

TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TAYLOR SCHOOL DISTRICT,
Public Employer-Respondent in Case No. C13 G-133

-and-

TAYLOR FEDERATION OF TEACHERS, AFT, LOCAL 1085
Labor Organization-Respondent in Case No. CU13 G-29

-and-

NANCY RHATIGAN, REBECCA METZ, AND ANGELA STEFFKE,
Individual Charging Parties.

APPEARANCES:

Mark H. Cousens, for Respondents

Derk A. Wilcox, Mackinac Center Legal Foundation, for the Charging Parties

DECISION AND ORDER

On December 27, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motions for Summary Disposition finding no unfair labor practice by Respondents Taylor School District (Employer) and Taylor Federation of Teachers, AFT, Local 1085 (Union), under §10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ concluded that the Charging Parties, individual teachers, had standing to challenge one of the two contracts between the Employer and the Union - a ten-year Union Security Agreement - but lacked standing to challenge the contract for lack of adequate consideration. The ALJ noted that a contract can only be challenged by a party thereto, which in this case is the employer and the union, not the employer and individual employees. The ALJ further held that the contract was backed by adequate consideration and that it could lawfully set policy for future school boards. Additionally, the ALJ found that the Union did not breach its duty of fair representation. Finally, the ALJ declined to find the length of the agreement excessive or unlawful, concluding that it is not the Commission's role to modify the terms of a lawful contract on public policy grounds.

The ALJ's Decision and Recommended Order was served upon the parties in accordance with §16 of PERA. After requesting and receiving an extension of time in which to file

exceptions to the ALJ's Decision and Recommended Order, Charging Parties filed their exceptions on February 20, 2014. Respondents requested and were granted an extension of time in which to file a response to the exceptions, and filed their response on March 28, 2014.

In their exceptions, Charging Parties contend that the ALJ erred by finding that they lacked standing to challenge the consideration for the contract, because as beneficiaries of the agreement, they have third-party standing. Further, Charging Parties argue that the Union Security Agreement lacks consideration. They also assert that the ALJ incorrectly determined that PERA permits agreements which have different expiration dates. Charging Parties also argue that the ALJ incorrectly determined that a public employer can use a contract to set public policy which its successors, future school boards, cannot alter. Charging Parties claim error in the ALJ's decision that entering into the Union Security Agreement does not breach the Union's duty of fair representation.

In its response to Charging Parties' exceptions, Respondents argue that MERC may not evaluate consideration for a contract. Respondents also argue that Charging Parties lack standing to challenge the consideration for the contract because they are merely incidental beneficiaries of it. Respondents contend that MERC has held that provisions of a collective bargaining agreement may expire at different times. MERC, they claim, has expressly approved collective bargaining agreements with different expiration dates and of long duration. Respondents except to Charging Parties' assertion that a school board may not use a contract to set policy and they assert that the ALJ was correct in finding that the Union exercised good faith judgment.

The National Right to Work Legal Defense Foundation (LDF) filed a motion seeking to submit an amicus curiae brief in support of Charging Parties' Exceptions on April 16, 2014, and Respondents wrote in opposition on the same day. The Commission granted the motion to allow the filing and the amicus curiae brief was filed on May 23, 2014. The brief argues that the Union breached its duty of fair representation by "deliberately suppressing the employees' Right to Work [in order to] satiate the union's pecuniary self-interest," and that it did so as a quid pro quo by using significant concessions at teachers' expense to obtain the Union Security Agreement.

Respondents filed a Motion to Strike Brief Amicus Curiae on May 27, 2014, arguing that the wage concessions were not quid pro quo for the Union Security Agreement, but rather a necessary part of the District's deficit elimination plan. In its response, filed on June 2, 2014, the LDF reiterated its argument that the wage concessions were quid pro quo for the Union Security Agreement as evidenced by the timing of the bargaining history and the ratification of both agreements. We find that Respondents' motion to strike the amicus brief is without merit and accordingly deny the motion. We will exercise our discretion in giving whatever weight we find appropriate to the LDF's arguments.

Respondents also filed, on December 26, 2014, a Motion to Reopen the Record for the purpose of receiving a document. The document is a Memorandum of Understanding which is an addendum to a master agreement between the School District of the City of Flint, Michigan and the United Teachers of Flint. According to Respondents, the purpose of the memorandum is to "address a substantial structural deficit facing the school district." The reductions agreed to in the memorandum are for a period of seven years. Because we are considering a long-term

agreement in this case, Respondents believe that we “should receive this document as it is evidence of a long-term agreement.” We find that an agreement between a school district and a union that are not parties to this case has no relevance to our decision here and, accordingly, deny the motion. Moreover, the requirements for reopening the record, set forth in Rule 166 of the General Rules, 2002 AACS, R 423.166, have not been met. The legality of an agreement between parties who are not involved in this case, which has not been ruled upon by this Commission or by a court of competent jurisdiction, has no persuasive effect, nor is it material to the issues before us. In addition, even if the document was relevant, its submission into the record would not require a different result. Accordingly, Respondents’ Motion to Reopen the Record is denied.

We have considered the arguments made in Charging Parties’ exceptions and find that they have merit. We, therefore, reverse the findings of the ALJ. Commissioner Yaw files a dissenting opinion, as she finds Charging Parties’ exceptions to be without merit.

Facts:

The record contains the following undisputed facts. Respondents Employer and Union ratified two separate agreements, the first on January 31, 2013 and the second on February 7, 2013. One agreement contained most of the terms and conditions of employment for the bargaining unit; that agreement expires on October 1, 2017. It includes a ten percent reduction in wages effective upon ratification and, continuing through 2016, suspension of step increases, reduction of stipends for coaches and the elimination of reimbursement for mileage expenses while driving on school business. In addition, the Union withdrew a charge pending before the Commission.

The second contract consists of a Union Security Agreement which requires Union members to pay either dues or service fees to the Union; this agreement expires on July 1, 2023. The Union Security Agreement states that it reflects the parties’ mutual goals of labor peace and bargaining unit continuity. Under the agreement, a bargaining unit member will have 14 days after receiving a Notice of New Hire from the Union in which to decide whether to join the Union or pay a service fee.

Discussion and Conclusions of Law:

Public Act 349 (PA 349), known as the “Right to Work” or “Freedom to Work” statute, was adopted by the Legislature in December 2012. In essence, PA 349 made union security provisions unlawful. The legislation did not take effect until March 28, 2013, after the Union and the Employer in this case had ratified the two contracts described above. PA 349 permits members of a bargaining unit to refuse to pay either union dues or service fees to the union, and prohibits employers from deducting union dues or service fees from employees’ pay, and from terminating employees for refusing to pay dues or fees. PA 349 permits parties to retain and enforce union security clauses that were contained in agreements prior to March 28, 2013. It states:

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

Thus, when the Union and the Employer executed the Union Security Agreement, such agreements were still lawful.

