RECEIVED by MSC 1/24/2023 3:31:14 PM

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

IN THE MATTER OF:

TECHNICAL, PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN,

Respondent-Appellant,

MSC No. 162601
COA No. 351991
MERC No. CU 18 J-034

v.

DANIEL LEE RENNER,

Charging Party-Appellee.

____/

FRANK A. GUIDO (P32023)
General Counsel
POLICE OFFICERS ASSOCIATION OF MICHIGAN on behalf of TECHNICAL, PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN
Attorney for Respondent-Appellant
27056 Joy Road
Redford, MI 48239
(313) 937-9000
fguido@poam.net

DAVID PORTER (P76785)
Attorney for Charging Party-Appellee
KIENBAUM HARDY VIVIANO PELTON & FOREST, P.L.C.
289 N. Old Woodward Ave., Suite 400
Birmingham, MI 48909
(248) 645-0000
dporter@khvpf.com

____/

APPENDIX OF THE APPELLANT
TECHNICAL, PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN

RECEIVED by MSC 1/24/2023 3:31:14 PM

TABLE OF CONTENTS

Page

A. Court of Appeals Docketing Notice........ 1

B. Claim of Appeal........ 2-3

C. Court of Appeals Jurisdictional Checklist........ 4

D. MERC Docket Entry Sheet........ 5-6

E. MERC Decision and ALJ Decision and Recommended Order........ 7-36

F. TPOAM March 1, 2017 letter to Renner........ 37

G. TPOAM email of September 27, 2018 to Renner........ 38-39

H. POAM, COAM, TPOAM, and FAOM Internal Operating Procedure........ 40-44

I. General Counsel notice on behalf of the Union to employees explaining Application of the Union's pay for services procedure........ 45-47

J. ULP Charge and attached exhibits........ 48-57

K. PERA relevant sections........ 58-65

L. Transcript of ULP proceeding........ 66-115

M. Employer's Answer to Renner's grievance, September 20, 2018........ 116

N. Court of Appeals Decision........ 117-131

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document A

Court of Appeals Docketing Notice

RECEIVED by MSC 1/24/2023 3:31:14 PM

Jerome W. Zimmer Jr.
Chief Clerk

RECEIVED
DEC 30 2019
P. O. A. M.

Michigan Court of Appeals
Office of the Clerk

Detroit Office

December 27, 2019

FRANK A GUIDO
27056 JOY ROAD
REDFORD, MI 48239

RE: TECHNICAL PROF AND OFFICEWORKERS ASSN OF MI V DANIEL LEE RENNER
Court of Appeals No.: 351991
Lower Court: 00-000034

The above-referenced Court of Appeals docket number has been assigned to the filing that was received by this Court on 12/23/2019. Please use this number on all future filings in this case.

Thank you,
Michigan Court of Appeals Clerk's Office

BB	JT	DK	KG	JD	JC	GP	TF
FG	GM	DG	CT	LS	WB	JB	KL
EK	CS	EJ	GA	DL	Negot's		
Memb		Other:					

DETROIT OFFICE
CADILLAC PLACE
3020 W. GRAND BLVD. SUITE 14-300
DETROIT, MICHIGAN 48202-6020
(313) 972-5678

TROY OFFICE
COLUMBIA CENTER
201 W. BIG BEAVER RD. SUITE 800
TROY, MICHIGAN 48084-4127
(248) 524-8700

GRAND RAPIDS OFFICE
STATE OF MICHIGAN OFFICE BUILDING
350 OTTAWA, N.W.
GRAND RAPIDS, MICHIGAN 49503-2349
(616) 456-1167

LANSING OFFICE
925 W. OTTAWA ST.
P.O. BOX 30022
LANSING, MICHIGAN 48909-7522
(517) 373-0786

COURT OF APPEALS WEB SITE – http://courts.mi.gov/courts/coa/

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document B

Claim of Appeal

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED
2019 DEC 23 AM 9: 34

STATE OF MICHIGAN
IN THE COURT OF APPPEALS

TECHNICAL, PROFESSIONAL AND
OFFICEWORKERS ASSOCIATION OF MICHIGAN
Respondent/Appellant,

v.

MERC Case No.: CU18 J-034
Agency: Employment Relations Commission

DANIEL LEE RENNER
Charging Party/Appellee.

CLAIM OF APPEAL
AND
PETITION TO SET ASIDE THE DECISION AND ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS

Appellant, the Technical, Professional and Officeworkers Association of Michigan (TPOAM), claims an appeal from the decision and order entered on December 10, 2019, by the Michigan Employment Relations Commission and, in support, states:

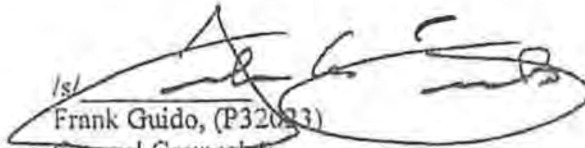
1. Appellant's principal place of business is 27056 Joy Road, Redford, Wayne County, Michigan. Appellee's residence is in Saginaw County, Michigan.

2. Appellee filed an unfair labor practice charge against Appellant under the Michigan Public Employment Relations Act (PERA), MCL 423.201 et. seq. with the Michigan Employment Relations Commission (MERC), case number MERC CU18 J-034.

3. In its decision and order entered December 10, 2019, MERC affirmed the Administrative Law Judge's decision and recommended order finding in Charging Party/Appellee's favor that Respondent/Appellant TPOAM violated sections of PERA committing an unfair labor practice. A copy of the decision and order is attached and made a part of this Claim of Appeal.

4. Appellant appeals by right, pursuant to MCL 423.216, to set aside the decision and order of the MERC.

Dated: 12/20/19



/s/
~~Frank Guido, (P32023)~~
~~General Counsel &~~
Christopher Tomasi (P60022)
Assistant General Counsel
Technical, Professional and Officeworkers
Association of Michigan
Attorneys for Appellant
27056 Joy Road
Redford, MI 48239
(313) 937-9000
poam@poam.net

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document C

Court of Appeals Jurisdictional Checklist

RECEIVED by MSC 1/24/2023 3:31:14 PM

POAM OFFICE File Copy

Trial Court/Tribunal Name: Michigan Employment Relations Commission	**Court of Appeals, State of Michigan** **Jurisdictional Checklist**	CASE NO. Trial Court/Tribunal: CU-18 J-034 Court of Appeals:

Case Name: TPOAM v Daniel Lee Renner

INSTRUCTIONS: Please complete this checklist and file with your claim of appeal. **ALL** of the numbered items are required. Check each box as you confirm that each item is being filed.

☑ 1. A **signed** claim of appeal showing the correct lower court number(s). [MCR 7.204(B)(1) & (D).]

☑ 2. A filing fee of $375.00 or appropriate fee substitute. [MCR 7.202(3) & 7.204(B)(2).] (Where multiple lower court or tribunal numbers are involved, an additional filing fee may be required. Appellants will be advised of any additional amount required.)

☑ 3. A copy of the order you are appealing. [MCR 7.204(C)(1).] (This is the order deciding the merits and not an order denying reconsideration, new trial, or other post-judgment relief.)

☑ 4. Evidence that the necessary transcript has been ordered. [MCR 7.204(C)(2).] (Only one item from a through g is required).

- ☐ a. No transcript will be filed. [MCR 7.204(C)(2) & AO 2004-5 ¶ 8(A)(1).]
- ☑ b. The transcript has already been filed. [MCR 7.210(B)(1)(a).]
- ☐ c. The complete transcript has been ordered. [MCR 7.210(B)(1)(a).]
- ☐ d. This appeal is from a probate court proceeding which does not require a complete transcript. [MCR 7.210(B)(1)(b).]
- ☐ e. A motion has been filed in the lower court or tribunal for submission of the appeal on less than the complete transcript. [MCR 7.210(B)(1)(c).]
- ☐ f. The parties have stipulated to submission of the appeal on less than the complete transcript. [MCR 7.210(B)(1)(d).]
- ☐ g. The parties have stipulated to a statement of facts. [MCR 7.210(B)(1)(e).]

☑ 5. Proof of service demonstrating that all other parties have been served. [MCR 7.204(C)(3).] (*Even if a party is not an appellee, they must be served.*)

☑ 6. A **current** register of actions from the lower court or tribunal. [MCR 7.204(C)(5).]

Finality of Order Being Appealed (Check the box that demonstrates your claim of appeal is by right. If neither applies, you do not have an appeal by right.)

☐ The claim of appeal is from an order defined as a final order by MCR 7.202(6) or MCR 5.801(B)(1). [MCR 7.203(A)(1).] Please specify which category of final order applies: ______

☑ The claim of appeal is from an order which is designated by statute, court rule, or case law as an order appealable by right to the Court of Appeals. Please specify the authority under which you have an appeal by right: MCL 423.216

12/23/2019
Date

Christopher Thomas [signature]
Preparer's Signature

6/07

Document D

MERC Docket Entry Sheet

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

DOCKET ENTRY SHEET

In the Matter of:

TECHNICAL PROFESSIONAL AND OFFICEWORKERS
ASSOCIATION OF MICHIGAN (TPOAM)
Labor Organization-Respondent,

MERC Case No. CU18 J-034
COA No. ____

-and-

DANIEL LEE RENNER
An Individual Charging Party.

10/2/18	UNFAIR LABOR PRACTICE CHARGE; EXHIBITS
10/5/18	CORRESPONDENCE FROM ALJ
10/5/18	COMPLAINT AND NOTICE OF HEARING
10/18/18	RESPONDENT'S ANSWER TO UNFAIR LABOR PRACTICE CHARGE; AFFIRMATIVE DEFENSES, MOTION FOR SUMMARY DISPOSITION, BRIEF IN SUPPORT OF MOTION; TRANSMITTAL LETTER; POS
10/23/18	CORRESPONDENCE FROM ALJ
10/23/18	ORDER RESCHEDULING HEARING
10/23/18	CORRESPONDENCE FROM CHARGING PARTY; EXHIBITS
11/2/18	NOTICE OF ORAL ARGUMENT
11/13/18	TRANSCRIPT OF PROCEEDINGS
4/1/19	CORRESPONDENCE FROM CHARGING PARTY
4/2/19	E-MAIL CORRESPONDENCE BETWEEN PARTIES
4/3/19	E-MAIL CORRESPONDENCE FROM CHARGING PARTY
4/5/19	E-MAIL CORRESPONDENCE FROM CHARGING PARTY

4/5/19	CORRESPONDENCE FROM ALJ
4/25/19	DECISION AND RECOMMENDED ORDER OF ALJ; TRANSMITTAL LETTER
5/7/19	RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION AND RECOMMENDED ORDER; BRIEF IN SUPPORT OF EXCEPTIONS; TRANSMITTAL LETTER; POS
12/10/19	DECISION AND ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION; TRANSMITTAL LETTER

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document E

MERC Decision and ALJ Decision
and Recommended Order

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY
LANSING

JEFF DONOFRIO
DIRECTOR

RECEIVED by MSC 1/24/2023 3:31:14 PM

December 10, 2019

Via Email and U.S. Mail

Daniel Lee Renner
815 Grove Sstreet
Saginaw, MI 48602

Frank A. Guido
Command Officers Association of Michigan
27056 Joy Rd.
Redford, MI 48239-1949

Re: Technical Professional and Officeworkers Assoc. of MI v Daniel Lee Renner
MERC Case No. CU18 J-034

Greetings:

Enclosed is a True Copy of the Michigan Employment Relations Commission's Decision and Order in the above-entitled matter, which is being sent to you electronically, as well as by U.S. Mail. The date of mailing of the Order should be considered as the date of its issuance for purposes of an appeal. **Should you decide to appeal this case to the Michigan Court of Appeals, please use the MERC Case No. listed above (not the MOAHR docket number) on all correspondence with the Court and this Agency. This will ensure proper and prompt processing of your appeal.**

Please note that this Order may be edited prior to publication in the Michigan Public Employee Reporter and posting on the MERC website. You are requested to immediately notify us of any typographical errors or non-substantive errors, so that corrections may be made prior to formal publication and posting on the Commission's website. Please forward suggested revisions to merc-ulps@michigan.gov. **We anticipate that publication and posting will occur no earlier than five (5) days after the date of this letter; therefore, it is imperative that we receive your suggested revisions before that time.**

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

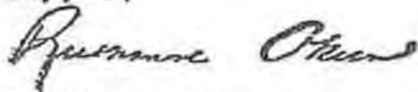
Cadillac Place (Detroit Office)
3020 W. Grand Blvd., Ste. 2-750
P.O. Box 02988
Detroit, Michigan 48202-2988
(313) 456-3510-phone (313) 456-3511-fax

Mason Building (Lansing Office)
503 W. Allegan, Garden Level
P.O. Box 30015
Lansing, Michigan 48909
(517) 373-3580-phone (517) 335-0181-fax

LEO is an equal opportunity employer/program.
Auxiliary aids, services and other reasonable accommodations are available, upon request, to individuals with disabilities

Thank you for your consideration.

Very truly yours,



Ruthanne Okun, Director
Bureau of Employment Relations/MERC

cc: Technical Professional and Officeworkers Association of Michigan

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TECHNICAL PROFESSIONAL AND OFFICEWORKERS
ASSOCIATION OF MICHIGAN (TPOAM)
Labor Organization-Respondent,

MERC Case No. CU18 J-034

-and-

DANIEL LEE RENNER
An Individual Charging Party.

APPEARANCES:

Frank Guido, Police Officers Association of Michigan, for Respondent

Daniel Lee Renner, appearing on his own behalf

DECISION AND ORDER

On April 25, 2019, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] on Motion for Summary Disposition in the above matter, finding that Respondent Technical Professional and Officeworkers Association of Michigan (TPOAM or Union) violated § 10(2)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(a). The ALJ found that Respondent's "Nonmember Payment for Labor Representation Services" Operating Procedure unlawfully discriminated against nonunion members and restrained employees from exercising their § 9 right to refrain from joining or assisting a labor organization. The ALJ also found that Respondent breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party in the exercise of his § 9 rights by refusing to file or process his grievance unless he paid Respondent a fee for its services. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on May 7, 2019. Charging Party did not file exceptions to the ALJ's Decision and Recommended Order or a brief in support of the Decision.

In its exceptions, Respondent contends that the ALJ erred when she failed to recognize that the U. S. Supreme Court's decision in *Janus v American Federation of State, County and Municipal Employees*, 138 S. Ct. 2448 (2018), allowed it to implement its "Nonmember Payment for Labor Representation Services" Operating Procedure and to demand that Charging Party

[1] MOAHR Hearing Docket No. 18-019077

RECEIVED by MSC 1/24/2023 3:31:14 PM

Renner pay for its services in processing his grievance. In its exceptions, Respondent further contends that the ALJ erred when she failed to recognize that, subsequent to the *Janus* decision, unions have the right under the First Amendment of the U. S. Constitution to refuse to associate with and represent nonmembers. Additionally, Respondent contends that the ALJ erred when she relied upon certain decisions of the National Labor Relations Board to find that it violated PERA. Finally, Respondent argues that the ALJ erred when she failed to recognize that its actions in the present case merely involved an internal union matter that did not impact conditions of employment.

We have reviewed the exceptions filed by Respondent and find them to be without merit.

Factual Summary:

Following a review of the record in this matter, we adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order. We will not repeat the facts, except as necessary.

Charging Party Daniel Lee Renner is employed by Saginaw County (the Employer) as a grounds employee and is covered by a collective bargaining agreement between the Employer and the TPOAM. This collective bargaining agreement contains a grievance procedure that ends in binding arbitration; however, only the Union has the right under the agreement to file a grievance and to process that grievance.

