act 349, i.e., the right to refrain from financially supporting their bargaining agent. The only difference, in fact, between the circumstances of this case and those in *Taylor* is that in *Taylor* the union security agreement extended for ten years while in this case it was only three years and three months. Although the Court in *Taylor* mentioned the length of the agreement in that case, I see nothing in its discussion of either the charges against the school district or the charges against the union that indicate the Court saw the length of the agreement as a pivotal factor. Rather, the Court repeatedly emphasized the timing of the agreement, what the Court saw as the respondents' attempt to thwart the intent of the Legislature, and the fact that the charging party employees were prevented by the agreement from exercising a right that they had under Section 9. I conclude that the shorter length of the union security agreement in this case does not distinguish it from *Taylor* and that, in accord with the Court's findings in *Taylor,* the union security agreement contained in the 2013 MOA in this case was unlawful and unenforceable. I find that because the union security agreement in 2013 MOA was unenforceable, Respondents' demands that Robinson pay them a service fee for the 2015-2016 school year unlawfully restrained and/or coerced him in his exercise of his Section 9 rights in violation of Section 10(2)(a) of PERA.[3] I recommend, therefore, that the Commission issue the following order.

---

[3] Robinson alleged that Respondents' demands also violated Section 10(3) of PERA. That Section, as noted above, states that "an individual shall not be required as a condition of obtaining or continuing public employment to ...

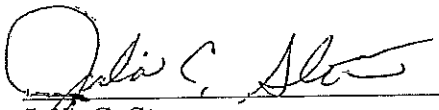
RECOMMENDED ORDER

Respondents Michigan Education Association and Ann Arbor Education Association, their officers, agents, and representatives, are hereby ordered to cease and desist from:

1. Interfering with, restraining or coercing Ronald Robinson in the exercise of his right guaranteed by Section 9 of PERA to refrain from contributing to the financial support of a labor organization by demanding that he pay them a service fee for the 2015-2016 school year after he resigned his union membership in August 2015.

2. Post the attached notice to members in all places on the premises of the Ann Arbor Public School where notices to bargaining unit members are customarily posted for a period of (30) consecutive days or, in the alternative, mail copies of this notice to all unit members within 30 days of the date of this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 30, 2017

pay any fees . . . to a labor organization or bargaining representative." However, the union security clause made part of the 2013 MOA does not explicitly require unit members to pay dues or fees as a condition of employment, and Respondents did not seek, or give any indication of an intention to seek, Robinson's discharge for failure to pay a service fee.

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY RONALD SHANE ROBINSON, AN INDIVIDUAL, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **MICHIGAN EDUCATION ASSOCIATION AND THE ANN ARBOR EDUCATION ASSOCIATION** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY THE MEMBERS OF OUR BARGAINING UNIT THAT:

WE WILL NOT interfere with, restrain or coerce Ronald Shane Robinson in the exercise of his right guaranteed by Section 9 of PERA to refrain from contributing to the financial support of a labor organization by demanding that he pay a service fee for the 2015-2016 school year after Robinson resigned his union membership in August 2015.

MICHIGAN EDUCATION ASSOCIATION AND ANN ARBOR EDUCATION ASSOCIATION

By: _____

Title: _____

Date: June 30, 2017

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Case No. CU16 B-008/Docket No. 16-005071-MERC.