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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

SAGINAW EDUCATION ASSOCIATION,
Labor Organization-Respondent in Case No. CU13 I-054/ Docket No. 13-013125-MERC; Case No. CU13 I-056/ Docket No. 13-013128-MERC; Case No. CU13 I-058/13-013130-MERC; Case No. CU13 I-060/ Docket No. 13-013132-MERC,

-and-

MICHIGAN EDUCATION ASSOCIATION,
Labor Organization-Respondent in Case No. CU13 I-055/Docket No. 13-013127-MERC; Case No. CU13 I-057/Docket No. 13-013129-MERC; Case No. CU13 I-059/Docket No. 13-013131-MERC; Case No. CU13 I -061/Docket No. 13-013134-MERC,

-and-

KATHY EADY-MISKIEWICZ,
Charging Party in Case No. CU13 I-054/13-013125-MERC and CU13 I-055/13-013127-MERC,

MATT KNAPP,
Charging Party in Case No. CU13 I-056/13-013128-MERC and CU13 I-057/13-01329-MERC,

JASON LAPORTE,
Charging Party in Case No. CU13 I-058/13-013130-MERC and CU13 I-059/13-013131-MERC,

SUSAN ROMSKA,
Charging Party in Case No. CU13 I-060/13-013132-MERC and CU13 I-061/13-013134-MERC.
/

APPEARANCES:

White, Schneider Young and Chiodini, P.C., by James J. Chiodini, Jeffrey S. Donahue, and Catherine E. Tucker, and Michael M. Shoudy, MEA General Counsel, for Respondents.

Mackinac Center Legal Foundation, by Patrick J. Wright and Derk A. Wilcox, for Charging Parties

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

The above unfair labor practice charges were filed with the Michigan Employment Relations Commission (the Commission) on October 21, 2013 pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. They were heard in Lansing, Michigan on February 26, 2014, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS). Based upon the entire record, including joint stipulations of fact by the parties, testimony presented and exhibits admitted at the hearing, and post-hearing briefs filed by the parties on or before May 9, 2014, I make the following findings of fact, conclusions of law, and recommended order.[1]

The Unfair Labor Practice Charges:

The four Charging Parties, Kathy Eady-Miskiewicz, Matt Knapp, Jason LaPorte, and Susan Romska are teachers employed by the Saginaw Public Schools (the Employer) and part of a collective bargaining unit represented by the Respondents Michigan Education Association (MEA) and its local affiliate, the Saginaw Education Association (SEA).[2] A collective bargaining agreement covering this unit expired on June 30, 2013. This agreement did not contain a union security agreement. There is not now, and has not been since 1998, any agreement between the Employer and Respondents requiring Charging Parties to pay dues or agency fees as a condition of employment. However, all four Charging Parties signed "Continuing Membership Agreements" agreeing to become members of Respondent around the time that they first became employed.

Charging Parties allege that in September and October 2013, they attempted to resign their union memberships and terminate their financial obligations to Respondents, but were told they could not do so except during Respondents' August "window" or "opt out" period. The Charging Parties filed charges against both the SEA and the MEA on October 21, 2013. The charges were consolidated, assigned to me, and amended on November 8, 2013. As amended, the charges allege that Respondents unlawfully restrained or coerced Charging Parties in the exercise of their §9 right to refrain from joining and/or assisting a labor organization, and thereby violated §10(2)(a) of PERA, by refusing to allow Charging Parties to resign their memberships when they attempted to do so and by threatening to attempt to collect dues they allegedly owed by hiring a debt collector and/or suing Charging Parties to collect the alleged debt.[3] The charges also allege that Respondents' violated their duty of fair representation under §10(2)(a) by failing to

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[1] See also my Decisions and Recommended Orders on Motions for Summary Disposition in *Grand Blanc Clerical Assn, MEA and Battle Creek Educational Secretaries Assn (Carr and Snyder)* Case Nos. CU14 C-020/ Docket No. 14-006843-MERC and CU14 C-009/Docket No. 14-004413-MERC and *Standish-Sterling Support Personnel Assn, MEA (Norgan),* Case No. CU14 B-002/Docket No. 14-002293, both issued this same date.

[2] A fifth Charging Party, teacher Kurt Alliton, withdrew his charges at the hearing.

[3] The charges also allege that Respondents' actions violated §9(2) of PERA because they constitute attempts to "compel public employees to remain members of a labor organization and/or to financially support a labor organization through threats and intimidation of reporting and trying to collect a debt that is not owed." However, under §16(a) of PERA, only violations of §10 are unfair labor practices remediable by the Commission. Charging Parties do not argue in their brief that Respondents violated §9(2).

adequately notify them and other teachers of the "steps they would need to take to extricate themselves fully from any financial obligation to the unions."

Findings of Fact and Stipulated Facts:

The MEA's Window Period Policy and Continuing Membership Application

The MEA is a private voluntary membership organization incorporated as a private non-profit corporation under the laws of the State of Michigan, and a 501(c)(4) social welfare organization under the Internal Revenue Code. Membership is open to all non-supervisory personnel employed by an educational institution or agency in Michigan. Local affiliates of the MEA, of which the SEA is one, are the basic units of self-governance within the MEA. Local affiliates, and not the MEA, are the exclusive bargaining representatives of employees for purposes of collective bargaining under PERA. However, the MEA and its affiliates have what is known as a "unified membership structure," which means that membership in a local affiliate includes membership in both the MEA and the National Education Association (NEA).

Article I of the current version of the MEA bylaws reads as follows:

Membership year and payment of dues

> The official membership year shall extend from September 1 through August 31 each year. The terminal dates for other than full-year membership shall be the same as for full-year members. All membership dues shall be paid on or after September 1 of each year but may be paid earlier according to Administrative Policies as established by the Board of Directors. *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.* [Emphasis added]

The MEA has had a continuing membership policy since at least the 1950's. The MEA's August window period policy, as set out in Article I of its bylaws, has been in effect since 1973. Pursuant to this policy, the MEA does not accept a member's resignation unless it is made in the month of August, or the member resigns their employment or is terminated by their employer in the middle of a school year and is no longer employed in a Michigan educational institution. Case-by-case exceptions are granted in appropriate extenuating circumstances.

The MEA bylaws are available on the MEA's website. The MEA website includes a link to the bylaws, and a Google search for the MEA's bylaws directs one to the website. The website, however, does not include a specific link for resignations or window period. The MEA has many publications, including a magazine, the *Voice,* with print and online editions. The *Voice* is emailed to all members who have provided the MEA with a home email address and mailed to all others; members can opt out of receiving the *Voice* if they choose. The website address appears on almost all MEA publications, including the *Voice.* Aside from making the bylaws available through its website and publicizing the website, the MEA does not regularly

publish information about the window period in any of its publications or send information about the window period to its members.

The MEA has instructed all staff who receive inquiries from members about resigning to tell them about the August window period. In addition, in August 2013 the MEA implemented a help line to improve its member service. Members who call the help line to inquire about resigning are told about the August window period.

In order to become a member of the MEA and/or its affiliates, individuals are required to sign a membership application, titled "Continuing Membership Application Local-Michigan-National Education Association." The Continuing Membership Application has differed in its content over the years. However, the membership applications signed by the Charging Parties in this case, and the application admitted at the hearing as the current application, include the following:

> Please check one (1) below:
>
> [Box] Cash Payment – Membership is continued unless I reverse this authorization in writing between August 1 and August 31 of any year.
>
> [Box] Payroll Deduction – I authorize my employer to deduct Local, MEA and NEA dues, assessments and contributions as may be determined from time to time, unless I revoke this authorization in writing between August 1 and August 31 of any year.

The Continuing Membership Applications signed by the Charging Parties do not mention either the MEA's bylaws or its website.

There is no evidence in the record as to whether the Charging Parties in this case received copies of their Continuing Membership Applications. However, standard practice is that members are given a signed carbon copy of their Continuing Membership Application immediately upon submission.

Charging Party Eady-Miskiewicz signed a Continuing Membership Application on March 1, 1996. Charging Party Romska signed on August 16, 1998, Charging Party Knapp signed on August 13, 2003, and Charging Party LaPorte signed on August 15, 2005. All of the Charging Parties checked Box 2, payroll deduction, when they signed their membership applications.