On March 1, 2017, Renner resigned his membership in the Union and exercised his right under §§ 9 and 10(3) of PERA to cease paying union dues, fees or assessments. The Union sent Renner a letter acknowledging his resignation and informing him that, as a non-member, he would not be entitled to the rights enjoyed by members. Specifically, as a non-member, Renner would not be allowed to attend union meetings, would not have the right to vote in either contract ratification elections or elections for union officers, and would not be eligible for coverage under the TPOAM extended legal representation plan. The letter also listed the conditions that Renner would have to meet in order to reestablish membership.

On August 10, 2018, the Union adopted a resolution entitled "Union Operating Procedure: Non-member Payment for Labor Representation Services" that required bargaining unit members who have opted out of union membership to pay for labor representation services when they request the union to perform such services. These services include, but are not limited to, internal investigatory proceedings, unfair labor practice proceedings, grievance handling, and arbitration proceedings.

On September 18, 2018, Renner received a written warning from the Employer for allegedly making a false claim about a co-employee.

On September 20, 2018, Renner submitted a written grievance over the reprimand to his supervisor on the Employer's form for its internal grievance procedure. He also sent a copy of his grievance to the Local Union President, Blanca Echevarria-Fulgencio, and told her it was a grievance at step one of the grievance procedure. Renner asked her to send him the forms necessary to file the grievance at step two. The following day, Renner and Union Business Agent

RECEIVED by MSC 1/24/2023 3:31:14 PM

Jim Cross exchanged a series of emails in which Cross explained that any assistance by the Union would require a service fee, and Renner responded by accusing the Union of violating PERA and right to work laws by trying to charge him a fee. Cross, nonetheless, emailed Renner a copy of the Union grievance form.

On September 26, 2018, Renner received a written response from his supervisor to his September 20 grievance. In the response, the supervisor noted that the Employer's internal grievance procedure could only be used by "employees not covered by a collective bargaining agreement." The supervisor further informed Renner he did not believe that Renner had the right to use the internal procedure since his position was covered by a collective bargaining agreement. The supervisor, however, also noted that he reviewed the information Renner had provided and believed that the disciplinary action taken against Renner was warranted.

Later that day, Renner sent an email to Echevarria-Fulgencio and Cross informing them that he had received a response from his supervisor and asking them to whom he should send the information necessary to file a grievance under the collective bargaining agreement.

On September 27, 2018, Union Counsel Frank Guido sent Renner an email in response to Renner's request for assistance in processing his grievance. Guido's email noted that Renner had exercised his right to opt-out of union membership and told Renner that while he remained part of the bargaining unit, "the Union does not owe any duty to you to provide direct representation services unless you comply with the Union Operating Procedure which mandates that an opt-out employee may request union representation services upon prepayment for services." A summary of the Union Operating Procedure was attached to the email.

In the email, Guido also provided Renner with an estimate of $420 for the services of Union representatives in processing his grievance through the third step of the grievance procedure, and an additional estimate of $870 for "consultation, review and determination by legal counsel to proceed to step 4." Renner was directed to prepay $1,290 by credit or debit card if he was requesting Union assistance in the further processing of his grievance and was informed that the Union "reserves the right, in its exclusive discretion, to determine if the grievance should be processed to step 4 arbitration."

Renner filled out the Union grievance form, signed it, and submitted it to Echevarria-Fulgencio and Cross by email on October 1, 2018, along with supporting documents. He did not, however, pay the Union any money and the Union did not submit the grievance on his behalf.

As a result, on October 2, 2018, Renner filed the instant charge. On October 18, 2018, the Union filed a motion for summary dismissal asserting that there were no genuine issues of fact and that it was entitled to summary judgment as a matter of law. Renner filed a response objecting to the motion on October 23, 2018 and, on November 13, 2018, the ALJ heard oral argument on the motion. On April 25, 2019, the ALJ issued her Decision and Recommended Order on Motion for Summary Disposition and recommended that the Union's motion be dismissed.

RECEIVED by MSC 1/24/2023 3:31:14 PM

Discussion and Conclusions of Law:

Charging Party alleges that the Union violated its duty of fair representation toward him and § 10(2)(a) of PERA, as well as his rights under PERA's right to work amendments, by refusing to represent him in a disciplinary dispute with the Employer unless and until he paid the Union a fee for its services.

The duty of fair representation is a judicially created doctrine founded on the principle that a union's status as exclusive bargaining representative carries with it the obligation and duty to fairly represent *all* employees in the bargaining unit. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v Detroit*, 419 Mich 651 (1984). The elements of a union's duty of fair representation include: 1) serving the interests of all members of the bargaining unit without hostility or discrimination; 2) exercising its discretion with complete good faith and honesty; and (3) avoiding arbitrary conduct. When a union's conduct toward a bargaining unit member is "arbitrary, discriminatory, or in bad faith," the duty of fair representation is breached. A union satisfies the duty of fair representation so long as its decision is within the range of reasonableness. *Air Line Pilots Ass'n v O'Neill*, 499 US 65 (1991); *Int'l Union of Operating Eng'rs, Local 547*, 2001 MERC Lab Op 309, 311; *City of Detroit, Detroit Fire Dep't*, 1997 MERC Lab Op 31, 34-35.

A union' s duty of fair representation extends to union conduct in representing employees in their relationship with their employer, such as negotiating a collective bargaining agreement or resolving a grievance, and in related decision-making procedures. *Wayne Co Cmty Coll Fed ' n of Teachers, Local 2000, AFT*, 1976 MERC Lab Op 347.

In *Lansing School District*, 1989 MERC Lab Op 210, we relied on the United States Supreme Court's decision in *Steele v. Louisville and Nashville Railroad Company*, 223 US 192 (1944), to hold that the duty of fair representation under PERA extends to all employees within the bargaining unit, regardless of their union affiliation. 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.

In *Hunter v. Wayne-Westland Cmty. Sch. Dist.*, 174 Mich App 330, 335-337 (1989), the Michigan Court of Appeals upheld our determination that a union breached its duty of fair representation and violated § 10 of PERA when it failed to properly represent a bargaining unit member due to her nonunion status. In affirming our decision, the Court held that an exclusive representative has a duty to represent all members of the bargaining unit and that discrimination based on nothing other than union membership violates the union's duty of fair representation. The Court noted, at 337:

> A union may not neglect the interests of a membership minority solely to advantage a membership majority; members are to be accorded equal rights, not arbitrarily subjected to the desires of a stronger, more politically favored group. *Teamsters Local Union No. 42, supra*, at p. 611. "These tenets strike home when a union

> attempts to prefer workers based solely on how long they have been loyal to the guild." *Id.*, at p. 612. The only factor distinguishing Hunter from other former Cherry Hill employees who received retroactive seniority was her lack of union membership while at Cherry Hill. The WWEA owed her a duty of fair representation and breached that duty.

More recently, in *Government Employees Labor Council*, 27 MPER 18 (2013), we again held that a union' s status as exclusive bargaining representative carries with it the obligation to fairly represent all employees in the bargaining unit, members and nonmembers alike, and that a union's failure to properly represent a nonmember violates § 10 of PERA. See also *SEIU, Local 517M*, 27 MPER 47 (2014). Additionally, as noted in the ALJ's decision, in 2012 PA 349, the Michigan Legislature enacted the "freedom to work" amendments to PERA. These amendments removed § 10(2) and, in a new § 10(3), explicitly made it unlawful for a public employer and union to require employees, as a condition of obtaining or continuing their employment, to "pay any dues, fees, assessment or other charges or expenses of any kind or amount or provide anything of value to a labor organization or bargaining representative." 2012 PA 349 also amended § 9 of PERA to state explicitly that public employees have a right to refrain from any the activities protected by § 9, including the right to form, join, or assist in labor organizations, and added a new § 9(2) that prohibits "any person from, by force, intimidation, or unlawful threats, compelling or attempting to compel any public employee" to financially support a labor organization or bargaining representative.

Prior to 2012, § 10(3)(a)(i) of PERA made it unlawful for a labor organization or its agents to "restrain or coerce public employees in the exercise of the rights guaranteed in Section 9." The freedom to work amendments left the language of § 10(3)(a)(i) in place, but this language became § 10(2)(a) of the amended statute.

In the present case, the ALJ found that the Respondent's "Nonmember Payment for Labor Representation Services" Operating Procedure violated § 10(2)(a) of PERA because it unlawfully discriminated against nonunion members and restrained employees from exercising their § 9 right to refrain from joining or assisting a labor organization. The ALJ also found that the Union breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party in the exercise of his § 9 rights by refusing to file or process his grievance unless he paid the Union a fee for its services.

In its exceptions, Respondent argues that the ALJ erred when she failed to recognize that the Supreme Court's decision in *Janus v American Federation of State, County and Municipal Employees*, 138 S. Ct. 2448 (2018), allowed it to lawfully implement its "Nonmember Payment for Labor Representation Services" Operating Procedure and to demand that Charging Party Renner pay for its services in processing his grievance. In *Janus*, the Supreme Court held that an Illinois statute authorizing the collection of mandatory agency fees from employees in the public sector who chose not to be union members was unconstitutional because it violated the free speech rights of public employees by compelling them to subsidize private speech on matters of substantial public concern. The *Janus* decision did not involve an allegation of either a breach of a union's duty of fair representation or restraint on an employee's pursuit of a statutory right. Respondent, nonetheless, points out that, in *Janus*, the Court noted, at 2468-2469:

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris*, 573 U.S., at ——, 134 S Ct, at 2639 (internal quotation marks omitted). *Individual nonmembers could be required to pay for that service or could be denied union representation altogether.*[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers. [Emphasis added]

Respondent further notes that, in footnote 6 of the *Janus* decision, the Court stated:

> There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.*, Cal. Govt. Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

Contrary to Respondent's position, however, we agree with the ALJ that, in the language relied upon by Respondent, the Supreme Court was only expressing its belief that a state statute could be enacted or modified to address a perceived "free rider" concern that would allow a public sector union to charge a non-member for processing his or her grievance without violating the non-member's First Amendment rights.[2] Nothing in the *Janus* decision, as we read it, prohibits a public sector bargaining unit from having an exclusive representative. Additionally, the *Janus* decision makes it clear that, if a union is an exclusive representative of a bargaining unit, it must not discriminate against non-members with respect to collective bargaining activities, even though nonmembers will no longer be required to pay "fair share" fees. Significantly, in the paragraph immediately following that relied upon by Respondent, the *Janus* Court goes on to state, at 2469:

> Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 2460-2461. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union

[2] We note that, on July 8, 2019, Rhode Island Governor Gina Raimondo signed companion bills H5259 and S0712 into law and thereby authorized public sector unions, in Rhode Island, to impose fees on nonmembers who request union representation in grievance and/or arbitration proceedings. Unlike Rhode Island, however, Michigan has not modified PERA to allow nonmember representation fees.

RECEIVED by MSC 1/24/2023 3:31:14 PM

were *not* subject to the duty to represent all employees fairly. *Steele, supra*, at 198, 65 S.Ct 226.

Similarly, the *Janus* Court asserted, at 2485, n. 27:

> States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.

We further note that, on remand from the Supreme Court, Mark Janus sought damages in the amount of the agency fees he paid to his union prior to the Supreme Court's *Janus* decision. In affirming the district court and rejecting this request, the Seventh Circuit analyzed the Supreme Court's *Janus* holding and concluded that "the only right the *Janus* decision recognized is that of an objector not to pay *any* union fees." *Janus v. AFSCME, Council 31*, --- F.3d ---, 2019 WL 5704367, at 4 (7th Cir., 2019) (emphasis in original). In coming to this conclusion, the Seventh Circuit noted that, after *Janus*, "even with payments of zero from objectors, the union still enjoys the power and attendant privileges of being the exclusive representative of an employee unit." Id. at 4. Additionally, when discussing the principles behind exclusive union representation, the Seventh Circuit noted that "Unions designated as exclusive representatives were (and still are) obligated to represent all employees, union members or not, 'fairly, equitably, and in good faith.'" Id. at 1.

In the present case, Respondent TPOAM is the exclusive representative of all employees in Charging Party's bargaining unit and, under PERA, has a concomitant duty to represent all members of that bargaining unit, regardless of union membership. In seeking to change this, we believe Respondent is seeking to change the State's labor relations statute and system, an end at odds with the Supreme Court's decision in *Janus*. See *Janus*, at 2485, n. 27. Consequently, the ALJ did not err when she found that the *Janus* decision did not allow Respondent to implement its "Nonmember Payment for Labor Representation Services" Operating Procedure or to demand that Charging Party Renner pay for its services in processing his grievance.

In its exceptions, Respondent also argues that unions and union members now have the right under the First Amendment of the U. S. Constitution to refuse to associate with and represent free-riding nonmembers. In *Sweeney v. Raoul*, No. 18-CV-1362, 2019 WL 5892981 (N.D. Ill. Nov. 12, 2019), however, the United States District Court for the Northern District of Illinois recently rejected an identical argument made by Local 150 of the International Union of Operating Engineers. In *Sweeney*, Local 150 argued that, after the Supreme Court's decision in *Janus*, the designation of a public employee union as the exclusive representative for a bargaining unit and the concomitant duty of the union to represent nonmembers fairly, were unconstitutional under the First Amendment. Local 150 specifically argued that the reasoning in *Janus* allows a union to refuse to represent non-union members because "unions and union members have the right under the First Amendment to refuse to associate with free-riding nonmembers." In rejecting this argument, the Court held that Local 150 was reading *Janus* too broadly and found:

> Because *Janus* did not change a union's exclusive representation obligations under the [Illinois Public Labor Relations Act], the Court is left with controlling Supreme Court precedent enunciated in *Minnesota State Bd. for Cmty. Coll. v. Knight*, 465

RECEIVED by MSC 1/24/2023 3:31:14 PM

U.S. 271, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984), which *Janus* did not overrule. *See Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (The *Janus* "decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue."). In *Knight*, the Supreme Court held that Minnesota's system of exclusive union representation did not violate First Amendment speech or associational rights of non-union members. *Id.* at 288, 104 S.Ct. 1058. Based on *Knight*, the Seventh Circuit has concluded "the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm and not subject to heightened scrutiny." *Hill v. Service Employees Int'l Union*, 850 F.3d 861, 864 (7th Cir. 2017). *Knight* directly controls Local 150's arguments and is still binding upon the lower courts until the Supreme Court overrules it. *See, e.g., Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019) (citing *Agostini v. Felton*, 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

***

Therefore, Local 150's argument that Illinois' exclusive-bargaining-representative scheme is unconstitutional under *Janus* fails.

The U. S. District Court's decision in *Sweeney* is consistent with the Ninth Circuit Court of Appeals' decision in *Mentele v. Inslee*, 916 F.3d 783 (9th Cir., 2019), (State's authorization of exclusive bargaining representative did not infringe upon First Amendment rights) and the United States District Court for the Eastern District of California's decision in *Sweet v. California Ass'n of Psychiatric Technicians*, 2019 WL 4054105 (E.D. Cal., 2019). See also the decision of the Supreme Judicial Court of Massachusetts in *Branch v. Commonwealth Employment Relations Bd.*, 481 Mass. 810, 120 N.E.3d 1163 (2019).

In view of the foregoing, we also believe that Respondent reads *Janus* too broadly and ignores much of the language of the decision as well as recent precedent interpreting the decision. Consequently, we do not believe the First Amendment allowed Respondent to refuse to represent nonmembers such as Charging Party.