Standing

The ALJ stated that “members of a bargaining unit are in some cases considered third-party beneficiaries of a collective bargaining agreement and, as such, have the right to enforce implied promises made to them in that agreement.” We agree with the statement and find that the individual Charging Parties have third-party beneficiary standing to challenge all aspects of the contract. In *MEA/NEA Local 1 v Mt. Clemens Cmty Schs*, 17 MPER 69 (2004), the Michigan Court of Appeals, in an unpublished opinion, found that a union had the right to sue to enforce an agreement between a school district and a private company hired to manage and operate several schools in the school district. The agreement provided that the teachers at these schools would continue to be employees of the school district and would be covered by the collective bargaining agreement between the school district and the union. The private company failed to pay the teachers at one school the wages set forth in the collective bargaining agreement. The Court held that the union had a right to enforce the contract between the school district and the private company because it was a third-party beneficiary of the contract. See also *Menosky v City of Flint*, 2012 WL 5818330 (ED Mich), which held that the surviving spouses of public employees were the intended third-party beneficiaries of a collective bargaining agreement negotiated between their deceased husbands and the husbands’ employer. Accordingly, the surviving spouses were eligible for and could seek benefits under the agreement even though they were not parties thereto.

This case is before the Commission now because the Wayne County Circuit Court dismissed an earlier lawsuit between these parties which held that MERC alone had jurisdiction. Sufficient standing has been shown to give Charging Parties the right to challenge the extraordinary Union Security Agreement. The ALJ was correct in holding that Charging Parties had standing to challenge the Union Security Agreement because they would be harmed by its enforcement.

Consideration

We agree with the ALJ that it is not within our authority to inquire into the adequacy of consideration for a contractual promise. “[C]ourts will not inquire into the adequacy of the consideration. When two competent parties, through a process of give and take, reach an agreement it can be presumed that the mutual promises were considered adequate.” *Harris v Chain Store Realty Bond & Mortgage Corp.*, 329 Mich 136 (1950), citing *Levitz v Capitol*

Savings & Loan Co., 267 Mich 92 (1934) ("The law does not inquire into the adequacy of the consideration. It is enough if the consideration is given, in whole or part, in exchange for the promise."); *Van Nordsall v Smith*, 141 Mich 355 (1905) ("Mere inadequacy of consideration, not accompanied by other elements of bad faith, is not a sufficient ground for rescission of a contract or for refusing specific performance of it, unless so excessive as to furnish satisfactory evidence of fraud."); *Olson v Rasmussen*, 304 Mich 639 (1943) ("Mere inadequacy of consideration ... will not warrant cancellation of a contract, unless so inadequate as to furnish convincing evidence of fraud or unless so grossly inadequate as to shock the conscience of the court.") Here, there is no evidence in the record of fraud, nor have Charging Parties alleged fraud on the part of Respondents. The consideration offered by the Union in support of the Union Security Agreement has not been alleged to, nor does it, shock the conscience of this Commission. We simply have no grounds on which to inquire into the adequacy of the consideration for the Union Security Agreement. Nor did the ALJ, who should have refrained from making findings on the issue of consideration.

The Duration of the Union Security Agreement

Charging Parties argue that the Union Security Agreement should be limited to three years or to the duration of the separate five-year contract. They also claim that PERA prohibits parties from agreeing to separate expiration dates for different provisions in a contract or designating different expiration dates for two agreements between the same parties. In support of this claim, Charging Parties cite the "contract bar rule", found at § 14(1) of PERA, which states:

An election shall not be directed in any bargaining unit or subdivision of any bargaining unit if there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties to the collective bargaining agreement if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

The purpose of the rule is to strike a balance between bargaining unit stability and the right of employees to decertify or change their bargaining representative. The Commission has held that for a contract to serve as a bar to an election, it must contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship. It will not constitute a bar if it is limited to wages only, or to a provision not deemed substantial. *Berrien County-Buchanan Pub Schs*, 1967 MERC Lab Op 518; *City of Inlay City*, 1978 MERC Lab Op 799. However, the rule applies only in situations where employees seek to either decertify a union or change representation. This case does not present such a situation. The rule nowhere states that all bargaining agreements or clauses within bargaining agreements must be of the same duration.

Moreover, we have held that it is lawful to have differing expiration dates for different clauses of a contract or to have more than one contract governing the relationship between the parties. For instance, in *Ann Arbor Fire Fighters Assn*, 1990 MERC Lab Op 528, the Commission found enforceable a pension moratorium clause in a collective bargaining

agreement which had an expiration date later than that of the remainder of the agreement. See also *City of Taylor*, 23 MPER 33 (2010) (no exceptions) where a separate pension moratorium clause with a later expiration date than the main agreement was also found to be valid. We agree with the ALJ that the fact that the two agreements at issue here have different expiration dates is insufficient, by itself, to render the Union Security Agreement unenforceable or invalid. We also agree that the contract bar rule is inapplicable here. However, *Ann Arbor Fire Fighters Assn* can be distinguished from this case because the Union and the Employer here are attempting to nullify a state law for the next ten years.

Unlike the ALJ, we find the ten-year duration of the Union Security Agreement to be excessive and unreasonable. Charging Parties are correct that the Union Security Agreement compels bargaining unit members to either remain in or to financially support a labor organization, a violation § 9 of PERA, which states:

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.

Charging Parties assert that the “sole purpose of the Union Security Agreement was to render PA 349 null and void.” While that statement is somewhat hyperbolic, given that PA 349 is the law of this State and is neither null nor void, we do agree that Respondents action was intended to delay the application of PA 349 for ten years beyond its legislatively mandated effective date. In so doing, Respondents have effectively compelled unwilling unit members, in violation of § 9 of PERA, to financially support the Union for the next decade.

What if the parties had signed a one-hundred-year contract? What if they had entered into a perpetual union security in an attempt to nullify the State’s Right-to Work legislation? Would not such actions be void as a matter of public policy? Just as one legislature cannot bind subsequent legislatures, one school board cannot bind subsequent school boards. Where do we as a Commission draw the line where a union and a school district can enter into a long-term contract binding on subsequent parties? Is fifty years, twenty-five years, or fifteen years acceptable?

The answer is not found in the length of the contract, but in whether the Employer has violated § 10(1)(a) and (c) of PERA by interfering with, restraining, or coercing public employees in the exercise of rights guaranteed by §9 “**in order to encourage membership in a labor organization.**” (Emphasis added). We hold that the Employer violated § 10(1)(a) of PERA by coercing Charging Parties to financially support the Union.

In addition, we hold that the Employer violated §10(1)(c) by discriminating in regard to hiring, terms, or other conditions of employment in order to encourage membership in a labor organization. The elements of a prima facie case of unlawful discrimination are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2)

employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Univ of Michigan*, 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Ewart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). See also *City of St. Clair Shores*, 17 MPER 27 (2004); *North Central Cmty Mental Health Services*, 1998 MERC Lab Op 427, 436. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA*, *supra*.