Purpose of the Window Period

Respondents assert that the primary purpose of the August window period is to give them a stable membership count for the upcoming school year for budgeting and other administrative purposes. Gretchen Dziadosz, the MEA's executive director, testified at the hearing that school districts generally do layoffs at the end of the school year, and that school districts have

generally hired all employees for the upcoming school year by the end of August.[4] Moreover, retirement paperwork of teachers retiring at the end of the previous school year has generally been completed by the end of August. Accordingly, the MEA does a membership count each year at the end of its August window period. It then uses the membership count to calculate its anticipated revenue for its upcoming fiscal year, which runs from September 1 through August 31. Since dues constitute most of the MEA's operating revenue, knowing how many dues paying members it will have through the fiscal year substantially assists the MEA in budgeting its expenditures.

As Dziadosz explained at the hearing, one of the MEA's most significant expenditures is providing staff to assist local affiliates with their representative functions. The MEA employs approximately 100 Uniserv Directors located in forty-three field offices across the state. The locations of the field offices and Uniserv Directors are currently determined according to a ratio based on the number of members in a geographical area. The MEA uses the August membership count to determine whether changes need to be made during the fiscal year in the location or number of offices or staff. The assurance of a stable member count in a particular geographical area allows the MEA to negotiate office lease agreements, hire staff, and lease or purchase the equipment and technology necessary to serve its membership over the course of the school year. It also allows the MEA to schedule local conferences and other professional development activities and allocate funds for training local officers based on the number of members and dues revenue generated in a particular geographical area.

In addition to services provided to members and non-members alike, the MEA offers a variety of members-only benefits. These include free employment liability insurance to members for both criminal and civil cases through the Educators Employment Liability program administered by the NEA. The MEA must pay for this liability insurance at the beginning of its fiscal year; the per-member cost to the MEA of buying this insurance depends on the number of members. The MEA asserts that its ability to provide this benefit would be severely impaired if its membership fluctuated throughout the year. Members-only benefits also include numerous discounts negotiated by the MEA and made available to individual members. These include tuition discounts at certain universities, group automobile and homeowners' insurance discounts, a no-fee MEA-sponsored credit card with a low rate, MEA-sponsored group term life insurance, and member discounts on long-term care insurance and investment and financial services. In addition, MEA members often receive substantial discounts from local merchants across the state. As an example, Dziadosz described a member who had recently saved $3,000 on an auto purchase from a local dealer because of the MEA discount. As Dziadosz testified, the MEA is able to negotiate these member-only discounts because of its large and stable membership base. She also testified that the MEA was concerned that if it permitted individuals to resign their memberships at any time during the school year, individuals would abuse their membership privileges by becoming members solely to take advantage of the discounts and then immediately resign.

MEA members also have certain rights not possessed by employees within the bargaining unit who are not members. These include the rights to vote in elections for officers, both at the local affiliate and MEA level, to attend and vote at membership conventions, and to vote in

[4] Laid-off MEA members continue to pay dues, but at a reduced rate.

elections to ratify collective bargaining agreements. Both elections for local officers and contract ratification elections are often held at the beginning of the school year, after the August window period. The August window period, Respondents argue, reasonably protects them from individuals who might become members only to vote in a particular election. In addition, local delegates to the MEA's representative assembly are apportioned based on the number of members the local affiliate has recorded as of August 31. Therefore, the August membership count impacts the voting power of a local affiliate for an entire year.

Also geared to the MEA's fiscal year are the MEA's current procedures for collecting service fees from nonmembers who object to the use of their fees for non-collective bargaining purposes. These procedures were approved by a Federal District Court in 1989 in *Lehnert v Ferris Faculty Assn,* 707 F Supp 1490 (WD Mich, 1989), aff'd 893 F2d 111 (CA 6, 1989) after over a decade of litigation. The procedures require Respondents, after the close of their fiscal year in August, to calculate Respondents total expenditures for chargeable and non-chargeable expenditures for that fiscal year and to calculate the reduced agency fee an objecting nonmember is to be required to pay for the upcoming fiscal year based on these expenditures. By November 30, Respondents are required to provide all nonmembers who are obligated to pay an agency or service fee with a notice that includes: (1) a list of expenditures, by major category, made by the NEA, MEA and, if applicable a local association, verified by an independent auditor; (2) a statement of whether a major category of expense, or a particular portion thereof, is chargeable to objectors; (3) the amount of the reduced agency fee; (3) the method used to calculate the agency fee; and (4) a statement of the MEA's procedures for collecting agency fees from objectors. Non-members then have a thirty-day window period in which to notify Respondents of their decision, for the current fiscal year to: (1) join the union and pay dues; (2) pay an agency fee equal to the amount of dues less the cost of NEA members-only liability insurance; (3) pay the reduced agency fee as determined by Respondents; or (4) pay the reduced agency fee into an escrow account and challenge Respondents' calculation of the reduced fee. Collection of the service fee from nonmembers does not begin until after this thirty-day window period has expired. If the non-member does not respond in a timely fashion, he or she is charged an agency fee in the amount of dues less the cost of the NEA liability insurance. The challenges of objecting nonmembers to Respondents' calculation of the reduced fee are heard by an impartial arbitrator and a decision is rendered no later than May 1. After the arbitrator renders a decision, the funds in the escrow account, including interest, are disbursed in accord with that decision; if an objecting nonmember has not paid enough into the escrow account, he or she is responsible for the deficit.

The procedures for collecting service fees require Respondents to provide separate notice, as set out above, to nonmembers who become part of a bargaining unit after the November 30 notice is sent and give these individuals a thirty-day window period to make the choice to become a member, to remain a nonmember and pay an agency fee equivalent to dues, or to become an objecting nonmember and either pay the reduced fee as calculated by Respondent or pay it into an escrow account while challenging the calculation. Non-members hired after November 1 are allowed to participate in the hearing before the impartial arbitrator unless their challenges come too late for them to participate. The procedures make no provision for individuals who resign their membership after the November 30 notice.

Some local affiliates assess local dues and fees, while others do not. In order to collect a local service fee under the MEA's procedures, a local affiliate must conduct an audit of its financial statements as of the end of the fiscal year and have that information available to be included in the November 30 mailing. Local affiliates decide whether or not to conduct an audit based on the number of nonmembers within the bargaining unit as of September 1. If a local affiliate decides not to pay for an audit, it waives any right to collect a local service fee from nonmembers during the fiscal year. Respondents assert that knowing how many dues-paying members it has at the beginning of the school year is therefore important to local affiliates in determining whether to spend the money for an audit.

2012 PA 53 and 2012 PA 349

All collective bargaining agreements between the Employer and Respondents, including the 2008-2013 collective bargaining agreement which expired on June 30, 2013, required the Employer to deduct union dues or agency fees from the paychecks of unit members who had authorized it. The 2008-2013 collective bargaining agreement included this provision:

> Upon SEA certification of membership or agency status and checkoff authorizations, the District will deduct monthly dues from each eligible employee's pay and remit to SEA an amount equal to the authorized monthly dues, PAC and other contributions, subject to applicable law.

On March 16, 2012, the Legislature passed 2012 PA 53, which amended §10(1)(b) of PERA to make it unlawful for a public school employer "to assist a labor organization in collecting dues or service fees from wages of public school employees." The collection of such dues and service fees pursuant to any collective bargaining agreement in effect on March 16, 2012 was not prohibited under PA 53 until the agreement expired or was terminated, extended, or renewed. On June 11, 2012, a U.S. District Court enjoined enforcement of PA 53 on equal protection grounds. *Bailey v Callaghan,* 873 F Supp 2d 879, (ED Mich, 2012). On May 9, 2013, the Court of Appeals reversed and remanded to the District Court to dissolve the injunction. 715 F3d 956 (CA 6, 2013). After the collective bargaining agreement covering Charging Parties' bargaining unit expired on June 30, 2013, and before any of the Charging Parties attempted to resign their memberships, the Employer ceased deducting dues and contributions from the Charging Parties' paychecks.

On December 11, 2012, the Legislature passed 2012 PA 349. The law, which became effective on March 28, 2013, amended both §9 and §10 of PERA. Section 9 sets out the rights of public employees protected by PERA. Prior to PA 349, §9 read as follows:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Section 9 was modeled on §7 of the National Labor Relations Act (NLRA), 29 USC 150 et seq. However, §7 of the NLRA, as amended by the 1947 Taft-Hartley amendments, includes an explicit "right to refrain" from engaging in §7 activities. The Michigan Legislature did not include a "right to refrain" from §9 activities when it adopted PERA in 1965, and it did not add this language to §9 when it amended PERA in 1973 to add provisions making certain conduct by labor organizations unfair labor practices under the Act. Among the statutory changes effected by PA 349, however, was the addition to §9 of PERA of the "right to refrain" language that had been part of §7 of the NLRA since 1947. Section 9(1) now reads:

> Sec. 9. (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).[5]

Section 10 of PERA was modeled on §8 of the NLRA. Like §8, §10 contains the conduct constituting unfair labor practices by public employers and labor organizations. Section 10(2)(a), like §8(b)(1)(A) of the NLRA, makes it unlawful for a labor organization or its agents to "restrain or coerce public employees in the exercise of rights guaranteed in §9 [or §7 of the NLRA]." Like §8(b)(1)(A) of the NLRA, §10(2)(a) also states that this section does not "impair

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[5] Section 9 now also contains subsections (2) and (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.