In its exceptions, Respondent also contends that the ALJ erred when she relied upon certain "archaic" decisions of the National Labor Relations Board (NLRB). The Michigan Supreme Court, however, has long held that since PERA, in its original form, was patterned on the NLRA, it was the Legislature's intent that the Commission would rely on legal precedents developed under the NLRA insofar as they applied to the public sector and that the Legislature intended the courts to view the federal labor case law as persuasive precedent. See *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 53, 64 (1974). See also *Michigan Employment Relations Comm. v Reeths-Puffer School Dist*, 391 Mich 253, 259–260 (1974) and *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-563 (1998). Significantly, in *Goolsby v City of Detroit*, 419 Mich 651, 660, (1984), the Michigan Supreme Court concluded that since the rights and responsibilities imposed by PERA on labor organizations representing public sector employees were similar to those imposed on labor organizations representing private sector employees by the NLRA, PERA impliedly imposes on labor organizations representing public

RECEIVED by MSC 1/24/2023 3:31:14 PM

sector employees a duty of fair representation, which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees.

In the present case, the NLRB has long held that a union violates the NLRA when it makes union membership a condition precedent to processing a grievance and that telling represented employees that a union will only represent them if they are members has the effect of unlawfully coercing employees into union membership. See, e.g., *Auto Workers Local 1303 (Jervis Corp Bolivar)*, 192 NLRB 966 (1971); *Lea Industries*, 261 NLRB 1136 (1982); *Plumbers Local 195 (Bethlehem Steel)*, 291 NLRB 571 (1988); *Mail Handlers Local 305 (Postal Service)*, 292 NLRB 1216 (1989); *Oil Workers Local 3-495 (Hercules, Inc.)*, 314 NLRB 385 (1994); *Joint Council of Teamsters Numbers 3, 28, 37, 42, (Lanier Brugh Corporation)*, 339 NLRB 131 (2003); and *United Food & Commercial Workers Union, Local 540 (Tyson Foods)*, 366 NLRB No. 105 (2018).

Similarly, in *Machinists Local 697 (HO Canfield Rubber Co)*, 223 NLRB 832 (1976), the Board extended some of these holdings to a case in which the union had made the payment of fees by nonmembers a condition of grievance processing. In *Machinists Local 697*, an employee in Virginia, a right to work state, was informed that the union would not pursue his grievance unless he paid a fee toward the cost of union representation. The employee was not a union member, and the local told him his non membership was the reason for the union's demand for a fee. The Board noted that "a grievance procedure is vital to collective bargaining and . . . grievance representation is due employees as a matter of right" and held that "[t]o discriminate against nonmembers by charging them for what is due them by right restrains them in the exercise of their statutory rights" in violation of the NLRA. See also *Hughes Tool Co.*, 104 NLRB 318, 329 (1953); *Electrical Workers Local 396 (Central Telephone Co.)*, 229 NLRB 469 (1977); *Plumbers Local 141*, 252 NLRB 1299 (1980); *Exxon Co. U.S.A.*, 253 NLRB 213 (1980); *American Postal Workers (Postal Service)*, 277 NLRB 541 (1985); *Furniture Workers Local 282 (Davis Co.)*, 291 NLRB 182, 183 (1988); *Allied Industrial and Service Workers International Union, Local 1192 (Buckeye Florida Corporation)*, 362 NLRB 1649 (2015); and *IATSE, Local 720 (Tropicana Las Vegas)*, 363 NLRB No. 148 (2016).

Although we recently noted, in *Hurley Medical Ctr*, 31 MPER 41 (2018), that the Commission is not bound to follow "every turn and twist" of NLRB case law especially where NLRB precedent conflicts with that of the Commission or other NLRB precedent, the NLRB precedent relied upon by the ALJ in this case is consistent with our own precedent, see *Lansing School District*, supra, and does not conflict with other NLRB precedent. Consequently, we do not believe that the ALJ erred when she relied upon certain decisions of the NLRB in concluding that Respondent breached its duty of fair representation and violated § 10(2)(a) of PERA.

In its exceptions, Respondent also argues that the ALJ erred when she failed to recognize that its implementation of its operating procedure requiring nonmember payment for representation services was an internal union matter that did not impact conditions of employment. Contrary to Respondent's argument, however, we believe that grievance handling is fundamental to a union's duty as the exclusive bargaining agent to represent all members of the bargaining unit without discrimination. Because a union's decision not to represent a unit member in a grievance or disciplinary matter has a clear impact on that unit member's terms or conditions of employment and the terms and conditions of other members of the bargaining unit, it is not merely an internal

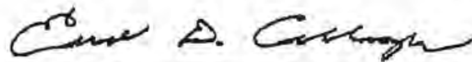
RECEIVED by MSC 1/24/2023 3:31:14 PM

union matter. Moreover, by requiring non-member payment for representation services, a union interferes with an employee's § 9 right to refrain from union activities. As we noted in *Amalgamated Transit Union, Local 26*, 30 MPER 22 (2016), the language of § 10(2)(a) does not permit a union to deny an employee the rights provided by § 9, regardless of whether the union's actions have an impact on conditions of employment. See also *Saginaw Ed Ass'n*, 29 MPER 21 (2015) and *Teamsters Local 214*, 29 MPER 46 (2015).

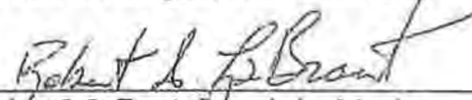
In conclusion, we find that Respondent's "Nonmember Payment for Labor Representation Services" Operating Procedure violates § 10(2)(a) of PERA because it unlawfully discriminates against nonunion members and restrains employees from exercising their § 9 right to refrain from joining or assisting a labor organization. Additionally, we find that the Respondent Union breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party Renner in the exercise of his § 9 rights by refusing to file or process his grievance unless he paid the Union a fee for its services. Although Respondent argues that requiring a union to bear the cost of grievance representation for nonmembers in a right to work state is unfair, we believe Respondent's argument should properly be made to the Michigan legislature and not in this forum.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. We, therefore, affirm the ALJ's decision and adopt the Order recommended by the ALJ.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Edward D. Callaghan, Commission Chair



Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: DEC 10 2019

RECEIVED by MSC 1/24/2023 3:31:14 PM

TRUE COPY

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TECHNICAL PROFESSIONAL AND OFFICEWORKERS
ASSOCIATION OF MICHIGAN (TPOAM),
Labor Organization-Respondent,

Case No. CU18-J-034
-and- Docket No. 18-019077-MERC

DANIEL LEE RENNER,
An Individual-Charging Party.
____/

APPEARANCES:

Frank Guido, Police Officers Association of Michigan, for Respondent

Daniel Lee Renner, appearing for himself

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On October 2, 2018, Daniel Lee Renner, an employee of Saginaw County (the Employer) filed an unfair labor practice charge against his collective bargaining representative, the Technical Professional and Officeworkers Association of Michigan (Respondent or the Union) pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR).

As discussed below, on September 18, 2018, Renner received a written warning from the Employer which included this statement, "Any further incidents will lead to progressive disciplinary action, up to and including discharge." Renner alleges that the Union violated PERA by refusing to represent him concerning that written warning, or file a grievance under the collective bargaining agreement, unless Renner agreed to pay the Union in advance for its services.

On October 18, 2018, the Union filed a motion for summary dismissal asserting that there were no genuine issues of fact and that the Union was entitled to summary judgment as a matter of law. Renner filed a response objecting to the motion on October 23, 2018. On November 13, 2018, I held oral argument on the motion.

RECEIVED by MSC 1/24/2023 3:31:14 PM

On April 1, 2018, Renner requested that I consider, as part of the record, recent actions taken against him by the Employer of a disciplinary nature. The Union opposed the request on the grounds that Renner had not shown that the new facts would require a different result. I agreed with the Union and rejected Renner's request on April 5, 2019.

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

The Unfair Labor Practice Charge:

Renner alleges that the Union violated its duty of fair representation toward him and Section 10(2)(a) of PERA, and his rights under PERA's right-to-work amendments, by refusing to represent him in a disciplinary dispute with the Employer unless and until Renner paid the Union a fee for its services.

Facts:

Renner is employed by the Employer as a grounds employee and is a member of a bargaining unit represented by the Union. On or about March 1, 2017, Renner resigned his membership in the Union and exercised his right under Section 10(3) of PERA to cease paying union dues, fees or assessments. The Union sent Renner a letter acknowledging his resignation and informing him that as a non-member, he would not be allowed to attend union meetings, would not have the right to vote in either contract ratification elections or elections for union officers, and would not be eligible for coverage under the TPOAM extended legal representation plan. The letter also listed the conditions Renner would have to meet in order to reestablish membership.

In February 2018, the Union filed a class action grievance on behalf of Renner and his co-workers in the grounds department over changes in their weekend work schedules. The grievance was resolved with a settlement agreement on or about March 14, 2018.

On August 10, 2018, the Union, and its affiliated labor organizations the Police Officers Association of Michigan (POAM), Command Officers Association of Michigan (COAM), and Firefighters Association of Michigan (FAOM) adopted a union operating procedure entitled "Nonmember Payment for Labor Representation Services." The operating procedure, made retroactive to July 23, 2018, included the following:

> 1.A nonmember that is part of bargaining unit represented by the Union (POAM, COAM, TPOAM & FAOM), that requests representation services, shall be required to pay, in advance, for the services rendered. The employment related issues that a nonmember may request paid-for services include, but are not limited to:

a. Internal investigatory proceedings, including critical incident submission of information (reports, statements, or verbal questioning- including *Weingarten* and *Garrity* related matters);

b. Employer administrative proceedings, including department hearings, trial boards, civil service commission meetings/hearings, pension board meetings/hearings, or any other commission, council board or tribunal proceeding;

c. State administrative proceedings, including, but not limited to, representation/unfair labor practice proceedings (direct not collective) before the Michigan Employment Relations Commission;

d. Consultation with a union representative or union legal counsel; and

e. Grievance step meetings, arbitration and post-arbitration matters.

2. POAM shall determine the costs, expenses and fees for the providing of labor representation services on a case-by-case basis.

3. The costs, expenses and fees shall include: (a) grievance arbitrator bills; (b) alternative dispute resolution agency charges for filing, processing and administration of arbitration cases (AAA, FMCS and MERC); (c) witness fees, including expert witness fees; (d) subpoena fees; (e) transcript fees; (f) court costs and related filing fees and expenses; (g) appeal fees and related costs and expenses; and (h) the hourly equivalent of the wages and benefits of the direct provider of services, whether business agent or attorney.

4. The nonmember will be advised by a representative of the Union of the amount of the service cost, expense and fee to be paid by the nonmember prior to the delivery of service.

5. The nonmember shall pay for the services to be rendered, in advance of the receipt of services, by credit or debit card, or other financial transaction service, as designated by the Union.

6. In the event the amount of the costs, expenses and fees cannot be calculated prior to services being provided, the Union shall estimate the anticipated costs, expenses and fees, which shall be paid by the nonmember in advance of services being provided.

7. In the event the actual amount of the costs, expenses and fees for services exceed the anticipated amount, the nonmember shall be

RECEIVED by MSC 1/24/2023 3:31:14 PM

responsible for payment of the additional amount within seven (7) days after transmittal of the notice of payment. In the event of nonpayment within the time period specified, further labor representation services shall be suspended, with any pending proceedings being adjourned. Failure to pay the costs, expenses and fees by the end of business on the tenth (10th) day after transmittal of the notice for payment, shall result in withdrawal and/or dismissal of the matter. Calculation of time period shall be on the day of the transmittal of the notice, whatever method of delivery is preferred, in the sole and exclusive discretion of the Union. The calculation of the time period shall be inclusive of weekdays and weekends.

8. The Union shall determine, in its sole and exclusive discretion, the Business Agent, Labor Attorney or Local Association Representative that will be assigned to represent the nonmember that has requested labor representation services.

9. A nonmember shall not be allowed to opt-in to union membership during the pendency of an employment related issue, as determined by the Union. At the conclusion of such matter, the nonmember shall be allowed to opt-in to dues paying union membership. The terms and conditions for opt-in shall also be in accordance with the governing POAM Executive Board Resolution, as adopted on May 8, 2015, which include, but are not limited to, the following requirements:

a. Payment to the Union of a $500.00 administrative/user reinstatement fee.

b. Execution of a deduction of union dues/fees authorization form with the public employer.

10. The Operating Procedure requirements, as specified in paragraphs one (1) to nine (9), hereinabove, may be waived in the sole discretion of the Union, if the bargaining unit employee, upon transmittal of notice from the Union, reconsiders and changes the decision to be a nonmember; provided further that the bargaining unit employee submits written notification of such decision to the Union office and executes the authorization form for dues/fees deduction with the public employer, within fourteen (14) days from the transmittal of the notice from the Union. In the event nonmember status is designated due to an arrearage in payment of union dues/fees, the bargaining unit employee will be allowed to restore union membership upon payment of all dues/fees in arrears, no later than (14) days from the transmittal of the notice from the Union.

. . . the Union retains the exclusive right to amend, modify, change or terminate any policy, rule, practice or procedure, with or without notice.

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

In the fall of 2018, a collective bargaining agreement between the Employer and the Union was in effect covering Renner's bargaining unit. This collective bargaining agreement contained a grievance procedure ending in binding arbitration. Only the Union had the right under the agreement to file a written grievance and process that grievance through the contractual procedure.

On September 6, 2018, Renner sent an email to one of his fellow grounds' employees asking him not to smoke around him because of Renner's medical condition. Renner copied his Union representative and supervisor on the email. Renner and the other employee then exchanged a series of emails in which the other employee denied smoking anywhere near Renner and Renner insisted that he had. On September 18, 2018, Renner received a written warning from the Employer for making what the Employer concluded was a false claim about a co-employee and failing to comply with his supervisor's request for "mutual cooperation with fellow employees." According to the written warning, the supervisor interviewed both the alleged smoker and another employee and determined that Renner's accusation was false.

On September 20, 2018, Renner submitted a written grievance over the reprimand to his supervisor on the Employer's form for its internal grievance procedure. In this grievance he referred to City rules, the collective bargaining agreement, and the Bullard-Plawecki Employee Right to Know Act, MCL 423. 501 et seq. He sent a copy to the Local Union President, Blanca Echevarria-Fulgencio and told her that this was a grievance at step one of the grievance procedure. Renner asked her to send him the forms necessary to file the grievance at step 2. The following day, Renner and Union Business Agent Jim Cross exchanged a series of emails in which Cross explained that any assistance by the Union would involve a service fee and Renner accused the Union of violating PERA and right-to-work laws by trying to charge him a fee. Cross emailed Renner a copy of the Union grievance form.

On September 26, 2018, Renner received a written response from his supervisor to his September 20 grievance. The supervisor noted that the internal grievance procedure stated that "regular full-time and regular part-time employees not covered by a collective bargaining agreement" had the right to use that procedure. The supervisor told Renner he did not believe that Renner had the right to use the internal procedure since his position was covered by a collective bargaining agreement. However, he said that he was nevertheless responding to the grievance. He wrote that he had reviewed the information Renner had provided and believed that the disciplinary action taken was still warranted.

Later that day, Renner sent an email to Echevarria-Fulgencio and Cross informing them that he had received a response from his supervisor and asking them to whom he should send the information in order to file a grievance under the collective bargaining agreement.