The ALJ erred in finding that Charging Parties did not establish a discrimination claim. They suffered an adverse employment action in regard to their wages because they will be forced to pay agency fees to the Union. In addition, Charging Parties engaged in protected activity by attempting to assert their rights under PERA, those being the right to refrain from assisting a labor organization and the right to be free of coercion intended to force them to financially support a labor organization. The Employer was aware of their efforts. The Employer demonstrated hostility toward Charging Parties' protected rights by entering into a contract which compelled them to support the Union. We believe that the record reveals that hostility toward Charging Parties' protected rights was a substantial or motivating factor in the Employer's decision to enter into the Union Security Agreement. Finally, the Employer has not established that it would have taken the same action even absent the protected conduct. Accordingly, we hold that the Employer violated § 10(1)(c) of PERA.

The Duty of Fair Representation Claim

The ALJ also erred in finding that the Union did not violate its duty of fair representation. Charging Parties allege that Respondent Union violated §10(2)(a), which prohibits a labor organization from restraining or coercing employees in the exercise of the rights guaranteed by §9. They also allege that the Union violated §10(2)(c), which makes it unlawful for a labor organization to cause or attempt to cause a public employer to discriminate against a public employee in violation of §10(1)(c).

Charging Parties take exception to the ALJ's finding that the Union did not violate its duty of fair representation toward them when it ratified the union security agreement. A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). Bad faith conduct is defined as "an intentional act or omission undertaken dishonestly or fraudulently." *Goolsby*. Arbitrary conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with

indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* The fact that individual unit members do not approve of the Union's actions is not sufficient to demonstrate that the Union acted with hostility, was dishonest, discriminated, or acted in a grossly negligent manner.

We disagree with the ALJ's conclusion that the Union acted lawfully and reasonably. The Union acted arbitrarily, in a manner that discriminated against some bargaining unit members, and was indifferent to the interests of those members. It was aware that PA 349 was pending when it negotiated for and ratified a Union Security Agreement that it knew would compel unwilling members to support it financially for ten years. The Union asserts that it was acting in the interests of all members and supports that contention by noting that the majority of the membership ratified the agreement and was, therefore, satisfied with the Union's conduct. We again disagree. Imposing a lengthy financial burden on bargaining unit members, in order to avoid the application of a state law for ten years, is arbitrary, indifferent and reckless. Therefore, we hold that the union committed an unfair labor practice in violation of § 10(2) (a) and (c) of PERA.

We have carefully considered all other arguments made by the parties, and by the LDF, and find that they would not change the result. Accordingly, we issue the following order:

ORDER

The Taylor School District, its officers, agents and representatives, shall cease and desist from:

- a. Interfering with, restraining, or coercing employees, including, but not limited to, Nancy Rhatigan, Rebecca Metz, and Angela Steffke, in the exercise of rights guaranteed in Section 9 of PERA, including the right to be free from coercion to financially support a labor organization;
- b. Discriminating against employees, including Nancy Rhatigan, Rebecca Metz, and Angela Steffke, regarding terms and conditions of employment in order to encourage or discourage union membership or financial support; and
- c. Enforcing the Union Security Agreement against Nancy Rhatigan, Rebecca Metz, and/or Angela Steffke by threatening to terminate, or terminating, their employment for failing or refusing to pay union fees or union dues.

The Taylor Federation of Teachers, AFT, Local 1085, its officers, agents and representatives, shall cease and desist from:

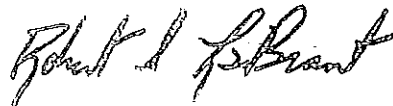
- a. Interfering with, restraining, or coercing employees, including, but not limited to, Nancy Rhatigan, Rebecca Metz, and Angela Steffke, in the exercise of rights guaranteed in Section 9 of PERA, including the right to be free from coercion to financially support a labor organization;

- b. Causing, or attempting to cause, a public employer to discriminate against public employees, including, but not limited to, Nancy Rhatigan, Rebecca Metz, and Angela Steffke, by encouraging a public employer to terminate, or threaten to terminate, public employees who refuse to pay union dues or union fees.
- c. Enforcing or attempting to enforce the Union Security Agreement against Nancy Rhatigan, Rebecca Metz, and/or Angela Steffke by threatening or attempting to cause the Employer to terminate their employment if they fail or refuse to pay union fees or union dues.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Edward D. Callaghan, Commission Chair



Robert S. LaBrant, Commission Member

Dated: FEB 13 2015

Commissioner Yaw, Dissenting

I disagree with Commissioners Callaghan and LaBrant and would affirm the findings of the ALJ, on all issues except the issue of third-party standing, for the reasons discussed below.

Standing

Charging Parties do not have standing to challenge the validity of the Union Security Agreement. “[An] individual employee has no standing under PERA to bring a repudiation claim or otherwise in any attempt to enforce a contractual right.” *Kent County*, 25 MPER 29 (2011) (no exceptions). Charging Parties argue that they are third-party beneficiaries of the Union Security Agreement and, thus, have standing to challenge it. This is not correct. MCL 600.1405 states in pertinent part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee. A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

Barrett Camp 33, Inc v Corporate Design Group, Inc, 1998 WL 1988890 (Unpublished opinion of the Michigan Court of Appeals). Here, neither the Employer nor the Union made a promise to do or refrain from doing anything directly to or for any of the three individual Charging Parties. Accordingly, they lack standing to challenge the Union Security Agreement. The ALJ was incorrect in finding that they had standing because they will be harmed if the Union Security Agreement is enforced, that harm being having to pay the Union a service fee for ten years. I do not agree, based on *Kent County*, *supra*, which explicitly states that individual employees have no standing to bring claims under PERA for any reason. See also *Kisiel v Holz*, 272 Mich App 168 (2006) which held that “an incidental beneficiary has no rights under a contract” and “a third person cannot maintain an action on a simple contract merely because he or she would receive a benefit from its performance or would be injured by its breach. Third party beneficiary status requires an express promise to act to the benefit of the third party.” Such an express promise is lacking in this case.

Moreover, the Commission has limited individual employee standing to bring charges under PERA. See *Coldwater Comm Schs*, 1993 MERC Lab Op 94 (the duty to bargain runs between the employer and the union and individuals do not have standing to file charges alleging failure to bargain); *USWA Local 14317*, 2002 WL 34676727 (no exceptions) (only employers and labor organizations have standing to file unfair labor practice charges that allege a refusal to bargain; individual bargaining unit members have no such standing); *Detroit Pub Schs*, 23 MPER 47 (2010) (no exceptions) (individual employee lacks standing to bring a charge against an employer related to disputed grievance processing); *Detroit Bd of Educ*, 1999 MERC Lab Op 269 (no exceptions) (“The Commission has consistently held that an individual may not file a charge which asserts that an employer has violated its duty to bargain in good faith.”); *City of*

Detroit, 1994 WL 168394458 (individual employee lacks standing to file a charge alleging that employer violated the duty to bargain); *Detroit Ass'n of Educ Office Employees*, 23 MPER 49 (2010) (no exceptions) (individual employee lacks standing to take a case to arbitration or to otherwise insist on further processing of a grievance.)