As noted in n 3, the charges allege that Respondents violated §9(2), but Charging Parties do not make this argument in their brief.

the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."

In addition to adding "right to refrain" language to §9, PA 349 removed provisions in PERA explicitly making it lawful for a public employer and labor organization to agree to make payment of an agency fee a condition of employment. It also added the following new language in §10(3):

> (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.

Subsection (4) states that subsection (3) does not apply to public police or fire department employees or state troopers.

SEA and MEA Response to PA 53 and PA 349

Sometime after the passage of PA 53 in March 2012, the MEA set up an e-dues program which allowed members and nonmember agency fee payers to sign up online to pay their dues and fees by credit card or deduction from their bank accounts. As noted above, enforcement of PA 53 was enjoined between June 2012 and May 2013.

On December 28, 2013, after the passage of PA 349, MEA President Steve Cook sent an email to local presidents, board members and staff discussing the MEA's response to that statute. Cook said that MEA membership applications indicate that if a member wished to resign, they must do so only in August, and that the MEA was going to stick to that. He told staff that members who indicate that they wish to resign should be told they could do so only in August. Cook's email also stated that the MEA would use any legal means at its disposal to collect the dues owed under signed membership forms from any member who withheld dues prior to terminating their membership in August for the following fiscal year.

On January 18, 2013, Cook sent an email to a larger list of local presidents, officers, Uniserv Directors, and other staff that provided them with a form letter to send to members who contacted local affiliates about resigning, a comparison sheet of benefits provided to members vs nonmembers, and talking points for discussing the impact of PA 349 and bargaining strategies with members. The form letter quotes Article 1 of the bylaws, and also states that the continuing membership agreement that the members signed provides that written notice of resignation of membership must be made in writing during August for the following fiscal year.

On January 23, 2013, a message from Cook regarding the impact of PA 349 was posted as part of the online edition of the *Voice*. The principle point of the message was that it had always been illegal to require anyone to join a union, and that what PA 349 really did was allow individuals to freeload, i.e., enjoy the benefits of union representation without paying its costs. Cook argued that PA 349 was likely to cause division within locals because providing help to freeloaders would take up an increasing amount of the local union's time. He also asserted that tracking down dues from union members would take up staff time better spent in organizing members to take collective action for their mutual benefit.

As discussed above, there is no indication in the record that the MEA publishes specific information about the August window period in any of its publications. There is also no indication that, after the passage of PA 349, the MEA sent any type of notice or reminder of the August window period to members who did not explicitly ask about resigning. Finally, there is no evidence that the MEA either urged its local affiliates to provide information about the August window period to its members or instructed them not to do so unless a member inquired.

In June, July, and August 2013, SEA President LeAnn Bauer sent a series of emails and letters to SEA members discussing the importance of paying dues, explaining the e-dues system and the fact that PA 53 had ended the deduction of MEA dues from their paychecks, and urging/reminding members to sign up for e-dues. None of these communications either mentioned the August window period or said anything about the consequences of not signing up for e-dues. SEA members who asked SEA representatives about when and how to resign during these months were told about the August window period. Five SEA members submitted written resignations in August 2013 and were permitted to resign.

On August 8, 2013, all teachers in Michigan were sent an email entitled "August is Teacher Freedom Month" from James Perialas. Perialas identified himself as president of the Roscommon Teachers Association. He explained that in Roscommon the teachers had decertified from their "parent" union and formed a "local-only" union. He argued that teachers in Roscommon were now better off. Perialas stated that he was sending the letter to help teachers seek out information regarding their "rights, options and implications of choosing to remain with their union or not." The email stated that he was sending the letter because "the month of August may be the only opportunity many of you have to choose what type of union representation fits your situation best." One of the options mentioned by Perialas was exercising the right to "fully opt out of paying dues or agency fees" if the teacher's collective bargaining agreement had expired. Perialas did not explain that the MEA did not permit "opt out" except in August, but his email did provide a link to a non-MEA website that had information about the window period. On August 12, 2013, Bauer sent SEA members an email responding to Perialas' argument that

teachers would be better off forming their own association instead of remaining part of the MEA. In this email, Bauer stated that educators had always had the choice of joining their local association or not joining. She said that the only change from the "right to work" law was that educators were now entitled to have rights under a collectively bargained contract without any obligation to pay for bargaining and protecting these rights. Cook also published a response to Perialas' email in the August 9, 2013 online edition of the *Voice*. Neither Bauer's email nor Cook's article mentioned the August window period.

The August window period became a topic of discussion at an SEA membership meeting held on September 26, 2013. During this meeting, Bauer admitted that SEA members had not been notified about the window period. A member also asked the SEA representatives during the meeting what would happen if a member did not pay dues. One of these representatives stated that the debt could be "taken to collections."

In November 2013, the MEA adopted a new dues collection policy, as follows:

Members in Arrears in Their Dues/Refusing to Pay/ Members Not in Good Standing

Local Association

1. The local association president or local membership chair should consult the ME412R report (local membership list and dues payment history) available from the membership system to assess which members are not paying dues . . .

2. Someone who is in arrears or not paying should be contacted by an association representative (president-treasurer, or building rep) about making payments. All conversations should be cordial. The eventual use of collections to collect dues should not be discussed in the first conversation. They should be reminded of their agreement to pay dues as members.

3. The member can/should be given the list of what a member loses if they become a member in arrears/not in good standing.

4. The local should attempt multiple contacts with the person within the first 90 days the member is in arrears.

MEA

1. Once the member is 60 days or more in arrears from the billing due date, MEA Membership will attempt at least three contacts (email, phone, or mail depending on the data in the system.) After this, if there has been no positive response, the member will receive a letter or email informing him/her that we are about to send the account to collections and he/she has 30 days to forward payment or to contact MEA to arrange for a payment schedule. A copy via email will be sent to the local association president and the local Uniserv director.

. . .

Alternative arrangements may include, but are not limited to:

The local association has determined to pay the dues on the member's behalf or

The individual and the MEA Secretary-Treasurer have agreed to a repayment plan that the member is following.

Dziadosz testified that between 900 and 1500 MEA members resigned during August 2013 She also testified that approximately 500 members contacted the MEA seeking information about resigning between August 31, 2013 and the date of the hearing in February 2014, and that about 200 members sent letters attempting to resign during that period.

During the 2013-2014 school year, there were approximately 112,000 active status (excluding student and retiree) MEA members. Dziadosz testified that as of the date of the hearing in February 2014, approximately 8,000 members who were no longer having dues deducted from their paychecks had not yet signed up for e-dues or paid their 2013-2014 dues in cash. She testified that the MEA had not yet implemented its November 2013 dues collection policy because it was finding many errors in its membership database and wanted to make sure the database was as accurate as possible before implementing the policy. She also testified that many members believed that they were still paying dues by payroll deduction, and were happy, after being contacted directly, to sign up and pay their dues.

According to Dziadosz, at the time of the hearing the MEA had hired debt collectors to collect dues from a few members who had not paid all the dues they owed for 2012-2013 after their employers stopped deducting dues from their paychecks. She testified that the MEA had taken this action when, despite previous contacts with them the previous year, these members had failed to set up payment plans. She testified that she believed that the MEA had not yet hired debt collectors to attempt to collect unpaid dues for the 2013-2014 membership year.