On September 27, 2018, Union counsel Frank Guido sent Renner an email which, first, noted that Renner had exercised his right to opt-out of union membership. Guido told Renner that while by law he remained part of the bargaining unit, "the Union does

RECEIVED by MSC 1/24/2023 3:31:14 PM

not owe any duty to you to provide direct representation services unless you comply with the Union Operating Procedure which mandates that an opt-out employee may request union representation services upon prepayment for services." A summary of the procedures was attached to the email.

In the email, Guido provided Renner with an estimate of $420 for the services of Union representatives in processing his grievance through the third step of the grievance procedure, and an additional $870 for "consultation, review and legal counsel to proceed to step 4," i.e. arbitration. Renner was directed to prepay $1,290 by credit or debit card if he was requesting Union assistance in the further processing of his grievance. Renner was warned that this was only an estimate, and that if the actual amount exceeded the estimate, he would have to pay the balance prior to any continuation of services. He was also advised that the estimate did not include any additional services in the event the grievance proceeded to arbitration. The email also included these paragraphs:

> Please be aware that the only process allowed to pursue a grievance, through the CBA steps, is via the Union. The Employer is prohibited from direct dealing with an individual employee in regard to the CBA grievance process. Though we are not obligated to advise you of individual rights under the Public Employment Relations Act (PERA), pursuit of an individual grievance is allowed under Section 1 of PERA, which states:
>
> > ...any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect, provided the bargaining representative has been given an opportunity to be present at such adjustment.

Renner filled out the Union grievance form, signed it, and submitted it to Echevarria-Fulgencio and Cross by email on October 1, 2018, along with supporting documents. He did not pay the Union any money, and the Union did not submit the grievance on his behalf. On October 2, 2018, Renner filed the instant charge, but continued to send Echevarria-Fulgencio and Cross emails asking about the status of his grievance, including an email on October 16, 2018, asking if the Union had "purposely missed the timeline" for filing the grievance.

Discussion and Conclusions of Law:

PERA's "Freedom to Work" Amendments
and the Duty of Fair Representation

Prior to 2012, PERA contained a provision, then Section 10(2), that explicitly affirmed the right of public employers and the unions representing their employees to agree that all members of a bargaining unit be required to share in the financial support of the bargaining representative by paying either dues or a service fee. In addition, Section

RECEIVED by MSC 1/24/2023 3:31:14 PM

10(1)(c), which prohibits a public employer from discriminating in order to encourage or discourage union membership, at that time included a proviso stating that this section did not prohibit a public employer from making an agreement with an exclusive bargaining representative to require employees to pay a service fee as a condition of their employment. These provisions became the subject of a Supreme Court case, *Abood v Det Bd of Ed*, 431 US 209 (1977), in which the Supreme Court upheld the constitutionality of the provisions in the face of arguments that they violated the nonmember plaintiffs' right of freedom of association under the First and Fourteenth Amendments of the United States Constitution. The *Abood* Court, however, drew a distinction between a union's expenses related to collective bargaining, for which a union could charge nonmembers, and the money it spent on political and ideological activities. The Court held that a union could not compel nonmembers to contribute to the latter.

In 2012 PA 349, the Michigan Legislature passed what came to be known as the freedom to work amendments to PERA. The amendments removed Section 10(2) and the proviso to Section 10(1)(c) and, in a new Section 10(3), explicitly made it unlawful for a public employer and union to require employees, as a condition of obtaining or continuing their employment, to "pay any dues, fees, assessment or other charges or expenses of any kind or amount or provide anything of value to a labor organization or bargaining representative." Public police and fire departments were exempted from this prohibition. 2012 PA 349 also amended Section 9 of PERA to state explicitly that public employees have a right to refrain from any the activities protected by Section 9, including the right to form, join, or assist in labor organizations, and added a new Section 9(2) that prohibits "any person from, by force, intimidation, or unlawful threats, compelling or attempting to compel any public employee" to financially support a labor organization or bargaining representative.

Prior to 2012, Section 10(3)(a)(i) of PERA had made it unlawful for a labor organization or its agents to "restrain or coerce public employees in the exercise of the rights guaranteed in Section 9." A proviso affirmed that Section 10(3)(a)(i) did not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition of membership therein." The freedom to work amendments left the language of Section 10(3)(a)(i) and its proviso in place but they became Section 10(2)(a) of the amended statute.

In addition to amending PERA, the Legislature, in 2012 PA 348, amended the Labor Relations and Mediation Act (LMA), MCL 423.1 et seq, to extend the prohibition on requiring nonmembers to pay agency fees to private sector employers and unions in Michigan. Thus, Michigan joined the list of 20-odd states with so-called "right-to-work" laws applicable to private employees, many of which dated back to the late 1940s and 1950s.[1]

[1] The National Labor Relations Act (NLRA), 29 USC 150 et seq., covers most private sector employers and employees and preempts most state regulation of labor relations in the private sector. Section 14(b) of the NLRA, however, explicitly permits states and territories to prohibit agreements requiring membership in a labor organization as a condition of employment.

RECEIVED by MSC 1/24/2023 3:31:14 PM

The *Janus* Decision

In *Janus v American Federation of State, County and Municipal Employees*, 138 S. Ct. 2448 (2018), a Supreme Court majority overruled *Abood* and held that an Illinois statute authorizing the collection of mandatory agency/service fees from employees in the public sector who chose not to be union members was unconstitutional as it violated the free speech rights of public employees by compelling them to subsidize private speech on matters of substantial public concern. Although it suggested that the "strict scrutiny" test for examining the constitutionality of statutes might be more appropriate, the Court noted that in previous cases involving the constitutionality of agency fees it had applied the less demanding "exacting scrutiny" test. However, the Court held that the Illinois statute could not survive even under the less demanding standard.

Citing *Knox v Service Employees International Union*, 567 US 298, 310 (2012), the Court held that under the "exacting scrutiny" test, a compelled subsidy of private speech must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." It held that that neither state's interest in preserving labor peace or its interest in avoiding "free riders," *Abood's* justifications for allowing agency fees, passed muster under that standard. The Court concluded that avoiding free riders was not a compelling state interest. In its discussion of this point, the Court also said, at 2468-69,

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris*, 573 U.S., at ——, 134 S Ct, at 2639 (internal quotation marks omitted). ***Individual nonmembers could be required to pay for that service or could be denied union representation altogether.***[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers. [Emphasis added]

In fn 6, the Court commented:

> There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.*, Cal. Govt. Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

Respondent relies on the statements quoted above to support the lawfulness of its "Nonmember Payment for Labor Representation Services" operating procedures and its demand that Renner pay for its services in processing his grievance pursuant to that policy. However, the issue in *Janus* was whether the Illinois statute permitting agency

fees as a condition of employment was constitutional under the First Amendment. Although this was not an issue before it, it appears, from the comments quoted above, that the *Janus* Court would not have found a state statute allowing public sector unions to charge nonmembers for processing their grievances unconstitutional as a violation of the nonmembers First Amendment rights. The issues before me here, however, are not constitutional but statutory. That is, I must decide whether Respondent's nonmember policy and its refusal to process Renner's grievance unless he paid a fee violate PERA as that statute is currently written. These are issues of first impression for the Commission.

Cone v Nevada Service Employees Union

Respondent cites *Cone v Nevada Service Employees Union, SEIU Local 1107,* 116 Nev 473 (2000) in support of its claim that its nonmember operating procedures do not violate PERA. In *Cone*, the Supreme Court of Nevada, a state with a right to work statute covering both public and private sector employees, held that it was not an unfair labor practice under Nevada's Local Government Employee-Management Relations Act (hereinafter the Nevada Act) for a union representing nonunion members of its bargaining unit to charge these nonmembers fees to represent them in grievance meetings, hearings, and arbitrations. It also found that this practice did not violate Nevada's separate right to work law.

The union in *Cone* represented a bargaining unit of employees of a Nevada public hospital. The collective bargaining agreement between the union and the hospital contained a provision stating that while the union agreed to fairly represent all employees in the bargaining unit, the hospital recognized the right of the union to charge nonmembers "a reasonable service fee for representation in appeals, grievances, and hearings." The union's practice, however, was not to charge a fee to nonmembers. However, soon after 100 members of the union's bargaining unit resigned their membership and revoked their dues authorization forms, the union adopted a new policy. This policy, first, established a fee schedule for nonmembers for representation in grievance matters and, second, notified nonmembers that they could select outside counsel to represent them in "collective bargaining matters."[2] Although the union never enforced this policy, a group of nonmembers filed a complaint with the Local Government Employees Management Relations Board alleging that the policy "interfered with, restrained, coerced and discriminated against [them and all nonmembers] in the exercise of their right, if they chose, to be nonmembers of the union."

Section 140 of the Nevada Act, NRS 288.140, includes these provisions:

> 1.It is the right of every local government employee, subject to the limitations provided in subsections 3 and 4 [disqualifying certain types of government employees from being a member of an employee organization], to join any employee organization of the employee's choice

[2] Section 195 of the Nevada Act guarantees employee organizations the right to be represented by an attorney when entering into negotiations with a local government employer.

RECEIVED by MSC 1/24/2023 3:31:14 PM

or to refrain from joining any employee organization. A local government employer shall not discriminate in any way among its employees on account of membership or nonmembership in an employee organization.

2. The recognition of an employee organization for negotiation, pursuant to this chapter, does not preclude any local government employee who is not a member of that employee organization from acting for himself or herself with respect to any condition of his or her employment, but any action taken on a request or in adjustment of a grievance shall be consistent with the terms of an applicable negotiated agreement, if any.

Section 270 of the Nevada Act, like Section 10 of PERA, includes provisions prohibiting both employers and unions from interfering with, restraining or coercing any employee in the exercise of rights guaranteed by the Act, and a provision prohibiting an employer from discriminating with regard to hiring, tenure, or terms and conditions of employment in order to encourage or discourage membership in a labor organization. Section 270(2), in addition to prohibiting unions from interfering with or restraining or coercing employees in the exercise of their rights, also explicitly prohibits them from discriminating because of political or personal reasons or affiliations.

The Nevada right to work statute, NRS 613. 250, reads as follows:

No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall the State, or any subdivision thereof or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization.

At the time the *Cone* decision was issued, this provision had been interpreted by the Nevada Courts as prohibiting agreements to pay fees to a labor organization in lieu of membership dues as a condition of employment. *Independent Guard Ass'n v Wackenhut Services*, 90 Nev 202 (1974).

The *Cone* Court first rejected the argument that the union's designation as the exclusive bargaining agent meant that it could not "pick and choose" what services it would provide for free and concluded that this designation did not prohibit a union from charging nonmembers a fee for individual grievance representation. It found that it was implicit in Section 140(2) of the Nevada Act, providing an individual with the right to forego union representation in dealing with his or her employer, that a nonunion member could be required to pay for pursuing his or her own grievance even if the payment was made to the union.

The *Cone* Court then concluded that the union's policy did not violate NRS 613.250. It stated that Nevada's right to work law was enacted for the express purpose of guaranteeing every individual the right to work for a given employer regardless of

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

whether the individual belonged to a union. It held that, unlike an agency shop agreement, the payment of a service fee for grievance representation was not a condition of employment. The Court noted, "Indeed an individual may opt to hire his or her own counsel, and thereby forego giving the union any money at all, without fear of losing his or her job."

The Court next rejected the argument that the union's policy discriminated against nonunion members and thereby breached its duty of fair representation as set forth in Section 140(1) and Section 270(2) of the Nevada Act. The Court stated that it found no discrimination, coercion, or restraint in requiring nonunion members to pay costs for union representation, citing *Schaffer v Bd of Ed*, 869 SW2d 163 (Mo. Ct. App. 1993), and *Opinion of the Justices*, 401 A2d 135 (Me. 1979).[3] The *Cone* Court also cited the Maine Supreme Court's statement that an exclusive bargaining relationship establishes a mutuality of obligation, in that the union has the obligation to represent all employees in the bargaining unit without regard to union membership and the employee has a corresponding obligation, if permissible under the collective bargaining agreement and union policy, to share in defraying the costs of collective bargaining services from which he or she directly benefits.

The *Cone* Court concluded its decision with the following paragraph:

> Although appellants cite much precedent, including NLRB opinions, in support of their position, we reject this authority. Preliminarily, we noted that this court is not bound by an NLRB decision when it determines that the statutes involved do not fall within the purview of the National Labor Relations Act. See *Associated Gen. Contractors v Otter Tail Power Co*,457 F Supp 1207 (DND 1978), (activities not listed in sections seven and eight of the National Labor Relations Act are within the jurisdiction of the state courts). Further, we disagree with this authority because it leads to an inequitable result that we cannot condone, by essentially requiring union members to shoulder the burden of costs associated with nonunion members' individual grievance representation.

<u>NLRB Decisions and Reasoning</u>

As noted above, there are in excess of 20 states with right to work laws, some of them dating back to the 1940s and 1950s, and the jurisdiction of the NLRA extends to private sector employers and employees in those states. As the *Cone* Court noted, its conclusion that under Nevada statutes unions could lawfully charge individual nonmembers a fee for representing them in the grievance procedure was contrary to the National Labor Relations Board's (NLRB or the Board) interpretation of similar provisions in the NLRA. In a recent decision, *Allied Industrial and Service Workers International Union, Local 1192 (Buckeye Florida Corporation)*, 362 NLRB 1649

---

[3] The provision in a state employee contract in Maine and the school board policy in Missouri that were the subject of these decisions both required nonunion employees to pay the union a "fair share fee" as a condition of employment.

(2015), the Board's ALJ, in a decision adopted by the Board when no exceptions were filed, summarized current Board law on this issue as follows:

> Applicable Board law is well settled and unambiguous. This matter arose in the State of Florida, a "right to work" state, and the collective bargaining agreement between the union and the employer contains no union security clause. The Union, via its Fair Share Policy, charges nonmember employees covered by the collective bargaining agreement a fee for processing a grievance. Under these circumstances, and current Board precedent, this Fair Share Policy violates Section 8(b)(1)(A) of the Act.
>
> ***
>
> Section 8(b)(1)(A) of the Act prohibits an exclusive bargaining representative from restraining or coercing employees in the exercise of their Section 7 rights, which includes the right to refrain from joining a union. The Board has long held that a union violates Section 8(b)(1)(A) when it makes union membership a condition to processing a grievance. See, e.g., *Auto Workers Local 1303 (Jervis Corp Bolivar)*, 192 NLRB 966 (1971). In *Machinists Local 697 (HO Canfield Rubber Co)*,223 NLRB 832 (1976), the Board extended that holding to a case in which the union had made payment of fees by nonmembers a condition of grievance processing. The Board held [that] doing so discriminated against nonmembers and that to "discriminate against nonmembers by charging them for what is due them by right restrains them in the exercise of their statutory rights" Id, at 835, relying on *Hughes Tool Co*, 104 NLRB 31 (1953), (in which the Board held that demanding that nonmembers pay a fee for grievance and arbitration processing violated the union's obligations under Section 9(a) of the Act warranting revocation of the union's certification.). Thereafter, the Board has consistently held that absent a valid union security clause, or in a "right to work" state, a union may not charge nonmembers for processing of grievances or other related services because doing so coerces employees in the exercise of their Section 7 right to refrain from joining a union. *Furniture Workers Local 282 (Davis Co)*, 291 NLRB 182 (1988) and *American Postal Workers (Postal Services)*, 277 NLRB 541 (1985).