By holding that the individual employees in this case have standing, the majority overturns longstanding precedent. In addition, the majority fails to acknowledge that granting broad, almost unlimited standing to individuals to bring charges under PERA will open the floodgates of litigation. It can reasonably be anticipated that individual employees will, following this decision, file many complaints challenging contracts (or contractual provisions) with which they disagree, notwithstanding that the majority of the bargaining unit has ratified the contract, and both the employer and the union, the actual parties to the contract, are satisfied with it. Individual bargaining unit members are not intended third-party beneficiaries of labor contracts; they are only incidental beneficiaries thereof. The consequences of the majority's holding raise serious concerns regarding the goals of PERA - stability in labor relations and the prompt resolution of labor disputes.

Consideration

I agree with the majority that it is not within our authority to inquire into the adequacy of consideration for a contractual promise. However, the ALJ discussed whether the consideration was adequate and the parties have argued the adequacy of the consideration in their exceptions and briefs. Therefore, I believe the issue should be discussed. The record demonstrates that the Employer and the Union negotiated in good faith and reached agreements that were acceptable to both. The consideration offered by the Union in support of both of these agreements - wage concessions, suspension of step increases, reduction of stipends, avoidance of internecine strife within the bargaining unit, labor-management collaboration, labor peace, bargaining unit continuity, and addressing the Employer's financial challenges - falls far short of being inadequate. Charging Parties' exceptions claim that the consideration supporting the main agreement cannot also serve as consideration for the Union Security Agreement. I disagree. In *Hall v Small*, 267 Mich App 330 (2005), the parties negotiated both a purchase agreement for real estate and a release entitled "Statement of Mutual Satisfaction." The plaintiff argued that although the purchase agreement was supported by adequate consideration, the release was not. The Michigan Court of Appeals disagreed. It relied upon and quoted *Rowady v K Mart Corp*, 170 Mich App 54, 59 (1988), which states: "Where there is no specific recitation of separate consideration for the release, but it is part of a larger contract involving multiple promises, the basic rule of contract law is that whatever consideration is paid for all of the promises is consideration for each one." I believe that all concessions and promises made by the parties were intended as consideration for both agreements even if that was not expressly stated in the contracts themselves. The agreements were executed within a short period of time after much discussion about the school district's financial situation and the parties' desire for labor peace and collaboration. I also find that even if the only consideration offered for the Union Security Agreement was labor peace and labor-management collaboration, that alone is sufficient to support the promises made in the Union Security Agreement. Therefore, I conclude that the consideration offered for the Union Security Agreement was adequate.

The Duration of the Union Security Agreement

I find the length of the Union Security Agreement to be neither excessive nor unenforceable as against public policy. In *Ann Arbor Fire Fighters Assn, supra*, the Commission found valid a ten-year pension moratorium clause in an agreement, even though the remainder of the agreement, which dealt with most of the wage and working conditions at issue, expired after four years. The Commission noted that while bargaining waivers in a contract are presumed to expire when the contract expires, the parties in *Ann Arbor Fire Fighters Assn* had clearly expressed their intent that the waiver extend beyond the contract term. The Commission, thus, found meritless the employer's argument that it should declare the clause invalid or unenforceable because it was unconscionably long. The Commission also noted that it was not authorized by PERA to police the contents of agreements and that it was not willing to hold that parties could not enter into a valid bargaining waiver of ten years duration.

In *City of Taylor*, 23 MPER 33 (2010) (no exceptions), the employer argued that a ten-year pension moratorium clause in the parties' contract conflicted with the fundamental purposes of PERA, those being to promote good faith bargaining and the prompt resolution of labor disputes and, thus, was invalid and unenforceable as against public policy. The ALJ found that the employer did not commit an unfair labor practice by simply demanding that the union negotiate changes to the pension moratorium agreement. However, she went on to discuss the moratorium clause in what she conceded was dicta. The ALJ stated that "it is not the Commission's role to reform an agreement reached by the parties to a collective bargaining agreement or to alter the bargain they intentionally reached, even if this agreement has bad consequences for one of the parties or for the bargaining unit as a whole." Noting that "one of the fundamental purposes of PERA is the encouragement of the voluntary settlement of disputes and the incorporation of these settlements into written agreements", the ALJ agreed with the Commission's holding in *Ann Arbor Fire Fighters Assn*. She noted that the ten-year moratorium clauses in both *Ann Arbor Fire Fighters Assn* and *City of Taylor* had specific ending dates and she was "as reluctant as the Commission in *Ann Arbor* to hold that a bargaining waiver with an ending date is an 'unconscionable' agreement" and "it would be inappropriate for the Commission to declare this agreement invalid."

The Duty of Fair Representation Claim

Finally, I disagree with the majority's holding that the Union committed an unfair labor practice by violating its duty of fair representation. The ALJ was correct that when it ratified the Union Security Agreement, the Union acted in a manner it reasonably believed to be for the benefit of the entire unit. The law has long been clear that a Union must serve what it believes to be the best interests of all its members, and the fact that individual members do not approve of the Union's actions is not sufficient to demonstrate that the Union engaged in hostility, discrimination, dishonesty or that it acted in a grossly negligent manner. *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123 (1973). It is difficult to imagine what better tactical choice an organization could make than one which guarantees its financial stability, ensuring that it will have the resources necessary to fulfill its duties and obligations. While the three individual Charging Parties here are dissatisfied with the Union Security

Agreement, their dissatisfaction is not legally sufficient to demonstrate hostility, discrimination, recklessness or gross negligence.

In conclusion, even if Charging Parties had standing, the ALJ is nevertheless correct that it is not our role to modify the terms of a contract - for any reason. *Kent County, supra*. By finding the Union Security Agreement excessive, the majority has altered the terms of the contract. We lack the authority to take such action. The ALJ was also correct that were the Commission to modify the terms of the contract, its decision would by necessity be arbitrary. The majority has stated that ten-year contracts are excessive, but has not stated what term of years it would find acceptable. It provides no guidance for future cases, which will result in additional disputes over contract duration, defeating the goals of stability in labor relations and the prompt resolution of labor disputes. Its decision is, therefore, arbitrary. In addition, the majority decision is not supported by the law that was in effect at the time the Union Security Agreement was ratified. For all of these reasons, I respectfully dissent.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Natalie P. Yaw, Commission Member