Charging Parties Resign their Memberships

On September 18, 2013, both LaPorte and Eady-Miskiewicz sent emails to Bauer with letters attached resigning from the SEA and MEA. Romska sent an email and resignation letter to Bauer on September 20, 2013. The letters sent by LaPorte, Eady-Miskiewicz and Romska also revoked their dues checkoff authorizations, even though the Employer had by this time ceased deducting dues because of PA 53. On or about October 10, 2013, Eady-Miskiewicz was sent a letter from MEA Uniserv Director Sue Rutherford stating that because her resignation was not made during the August window, it was untimely. The letter gave Eady-Miskiewicz instructions on how to properly submit her resignation the following August. Romska received a similar letter. It is not clear whether LaPorte also received a letter from Rutherford. However, after the September 26, 2013 SEA meeting, LaPorte sent Bauer an email asking if she was willing to accept a resignation letter if it was predated to August. Bauer replied on October 1, stating that she was unable to accept resignations at that time; she told him that if payroll deduction was not an issue, the Employer would still be collecting dues. In this email, Bauer also told LaPorte, "I don't know of any organization that tells members how to resign."

In early September 2013, Knapp told an SEA building representative that he did not want to pay dues. On September 11, 2013, Knapp received an email from Rutherford asking to meet with him to "discuss his options." Knapp did not contact Rutherford, but in early October received a letter from the MEA about dues. On October 7, he sent Bauer an email stating that he was under the assumption that he was no longer a member if he did not sign up to pay dues, and asking her to explain the protocol for leaving the SEA and MEA. Rutherford then contacted Knapp and explained the window period. She told him that Respondents did not consider failing to sign up for e-dues to be a resignation.

None of the four Charging Parties signed up for e-dues. None of the four Charging Parties have paid any dues or fees to Respondents since June 2013.

Discussion and Conclusions of Law:

Impact of PA 349

The parties submitted a joint statement of "questions presented for decision" listing the issues which each party believed should be addressed. The parties did not stipulate to any issue.

I find, first, that all four Charging Parties in this case resigned their union memberships outside of Respondents' window period, and that Respondent rejected their resignations as untimely. I reject Respondents' argument that Knapp never resigned because he never submitted a resignation letter. Knapp's October 7, 2013 email to Bauer clearly indicated that he wanted to resign. Knapp did not submit a formal resignation letter because he was orally informed by Uniserv Director Rutherford that it would not be accepted.[6]

However, because the Employer was not deducting dues from Charging Parties' paychecks, Respondents' refusal to accept their resignations had no immediate financial consequences. Nor do Charging Parties allege that Respondents' refusal to accept their resignations had any other immediate adverse consequences. Rather they allege that Respondents violated §10(2)(a) of PERA by threatening to take legal action, including hiring a debt collector, to collect membership dues that Respondents assert that they owe because they did not submit a timely resignation. As Respondents point out, taking legal action to collect the alleged debt would not have any impact on Charging Parties' employment. The Commission has repeatedly held that only union actions which impact employment or employment status violate §10(3)(a)(i), the predecessor to §10(2)(a). See, e.g., *Assn of School and Community Service Administrators (Mettler),* 1987 MERC Lab Op 710, in which the Commission held that a union did not violate an employee's §9 rights by filing an action in Small Claims court to collect a

[6] Charging Parties seem to suggest in their brief that the mere failure to pay union dues, after dues deduction ceased, might constitute a resignation. I do not accept this argument. It seems obvious that the desire to cease being a member is only one of a number of reasons why a union member might fail to actually pay his or her dues. I find that in order for a union member to resign, he or she must affirmatively express the intent to do so. I also find that it is reasonable for a union to require that the resignation be put in writing, and that merely requiring a written resignation is not a restriction on the right to resign. See, e.g., *Int'l Union, United Auto, Aerospace & Agr Implement Workers of Am. (UAW) v NLRB*, 865 F2d 791, 797 (CA 6, 1989).

service fee it claimed that the employee, a nonmember, owed it. The collective bargaining agreement covering the employee did not contain any form of union security agreement. The Small Claims court had entered a judgment against the employee based on a provision in the union's bylaws that required nonmembers to pay an annual service fee. The Commission noted that it had no power to review the court's judgment. It also held that bringing the action could not be construed as a violation of PERA because there was no effect on the employee's employment.

Prior to PA 349, therefore, under established Commission precedent, Respondents' enforcement of its window period for resignations in this case would not have constituted an unfair labor practice because it did not impact the Charging Parties' employment. However, PA 349 added to §9 of PERA an explicit right to refrain from the activities described in that section, including joining and assisting a labor organization. Charging Parties assert that by adding this language, the Legislature gave public employees the right to resign their union memberships at any time. They also assert that any restriction on this right by a labor organization violates §10(2)(a).

The goal of statutory construction is to effectuate the Legislature's intent. *Casco Twp v Secretary of State,* 472 Mich 566, 571 (2005). That intent is clear if the statutory language is unambiguous, and the statute must then be enforced as written. *Lorencz v Ford Motor Co,* 439 Mich 370, 376 (1992); *Weakland v Toledo Eng Co, Inc*, 467 Mich 344, 347 (2003). Every word of a statute should be given meaning and no word should be made nugatory. *People v Warren,* 462 Mich 415, 429, n. 24 (2000). A change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute. *Bush v Shabahang,* 484 Mich 156, 168 (2009).

Section 9(1), as amended, does not explicitly give public employees the right to resign their union membership at will. However, as Charging Parties point out, the NLRB and Courts have held that under the NLRA, union members have an unrestricted right to resign. They have also held that a union commits an unfair labor practice by maintaining or enforcing rules that restrict that right. See *Pattern Makers' League of North America, AFL–CIO v NLRB,* 473 US 95 (1985) and other cases discussed below.

The Commission and Michigan Courts have long recognized that because PERA is modeled on the NLRA, federal precedent, although not controlling, provides valuable guidance in interpreting PERA. *Gibraltar Sch Dist v Gibraltar MESPA-Transp.,* 443 Mich. 326, 335, (1993);, *Central Michigan Univ Faculty Assn v Central Michigan Univ.,* 404 Mich. 268, 273 (1978); *Pontiac Police Officers Assn v Pontiac (After Remand),* 397 Mich 674, 246 N.W.2d 831 (1976); *Detroit Police Officers Assn v Detroit,* 391 Mich 44 at 53 (1974). Respondents argue that *Pattern Makers,* and other authority under the NLRA on resignation of union membership, should serve as precedent for interpreting §9(1)(b) because NLRA permits negotiation of collective bargaining agreements that require membership in a labor organization as a condition of employment, while PERA has never had that requirement. It is true that the 1973 amendment to PERA, which authorized union security agreements, permitted only those agreements that required employees to pay service fees to a union, while the NLRA, on its face, authorizes agreements requiring union membership. However, long before the 1973 amendments to PERA, the requirement of membership in a labor organization under the NLRA had been "whittled

down to its financial core," i.e., the payment of union dues and fees. *NLRB v General Motors Corp,* 373 US 734, 742 (1963). Moreover, until PA 349 made agency fee agreement unlawful, PERA, on its face, permitted union security agreements that required the payment of service fees equal to the amount charged to members as dues and fees. The right of a union to charge agency fees in the amount of dues and fee was limited only by *Abood v Detroit Bd of Ed,* 431 US 209 (1977), which held that public employees could not constitutionally be required to pay an agency fee that funded expenditures other than those for collective bargaining and contract administration. Later, in *Communications Workers of America v Beck,* 487 US 735 (1988), the Supreme Court brought *Abood* into the private sector by further limiting "financial core" membership under the NLRA to the support of activities germane to collective bargaining, contract administration, and grievance adjustment. In sum, I find that by the time PA 349 went into effect, there was no significant difference between lawful union security agreements under the NLRA and under PERA.

In PA 349, the Legislature inserted into PERA language from the NLRA giving employees the right to refrain from §9 activities, language that had been omitted from previous versions of PERA. I conclude that the Legislature's intent was to incorporate into PERA the right to refrain as it has been interpreted under the NLRA, including what union conduct constitutes unlawful restraint or coercion of the exercise of that right. How I believe these rights and obligations have been interpreted is discussed below.

Reasonableness of Respondents' Window Period and *West Branch*

Before addressing that question, however, I note that I agree that Respondents presented ample evidence at the hearing that its window period serves the interests of its membership as a whole. The August window period provides Respondents with stable membership numbers and, consequently, a stable revenue figure for the upcoming fiscal year. This substantially assists Respondents in planning for the upcoming year and in budgeting. Knowing the number of members and their locations also helps Respondent adjust staffing. These efficiencies strengthen the organization and allow Respondents to better serve the interests of all the employees it represents. A stable membership figure, by ensuring businesses access to a large and stable market, also allows the MEA to negotiate significant discounts on goods and services for its members.