The Board explained its rationale for prohibiting unions from charging fees for grievance processing first in *Hughes Tool Co, supra* and then in *Machinists Local 697 (H.O. Canfield Rubber Co), supra. Hughes Tool* did not involve an unfair labor practice charge, but a motion by a rival union to revoke the certification of a unit's bargaining agent. Two different locals represented unit employees, one of which, Local 1, had announced that it would henceforth require that employees who were not union members be charged a fee for each grievance and each arbitration proceeding for which the union served as their representative. The rival union asserted that the fee system violated Local

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

1's duty to represent all employees in the bargaining unit whether or not they were members. Local 1 defended its fee system as a nondiscriminatory method of equitably sharing the costs of representation and argued that prior to the system certain members were "weighing our grievance men down with spurious grievances." Local 1 asserted that it did not refuse to represent any employee in the bargaining unit but merely required payment to equalize the financial burden arising from the expenses of grievance processing and arbitration.

The Board began its discussion with Section 9(a) of the NLRA. Section 9(a) is identical to Section 11 of PERA, and both state that "representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in the unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." Like Section 11 of PERA, Section 9(a), in a proviso, states that any individual employee shall have the right at any time to present grievances to his employer and have the grievances adjusted without intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement and the bargaining representative has been given the opportunity to be present at such adjustment. In *Hughes*, the Board stated that it had previously recognized that a labor organization which is granted exclusive bargaining rights has, in return, assumed the basic responsibility to act as a genuine representative of all the employees in the bargaining unit. The Board noted that a certified representative's status as exclusive representative can be achieved by virtue of the support of a bare majority of unit employees, and it held that to allow a union to discriminate based on union membership would subvert the privileges and rights granted to the union by the NLRA. The Board then held that since grievance handling plays a prominent part in the representation of employees, the presentation and adjustment of grievances is subject to the same requirement of nondiscriminatory representation as the negotiation of a collective bargaining agreement.

The Board concluded that Congress's intent in the proviso to Section 9(a) was to address the problem of an employee's right to choose to process a grievance without interference by his or her representative versus the representative's interest in preserving existing conditions of employment and its right to bargain. The proviso, the Board held, did not lessen the union's responsibility with respect to those grievances on which its aid had been requested. Finally, the Board concluded that the grievance and arbitration fees charged in the case before it conflicted with the union's duty to represent employees in grievance proceedings without discrimination. It said, "The duty of the certified representative to render such impartial assistance is clearly evaded where some employees are forced to pay a price for such help *or to forego it entirely.*" [Emphasis in original.]

In *Machinists Local 697*, the collective bargaining agreement between the union and employer contained a grievance procedure ending in binding arbitration. Because the employer was in Virginia, a right to work state, the collective bargaining agreement was prohibited by Virginia law from including an agency shop or other compulsory union

RECEIVED by MSC 1/24/2023 3:31:14 PM

membership provision. The charging party, a member of the union's bargaining unit but not a union member, filed six grievances within a period of less than a year. After being involuntarily transferred to another job, charging party filed a seventh grievance, and filed an eighth after he was notified by the employer later that month that he was to be laid off for five days for failure to meet production standards. After charging party filed his seventh grievance, the union told him that it would process grievances for nonmembers through the first step, but absent an agreement to pay for all costs incurred, it would not process them further.

The Board first noted that it was undisputed that the union had drawn a distinction between members and nonmembers and, to that extent, had discriminated against the charging party. The Board framed the issue as whether the union's discrimination against nonmembers was such that it restrained or coerced them in the exercise of their Section 7 rights, or whether the discrimination was merely a lawful exercise of reasonable discretion as the union claimed.

The Board began its analysis of this issue by noting that it had long held that an exclusive bargaining agent takes on the responsibility to act as the genuine representative of all employees in its bargaining unit irrespective of union membership or a union security contract. As it had in *Hughes Tool*, the Board held that this responsibility was the quid pro quo under the NLRA for the union's receiving the right to compel an employer to bargain with it in good faith despite the fact that a substantial minority in the unit may not want to be represented by that particular union or any union at all. The Board also held, as it had in *Hughes Tool*, that a grievance and arbitration procedure is a "a primary tool in the implementation of the collective bargaining agreement and therefore a vital part of collective bargaining." It noted it had repeatedly held that a union's duty to avoid unfair discrimination extends to the grievance procedure and that a union could not lawfully refuse to process the grievance of an employee in the unit because he was a nonmember. The Board cited *Port Drum Company*, 170 NLRB 555, 556, fn. 4 (1968). *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, and its Local No. 1303 (Jervis Corp., Bolivar Division)*, 192 NLRB 966 (1971); *United Steelworkers of America, Local No. 937, AFL-CIO-CLC (Magma Copper Company)*, 200 NLRB 40 (1972); *Local Union Nos. 186, 381, 396, et al., affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (United Parcel Service)*, 203 NLRB 799 (1973); and *International Brotherhood of Electrical Workers, Local Union 1504 (Western Electric Company, Inc.)*, 211 NLRB 580 (1974).

Although admitting that the union in the case before it had not refused outright to process charging party's grievance, the Board held that by requiring a fee from nonmember employees for services "which are due the latter as a matter of right," the union had, in effect taken the position that it would only represent its members in the important area of contract administration. The Board stated that by charging only nonmembers for grievance representation, the union had discriminated against nonmembers. It concluded that discriminating against nonmembers by charging them for what was due them by right restrained them in the exercise of their statutory rights under

Section 7 of the NLRA, including the right to refrain from joining a union, and thus violated Section 8(b)(1)(A) of the NLRA. [4]

Conclusion

Despite essential similarities between the Nevada Local Government Employee-Management Relations Act and the NLRA, the Nevada Court in *Cone* and the NLRB in *Machinists Local 697* reached opposite conclusions as to whether charging nonmembers a fee for grievance processing constitutes unlawful discrimination against nonmembers or interference with employees' right to refrain from joining a labor organization under these statutes. I note that the *Cone* Court apparently interpreted the Nevada Act as giving individual employees not only the right to present grievances to their employer and have them adjusted without assistance from the union but the right to compel their employer to deal with them and their personal attorneys on grievance matters. Neither Section 11 of PERA, nor Section 9(a) of the NLRA insofar as I can determine, has been interpreted as giving employees either the latter right or the right as individuals to file and process a grievance through the contractual grievance procedure when the union will not. However, the Court's ultimate holding in *Cone* did not rest on this distinction.

The Courts have long held that since PERA, in its original form, was patterned on the NLRA, it was the Legislature's intent that the Commission would rely on legal precedents developed under the NLRA insofar as they applied to the public sector and that the Legislature intended the courts to view the federal labor case law as persuasive precedent. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 53, 64 (1974). See also *Michigan Employment Relations Comm. v Reeths-Puffer School Dist*, 391 Mich 253, 259–260, (1974) and *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-563 (1998). In *Goolsby v City of Detroit*, 419 Mich 651, 660, (1984), the Supreme Court concluded that since the rights and responsibilities imposed by PERA on labor organizations representing public sector employees were similar to those imposed on labor organizations representing private sector employees by the NLRA, PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees.

The Commission is not required to follow "every twist and turn of federal precedent," even where the pertinent language in PERA is identical to that in the NLRA. *Kent Co*, 21 MPER 61 (2008); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530; *Marquette Co Health Dep't*, 1993 MERC Lab Op 901. Here, however, as the ALJ in *Buckeye Florida Corporation*, put it, the Board law is "well settled and unambiguous" and the issue is one of first impression for the Commission. As the *Cone* Court pointed out, Board law requires unions which are legally barred from compelling unit employees to pay an agency fee, and those unions' members, to shoulder the cost of grievance representation for nonmembers. I agree with that Court that this is, at least

[4] Like Section 10(2)(a) of PERA, Section 8(b)(1)(A) includes a proviso stating that the section does not "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." The Board in *Machinists*, however, did not discuss the impact of this section on the lawfulness of charging nonmembers a fee for grievance processing.

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

arguably, unfair to those employees who pay dues to support these services. Nevertheless, I recommend that the Commission follow Board precedent and, therefore, deny Respondent's motion for summary dismissal of the charge.[5] As the parties agree that there are no genuine issues of material fact and that they have had the opportunity to argue the issues of law, I also recommend that the Commission find that the Union's "Nonmember Payment for Labor Representation Services" operating procedures violate Section 10(2)(a) of PERA because they unlawfully discriminate against nonunion members and restrain employees from exercising their Section 9 right to refrain from joining or assisting a labor organization. In addition, I recommend that the Commission find that the Union unlawfully discriminated against and restrained Renner in the exercise of his Section 9 rights by refusing to file or process his grievance unless he paid the Union a fee for its services. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Technical Professional and Officeworkers Association of Michigan, its officers and agents, are hereby ordered to:

1. Cease and desist from discriminating against nonmembers, and from interfering with, restraining, and coercing them in the exercise of their right to refrain from joining or assisting a union.

2. Cease and desist from refusing to represent nonmembers in grievance or disciplinary matters for which the Respondent normally provides representation without additional charge unless the nonmembers pay Respondent a fee for its representation;

3. Rescind or cease and desist from enforcing its "Nonmember Payment for Labor Representation Services" operating procedures adopted on August 10, 2018, to the extent that these operating procedures require nonmembers to pay Respondent a fee for services Respondent normally provides to its members without additional charge;

4. Cease and desist from demanding that Daniel Renner pay Respondent a fee as a condition of Respondent's filing a grievance on his behalf or providing him representation with respect to a disciplinary matter;

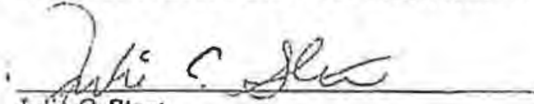
5. If permitted by Renner's employer, Saginaw County, post the attached notice in all places on the employer's premises where Respondent

[5] Respondent argues in this case that its right to implement these procedures is protected by the proviso to Section 10(2)(a) because the charging of fees is an internal union matter. However, as the NLRB has held, grievance processing is fundamental to a union's duty, as the exclusive bargaining agent, to represent all members of its bargaining unit without discrimination. Because a union's decision not to represent a unit member in a grievance or disciplinary matter has a clear impact on the unit member's terms or conditions of employment, it is not merely an internal union matter.

RECEIVED by MSC 1/24/2023 3:31:14 PM

normally posts notices to its unit members for a period of thirty consecutive days or provide copies of the notice to unit members by other means Respondent usually uses to communicate with them.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: April 25, 2019

RECEIVED by MSC 1/24/2023 3:31:14 PM

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY DANIEL LEE RENNER, AN INDIVIDUAL, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **TECHNICAL PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN (TPOAM)** 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 THE MEMBERS OF OUR BARGAINING UNIT THAT:

WE WILL NOT discriminate against nonmembers of the union, or interfere with, restrain or coerce them in the exercise of their right to refrain from joining or assisting a union.

WE WILL NOT refuse to represent nonmembers in grievance or disciplinary matters for which we normally provide representation without additional charge unless the nonmembers pay us a fee for our representation services;

WE WILL NOT demand that Daniel Lee Renner pay us a fee as a condition of our filing a grievance on his behalf or providing him with representation with respect to a disciplinary matter;

WE WILL rescind or cease and desist from enforcing our "Nonmember Payment for Labor Representation Services" operating procedures adopted on August 10, 2018, to the extent that these operating procedures require nonmembers to pay us a fee for services we normally provide to our members without additional charge

TECHNICAL PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN

By: ______________________________

Title: ______________________________

Date: __________

This notice must remain posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510. Case No CU18 J-034

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document F

TPOAM March 1, 2017 letter to Renner

RECEIVED by MSC 1/24/2023 3:31:14 PM

TPOAM

Technical, Professional and Officeworkers Association of Michigan

27056 Joy Road • Redford, MI 48239-1949 • (313) 937-9000 • FAX (313) 937-9165

March 1, 2017

Dan Renner
815 Grove Street
Saginaw, MI 48602

Re: Union Dues

Dear Mr. Renner:

The TPOAM has been informed that you are exercising the option under section 10 (3) of the Public Employment Relations Act, MCL 423.210 (3), to discontinue paying dues to the Union.

Please be advised that if you do not want to be a member of the union, you will still be a part of the bargaining unit, however, your status will not entitle you to rights enjoyed by employees who opt for union membership. To that end, you may not hold or seek elective union office, nor have any input in collective bargaining matters. You will not be allowed to attend union meetings, nor will you have any voting rights as to either proposed collective bargaining agreements or elected positions. In addition, you will not be eligible for coverage under the TPOAM extended legal representation plan.

If, in the future, you choose to reestablish membership in the union, you will be readmitted to membership upon fulfillment of the following requirements and conditions: (1) direct payment to the union office of a $500.00 administrative/user fee; (2) posting of the administrative/user fee by the union to the appropriate account; (3) authorization provided to the public employer to make dues deduction in accordance with the procedure set forth in the collective bargaining agreement; and (4) no less than one payroll period of dues has been deducted by the public employer and transmitted to the union.

Should there be any further questions regarding this matter, please contact your TPOAM Business Agent.

Very truly yours,

Frank A. Guido
General Counsel

FG/jlh

cc: Lynn Singer, Controller
Jim Cross, Business Agent
Saginaw County Court Employees Association

Document G

TPOAM email of September 27, 2018 to Renner

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

Frank Guido

From:	Frank Guido	
Sent:	Thursday, September 27, 2018 1:10 PM	
To:	'drenner@saginaqcounty.com'; 'danrenner1970@gmail.com'	
Cc:	Blanca Echevarria-Fulgendo; Jim Cross	
Subject:	9-19-18 Reprimand	
Attachments:	POAM Operating Procedure Summary.docx	
Tracking:	**Recipient**	**Delivery**
	'drenner@saginaqcounty.com'	
	'danrenner1970@gmail.com'	
	Blanca Echevarria-Fulgendo	
	Jim Cross	Delivered: 9/27/2018 1:10 PM

Mr. Renner:

Your email (below) for Union assistance in the processing of your grievance, has been referred to the undersigned for review and response.

As all parties are aware, you previously exercised your right to opt-out of union membership. By law, you remain a part of the bargaining unit, however, the Union does not owe any duty to you to provide direct representation services unless you comply with the Union Operating Procedure which mandates that an opt-out employee may request union representation services upon prepayment for services. Attached hereto is a summary of the Union Operating Procedure. If you are requesting union assistance in the further processing of your grievance, the following prepayment for services must be received by credit or debit card:

Internal investigatory review and processing of grievance (including meetings internal and with the employer) through contractual steps one through three: Estimated time 7 hours $420.00
Consultation, review and determination by legal counsel to proceed to step 4: Estimated time 3 hours $870.00

Total: $1,290.00

The stated amount must be paid prior to the Union providing any representation services.

In the event you request and prepay for services, be advised that the amount is merely an estimate. If the amount exceeds the stated estimate, the balance must be paid prior to any continuation of services. In addition, the stated amount does not include any additional services in the event the matter proceeds to step 4. The Union reserves the right, in its exclusive discretion, to determine if the grievance should be processed to step 4 arbitration.

Please be aware that the only process allowed to pursue a grievance, through the CBA steps, is via the Union. The Employer is prohibited from direct dealing with an individual employee in regard to the CBA grievance process. Though we are not obligated to advise you of individual rights under the Public Employment Relations Act (PERA), pursuit of an individual grievance is allowed under section 11 of PERA, which states:

> ....any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect, provided the bargaining representative has been given an opportunity to be present at such adjustment.

You, of course, probably know of that process given your repeated statements to the Union and other members of the bargaining unit that you are very experienced in labor relations matters.