Dated: FEB 13 2015

NOTICE TO BARGAINING UNIT MEMBERS
TAYLOR FEDERATION OF TEACHERS, AFT, LOCAL 1085

After a public hearing before the Michigan Employment Relations Commission (MERC), the **TAYLOR FEDERATION OF TEACHERS, AFT, LOCAL 1085**, a bargaining agent under the Public Employment Relations Act (PERA), has been found to have committed unfair labor practices in violation of PERA. Pursuant to the terms of the MERC's order, we hereby notify all bargaining unit members that:

WE WILL NOT

- a. Interfere with, restrain, or coerce bargaining unit members, including, but not limited to, Nancy Rhatigan, Rebecca Metz, and Angela Steffke, in the exercise of rights guaranteed by Section 9 of PERA, including the right to be free from coercion to financially support a labor organization;
- b. Cause, or attempt to cause, the Taylor School District, to discriminate against its employees, including, but not limited to, Nancy Rhatigan, Rebecca Metz, and Angela Steffke, by encouraging the Taylor School District to terminate, or threaten to terminate, bargaining unit members who refuse to pay union dues or union fees.
- c. Enforce, or attempt to enforce, the Union Security Agreement against Nancy Rhatigan, Rebecca Metz, and/or Angela Steffke by threatening or attempting to cause the Taylor School District to terminate their employment if they fail or refuse to pay union fees or union dues.

ALL of our bargaining unit members are free to engage in, or refrain from engaging in, lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the PERA.

TAYLOR FEDERATION OF TEACHERS, AFT, LOCAL 1085

By: _____

Title: _____

Date: _____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission (MERC), the **TAYLOR SCHOOL DISTRICT**, a public employer under the Public Employment Relations Act (PERA), has been found to have committed unfair labor practices in violation of PERA. Pursuant to the terms of the MERC's order, we hereby notify our employees that:

WE WILL NOT

- a. Interfere with, restrain, or coerce employees, including, but not limited to, Nancy Rhatigan, Rebecca Metz, and Angela Steffke, in the exercise of rights guaranteed in Section 9 of the PERA, including the right to be free from coercion to financially support a labor organization;
- b. Discriminate against employees, including Nancy Rhatigan, Rebecca Metz, and Angela Steffke, regarding terms and conditions of employment in order to encourage or discourage Union membership or financial support; and
- c. Threaten to terminate, or terminate employees, including Nancy Rhatigan, Rebecca Metz, and Angela Steffke, for failing to pay union dues or fees if notified by employees that they do not wish to join or to financially support the union.

ALL of our employees are free to engage in, or refrain from engaging in, lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the PERA.

TAYLOR SCHOOL DISTRICT

By: _____

Title: _____

Date: _____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.

TRUE COPY

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TAYLOR SCHOOL DISTRICT,
Public Employer-Respondent in Case No. C13 G-133/Docket No. 13-007942-MERC,

-and-

TAYLOR FEDERATION OF TEACHERS, AFT, LOCAL 1085,
Labor Organization-Respondent in Case No. CU13 G-29/Docket No. 13-007944-MERC,

-and-

NANCY RHATIGAN, REBECCA METZ, AND ANGELA STEFFKE,
Individual Charging Parties.

APPEARANCES:

Mark H. Cousens, for Respondents

Derk A. Wilcox, Mackinac Center Legal Foundation, for the Charging Parties

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTIONS FOR SUMMARY DISPOSITION

On August 6, 2013, Nancy Rhatigan, Rebecca Metz, and Angela Steffke, employees of the Taylor School District (the Employer) and members of a bargaining unit represented by the Taylor Federation of Teachers (the Union), filed the above unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against the Employer and the Union under §10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charges were assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System.

On October 3, 2013, both Respondents filed a motion for summary dismissal of the charges against them. On October 22, 2013, Charging Parties filed a response and cross-motion for summary disposition. On November 8, 2013, I heard oral argument on the motions.

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

The Unfair Labor Practice Charges:

On January 31 and February 7, 2013, the Employer's Board of Education and the Union's membership, respectively, ratified two separate agreements covering the Charging Parties' bargaining unit. One of these agreements contains most of the terms and conditions of employment for the bargaining unit. This agreement expires on October 1, 2017. The second agreement contains a union security agreement which requires members of the bargaining unit to pay either dues or a service fee to the Union. This agreement expires on July 1, 2023. For a variety of reasons discussed below, Charging Parties assert that this second agreement is invalid. Charging Parties allege that the Employer violated §§10(1)(a) and (c) of PERA, and that the Union violated §§10(2)(c) and/or §10(2)(a) of the Act, by entering into the union security agreement and by threatening to enforce the terms of this invalid agreement against them.

Facts:

Act 349 Amendments to PERA

The origin of this dispute is legislation adopted in December 2012 which substantially altered a union's ability under PERA to require unwilling members of its bargaining unit to pay a service fee to their bargaining representative. This legislation, 2012 PA 349 (Act 349), was not given immediate effect. It became effective on March 28, 2013.

Sections 10(1)(a) and 10(1)(c) of PERA make it unlawful for a public employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in §9 of PERA and to discriminate in regard to hire, terms, or other conditions of employment in order to encourage or discourage membership in a labor organization. Section 10(3)(b) - renumbered by Act 349 as §10(2)(c) - makes it unlawful for a union to cause or attempt to cause an employer to discriminate against a public employee in violation of §10(1)(c). Section 10(3)(a)(i) - renumbered as §10(2)(a) - prohibits a union from restraining or coercing employees in the exercise of their §9 rights. This section is the basis of a union's duty of fair representation towards its members under PERA.

In 1973, the Legislature added a proviso to §10(1)(c) which made it clear that this section did not prohibit so-called "agency fee" agreements. This proviso read:

Nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in Section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

After this proviso was added to PERA, the United States Supreme Court, in *Abood v Detroit Bd of Ed*, 431 US 209 (1977), held that the Federal Constitution protects public employees who choose not to become union members from being forced to fund certain activities of the union. However, the Court held that public employees could constitutionally be

required to pay a service fee which paid for collective bargaining activities. Subsequent Supreme Court decisions, including *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson* 475 U.S. 292 (1986) and *Lehnert v Ferris Faculty Ass'n*, 500 US 507 (1991), and many other federal court decisions, have further defined the constitutional protections available to public employees represented by unions who chose not to become union members.

Act 349 eliminated the proviso to §10(1)(c). It also eliminated §10(2) of PERA, which contained a general statement affirming that employees subject to the Act should share fairly in the financial support of their bargaining representative by paying a service fee. It replaced these sections with the following:

Section 10(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.

The above language was also incorporated into §9, so that conduct that violated §10(3) would also constitute unlawful restraint or coercion by an employer in violation of §10(1)(a) or by a union in violation of §10(2)(a).

Finally, Act 349 added the following language, as §10(5):

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

Respondents' Agreements

In 2011, the Employer and the Union began negotiations for a successor to a collective bargaining agreement that expired on August 11, 2011. The expired agreement, like previous collective bargaining agreements between the parties, contained a union security clause. Respondents had not reached agreement on a successor contract when Act 349 was adopted in December 2012.