In *West Branch Rose City EA, MEA,* 17 MPER 25 (2004), an employee covered by a union security agreement sought to resign his MEA membership and assert his right under *Abood* to become an objecting nonmember and limit his contributions to the union to sums used for collective bargaining and contract administration. The Commission held in that case that the MEA's window period was reasonable and organizationally necessary. It concluded, therefore, that the MEA's window period policy was not an arbitrary rule and that it did not violate its duty of fair representation by refusing to allow the charging party to resign outside of the window period in order to exercise his *Abood* rights. However, *West Branch* was decided before PA 349 added the "right to refrain" language to PERA. In *West Branch,* at n 5, the Commission noted that PERA lacked the right to refrain language contained in the NLRA, and stated that it would not infer a right to refrain in the absence of clear legislative intent. While the footnote acknowledged that union membership could not be required under PERA even in the absence of

this language, the Commission noted that the charging party in *West Branch* had voluntarily joined the union initially. I agree with Charging Parties that because of the addition to §9 of a right to refrain, *West Branch* is no longer binding on the issue of whether the MEA's August window period violates §10(2)(a) of PERA.

Relevant Case Law under the NLRA

In a seminal decision, *Pattern Makers League of North America,* the Supreme Court declared that union members have a right to resign under the NLRA. This case upheld a decision by the National Labor Relations Board (NLRB) holding that a union violated §8(b)(1)(A) of the NLRA by fining members for violations of a union rule against working during a strike that occurred after the individuals had attempted to resign their memberships. *Pattern Makers League of North America,* 265 NLRB 1332 (1978), In *Pattern Makers,* the union's constitution stated that resignations or withdrawals would not be accepted during a strike. A number of members submitted resignations during a strike and then returned to work. The union refused to accept their resignations and imposed substantial fines on them for violating the rule against working during the strike. One employee was expelled, and the union later attempted to cause his discharge under the union security agreement. The decision does not indicate whether the employees who resigned, but were not expelled, continued to pay dues to the union after they tendered their resignations, but the union did not seek their discharge under the union security clause. The decision also does not indicate how, or whether, the union made efforts to collect the fines from the employees it had not expelled.

Prior to *Pattern Makers,* the Supreme Court had held that fining union members for violations of a union rule did not violate §8(b)(1)(A). *NLRB v Allis-Chalmers Mfg Co,* 388 US 175 (1967). It had also held that where there was no provision in the union constitution or bylaws restricting the right to resign, a union could not lawfully fine employees who had resigned their union memberships before violating a union rule. *NLRB v Granite State Joint Bd, Textile Workers Union of America, Local 1029, AFL-CIO,* 409 US 213 (1972). However, the Supreme Court had never directly addressed the effect of a restriction on resignations contained in a union's constitution. The Court in *Pattern Makers*, at 101, n 9, implicitly acknowledged that provisions in a union's constitution and bylaws are generally considered to constitute a contract between a union and its members, noting that in previous cases it had explicitly left open "the extent to which contractual restrictions on a member's right to resign may be limited by the Act." The Court held, nevertheless, that the union's imposition of fines on employees after they had tendered their resignations from membership constituted unlawful restraint and coercion under §8(b)(1)(A).

The *Pattern Makers* Court rejected the union's argument that language in the NLRA protecting a union's right to prescribe its own rules with respect to the acquisition and retention of membership protected its conduct in that case. The Court held, at 104, that §8(b)(1)(A) allowed unions to enforce only those rules that "impaired no policy Congress embedded in the Act." After reviewing the legislative history of the "acquisition and retention" language, the Court concluded that Congress did not intend that language to authorize restrictions on the right to resign and escape union discipline, noting that in 1947, when the Taft-Hartley Act added that language to the NLRB, union constitutional provisions restricting the right to resign were

uncommon. Citing legislative history, the Court concluded that Congress intended to give unions the right to expel members for violations of union rules, but not the right to prevent them from resigning. The Court declared that a policy of "voluntary unionism" was embedded in the NLRA, and it concluded that the restriction on resignations in *Pattern Makers* impaired this policy.

As the Board thereafter stated in *Auto Workers Local 148 (McDonnell-Douglas),* 296 NLRB 970 (1989), after *Pattern Makers* it became settled law under the NLRA that any restrictions placed by a union on its members' right to resign were unlawful, irrespective of the period of restriction, and that the maintenance of such a restriction restrains and coerces employees from exercising their Section 7 rights. *Sheet Metal Workers Local 73 (Safe Air)*, 274 NLRB 374 (1985), aff'd 840 F.2d 501 (CA 7, 1988).

It should be noted, however, that in declaring that a policy of "voluntary unionism" was embedded in the NLRA, the Court was referring to "full" as opposed to "financial core" membership. *Pattern Makers*, at 106. That is, the issue addressed by *Pattern Makers* was whether a union could, by a provision in its constitution, restrict a member from resigning his "full" membership and escape union discipline. *Pattern Makers* did not specifically address whether a union could place restrictions on when a member could resign to escape a financial obligation toward the union.

That issue was addressed by the NLRB in *International Brotherhood of Electrical Workers, Local 2088 (Lockheed Inc),* 302 NLRB 322 (1991). In *Lockheed,* charging party May had signed a checkoff authorization authorizing Lockheed to deduct his "Initiation fee, and on the first pay day of each month, [his] regular membership dues in Local Union 2088, International Brotherhood of Electrical Workers, AFL-CIO, and remit same to said Union." The authorization, tracking the language of §302(c)(4) of the Labor Management Relations Act (LMRA), provided that it would be "irrevocable for a period of one year from the date hereof or until the expiration of the present collective bargaining agreement between the Company and the Union, whichever is the shorter of the two periods." May sent a letter to the union outside of the period stated in the checkoff authorization resigning his membership. He also sent a letter to Lockheed revoking his checkoff authorization. The union did not accept this letter as a resignation, the employer continued to deduct dues, and the union continued to accept them. At the time May sent this letter there was a collective bargaining agreement in effect between the union and Lockheed, but no union security agreement. The record did not indicate that there was any union bylaw or provision in the union constitution restricting the right to resign. May filed a charge alleging that the union violated §§8(b)(1)(A) and (2) of the NLRA. The union argued that by signing the checkoff authorization, May "elected to forego his right to be able to stop payment of dues at any time" and thereby effectively agreed to waive any right to resign except in the manner and at the time specified in the authorization. It argued that the resignation letter, which did not comply with the terms of the authorization, did not constitute an effective resignation of membership.

The NLRB framed the question as whether a union, without reliance on any valid union-security clause, could seek to require the continued checkoff of union membership dues from the wages of an employee who signed a dues-checkoff authorization that was irrevocable for 1 year

or the expiration of the current collective-bargaining agreement, whichever is sooner, but who resigned from membership before the end of that period of irrevocability. It concluded that its policy concerning the effect of a resignation on a checkoff authorization for deduction of union dues needed reexamination. In its reexamination, the Board first examined the legislative history of §302(c)(4), but concluded that it provided no answer and that the question should be decided in accord with more general policies of the NLRA. It stated, at 327-329,

> In particular, we find it reasonable to take account of the policy of "voluntary unionism" that, as the Supreme Court explained in *Pattern Makers*, was incorporated into the Act by the 1947 Taft-Hartley amendments, and of the principle that waivers of statutory rights must be clear and unmistakable.
>
> In its 1947 modification of Section 7 of the Act, Congress gave employees the right to refrain from engaging in the activities specified in that section. Because those activities include "join[ing], or assist[ing] labor organizations," it can hardly be disputed that Section 7 protects both the right to refrain from belonging to a union and the right to refrain from contributing money to it, except to the extent that the proviso to Section 8(a)(3) of the Act permits an employee to be required to pay dues under a contractual provision as there defined. These expressly stated policies of the Act, together with the contractual principles reviewed in section C below, must inform our decision concerning what the Respondent could lawfully require of May after he resigned membership and revoked his authorization for deductions made from his wages for the support of the Respondent.
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> ***
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> Our review of statutory policies and contractual principles persuades us that there is no reasonable basis for precluding an employee from individually agreeing that he will pay dues to a union whether or not he is a member of it and that he will pay such dues through a partial assignment of his wages, i.e., a checkoff. Neither is there a reasonable basis for precluding enforcement of such a voluntary agreement. But the policies discussed above also make it reasonable for us to conclude that an employee who has promised only to pay union "membership" dues by checkoff for 1 year has not necessarily thereby obliged himself to continue paying such dues throughout that period—i.e., to continuing assisting the union—even when he is no longer a union member. We will require clear and unmistakable language waiving the right to refrain from assisting a union, just as we require such evidence of waiver with regard to other statutory rights. The authorization signed by May, which refers only to an obligation with respect to payments of "my Initiation fee" and "my regular membership dues" plainly does not meet this standard.
>
> The Respondent seeks to surmount this difficulty by arguing that May in fact continued to be a "member" even after he attempted to resign, because his authorization was not merely an agreement to pay dues through a checkoff mechanism but also constituted an agreement to refrain from resigning his

membership. Hence, the Respondent in essence argues May waived two rights through the authorization—his right to refrain from assisting the Respondent and his right to refrain from belonging to it. Under this theory, May continued to owe dues as a member and to be obligated, during the stated irrevocability period of the authorization, to have those dues deducted from his wages. Because, however, we find the authorization's references to payment of dues insufficiently clear to require continued payment of membership dues after resignation, a fortiori we find the language insufficiently clear to prohibit May from resigning.