Regards,

Frank A. Guido
POAM-COAM-TPOAM
General Counsel

From: Renner, Dan <drenner@saginawcounty.com>
Sent: Wednesday, September 26, 2018 6:55 PM
To: Echevarria-Fulgencio, Blanca <befulgencio@saginawcounty.com>; Jim Cross <jcross@poam.net>
Subject: 9-19-18 Reprimand

9-26-18

Today I received the step 1 response from Bernie Delaney, now with that according to CBA there are ten (10) working days for it to be submitted in writing on form....with that I will have all my documentation, proof, cba violations, policy violations, laws, video's etc to WHOM by Monday, October 1, 2018?

please advise to WHOM I should send all my information....again I will have ALL my arguments etc done and to WHOM ever I am told to send by Monday, October 1, 2018 end of business.

thanks

Dan Renner

989 928-0742

danrenner1970@gmail.com

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document H

POAM, COAM, TPOAM and FAOM
Internal Union Operating Procedure,
effective July 23, 2018

RESOLUTION ADOPTING:

UNION OPERATING PROCEDURE:

NONMEMBER PAYMENT FOR LABOR REPRESENTATION SERVICES

Effective: July 23, 2018

Police Officers Association of Michigan (POAM)
Command Officers Association of Michigan (COAM)
Technical, Professional and Officeworkers Association of Michigan (TPOAM)
Firefighters Association of Michigan (FAOM)

Pursuant to a duly made, seconded and unanimously adopted motion, the Executive Board of the POAM adopts the following Resolution; thereby giving retroactive effect to the Union Operating Procedure: Nonmember Payment for Labor Representation Services, as administratively implemented on July 23, 2018:

Whereas, POAM is an incorporated, not-for-profit, labor organization that has been created and operates under the provisions of the Public Employment Relations Act (PERA) and other applicable State and Federal laws; and

Whereas, POAM, COAM, TPOAM and FAOM (hereinafter collectively referred to as the "Union") are affiliate labor organizations; and

Whereas, the Union represents public employees under the provisions of PERA that are designated as "bargaining unit members" irrespective of their status as dues paying union members; and

Whereas, the Union provides labor representation services which are internally designated as "direct labor representation services" or "collective labor representation services;" and

Whereas, direct labor representation services involve representation of a bargaining unit member in an individual capacity, in employment related issues including, but not limited to, critical incidents, investigatory interviews, grievance representation and arbitration, and administrative representation; and

RECEIVED by MSC 1/24/2023 3:31:14 PM

Whereas, collective labor representation services involve representation of the bargaining unit employees collectively, in circumstances such as collective bargaining, compulsory interest arbitration and certain unfair labor practice proceedings; and

Whereas, sections 10(3) and 10(4) of PERA, commonly referred to as the "Right-to-Work" provisions, establish, in part, that public employees cannot be compelled to: (1) become a member of a labor organization; (2) remain a member of a labor organization; or (3) pay a service fee in lieu of membership; and

Whereas, The United States Supreme Court in *Janus v AFSCME (2018)* declared:

> "Individual nonmembers could be required to pay for that service or could be denied union representation altogether." (pg. 17 of slip opinion) ".... There is precedent for such arrangements.... This more tailored alternative, if applied to other objectors, would prevent free ridership......" (pg. 17 of slip opinion at footnote 6).
>
> The Supreme Court further stated:
>
> ".... the employer is required by state law to listen to and to bargain in good faith with only the union." (pg. 15 of slip opinion)
>
> and;

Whereas, The Court's statement reaffirms that nonmembers cannot bargain directly with a public employer concerning wages and benefits. Only the union, as the designated exclusive representative, is empowered to negotiate for the bargaining unit, which consists of members and nonmembers. A nonmember, therefore, is prohibited from utilizing the contractual grievance-arbitration procedure, in an individual capacity or through private legal representation. Any grievance-arbitration matter must be pursued exclusively through the Union. Absent direct payment to the Union for services, the nonmember will not have any contractual recourse for a breach of contract claim, including disciplinary matters; and

Whereas, bargaining unit employees that are dues paying members of the Union, are recognized for continued support of the Union and their corresponding receipt of labor representation services through the dues that are paid, and will be paid, during the period of employment that leads to a regular service retirement; and

Whereas, the Union has determined that it is in the best interest of the labor organization and its dues paying membership to establish an Internal Operating Procedure mandating nonmembers, that are part of the bargaining unit, in fair exchange for the receipt of requested labor representation services, be required to pay the costs, expenses and fees incurred for such services; therefore

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

BE IT RESOLVED, the following "Union Operating Procedure: Nonmember Payment for Labor Representation Services," as administratively implemented by the Union, is hereby adopted and granted retroactive effect to July 23, 2018:

UNION OPERATING PROCEDURE:
NONMEMBER PAYMENT FOR LABOR REPRESENTATION SERVICES

Effective: July 23, 2018

Police Officers Association of Michigan (POAM)
Command Officers Association of Michigan (COAM)
Technical, Professional and Officeworkers Association of Michigan (TPOAM)
Firefighters Association of Michigan (FAOM)

The Union Operating Procedure: Nonmember Payment for Labor Representation Services (hereinafter "Operating Procedure") is hereby administratively implemented, effective July 23, 2018.

1. A nonmember that is a part of a bargaining unit represented by the Union (POAM, COAM, TPOAM, & FAOM), that requests representation services, shall be required to pay, in advance, for the services rendered. The employment related issues that a nonmember may request paid-for services include, but are not limited to:

   - ✓ Internal investigatory proceedings, including critical incident submission of information (reports, statements, or verbal questioning—including *Weingarten* and *Garrity* related matters);
   - ✓ Employer administrative proceedings, including department hearings, trial boards, civil service commission meetings/hearings, pension board meetings/hearings, or any other commission, council, board, or tribunal proceeding;
   - ✓ State administrative proceedings, including, but not limited to, representation/unfair labor practice proceedings (direct not collective) before the Michigan Employment Relations Commission;
   - ✓ Consultation with a union representative or union legal counsel; and
   - ✓ Grievance step meetings, arbitration and post-arbitration matters.

2. POAM shall determine the costs, expenses and fees for the providing of labor representation services on a case-by-case basis.

3. The costs, expenses and fees shall include: (a) grievance arbitrator bills; (b) alternative dispute resolution agency charges for filing, processing and administration of arbitration cases (AAA, FMCS and MERC); (c) witness fees, including expert witness fees; (d) subpoena fees; (e) transcript fees; (f) court costs and related filing fees and expenses; (g) appeal fees and related costs and expenses; and (h) the hourly equivalent of the wages and benefits of the direct provider of services, whether business agent or attorney.

4. The nonmember will be advised by a representative of the Union of the amount of the service cost, expense and fee to be paid by the nonmember prior to the delivery of service.

5. The nonmember shall pay for the services to be rendered, in advance of the receipt of services, by credit or debit card, or other financial transaction service, as designated by the Union.

6. In the event the amount of the costs, expenses and fees cannot be calculated prior to services being provided, the Union shall estimate the anticipated costs, expenses and fees, which shall be paid by the nonmember in advance of services being provided.

7. In the event the actual amount of the costs, expenses and fees for services exceeds the anticipated amount, the nonmember shall be responsible for payment of the additional amount within seven (7) days after transmittal of the notice for payment. In the event of nonpayment within the time period specified, further labor representation services shall be suspended, with any pending proceedings being adjourned. Failure to pay the costs, expenses and fees by the end of business on the tenth (10th) day after transmittal of the notice for payment, shall result in withdrawal and/or dismissal of the matter. Calculation of time periods shall begin on the day of transmittal of the notice, whatever method of delivery is preferred, in the sole and exclusive discretion of the Union. The calculation of the time period shall be inclusive of weekdays and weekends.

8. The Union shall determine, in its sole and exclusive discretion, the Business Agent, Labor Attorney or Local Association Representative that will be assigned to represent the nonmember that has requested labor representation services.

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

9. A nonmember shall not be allowed to opt-in to union membership during the pendency of an employment related issue, as determined by the Union. At the conclusion of such matter, and upon payment of all costs, expenses and fees related to such matter, the nonmember shall be allowed to opt-in to dues paying union membership. The terms and conditions for opt-in shall also be in accordance with the governing POAM Executive Board Resolution, as adopted on May 8, 2015, which include, but are not limited to, the following requirements:

   - ✓ Payment to the Union of a $500.00 administrative/user reinstatement fee
   - ✓ Execution of a deduction of union dues/fees authorization form with the public employer

10. The Operating Procedure requirements, as specified in paragraphs one (1) to nine (9), hereinabove, may be waived in the sole discretion of the Union, if the bargaining unit employee, upon transmittal of notice from the Union, reconsiders and changes the decision to be a nonmember; provided further that the bargaining unit employee submits written notification of such decision to the Union office and executes the authorization form for dues/fees deduction with the public employer, within fourteen (14) days from the transmittal of the notice from the Union. In the event nonmember status is designated due to an arrearage in payment of union dues/fees, the bargaining unit employee will be allowed to restore union membership upon payment of all dues/fees in arrears, no later than fourteen (14) days from the transmittal of the notice from the Union.

BE IT FURTHER RESOLVED, the Union retains the exclusive right to amend, modify, change or terminate any policy, rule, practice or procedure, with or without notice.

Motion by Lamontaine, seconded by Scherer, that the aforestated Resolution and Operating Procedure be hereby adopted.

I, Jonathan Pignataro, Union Secretary, hereby certify that the above is a true and correct copy of the Resolution adopted at a meeting of the POAM Executive Board on Friday, August 10, 2018.

Jonathan Pignataro
Secretary

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document I

General Counsel notice on behalf of the Union to employees as to application of the Union's pay for services procedure

RECEIVED by MSC 1/24/2023 3:31:14 PM

IMPORTANT NOTICE TO ALL POAM, COAM, TPOAM & FAOM BARGAINING UNIT MEMBERS

Frank A. Guido
General Counsel

Due to the recent United States Supreme Court decision in Janus v AFSCME (2018), a labor organization can no longer require a bargaining unit employee to join the union and pay dues or, if a nonmember, pay a service fee amount. The Court, however, made several pronouncements which affirm that a labor organization does not owe a duty to provide "free rider" services to a nonmember. The following information will be transmitted to any bargaining unit member that refuses union membership, discontinues union membership, or is more than thirty (30) days in arrears in payment of union dues/fees. The failure to pay union dues/fees is considered an affirmative decision to opt-out of union membership.

An employee that does not want to be a member of the union is still considered, by law, a part of the bargaining unit. As a nonmember the employee will not be entitled to rights enjoyed by bargaining unit employees that opt for union membership. Nonmember status means that the employee:

- ✓ Will not be allowed to give input on collective bargaining issues;
- ✓ Will not be allowed to participate in contract ratification voting;
- ✓ Will not be allowed to attend union meetings;
- ✓ Will not be allowed to vote in elections for union officers;
- ✓ Will not be allowed to hold union office; and
- ✓ Will not be eligible for coverage under the union extended legal representation plan

The United States Supreme Court in *Janus v AFSCME (2018)* declared:

"Individual nonmembers could be required **to pay for that service** or could be **denied union representation** altogether." (pg. 17 of slip opinion) ".... There is precedent for such arrangements.... This more tailored alternative, if applied to other objectors, would **prevent free ridership......**" (pg. 17 of slip opinion at footnote 6).

The Supreme Court further stated:

".... the employer is required by state law to listen to and to bargain in good faith **with only the union.**" (pg. 15 of slip opinion)

The Court's statement reaffirms that nonmembers cannot bargain directly with a public employer concerning wages and benefits. Only the union, as the designated exclusive representative, is empowered to negotiate for the bargaining unit, which consists of members and nonmembers. For example, a nonmember is prohibited from utilizing the contractual grievance-arbitration procedure, in an individual capacity or through private legal representation. Any grievance-arbitration matter must be pursued exclusively through the union. Absent direct payment to the union for services, the nonmember will not have any contractual recourse for a breach of contract claim, including disciplinary matters.

In accord with the Supreme Court pronouncements, if a nonmember requests service from a union representative or union legal counsel concerning an employment related issue, such service will only be provided upon payment for that service. The costs, expenses and fees for services shall include the pro-rata amount of compensation for the respective union representative or union legal counsel, as determined by the union, in its discretion, on a case-by-case basis. As recognized by the Supreme Court, there is no duty of union representation owed to a nonmember that has not requested, nor made payment for, employment related services.

The Union Operating Procedure, adopted July 23, 2018, governs nonmember payment for services. Pursuant to the Operating Procedure, employment related issues for which service and prepayment shall be required include, but are not limited to:

- ✓ Internal investigatory proceedings, including critical incident submission of information (reports, statements, or verbal questioning);
- ✓ Employer administrative proceedings, including department hearings, trial boards, civil service commission meetings/hearings, pension board meetings/hearings, or any other commission, council, board, or tribunal proceeding;
- ✓ State administrative proceedings, including, but not limited to, representation/unfair labor practice proceedings before the Michigan Employment Relations Commission;
- ✓ Consultation with a union representative or union legal counsel;
- ✓ Grievance step meetings, arbitration and post-arbitration matters;
- ✓ Costs, expenses and fees for: grievance arbitrator bills; alternative dispute resolution agency charges for filing and administration of arbitration cases (AAA, FMCS and MERC); witness fees, including expert witness fees; subpoena fees; transcript fees; court costs and related filing fees and expenses; appeal fees and related costs and expenses.

In the event the amount of the costs, expenses and fees cannot be calculated prior to services being provided, the union shall estimate the anticipated amount which shall be paid by the nonmember in advance of services being provided. In the event the actual amount of the costs, expenses and fees for services exceeds the anticipated amount, the nonmember shall be

RECEIVED by MSC 1/24/2023 3:31:14 PM

responsible for payment of the additional amount within seven (7) days after transmittal of the notice for payment, after which services shall be suspended in the event of nonpayment.

A nonmember shall not be allowed to opt-in to union membership during the pendency of an employment related issue, as determined by the Union. The nonmember shall be allowed to opt-in to union membership upon conclusion of an employment related issue, provided the nonmember has paid all costs, expenses and fees assessed by the union for services rendered to the nonmember. In addition, the terms and conditions for opt-in to union membership shall be governed by the Union Executive Board Resolution, adopted May 8, 2015, which include the following requirements:

- ✓ Payment to the Union of a $500.00 administrative/user reinstatement fee
- ✓ Execution of a deduction of union dues/fees authorization form with the public employer

Those requirements are waived if an employee reconsiders and changes the decision to be a nonmember, provided the employee submits written notification to the union office and executes the authorization form for dues/fees deduction with the public employer within fourteen (14) days from the date of transmittal of notice to the employee. In the event nonmember status is designated due to an arrearage in payment of union dues/fees, the employee will be allowed to restore union membership upon payment of all dues/fees in arrears, no later than fourteen (14) days from the date of notice to the employee.

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document J

ULP Charge and attached exhibits

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

TPOAM

CHARGE

Authority: P.A. 380 of 1965, as amended.

Michigan Department of Licensing and Regulatory Affairs
Employment Relations Commission (MERC)
Labor Relations Division
313-456-3510

INSTRUCTIONS: File an original and 4 copies of this charge (including attachments) with the Employment Relations Commission at: Cadillac Place, 3026 W. Grand Boulevard, Suite 2-750, PO Box 02988, Detroit MI 48202-2988 or 611 W. Ottawa St, 2nd Floor, PO Box 30015, Lansing, MI 48909. The Charging Party must serve the Charge on the opposing side within the applicable statute of limitations, and must file a statement of service with MERC.
(Refer to the "How to File a Charge" document under the "Forms" link at www.michigan.gov/merc.)

Complete Section 1 if you are filing charges against an employer and/or its agents and representatives. —or—
Complete Section 2 if you are filing charges against a labor organization and/or its agents and representatives.