On January 24, 2013, Respondents entered into two tentative collective bargaining agreements. The first agreement, with an expiration date of October 1, 2017, contains most of the terms and conditions of employment for members of the unit. This agreement includes a ten percent reduction in wages to become effective upon ratification and continuing through 2016, the partial suspension of incremental step increases, the reduction of stipends paid to coaches, and the elimination of mileage paid for driving on school business.

The second agreement, with an expiration date of July 1, 2023, contains a union security/agency fee agreement. The introductory paragraph to this second agreement states that the agreement is made to reflect the parties' mutual goals of labor peace and bargaining unit continuity. The agreement provides that unit members will have 14 days after receiving a document entitled "Notice to New Hire" from the Union to decide whether to become a Union member or pay a service fee. It also provides that the Employer will deduct a service fee from the compensation of any person who fails or refuses to become a union member, approve deduction of a service fee, or pay a service fee. The agreement further provides that if this last provision is found unenforceable by a court or agency of competent jurisdiction, an individual refusing to pay dues or service fee will, after proper notice and an opportunity to make arrangements to pay, be subject to discharge. The second agreement also contains provisions providing for notice to employees of their right to refrain from becoming members of the Union and to exercise their constitutional rights under *Aboud*.

The second agreement includes the following, under the heading of "Duration:"

1. This agreement is effective immediately upon ratification by the last party and shall continue in effect until July 1, 2023 and bind the parties and their successors.
2. This agreement is understood to be a collective bargaining agreement separate and distinct from the agreement establishing, among other matters, wages, hours and working conditions. That agreement, and its successors, shall be in effect according to its terms.
3. It is the mutual objective of the parties to recognize this agreement through the entire of the stated duration. In the event that a court or agency of proper jurisdiction, from which all appeals have been exhausted or waived, finds the duration to be unenforceable, this agreement shall survive and remain in effect for the longest duration found reasonable.

4. This agreement supersedes Article II – Section B of the parties' collective bargaining agreement dated August 16, 2007 while this agreement remains in effect. Article II Section B shall become immediately effective if enforcement of this agreement is either temporarily or permanently precluded.

These two tentative agreements were ratified by the Employer's Board of Education on January 31, 2013. On February 7, 2013, they were presented to the Union's members and were, in separate votes, ratified by the membership.

Charging Parties do not allege that Respondents have, as yet, taken any action to collect service fees from them. However, Respondents do not deny that unless this action is found to be unlawful or the agreement invalid, they do intend at some point to enforce the terms of the union security agreement against Charging Parties and other unit members who do not wish to become union members or to pay the Union a service fee.

Discussion and Conclusions of Law:

Charging Parties are members of the Union's bargaining unit who represent themselves as unwilling to pay either dues or a service fee to the Union. They allege in this charge that the existence of the union security agreement constitutes a threat by the Employer to discriminate against them under §10(1)(c) and a violation by the Employer of §10(1)(a) of PERA. They also allege that the Union violated §§10(2)(a) or (c) by entering into this agreement. There is no dispute that Charging Parties will be required to pay either dues or a service fee under this agreement unless the agreement is found unenforceable, and that they would not have been required to do so in the absence of this agreement. I find that, contrary to Respondents' argument, the charges are not merely a request for a declaratory ruling, but that Charging Parties have shown that the union security agreement has caused them actual harm.

Had Respondents entered into this union security agreement after March 28, 2013, the agreement would not be enforceable under Act 349. In addition, under Act 349 each Respondent would violate at least one section of PERA if they attempted to compel Charging Parties, as a condition of continued employment, to pay the service fee set forth in the agreement. However, §10(5) of Act 349, which states that an agreement which violates §10(3) is unenforceable, also states that this subsection applies only to agreements which take effect or are extended or renewed after the effective date of Act 349. I find that Act 349 clearly and explicitly permits the enforcement, after March 28, 2013, of union security agreements entered into before that date. Since Respondents entered into their union security agreement before March 28, 2013, it seems to follow that actions taken by either Respondent to enforce the terms of the agreement would not violate PERA, and that the union security agreement would not constitute an unlawful threat to violate the Charging Parties' §9 rights.

The Union Security Agreement is Invalid

Charging Parties attempt to counter this logic by attacking the validity of the union security agreement on grounds not directly related to its content. For example, Charging Parties argue that the union security agreement is invalid because it lacks consideration. I conclude that

Charging Parties' consideration argument fails for several reasons. First, lack of consideration is considered an affirmative defense to a claim for enforcement of a contract. See MCR 2.111(F)(3)(a). As an affirmative defense, lack of consideration is personal to the parties to the contract. See, e.g., *County of Tioga v Solid Waste Industries Inc.* 178 A.D.2d 873, 874 (1991). That is, the voidability or unenforceability of a contract for lack of consideration can be raised only by a party to the contract. A collective bargaining agreement is an agreement between an employer and the representative of its employees. It is not an agreement between the employer and each individual bargaining unit employee. In this case, Respondents bargained and entered into the union security agreement. Neither party to that agreement challenges its enforceability for lack of consideration.

As Charging Parties correctly point out in their motion, members of a bargaining unit are in some cases considered third-party beneficiaries of a collective bargaining agreement and, as such, have the right to enforce implied promises made to them in that agreement. Here, however, Charging Parties are not attempting to enforce promises made to them in the union security agreement. Charging Parties devote many pages in their motion to arguing that members of a bargaining unit, or their privies, have standing to bring suit to enforce the terms of a collective bargaining agreement. However, none of the cases cited by the Charging Parties stand for the proposition that an individual member of a bargaining unit may have a collective bargaining agreement declared unenforceable for lack of consideration.

Charging Parties are also, I believe, mistaken when they assert that there was no consideration for the union security agreement because the terms and conditions of employment for the bargaining unit were made part of a second agreement. Consideration requires only that there be a bargained-for exchange; courts do not inquire into the sufficiency of the exchange. *General Motors Corp v Department of Treasury, Revenue Division*, 466 Mich 231, 238-239 (2002). On the date that Respondents entered into the union security agreement, agency fee was, and had long been recognized to be, a mandatory subject of bargaining under PERA. See *Oakland Co Sheriff's Dept*, 1968 MERC Lab Op 1. The union security agreement in this case was a bargained-for agreement which settled a dispute over a mandatory subject of bargaining for the duration of that agreement. By resolving this dispute, the union security agreement provided the parties to the agreement with the benefit of future labor peace.¹ The fact that the union security agreement did not resolve all existing disputes between those parties over terms and conditions of employment does not mean that it lacked consideration.