In reaching this conclusion, we are not identifying forced union membership with forced payment of dues. As noted above, we agree that the Board's decision in *Shen-Mar* rejecting that equation is still good law.[7] We recognize that paying dues and remaining a union member can be two distinct actions. We merely hold that the policy of "voluntary unionism" that informs the Supreme Court's decision in *Pattern Makers* with regard to remaining, or declining to remain, a union member also logically relates to other forms of union activity. The policy warrants the application of a test that will assure that the extraction of moneys from an employee's wages to assist a union, if not authorized by a lawful union-security clause, is in accord with the employee's voluntary agreement. If the employee did not agree, when he signed the authorization, to have "regular membership dues" deducted even when he is no longer a union member, then the employee's continued financial support of the union is not clearly "voluntary" after he has resigned.

Accordingly, we will construe language relating to a checkoff authorization's irrevocability—i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization's execution or on the expiration of the existing collective-bargaining agreement—as pertaining only to the *method* by which dues payments will be made *so long as dues payments are properly owing*. We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis. Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. If an authorization contains such language, dues may properly continue to be deducted from the employee's earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization. [Emphasis in original].

On the same day as *Lockheed,* the Board issued another case involving an employee who resigned his union membership and attempted to revoke his checkoff obligation outside of the window period provided in the checkoff authorization. In that case, the Board dismissed the

[7] *Shen-Mar Food Products*, 221 NLRB 1329 (1976), enfd as modified 557 F2d 396 (CA 4, 1977).

charge against the union. It concluded that a checkoff agreement authorizing the employer "to deduct from my pay each month, while I am in employment with the collective bargaining unit in the Company, and irrespective of my membership status in the Union, monthly dues, assessments..." clearly obligated the charging party to pay dues after he resigned his union membership until he properly revoked his checkoff authorization within the designated window period. *United Steelworkers of America, Local 4671,* 302 NLRB 367 (1991).

In *Schweizer Local No 1752 (UAW) (Schweizer Aircraft Corp),* 320 NLRB 528 (1995), an employee resigned his union membership and attempted to revoke his checkoff authorization outside of the window period while he was subject to a valid union security agreement. The authorization contained language similar to that in *Lockheed,* authorizing the deduction of "membership dues, including an initiation or reinstatement fee and monthly dues in such sums as may be established from time to time by said local union in accordance with the Constitution of the International Union, UAW AFL-CIO." However, the Board concluded that since the employee was covered by a valid union security clause, he had no §7 right to refrain from financially assisting the union. Therefore, it concluded, the clear and explicit waiver analysis of *Lockheed* did not apply, and the employee was not privileged to revoke his checkoff authorization outside of the window period. The Board noted, at 530, n 6, that the case did not raise any *Beck* issue, since following the employee's resignation, an adjustment was made to the amount being deducted from his wages reflecting his status as a financial core member who objected to payment of full union dues and fees.

Two days before *Schweizer,* the Board issued *California Saw and Knife Works,* 320 NLRB 224 (1995). In that decision, it concluded that a union's window period for making *Beck* objections, as applied solely to members who resigned outside the window period and not employees who were nonmembers during the last window period, acted as an arbitrary restriction on employees' right to resign from union membership, citing *Pattern Makers,* and also on these employees' right not to be compelled to support the union's nonrepresentational expenditures. The Board noted that an employee could exercise *Beck r*ights only when not a member of the union, and that the window period, as applied to those who had newly resigned, effectively compelled these employees to contribute to (what even the union would agree were) non-collective bargaining expenditures. The majority of the Board adopted this reasoning in *Polymark Corp,* 329 NLRB 9 (1999) to again find that a union's window period for making *Beck* objections, as applied to members who resigned after the window period, violated §8 (b)(1)(A) of the NLRB.

From the above, I conclude that the law under the NLRA is as follows. First, the "right to refrain" in §7 includes the right to resign one's union membership at any time. The proviso in the NLRA which protects the right of a union to prescribe its own rules with respect to the acquisition or retention of membership, and which has been broadly interpreted as giving a union the right to control its internal affairs, does not authorize restrictions on the right to resign. Therefore, a union unlawfully restrains or coerces employees in the exercise of their §7 rights if its actions restrict their right to resign even if, as in *Pattern Makers,* there is no direct impact on the employees' employment. It is unclear whether a member could, by any means, waive his or her right to resign full membership at any time. However, it is clear, under the authority of *Pattern Makers,* that members do not waive their right to resign full membership merely by voluntarily becoming a member of a union that has a rule in its constitution or bylaws restricting

the right to resign. The Board has also held that the §7 "right to refrain" of employees who are not covered by a valid union security clause also includes the right to refrain from financially assisting a union after resigning. An employee can waive that right by signing an individual agreement to financially support the union after he has resigned his membership. However, because this is an agreement to waive a statutory right, the waiver must be clear, explicit, and unmistakable.

Application to the Facts of the Case

Respondents argue that finding their August window period to be unlawful would affect their ability to establish criteria for the acquisition of membership. That is, they argue that they have the right, under §10(2)(a), to require, as a condition of membership, that employees agree to limit their right to resign. They argue that their ability to establish criteria for the acquisition of membership cannot be impaired in the absence of a demonstrable impact on the Charging Parties' employment, which is not present in this case.

As Respondents point out, PA 349 left intact the proviso in §10(2), identical to that in §8(b)(1)(A) of the NLRA, stating that the prohibition against restraint or coercion of public employees in the exercise of §9 rights does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership. As the Supreme Court noted in *Pattern Makers,* at 102, this language had been interpreted to protect a union's right to fine and expel members for violations of its internal rules. The Court in *Pattern Makers,* however, found that a restriction on the right to resign, although made part of the union's constitution, was not an internal union matter outside the reach of §8(b)(1)(A). After reviewing the legislative history, the Court concluded that in enacting the proviso protecting the union's right to make its own rules as part of the Taft-Hartley Amendments, Congress did not intend to allow union restrictions on the right to resign membership. It stated, at 103:

> The congressional purpose to preserve unions' control over their own "internal affairs" does not suggest intent to authorize restrictions on the right to resign. Traditionally, union members were free to resign and escape union discipline. In 1947, union constitutional provisions restricting the right to resign were uncommon, if not unknown. Therefore, allowing unions to "extend an employee's membership obligation through restrictions on resignation" would "expan[d] the definition of internal action" beyond the contours envisioned by the Taft-Hartley Congress. *International Assn of Machinists, Local 1414 (Neufeld Porsche-Audi, Inc,* 270 NLRB No. 209, p 11 (1984). [Footnotes omitted].]

In *Pattern Makers,* the union imposed fines on individuals it claimed had not validly resigned, but took no action that impacted their employment. Clearly, the Court in *Pattern Makers* concluded that Congress, in adopting Taft-Hartley, intended the right to resign full union membership to constitute such a fundamental right that a union's restriction of this right would constitute unlawful restraint or coercion even if the union's actions did not have an effect on their ex-members' employment.

Respondents also argue that the addition in PA 349 of §10(3) indicates the Legislature's intent to make unlawful only union restrictions on resignation from membership that impact the member's employment status. Section 10(3) now explicitly states that individuals may not be required as a condition of employment to, among other things, remain members of a labor organization. Respondents argue that if the Legislature's intent had been to make all union restrictions on the right to resign unlawful under §10(2)(a), §10(3) would be unnecessary. Section 10(3), however, is the provision in the statute which explicitly outlaws union security agreements. As such, it replaces the former §10(2) and the former proviso to §10(1)(c) which explicitly permitted such agreements. Like these former proviso, the new §10(3) addresses the rights of public employers, as well as unions and public employees. I do not agree that the inclusion of §10(3) indicates that Legislature did not also intend to bar unions from otherwise restricting its members right to resign.