1. EMPLOYER AGAINST WHICH THE CHARGE IS BROUGHT Check appropriate box: ☐ Private ☐ Governmental

Name and Address:

2. LABOR ORGANIZATION AGAINST WHICH THE CHARGE IS BROUGHT

Name and Address:

Jim Cross, Business Agent, POAM/COAM/TPOAM
27056 Joy Road
Redford, MI 48239-1949

3. CHARGE

Pursuant to the ~~Labor Mediation Act (LMA)~~ Public Employment Relations Act (PERA) *(cross out one)*, the undersigned charges that the above-named party has engaged in or is engaging in unfair labor practices within the meaning of the Act.

On an attached sheet you must provide a clear and concise statement of the facts which allege a violation of the LMA or PERA, including the date of occurrence of each particular act and the names of the agents of the charged party who engaged in the complained of conduct. The charge should describe who did what and when they did it, and briefly explain why such actions constitute a violation of the LMA or PERA.

The Commission may reject a charge for failure to include the required information. However, it is not necessary to present your case in full at this time. Documentary material and exhibits ordinarily should not be submitted with this charge form.

4. Name and Address of Party Filing Charge (Charging Party) (If labor organization, give full name, including local name and number)	Telephone Number:
Dan Renner 815 Grove Street, Saginaw MI 48602	(989) 928-0742

5. List ALL related MERC case(s) (if any): N/A
(Name of parties)

Case No.: ____ Judge: ____
Case No.: ____ Judge: ____

I have read this charge and it is true to the best of my knowledge and belief.	Email: danrenner1970@gmail.com
[signature] Signature of Representative/Person Filing Charge	Telephone/Cell No.: 989 928-0742
Print Name and Title: Dan Renner 9-27-18	Fax No.: N/A
Street Address: 815 Grove Street City: Saginaw State: MI	Zip Code: 48602

The Department of Licensing and Regulatory Affairs will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

BER____ (6/27)

RECEIVED by MSC 1/24/2023 3:31:14 PM

September 22, 2018

Department of Licensing and Regulatory Affairs
Bureau of Employment Relations
Cadillac Place
3026 W. Grand Boulevard, Suite 2-750
PO Box 02988
Detroit, MI 48202-2988

My name is Dan Renner, I work for Saginaw County Municipality (specifically the grounds department), on September 19, 2018 I received a written reprimand from my employer, now with that I followed county policy as well as Union Contract (TPOAM) and filed a grievance at step one.

Now I have enacted my Freedom to Work right a few years ago.

I am trying to be pro-active and requested from my union President a copy of the grievance form, in anticipation that the employer will not settle my grievance at step 1. The union president sent my information to Business Agent Jim Cross, who sent me a few emails of which I responded, and he indicated that unless I pay a service fee they will not help with grievance.

I have attached that email chain

Now legally I do NOT believe they can do this and would like/hope that perhaps someone at LARA can/will assist me as to what I should do....perhaps file a charge etc.

Sincerely

Dan Renner

815 Grove Street

Saginaw, MI 48602

(989) 928-0742

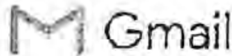
Danrenner1970@gmail.com

9-26-18

I am filing a Duty of Fair Representation charge against TPOAM

Dan Renner

RECEIVED by MSC 1/24/2023 3:31:14 PM



Dan Renner <danrenner1970@gmail.com>

TPOAM Grievance Form(s)
2 messages

Renner, Dan <drenner@saginawcounty.com> Thu, Sep 20, 2018 at 7:16 PM
To: "Echevarria-Fulgencio, Blanca" <befulgencio@saginawcounty.com>

9-20-18

Blanca,

I have submitted a TPOAM grievance at level one in accordance with Article 5 (B) Section 4, Step 1 to Bernie Delaney today September 20, 2018.

With that I don't expect him to settle/resolve so please send me whatever form(s) I am required to fill out in accordance with Article 5(B) Section 4 step 2.

If possible please send via PDF.

Respectfully

Dan Renner
989 928-0742

Renner, Dan <drenner@saginawcounty.com> Fri, Sep 21, 2018 at 12:19 PM
To: Dan Renner <danrenner1970@gmail.com>

Get Outlook for iOS

From: Renner, Dan
Sent: Friday, September 21, 2018 12:18:53 PM
To: Jim Cross
Cc: Echevarria-Fulgencio, Blanca
Subject: Re: TPOAM Grievance Form(s)

It is seeming very clear I am going to be discriminated and intimidated and bullied, I will do leg work fill out forms, follow Cba and county policy and law to the letter and if not represented in accordance with Lara I will do as needed

Respectfully

Dan Renner

Cc: LARA

Get Outlook for iOS

RECEIVED by MSC 1/24/2023 3:31:14 PM

From: Renner, Dan
Sent: Friday, September 21, 2018 12:08:25 PM
To: Jim Cross
Cc: Echevarria-Fulgencio, Blanca
Subject: Re: TPOAM Grievance Form(s)

Where does it say I have to do
My beck rights that is optional

Get Outlook for iOS

From: Renner, Dan
Sent: Friday, September 21, 2018 12:04:22 PM
To: Jim Cross
Cc: Echevarria-Fulgencio, Blanca
Subject: Re: TPOAM Grievance Form(s)

What law says I have to pay? Please provide statute in Michigan right to work state?

Get Outlook for iOS

From: Jim Cross <Jcross@poam.net>
Sent: Friday, September 21, 2018 12:02:06 PM
To: Renner, Dan
Cc: Echevarria-Fulgencio, Blanca
Subject: RE: TPOAM Grievance Form(s)

Dan,

As I've stated before, any assistance by the union will involve a service fee. We will need some advance notice.

Jim Cross

Business Agent, POAM/COAM/TPOAM

(989) 372-4993

From: Renner, Dan <drenner@saginawcounty.com>
Sent: Friday, September 21, 2018 11:58 AM
To: Jim Cross <Jcross@poam.net>
Cc: Echevarria-Fulgencio, Blanca <befulgencio@saginawcounty.com>
Subject: Re: TPOAM Grievance Form(s)

Are you telling me I am being charged for filing a grievance??

Get Outlook for iOS

From: Jim Cross <Jcross@poam.net>
Sent: Friday, September 21, 2018 11:55:11 AM
To: Renner, Dan
Cc: Echevarria-Fulgencio, Blanca
Subject: FW: TPOAM Grievance Form(s)

Dan,

I've attached the POAM grievance form for you. If you have any further need, please get them to me as early as possible so that you can take care of the service fee in advance.

Sincerely,

Jim Cross

Business Agent, POAM/COAM/TPOAM

(989) 372-4993

From: Blanca Echevarria-Fulgencio <befulgencio@saginawcounty.com>
Sent: Friday, September 21, 2018 10:57 AM
To: Jim Cross <Jcross@poam.net>
Subject: Fwd: TPOAM Grievance Form(s)

Blanca R. Echevarria-Fulgencio
Deputy Clerk/Saginaw County Employee Association TPOAM President
10th Circuit Court Records
111 S. Michigan Ave.
Saginaw, MI 48602
(989) 790-5543
befulgencio@saginawcounty.com

[Quoted text hidden]

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

Dan Renner <danrenner1970@gmail.com>

9-19-18 Reprimand
10 messages

Renner, Dan <drenner@saginawcounty.com> Wed, Sep 26, 2018 at 6:55 PM
To: "Echevarria-Fulgencio, Blanca" <befulgencio@saginawcounty.com>, Jim Cross <Jcross@poam.net>

9-26-18

Today I received the step 1 response from Bernie Delaney, now with that according to CBA there are ten (10) working days for it to be submitted in writing on form....with that I will have all my documentation, proof, cba violations, policy violations, laws, video's etc to WHOM by Monday, October 1, 2018?

please advise to WHOM I should send all my information....again I will have ALL my arguments etc done and to WHOM ever I am told to send by Monday, October 1, 2018 end of business.

thanks

Dan Renner
989 928-0742
danrenner1970@gmail.com

Renner, Dan <drenner@saginawcounty.com> Wed, Sep 26, 2018 at 7:22 PM
To: Dan Renner <danrenner1970@gmail.com>

From: Jim Cross <Jcross@poam.net>
Sent: Wednesday, September 26, 2018 7:05 PM
To: Renner, Dan
Subject: Read: 9-19-18 Reprimand

Your message

To: Jim Cross
Subject: 9-19-18 Reprimand
Sent: Wednesday, September 26, 2018 6:55:28 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Wednesday, September 26, 2018 7:05:46 PM (UTC-05:00) Eastern Time (US & Canada).

RECEIVED by MSC 1/24/2023 3:31:14 PM

Renner, Dan <drenner@saginawcounty.com> Thu, Sep 27, 2018 at 7:03 AM
To: Dan Renner <danrenner1970@gmail.com>

Get Outlook for iOS

From: Renner, Dan
Sent: Wednesday, September 26, 2018 7:22:48 PM
To: Dan Renner
Subject: Fw: 9-19-18 Reprimand

[Quoted text hidden]

Frank Guido <FGuido@poam.net> Thu, Sep 27, 2018 at 1:09 PM
To: "drenner@saginaqcounty.com" <drenner@saginaqcounty.com>, "danrenner1970@gmail.com" <danrenner1970@gmail.com>
Cc: Blanca Echevarria-Fulgencio <befulgencio@saginawcounty.com>, Jim Cross <Jcross@poam.net>

Mr. Renner:

Your email (below) for Union assistance in the processing of your grievance, has been referred to the undersigned for review and response.

As all parties are aware, you previously exercised your right to opt-out of union membership. By law, you remain a part of the bargaining unit, however, the Union does not owe any duty to you to provide direct representation services unless you comply with the Union Operating Procedure which mandates that an opt-out employee may request union representation services upon prepayment for services. Attached hereto is a summary of the Union Operating Procedure. If you are requesting union assistance in the further processing of your grievance, the following prepayment for services must be received by credit or debit card:

Internal investigatory review and processing of grievance (including meetings internal and with the employer) through contractual steps one through three: Estimated time 7 hours $420.00

Consultation, review and determination by legal counsel to proceed to step 4: Estimated time 3 hours $870.00

Total: $1,290.00

The stated amount must be paid prior to the Union providing any representation services.

In the event you request and prepay for services, be advised that the amount is merely an estimate. If the amount exceeds the stated estimate, the balance must be paid prior to any continuation of services. In addition, the stated amount does not include any additional services in the event the matter proceeds to

RECEIVED by MSC 1/24/2023 3:31:14 PM

step 4. The Union reserves the right, in its exclusive discretion, to determine if the grievance should be processed to step 4 arbitration.

Please be aware that the only process allowed to pursue a grievance, through the CBA steps, is via the Union. The Employer is prohibited from direct dealing with an individual employee in regard to the CBA grievance process. Though we are not obligated to advise you of individual rights under the Public Employment Relations Act (PERA), pursuit of an individual grievance is allowed under section 11 of PERA, which states:

> ....any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect, provided the bargaining representative has been given an opportunity to be present at such adjustment.

You, of course, probably know of that process given your repeated statements to the Union and other members of the bargaining unit that you are very experienced in labor relations matters.

Regards,

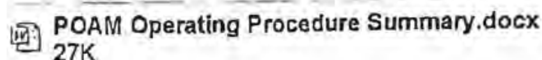
Frank A. Guido

POAM-COAM-TPOAM

General Counsel

From: Renner, Dan <drenner@saginawcounty.com>
Sent: Wednesday, September 26, 2018 6:55 PM
To: Echevarria-Fulgencio, Blanca <befulgencio@saginawcounty.com>; Jim Cross <Jcross@poam.net>
Subject: 9-19-18 Reprimand

[Quoted text hidden]



Frank Guido <FGuido@poam.net> Thu, Sep 27, 2018 at 1:11 PM
To: "drenner@saginawcounty.com" <drenner@saginawcounty.com>, "danrenner1970@gmail.com" <danrenner1970@gmail.com>

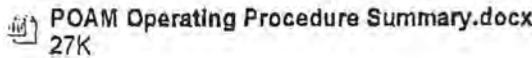
RECEIVED by MSC 1/24/2023 3:31:14 PM

Cc: Blanca Echevarria-Fulgencio <befulgencio@saginawcounty.com>, Jim Cross <Jcross@poam.net>

[Quoted text hidden]

Frank Guido <FGuido@poam.net> Thu, Sep 27, 2018 at 1:13 PM
To: "drenner@saginawcounty.com" <drenner@saginawcounty.com>, "danrenner1970@gmail.com" <danrenner1970@gmail.com>
Cc: Blanca Echevarria-Fulgencio <befulgencio@saginawcounty.com>, Jim Cross <Jcross@poam.net>

[Quoted text hidden]



Renner, Dan <drenner@saginawcounty.com> Thu, Sep 27, 2018 at 2:37 PM
To: Frank Guido <fguido@poam.net>, "danrenner1970@gmail.com" <danrenner1970@gmail.com>
Cc: "Echevarria-Fulgencio, Blanca" <befulgencio@saginawcounty.com>, Jim Cross <jcross@poam.net>

I have forwarded this to Lara

Get Outlook for iOS

From: Frank Guido <FGuido@poam.net>
Sent: Thursday, September 27, 2018 1:11:47 PM
To: Renner, Dan; danrenner1970@gmail.com
Cc: Echevarria-Fulgencio, Blanca; Jim Cross
Subject: RE: 9-19-18 Reprimand

[Quoted text hidden]

Renner, Dan <drenner@saginawcounty.com> Thu, Sep 27, 2018 at 2:40 PM
To: Dan Renner <danrenner1970@gmail.com>

Get Outlook for iOS

From: Renner, Dan
Sent: Thursday, September 27, 2018 2:37:43 PM
To: Frank Guido; danrenner1970@gmail.com
Cc: Echevarria-Fulgencio, Blanca; Jim Cross
Subject: Re: 9-19-18 Reprimand

[Quoted text hidden]

Renner, Dan <drenner@saginawcounty.com> Thu, Sep 27, 2018 at 2:50 PM
To: Frank Guido <fguido@poam.net>, "danrenner1970@gmail.com" <danrenner1970@gmail.com>
Cc: "Echevarria-Fulgencio, Blanca" <befulgencio@saginawcounty.com>, Jim Cross <jcross@poam.net>

I sent this to Lara with my dfr charge. I will still by close of business on Monday do all leg work etc and send grievance to all on this email as according Ftw law I must be represented

RECEIVED by MSC 1/24/2023 3:31:14 PM

Get Outlook for iOS

From: Renner, Dan
Sent: Thursday, September 27, 2018 2:37:43 PM
To: Frank Guido; danrenner1970@gmail.com
Cc: Echevarria-Fulgencio, Blanca; Jim Cross
Subject: Re: 9-19-18 Reprimand

[Quoted text hidden]

Frank Guido <FGuido@poam.net> Thu, Sep 27, 2018 at 3:04 PM
To: "Renner, Dan" <drenner@saginawcounty.com>
Cc: "danrenner1970@gmail.com" <danrenner1970@gmail.com>, "Echevarria-Fulgencio, Blanca" <befulgencio@saginawcounty.com>, Jim Cross <Jcross@poam.net>

Mr. Renner:

You have my earlier response. It is your choice to file a charge—we will defend as we have in the past. Clealy, you do not understand that the Union is willing to provide to you direct represention—however, per the Janus Supreme Court decision—if, as an opt-out person, you want services, you do not get to be a free-rider.

You will not receive any further response concerning the grievance if you choose to not pay for representation services.