Charging Parties' second argument is related to their first in that they contend that the union security agreement is unenforceable under PERA simply because it is a second collective bargaining agreement with a different expiration date than the collective bargaining agreement containing other terms and conditions of employment for the unit. Charging Party baldly asserts that "there cannot be two collective bargaining agreements with different expiration dates at the same time." However, the Commission has never held that there cannot be more than one

¹Charging Parties are incorrect when they assert in their motion that "effectuation of labor peace was a *pre-existing duty* that could not be used as consideration for the subsequent [sic] union security agreement." Rather, as Charging Parties acknowledge elsewhere, labor peace is an object of collective bargaining and of collective bargaining agreements, not a legal duty under PERA.

enforceable agreement between parties to a collective bargaining relationship at one time. In fact, parties regularly enter into enforceable stand-alone agreements on one or more issues. These include, for example, grievance settlements and letters of understanding executed during the term of or after the expiration of a comprehensive collective bargaining agreement.² These are recognized as enforceable agreements under PERA, and the Commission has repeatedly held that repudiation of an agreement which is not a "full collective bargaining agreement" may nevertheless violate a party's duty to bargain. *Wayne Co*, 24 MPER 12 (2011); *Oakland University*, 23 MPER 86 (2010); *City of Roseville*, 23 MPER 5 (2010). Agreements that are not comprehensive collective bargaining agreements are also recognized as enforceable in the private sector. In fact, in *Retail Clerk's Int'l Ass'n v Lion Dry Goods*, 369 US 17 (1962), a case cited by the Charging Parties, the Supreme Court held that a strike settlement agreement between a union and employer in the private sector which affected terms and conditions of employment, but which did not constitute a comprehensive agreement on terms and conditions of employment, constituted a "contract" between those parties enforceable under §301(a) of the Federal Labor Management Relations Act, 29 USC §185 (a).

It is also a common practice for unions and employers to enter into comprehensive collective bargaining agreements which contain different expiration dates for different terms of the agreement. So-called "reopener clauses" typically provide that, upon notice by either party, negotiations may be reopened during the term of the contract for those topics covered by the reopener clause. Such clauses are lawful, and do not affect the underlying enforceability of the agreement. See, e.g., *Speedrack, Inc*, 293 NLRB 1054 (1989). See also *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528, in which the Commission found enforceable a "pension moratorium" clause in a collective bargaining agreement with a duration longer than that of the remainder of the agreement.

Although, as noted above, stand-alone agreements between a union and employer on different topics are a common practice, Charging Parties argue that allowing multiple collective bargaining agreements with different expiration dates would make other provisions of PERA, including §14(1), unworkable. Section 14(1) imports into PERA the contract bar doctrine adopted by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), 29 USC 150 et seq. Section 14(1) states, "An election shall not be directed in any bargaining unit or subdivision of any bargaining unit if there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties to the collective bargaining agreement if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later." Charging Parties assert that that if more than one collective bargaining agreements is allowed, than nothing would prevent the parties to a collective bargaining relationship from negotiating an overlapping series of

² I note that it has long been the practice for the City of Detroit and the labor organization representing the largest number of its employees, AFSCME Council 25, to negotiate one "master" collective bargaining agreement supplemented by separate collective bargaining agreements negotiated between the City and the various AFSCME local unions that represent the City's employees. Not only are these supplemental agreements enforceable, but the Commission has held that the City violated its duty to bargain in good faith by refusing a local's demand to negotiate a new supplemental agreement after the previous one expired. *City of Detroit*, 25 MPER 68 (2012).

collective bargaining agreements so that there is always an agreement which bars the filing of a petition by an outside union.

The purpose of the contract bar rule is to strike a balance between bargaining unit stability and the right of employees to decertify or change their bargaining representative. As set forth in the statute, a contract may be binding and enforceable but not serve as a bar to an election petition. The Commission has not apparently been presented with the fact situation – a succession of overlapping collective bargaining agreements on different subjects – presented by the Charging Parties' hypothetical. However, it has adopted the NLRB's policy, first articulated in *Appalachian Shale Products Co.* 121 NLRB 1160, 1163 (1958), that to serve as a bar, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship. That is, a contract will not constitute a bar if it is limited to wages only, or to one or several provisions not deemed substantial. *Berrien County-Buchanan Pub Schs*, 1967 MERC Lab Op 518, 520; *City of Inlay City*, 1978 MERC Lab Op 799, 802; *Delton-Kellogg Schs*, 1989 MERC Lab Op 389, 381. See also *In re Coca-Cola Enterprises, Inc.* 352 NLRB 1044, 1045 (2008). In the hypothetical posed by the Charging Parties, therefore, the Commission might hold that none of the overlapping collective bargaining agreements was sufficient to stabilize the bargaining relationship and serve as a bar.

Charging Parties also argue that multiple collective bargaining agreements would lead to an absurd result under Section 15b of PERA. That section states that after the expiration date of a collective bargaining agreement, and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. It also provides that employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. As an example of an absurd result, Charging Parties assert that under §15b an employer that entered into multiple agreements covering wages and other terms of employment would be prohibited from paying a wage increase it had agreed to pay under one of these agreements if an agreement on another topic had expired. I do not agree with Charging Parties that Section 15b would require this result. I also do not agree that the mandates of §15b cannot be reconciled with the principle that the parties to a collective bargaining relationship may enter into more than one enforceable agreement at a time covering terms and conditions of employment.

As discussed above, neither PERA nor the NLRA has been interpreted to prevent parties to a collective bargaining relationship from voluntarily entering into multiple agreements covering different terms and conditions of employment, or from entering into a single agreement with provisions that expire on different dates. I see no reason to hold that the union security agreement in this case was not enforceable under PERA simply because Respondents entered into this agreement and another agreement covering terms and conditions of employment at the same time or because these two agreements had different expiration dates.

Charging Parties argue, in addition, that the union security agreement is not valid because the Employer's School Board cannot enter into an agreement that binds successive school board members to a particular policy. Charging Parties concede that public bodies may enter into contracts, even contracts for a period of time exceeding the terms of individual board members.

They assert, however, that a "public body may not use a contract to set policy." They then argue, citing *City of Detroit v Detroit & Howell Plank Rd*, 43 Mich 140,145 (1880), that the courts subject this type of contract to special scrutiny to ensure that it is a valid contract and "not just an end-run around the fundamental prohibition on making unalterable policy." That is, according to Charging Parties, the courts look at such contracts carefully to make sure that the essential elements of a contract, including concession and consideration, are present.

The "policy" Charging Parties refer to is, of course, the union security agreement which requires unit members to become union members or pay the union a service fee. As discussed above, I do not agree with Charging Parties argument that this agreement lacked consideration. The more fundamental problem with Charging Parties' argument is that it leads inexorably back to the fact that under the law as it existed when the agreement was reached, the agency fee agreement was a lawful agreement between the governing body of a public employer and the exclusive bargaining representative of its employees concerning a mandatory subject of bargaining. Thus, there is no real basis for distinguishing Respondents' union security agreement from other agreements covering terms and conditions of employment. Charging Parties argue that the union security agreement will force future school boards to demand payment from teachers of union dues or fees, even if it depresses teacher recruiting and retention, and to fire teachers at the request of the Union even if the school board believes that this is bad policy. However, many collective bargaining agreements under PERA bind public employers' governing bodies to "policies" that subsequent members of the governing body might change if they had the freedom to do so. To cite the most obvious example, a collective bargaining agreement that covers wages can be said to establish a wage "policy" for the term of that agreement. Charging Parties might just as well assert that a collective bargaining agreement covering wages is subject to some sort of special scrutiny because these "policies" impact a public employer's future financial welfare.