As discussed above, I find that when the Legislature added the right to refrain language to §9 of PERA, it incorporated into PERA the right to refrain as it has been interpreted under the NLRA. I find that under §9(b) of PERA employees have a right to resign their union memberships at will. I conclude that any union rule or policy, including the MEA's August window period policy, which limits or restricts that right violates §10(2)(a) of PERA. I conclude, therefore, that Respondents' maintenance and enforcement of the last sentence of Article I of its bylaws, which on its face restricts the rights of employees to resign their memberships at will, constituted unlawful restraint and coercion of employees' §9 rights and therefore violates §10(2)(a) of PERA.

I also find that, under the principal of "voluntary unionism," a member can agree to limitations on his right to resign his "financial core" membership, i.e., his obligation to pay dues and fees, at least if that restriction is reasonable. I conclude that Respondents could lawfully condition admission to membership on an individual's written agreement to limit his right to resign his "financial core" membership at any time. However, I find that this agreement, as a waiver of individual statutory rights, must be clear, explicit, and unmistakable. I find that merely becoming or remaining a member of a labor organization with a rule or policy restricting the right to resign cannot constitute a clear and explicit waiver of the statutory right to resign at will. Moreover, I find that to constitute a valid waiver of the right to resign at will, any agreement signed by an individual member waiving their right to resign must clearly state that "membership" is limited to the obligation to pay dues and fees.

I find that the Continuing Membership Agreements signed by the Charging Parties in this case do not clearly, explicitly and unmistakably waive their right to resign their "financial core" memberships at will. The Continuing Membership Agreements signed by the Charging Parties do not define "membership" or clearly state that membership is limited to an obligation to pay dues or fees. I conclude, therefore, that Respondents also violated §10(2)(a) of PERA by refusing to accept Charging Parties' resignations outside of the August window period.

The remaining question is whether Respondents violated §10(2)(a) by threatening to take action against Charging Parties, whether hiring a debt collector or filing suit, to collect the dues and assessments Respondents assert that Charging Parties owe.

As discussed above, the NLRB has held that paying dues and being a union member are two separate actions, and that employees can agree to continue paying dues after resigning their memberships. In *International Brotherhood of Electrical Workers (Lockheed),* the NLRB held that where the issue was whether a union could lawfully continue to demand that the employer continue checking off dues after the employee's resignation, the Board would require the agreement to continue to pay dues after resignation to be clear and unmistakable, in accord with the standard for waivers of other statutory rights. In that case, the union sought to use the employees' employer to collect the dues that the union claimed it was owed. Here, however, Respondents have not demanded that Charging Parties' employer continue to deduct dues from their paychecks, and the Employer is prohibited from deducting dues from the paychecks of even those members who would prefer that the Employer do so.

Respondents argue that they cannot be found to have violated §10(2)(a) of PERA by threatening to take legal action against the Charging Parties to collect dues because a threat to invoke a legal right cannot constitute a violation of the Act. Respondents argue that a statute, in this case PERA, should be interpreted in a manner consistent with constitutional principles.[8] They assert that finding them to have committed an unfair labor practice based solely on their threat to take legal action on a debt would infringe on their First Amendment right to petition and of access to the courts. Respondents cite the Supreme Court's holding in *Bill Johnson's Restaurants v NLRB,* 461 US 732, 745-46 (1983). In *Bill Johnson*, the Court held that because of the First Amendment's protection of the right to access to the courts, the filing and prosecution of a state court lawsuit by an employer against its employee could not be enjoined as an unfair labor practice under the NLRA, regardless of the employer's motive for filing the suit, unless the lawsuit "lacked a reasonable basis." The Court stated that if the plaintiff in the lawsuit was able to present the Board with evidence that its lawsuit raised genuine issues of material fact, the Board should proceed no further with the unfair labor practice proceeding until the state court suit was concluded since the NLRA should not be construed to allow the Board to usurp the traditional fact-finding function of a state court. The Court also held that if the state court proceeding resulted in a judgment adverse to the employer, and the NLRB then concluded that the suit was filed to retaliate against the employee for his protected concerted activity, the Board could find an unfair labor practice and order appropriate relief. In a subsequent case, *BE & K Construction Co v NLRB,* 536 US 516 (2002), the Court held that an employer's unsuccessful state court lawsuit against a union could not form the basis for an unfair labor practice finding unless the Board could conclude that the suit was "objectively baseless," i.e. no reasonable litigant could expect success on the merits.

Respondents also argue that the Commission lacks jurisdiction to find a violation of PERA because this dispute has no impact on Charging Parties' employment. As mentioned above, the Commission has consistently held that it has no jurisdiction to interfere with internal

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[8] For the proposition that PERA must be interpreted in line with constitutional principles, Respondents cite *Grass Lake Cmty Schs,* 1978 MERC Lab Op 1186, aff'd *Jackson Co Ed Assn v Grass Lake Cmty Schs,* 95 Mich App 635, (1979). In *Grass Lake,* the Commission held that even if union representatives authored a petition presented to the employer's school board asking it to replace its chief negotiator, the union did not violate §10(3)(b) of PERA prohibiting unlawful coercion of an employer in the selection of its representative for collective bargaining. The Commission held that since the presentation of a petition to a governing body is conduct protected by the First Amendment, it would not find the mere presentation of the petition to violate the Act.

union affairs absent some direct impact on employment. See, e.g., *Assn of School and Community Service Administrators (Mettler),* supra; *Organization of Classified Custodians,* 1996 MERC Lab Op 181 (no exceptions) (suspension and expulsion from union membership an internal union matter not subject to regulation by the Commission absent some impact on employment); *AFSCME Local 118,* 1991 MERC Lab Op 617 (no exceptions) (whether union collected dues from members for work done during the summer months an internal union matter where there was no impact on employment); *Macomb Co Professional Deputy Sheriff's Assn,* 1995 MERC Lab Op 595 (no exceptions) (union's lawsuit, after member resigned, to collect back dues that were mistakenly not withheld during her employment an internal union matter not affecting her employment); *Detroit Assn of Educational Office Employees,* (no exceptions) 1980 MERC Lab Op 1058 (dispute between union and members over whether they were required to pay back dues as a condition of remaining members an internal union matter where no employer action or involvement in the dispute).

As discussed above, I agree that a union's restrictions on the right to resign union membership are not internal union matters protected by the provision giving the union the right to prescribe its own rules with respect to the acquisition or retention of membership. However, I agree with Respondents that the Commission does not have jurisdiction under PERA to find an unfair labor practice based on a union's attempts to enforce the terms of a private agreement between itself and an ex-member when these attempts do not involve either the ex-member's employer or employment. I conclude, therefore, that Respondents did not violate §10(2)(a) of PERA by threatening to hire a debt collector or file suit to collect the sums it claimed were owed by the Charging Parties.

In sum, my conclusions are as follows. The addition of right to refrain language to in §9(1)(b) of PERA gave employees the right under §9 of PERA to resign their union memberships at will and prohibited unions from restricting that right by rule or policy. The Charging Parties in this case had a §9 right to resign their union memberships outside of the MEA's August window period. They did not clearly and explicitly waive that right either by joining Respondents when that organization had a bylaw that restricted when they could resign or by the Continuing Memberships agreements which they signed. All four Charging Parties either resigned in writing or, in the case of Knapp, requested to resign but were explicitly told that a written resignation request made outside the union window period would be futile. I conclude that Respondents continued maintenance and enforcement of the August window period contained in the last sentence of Article I of its bylaws violated §10(2)(a) of PERA because it constituted an unlawful restriction on employees' right to resign. I also conclude that Respondents violated §10(2)(a) of PERA by refusing Charging Parties' requests to resign outside the August window period. I find that Respondents did not violate §10(2)(a) by threatening to hire a debt collector or file suit to collect the dues Respondents claimed that Charging Parties owed for them.

Respondents' Failure to Notify Charging Parties of the Window Period

Charging Parties also argue that Respondents breached their duty of fair representation toward them by failing "to take sufficient action to notify them and other teachers of the steps needed to extricate themselves fully from any financial obligation to the unions." As discussed in

the fact section above, Respondents' August window period for resignations is contained in Article I of its bylaws, which are on the MEA website. However, the website does not include a specific link to "resignations" or "August window period." The MEA *Voice,* a publication regularly sent to members, publicizes the website. However, neither Article I of the bylaws nor other information specifically about the August window period is published in the *Voice.*

In support of the argument that Respondents had a duty to affirmatively notify them of the August window period, Charging Parties first cite *Steele v Louisville & NPR,* 323 US 192 (1944), for the proposition that a union's duty of fair representation toward nonmembers includes the duty to "keep nonmembers informed of important issues." In *Steele,* which arose under the Railway Labor Act, a union representing railroad firemen excluded black firemen from membership. It also negotiated collective bargaining agreements with provisions that explicitly discriminated against them. While not holding that the union's exclusion of the black firemen from membership was unlawful, the Supreme Court held that since the union was the statutory representative of the class of firemen, it owed a duty toward all employees in that class, including those who were not union members. The Supreme Court said, at 204, that the union's duty to represent nonmembers without hostile discrimination, fairly, impartially and in good faith, required it to consider the views of nonmembers, and where necessary, provide these nonmembers with "notice of and opportunity for hearing upon its proposed action."

Charging Parties go on in their brief to discuss the development of the statutory and common law cause of action for breach of the duty of fair representation, including, as set out in *Vaca v Sipes,* 386 US 171,177 (1967), the duty of a union "to serve the interest of all unit members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Among the other cases they cite is *American Postal Workers Union, Local 6885 v American Postal Workers Union,* 665 F2d 1096 (CA DC 1981), in which a local union challenged a contract negotiated by its international union on its behalf. The local alleged that the international breached its duty of fair representation by a series of actions it took during negotiations, including promising to consult with the local union but failing to do so before changing its bargaining position. Before rejecting the claim that the international had breached its duty of fair representation, the Court reviewed cases holding that unions violated their duty of fair representation by failing to adequately inform members about matters on which they were required to act. In one of the cases discussed, unions failed to tell members that if they ratified the contract which was before them for a vote, the employer would eliminate the entire unit. In another, the union breached its duty by failing to tell an employee that failure to join the union and pay dues would result in his discharge.

Charging Parties conclude with a discussion of *Knox v Service Employees International Union,* Local *1000,* 567 US ____ (2012), where the issue was whether a union violated the constitutional rights of nonmembers when it required them to pay a union special assessment intended to fight a ballot proposal. The special assessment was announced after the union's annual window period for nonmembers to make objections to the amount of the agency fee, and the union therefore provided nonmembers with no opportunity to object to paying the special assessment. In finding that the union acted improperly, the Court held, as Charging Parties note, that "a nonmember cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent."

From the cases discussed above, Charging Parties argue that Respondents had a duty to provide them, and all its other members, with sufficient information to make an informed choice during the August window period. However, Charging Parties have provided no good authority for the proposition that a union's duty of fair representation includes the obligation to provide its members with information about how to go about resigning their memberships. A union's duty of fair representation requires it to represent employees fairly and without hostility with respect to matters related to their employment. This sometimes includes, as discussed in the cases cited by Charging Parties, an affirmative duty to inform employees about matters that affect their employment status or their terms and conditions of employment. As Respondents rightly point out, however, the duty of fair representation is coextensive with the union's authority under the statute to bargain on the employee's behalf, i.e., it extends only to matters for which the union is the employees' exclusive representative. See, e.g., *Detroit Bd of Ed,* 1997 MERC Lab Op 394. Even if union members have the right to resign, as I have concluded that they do, I find that information about how to resign does not fall into this category, at least for members not subject to a union security agreement.[9] I conclude that Respondents' duty of fair representation under §10(2)(a) did not include an obligation to provide members not subject to a union security agreement with information about how to resign their memberships.

I note that Charging Parties argue that the sheer number of MEA members who failed to sign up for e-dues or pay their dues in cash for the 2013-2014 membership year, approximately 8,000, as contrasted with the 900 to 1500 who actually resigned in August 2013, indicates that Respondents failed to provide sufficient notice of the resignation process. Of course, some of these 8,000 members may have been unaware of Respondents' resignation process. Others may have been unaware that they needed to resign their union memberships in order to escape a financial obligation to Respondent after PA 349 took effect, or that there was and is a distinction between being a member of a bargaining unit and being a member of the union representing that unit. In recognition that employees needed information about the effect of PA 349 on their rights and responsibilities, the Legislature specifically directed the Department of Licensing and Regulatory Affairs to provide this type of information to employees, as well as to public employers and labor organizations. This to me indicates that the Legislature understood that unions did not have an affirmative duty to educate their members concerning the changes wrought by PA 349.

Proposed Remedy

In accord with my conclusion that Respondents violated §10(2)(a) by maintaining and enforcing their August window period policy on resignations because it constituted unlawful restraint or coercion of their members' right to resign their memberships at will, I will recommend to the Commission that it order Respondents to cease and desist from enforcing this policy and either remove Article I from the MEA bylaws or amend it to reflect that the August window period, as reflected in the last sentence of that article, cannot be enforced.

[9] The issue, for members subject to a union security agreement, is whether their rights under *Abood* and *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson* 475 US 292 (1986), require this notice.

In accord with my conclusion Respondents violated §10(2)(a) by refusing to accept Charging Parties' resignations in September and October 2013, I will recommend that the Commission order Respondents to cease and desist from refusing to accept Charging Parties' resignations and notify them in writing that their resignations have been accepted. In accord with my conclusion that Respondents' threats to hire a debt collector or take other actions to collect sums that Charging Parties allegedly owed pursuant to a private contract with Respondents did not violate PERA, I recommend that this allegation be dismissed. I also recommend that the Commission find that Respondents duty of fair representation did not include an affirmative obligation to provide notice to Charging Parties, or to other members not subject to union security agreements, of its August window period.

I will also recommend that the Commission issue an order requiring Respondents to take the actions set forth below, including ordering Respondents, with the permission of the Employer, to post a notice to its members on the Employer's premises and ordering Respondents to publish the order in both its online and paper editions of the *Voice.*

Based on the findings and stipulations of fact and findings and conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondents Saginaw Education Association and Michigan Education Association, its officers and agents, are hereby ordered to:

1. Cease and desist from restraining and coercing employees in the exercise of their right under §9 of PERA to refrain from joining or assisting labor organizations by:

   a. Maintaining or enforcing the rule contained in Article I of the MEA's bylaws prohibiting members from resigning their union memberships except during the month of August;

   b. Refusing to accept Kathy Eady-Miskiewicz's September 18, 2013 resignation from her union membership, Jason LaPorte's September 18, 2013 resignation from his union membership, Susan Romska's September 20, 2013 resignation from her union membership, and Matt Knapp's October 7, 2013 resignation from his union membership.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Remove the last sentence of Article I from the bylaws or amend the bylaw to reflect the fact that the last sentence of Article can no longer be enforced as written;

b. Affirmatively notify Kathy Eady-Miskiewicz, Jason LaPorte, Susan Romska, and Matt Knapp in writing that their resignations in September and October 2013 have been accepted;

c. With the agreement of the Charging Parties' employer, the Saginaw Public Schools, post the attached notice to union members in conspicuous places on the employer's premises, including all places where notices to members of the Saginaw Education Association's bargaining unit are normally posted, for a period of 30 consecutive days; within 60 days of the date of this order, publish the attached notice in both the print and online editions of the MEA *Voice* and email or mail copies of this editions of the *Voice* to all members who normally receive the *Voice*.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 2, 2014

NOTICE TO UNION MEMBERS

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **SAGINAW EDUCATION ASSOCIATION** AND THE **MICHIGAN EDUCATION ASSOCIATION** TO HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT restrain and coerce employees in the exercise of their rights under §9 of PERA to refrain from joining or assisting in labor organizations.

WE WILL NOT maintain or enforce a rule that prohibits members from resigning their union memberships except during the month of August.

WE WILL NOT refuse to accept Kathy Eady-Miskiewicz's September 18, 2013 resignation from her union membership, Jason LaPorte's September 18, 2013 resignation from his union membership, Susan Romska's September 20, 2013 resignation from her union membership, and Matt Knapp's October 7, 2013 resignation from his union membership.

WE WILL remove the last sentence of Article I from the bylaws or amend it to reflect the fact that it can no longer be enforced as written.

WE WILL affirmatively notify Kathy Eady-Miskiewicz, Jason LaPorte, Susan Romska, and Matt Knapp in writing that their resignations in September and October 2013 have been accepted.

SAGINAW EDUCATION ASSOCIATION

By: _____

Title: _____

MICHIGAN EDUCATION ASSOCIATION

By: _____

Title: _____

Date: _____

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 Nos. CU13 I-054/13-013125-MERC through CU13 I-061/13-013134-MERC