In sum, I find no basis for declaring the union security agreement to be "invalid" or unenforceable.

The Union's Duty of Fair Representation

Charging Parties also argue that the Union violated its duty of fair representation toward them by entering into the "invalid" union security agreement. A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). Bad faith conduct has been described by the Michigan Supreme Court "an intentional act or omission undertaken dishonestly or fraudulently." *Goolsby v Detroit*, 419 Mich 651, 679 (1984). "Discriminatory" conduct, in the context of the duty of fair representation, has been defined as "discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Merritt v International Ass'n of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010); *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v Lockridge*, 403 US 274, 301 (1971). "Arbitrary" conduct includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with

indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence. *Goolsby* at 682.

As discussed above, I do not agree that the union security agreement in this case was "invalid." However, I will briefly address Charging Parties' arguments that entering into the union security agreement violated the Union's duty of fair representation because it breached its duty to act in good faith and avoid discriminatory and/or arbitrary conduct.

In their motion, Charging Parties mention a newspaper article quoting the Union's president as stating that union security clauses are typically for the same duration as the contract agreement. The newspaper article also quotes the Union's president as admitting that the length of the union security agreement in this case was a reaction to Act 349. Respondents do not admit in their pleadings that the passage of Act 349 was the reason they entered into a 10-year union security agreement, and a reference to a newspaper article is, of course, not evidence. However, I find that even if the Union entered into this agreement for the specific purpose of postponing the effect of Act 349, it would not have breached its duty of fair representation by doing so.

As the Michigan Supreme Court held long ago in *Lowe v Hotel & Restaurant Employees Union, Local 705* 389 Mich 123, 145-146 (1973), a union's relationship towards its members is not fully a fiduciary one because the union, by its nature, has a divided loyalty. That is, its first duty is concern for the common good of the entire membership. As the *Lowe* Court stated, this duty may sometimes conflict with the needs, desires, or rights of an individual member. When the general good conflicts with the rights of the individual member, the individual member's rights must be enforced. However, when the general good of the unit conflicts with the needs or desires of an individual member, the union must be allowed the discretion to choose the general good. For this reason, a union does not violate its duty of fair representation merely by negotiating an agreement that fails to satisfy each and every member of the bargaining unit.

In their motion, Respondents state that the union security clause will avoid internecine struggle between dues payers and so-called "free riders," i.e. unit members who do not pay either dues or a service fee. Put another way, the Union asserts that, in its judgment, the common good of the bargaining unit would best be served by continuing to require all unit members to pay either dues or a service fee. Act 349 represents a decision by the Legislature that individual bargaining unit members like Charging Parties who do not want to pay a service fee should have the right not to do so. I find, however, that until Act 349 took effect, the Union's duty of fair representation did not obligate it to recognize or give consideration to the individual interests of the Charging Parties in refraining from paying the fee. Rather, the Union could lawfully enter into an agreement which served what it had determined to be the common good of the unit. I conclude, therefore, that the Union did not violate its duty of fair representation by entering into the union security agreement in this case.

Length of Agreement and Enforcement

For reasons discussed above, I have concluded that the union security agreement is not unlawful or invalid, and that the Union did not violate its duty of fair representation by entering into this agreement. The fact remains, however, that the agreement prevents Charging Parties from exercising the right the Legislature granted them in Act 369 for a very long time after the

effective date of that statute. It seems to me unlikely that when it adopted Act 369, the Legislature considered the possibility that unions and employers might enter into agreements of this length before the effective date of the statute.

In addition to arguing that the union security agreement should be declared invalid, Charging Parties argue that as a matter of public policy enforcement of the agreement should be limited to a "reasonable period," which they suggest should be three years. This is the same length of time that a contract can serve as a bar to an election petition under the contract bar rule.

In *Ann Arbor Fire Fighters Local 1733*, the employer filed an unfair labor practice charge alleging that the union had unlawfully refused to bargain over changes in mandatory subjects of bargaining proposed by the employer during negotiations for a new collective bargaining agreement to replace an agreement expiring on June 30, 1986. The union asserted that it had no duty to bargain over these subjects because they affected final average compensation, and therefore the pension benefits, of bargaining unit members. It argued that a "pension moratorium" clause in the otherwise expired contract constituted a waiver of the employer's right to demand that the union negotiate over these subjects for the term of that waiver. This provision stated that "neither [party] shall alter or attempt to alter, add to or attempt to add to, through negotiation, arbitration or court or administrative action, any provision or practice related to pension benefits currently in effect. This prohibition shall be for a period of ten (10) years, commencing July 1, 1981." The employer argued that the pension moratorium, because of its length, should be declared invalid. In support of this second argument, the employer asserted that a 10-year waiver agreement is too long to be consistent with PERA's goal of promoting good faith bargaining. It also argued that any written waiver that extended beyond the length of the remainder of the agreement in which it was contained was inconsistent with the duty to bargain in good faith. The Commission held that it was not authorized by PERA to police the content of a collective bargaining agreement to redress an imbalance in bargaining power. It noted that while, in *Capac Cmty Schs*, 1984 MERC Lab Op 1195 and *Wayne Co*, 1985 MERC Lab Op 168, it had refused to presume that the parties intended a contractual waiver of bargaining rights to extend beyond the expiration date of the contract, in *Ann Arbor* there was no dispute over the length of the waiver. Concluding that the employer's public policy arguments did not provide a basis for setting aside the parties' agreement, the Commission refused to declare the pension moratorium agreement invalid.

In this case, of course, it is the rights of nonparties impacted by the length of the union security agreement that are at issue. Charging Parties did not enter into the agreement, voluntarily or otherwise. As the Commission held in *Ann Arbor*, however, it is not the Commission's role to modify the terms of a lawful contract on public policy grounds. In addition, any limitation imposed by the Commission on the length of enforcement of an agreement, including the three year period Charging Parties suggest, would necessarily be arbitrary. I conclude that the decision on whether to impose such a limitation is a decision more properly left to the Legislature.

In accord with the discussion and conclusions of law set out above, I recommend that Respondents' motion for summary dismissal of the charges against them be granted and that the

Charging Parties' cross-motion for summary disposition be denied. I recommend, therefore, that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charges filed against the Taylor Public Schools and the Taylor Federation of Teachers, AFT, Local 1085, are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Julia C. Stern", is written over a horizontal line.

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 27, 2013