Frank A. Guido
POAM-COAM-TPOAM
General Counsel

Sent from my iPhone
[Quoted text hidden]

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document K

PERA relevant sections

RECEIVED by MSC 1/24/2023 3:31:14 PM

PUBLIC EMPLOYMENT RELATIONS
Act 336 of 1947

AN ACT to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; to require certain provisions in collective bargaining agreements; to prescribe means of enforcement and penalties for the violation of the provisions of this act; and to make appropriations.

History: 1947, Act 336, Eff. Oct. 11, 1947;—Am. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 2011, Act 9, Imd. Eff. Mar. 16, 2011;—Am. 2012, Act 53, Imd. Eff. Mar. 16, 2012.

Popular name: Public Employment Relations

The People of the State of Michigan enact:

423.201 Definitions; rights of public employees.

Sec. 1. (1) As used in this act:

(a) "Bargaining representative" means a labor organization recognized by an employer or certified by the commission as the sole and exclusive bargaining representative of certain employees of the employer.

(b) "Commission" means the employment relations commission created in section 3 of 1939 PA 176, MCL 423.3.

(c) "Intermediate school district" means that term as defined in section 4 of the revised school code, 1976 PA 451, MCL 380.4.

(d) "Lockout" means the temporary withholding of work from a group of employees by shutting down the operation of the employer to bring pressure upon the affected employees or the bargaining representative, or both, to accept the employer's terms of settlement of a labor dispute.

(e) "Public employee" means an individual holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:

(*i*) An individual employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these.

(*ii*) If, by April 9, 2000, a public school employer that is the chief executive officer serving in a school district of the first class under part 5A of the revised school code, 1976 PA 451, MCL 380.371 to 380.376, issues an order determining that it is in the best interests of the school district, then a public school administrator employed by that school district is not a public employee for purposes of this act. The exception under this subparagraph applies to public school administrators employed by that school district after the date of the order described in this subparagraph whether or not the chief executive officer remains in place in the school district. This exception does not prohibit the chief executive officer or board of a school district of the first class or its designee from having informal meetings with public school administrators to discuss wages and working conditions.

(*iii*) An individual serving as a graduate student research assistant or in an equivalent position, a student participating in intercollegiate athletics on behalf of a public university in this state, or any individual whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act.

(f) "Public school academy" means a public school academy or strict discipline academy organized under the revised school code, 1976 PA 451, MCL 380.1 to 380.1852.

(g) "Public school administrator" means a superintendent, assistant superintendent, chief business official, principal, or assistant principal employed by a school district, intermediate school district, or public school academy.

(h) "Public school employer" means a public employer that is the board of a school district, intermediate school district, or public school academy; is the chief executive officer of a school district in which a school reform board is in place under part 5A of the revised school code, 1976 PA 451, MCL 380.371 to 380.376; or is the governing board of a joint endeavor or consortium consisting of any combination of school districts,

© Legislative Council, State of Michigan *Courtesy of www.legislature.mi.gov*

RECEIVED by MSC 1/24/2023 3:31:14 PM

employees evidenced by a petition signed by the majority and delivered to the commission, or upon request of any public employer of the employees, the commission forthwith shall mediate the grievances set forth in the petition or notice, and for the purposes of mediating the grievances, the commission shall exercise the powers and authority conferred upon the commission by sections 10 and 11 of Act No. 176 of the Public Acts of 1939, as amended, being sections 423.10 and 423.11 of the Michigan Compiled Laws.

(2) At least 60 days before the expiration date of a collective bargaining agreement, the parties shall notify the commission of the status of negotiations. If the dispute remains unresolved 30 days after the notification on the status of negotiations and a request for mediation is not received, the commission shall appoint a mediator.

History: 1947, Act 336, Eff. Oct. 11, 1947;—CL 1948, 423.207;—Am. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 1973, Act 25, Imd. Eff. June 14, 1973;—Am. 1976, Act 18, Imd. Eff. Feb. 20, 1976.

Popular name: Public Employment Relations

423.207a Additional mediation.

Sec. 7a. (1) In addition to mediation conducted under section 7, if a public school employer and a bargaining representative of a bargaining unit of its employees mutually agree that an impasse has been reached in collective bargaining between them, the parties may agree to participate in additional mediation under this section.

(2) If parties described in subsection (1) agree to participate in mediation under this section, then not later than 30 days after the date of impasse, each of the parties shall appoint 1 individual to represent the party in the mediation, and those 2 representatives shall select through a mutually agreed process a neutral third party to act as the mediator. The mediator and the 2 representatives shall meet to attempt to agree to a recommended settlement of the impasse.

(3) Not later than 30 days after appointment of a mediator under subsection (2), if the representatives of the parties mutually agree on a recommended settlement of the impasse, the representatives each shall present the recommended settlement to the party he or she represents for approval.

(4) If 1 or both of the parties fail to ratify a recommended settlement described in subsection (3) within the 30-day time limit specified in subsection (3), the public school employer may implement unilaterally its last offer of settlement made before the impasse occurred. This section does not limit or otherwise affect a public school employer's ability to unilaterally implement all or part of its bargaining position as otherwise provided by law.

(5) Both parties shall share equally any expenses of mediation conducted under this section.

History: Add. 1994, Act 112, Eff. Mar. 30, 1995.

Popular name: Public Employment Relations

423.208 Repealed. 1965, Act 379, Imd. Eff. July 23, 1965.

Compiler's note: The repealed section provided penalties for inciting public employees to strike.

Popular name: Public Employment Relations

423.209 Public employees; rights; prohibited conduct; violation; civil fine.

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).

(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.

(d) Pay the costs of an independent examiner verification as described in section 10(9).

(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

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 1/24/2023 3:31:14 PM

state.

History: Add. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 2012, Act 349, Eff. Mar. 28, 2013;—Am. 2014, Act 414, Imd. Eff. Dec. 30, 2014.

Compiler's note: Enacting section 1 of Act 349 of 2012 provides:

"Enacting section 1. If any part or parts of this act are found to be in conflict with the state constitution of 1963, the United States constitution, or federal law, this act shall be implemented to the maximum extent that the state constitution of 1963, the United States constitution, and federal law permit. Any provision held invalid or inoperative shall be severable from the remaining portions of this act."

Enacting section 1 of Act 414 of 2014 provides:

"Enacting section 1. If any part or parts of this act are found to be in conflict with the state constitution of 1963, the United States constitution, or federal law, this act shall be implemented to the maximum extent that the state constitution of 1963, the United States constitution, and federal law permit. Any provision held invalid or inoperable shall be severable from the remaining portions of this act."

Popular name: Public Employment Relations

423.210 Prohibited conduct by public employer or officer or agent; prohibited conduct by labor organization; conduct not required as condition for obtaining or continuing public employment; exception; enforceability of agreement, contract, understanding, or practice; jurisdiction of court; appropriation; violation; civil fine; verification by independent examiner; declaration identifying local bargaining units; civil action.

Sec. 10. (1) A public employer or an officer or agent of a public employer shall not do any of the following:

(a) Interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9.

(b) Initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. A public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization. However, a public school employer's collection of dues or service fees pursuant to a collective bargaining agreement that is in effect on March 16, 2012 is not prohibited until the agreement expires or is terminated, extended, or renewed. A public employer may permit employees to confer with a labor organization during working hours without loss of time or pay.

(c) Discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization.

(d) Discriminate against a public employee because he or she has given testimony or instituted proceedings under this act.

(e) Refuse to bargain collectively with the representatives of its public employees, subject to section 11.

(2) A labor organization or its agents shall not do any of the following:

(a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. This subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

(b) Restrain or coerce a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

(c) Cause or attempt to cause a public employer to discriminate against a public employee in violation of subsection (1)(c).

(d) Refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees, subject to section 11.

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

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

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

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

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

(4) The application of subsection (3) is subject to the following:

(a) Subsection (3) does not apply to any of the following:

(*i*) A public police or fire department employee or any person who seeks to become employed as a public police or fire department employee as that term is defined under section 2 of 1969 PA 312, MCL 423.232.

(*ii*) A state police trooper or sergeant who is granted rights under section 5 of article XI of the state

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 1/24/2023 3:31:14 PM

constitution of 1963 or any individual who seeks to become employed as a state police trooper or sergeant.

(b) Any person described in subdivision (a), or a labor organization or bargaining representative representing persons described in subdivision (a) and a public employer or this state may agree that all employees in the bargaining unit shall share fairly in the financial support of the labor organization or their exclusive bargaining representative by paying a fee to the labor organization or exclusive bargaining representative that may be equivalent to the amount of dues uniformly required of members of the labor organization or exclusive bargaining representative. Section 9(2) shall not be construed to interfere with the right of a public employer or this state and a labor organization or bargaining representative to enter into or lawfully administer such an agreement as it relates to the employees or persons described in subdivision (a).

(c) If any of the exclusions in subdivision (a)(*i*) or (*ii*) are found to be invalid by a court, the following apply:

(*i*) The individuals described in the exclusion found to be invalid shall no longer be excepted from the application of subsection (3).

(*ii*) Subdivision (b) does not apply to individuals described in the invalid exclusion.

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

(6) The court of appeals has exclusive original jurisdiction over any action challenging the validity of subsection (3), (4), or (5). The court of appeals shall hear the action in an expedited manner.

(7) For fiscal year 2012-2013, $1,000,000.00 is appropriated to the department of licensing and regulatory affairs to be expended to do all of the following regarding 2012 PA 349:

(a) Respond to public inquiries regarding 2012 PA 349.

(b) Provide the commission with sufficient staff and other resources to implement 2012 PA 349.

(c) Inform public employers, public employees, and labor organizations concerning their rights and responsibilities under 2012 PA 349.

(d) Any other purposes that the director of the department of licensing and regulatory affairs determines in his or her discretion are necessary to implement 2012 PA 349.

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

(9) By July 1 of each year, each exclusive bargaining representative that represents public employees in this state shall have an independent examiner verify the exclusive bargaining representative's calculation of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment during the prior calendar year and shall file that verification with the commission. The commission shall make the exclusive bargaining representative's calculations available to the public on the commission's website. The exclusive bargaining representative shall also file a declaration identifying the local bargaining units that are represented. Local bargaining units identified in the declaration filed by the exclusive bargaining representative are not required to file a separate calculation of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment. For fiscal year 2011-2012, $100,000.00 is appropriated to the commission for the costs of implementing this subsection. For fiscal year 2014-2015, $100,000.00 is appropriated to the commission for the costs of implementing this subsection.

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

History: Add. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 1973, Act 25, Imd. Eff. June 14, 1973;—Am. 2012, Act 53, Imd. Eff. Mar. 16, 2012;—Am. 2012, Act 349, Eff. Mar. 28, 2013;—Am. 2014, Act 414, Imd. Eff. Dec. 30, 2014.

Constitutionality: In Lehnert v Ferris Faculty Association, 500 US 507; 111 S Ct 1950; 114 L Ed 2d 572 (1991), the United States Supreme Court held that a collective-bargaining unit constitutionally may compel its employees to subsidize only certain union activities. "[I]n determining which activities a union constitutionally may charge to dissenting employees ... chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

Ruling on the respondent union's disputed activities, the Court held:

(1) The respondent may not charge the funds of objecting employees for a program designed to secure funds for Michigan public education or for that portion of a union publication that reports on those activities. The Court found none of the activities "to be oriented toward the ratification or implementation of petitioner's collective-bargaining agreement."

(2) The respondent may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 1/24/2023 3:31:14 PM

union. The district court had found these costs to be germane to collective bargaining and similar support services; the court agreed with the finding.

(3) The respondent may not charge for the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, union literature reporting on such activities. The Court found extra-unit litigation to be proscribed by the First Amendment of the United States Constitution because it is "more akin to lobbying in both kind and effect" and not germane to a union's activities as an exclusive bargaining agent.

(4) The respondent may not bill for certain public relations activities. The Court states: "[T]he ... activities ... entailed speech of a political nature in a public forum. More important, public speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights ... ."

(5) The respondent may charge for those portions of a union publication that concern teaching and education generally, professional development, unemployment, job opportunities, union award programs, and miscellaneous matters. The Court noted that such informational support services are neither political nor public in nature and that expenditures for them benefit all, without additional infringements upon the First Amendment.

(6) The respondent may bill for fees to send delegates to state and national affiliated conventions. The Court found that participation by local members in the formal activities of the parent is an important benefit of affiliation and an essential part of a union's discharge of its duties as a bargaining agent.

(7) The respondent may charge expenses incidental to preparation for a strike which, had it occurred, would have been illegal under Michigan law. The Court, noting that the Michigan Legislature had imposed no restriction, stated there was no First Amendment limitation on such charges. The Court added that such expenses are "substantively indistinguishable from those appurtenant to collective-bargaining negotiations ... enure to the direct benefit of members of the dissenters' unit ... and impose no additional burden upon First Amendment rights."

Compiler's note: Enacting section 1 of Act 349 of 2012 provides:

"Enacting section 1. If any part or parts of this act are found to be in conflict with the state constitution of 1963, the United States constitution, or federal law, this act shall be implemented to the maximum extent that the state constitution of 1963, the United States constitution, and federal law permit. Any provision held invalid or inoperative shall be severable from the remaining portions of this act."

Enacting section 1 of Act 414 of 2014 provides:

"Enacting section 1. If any part or parts of this act are found to be in conflict with the state constitution of 1963, the United States constitution, or federal law, this act shall be implemented to the maximum extent that the state constitution of 1963, the United States constitution, and federal law permit. Any provision held invalid or inoperable shall be severable from the remaining portions of this act."

Popular name: Public Employment Relations

423.211 Public employees; designation of bargaining representatives; grievances of individual employees.

Sec. 11. Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

History: Add. 1965, Act 379, Imd. Eff. July 23, 1965.

Popular name: Public Employment Relations

423.212 Collective bargaining representative; petition; investigation; notice; hearing; election by secret ballot; certification of results; consent election.

Sec. 12. When a petition is filed, in accordance with rules promulgated by the commission:

(a) By a public employee or group of public employees, or an individual or labor organization acting in their behalf, alleging that 30% or more of the public employees within a unit claimed to be appropriate for such purpose wish to be represented for collective bargaining and that their public employer declines to recognize their representative as the representative defined in section 11, or assert that the individual or labor organization, which is certified or is being currently recognized by their public employer as the bargaining representative, is no longer a representative as defined in section 11; or

(b) By a public employer or his representative alleging that 1 or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 11; The commission shall investigate the petition and, if it has reasonable cause to believe that a question of representation exists, shall provide an appropriate hearing after due notice. If the commission finds upon the record of the hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules of the commission.

History: Add. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 1976, Act 18, Imd. Eff. Feb. 20, 1976.

Popular name: Public Employment Relations

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 1/24/2023 3:31:14 PM

Administrative rules: R 423.101 et seq. of the Michigan Administrative Code.

423.213 Decision as to appropriate collective bargaining unit; supervisor of fire fighting personnel.

Sec. 13. The commission shall decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining as provided in section 9e of Act No. 176 of the Public Acts of 1939, as amended, being section 423.9e of the Michigan Compiled Laws: Provided, That in any fire department, or any department in whole or part engaged in, or having the responsibility of, fire fighting, no person subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator, shall be deemed to be a supervisor.

History: Add. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 1976, Act 18, Imd. Eff. Feb. 20, 1976.

Popular name: Public Employment Relations

423.214 Elections; eligibility to vote; rules; runoff election; effect of collective bargaining agreement; bargaining unit of public employer consisting of individuals not public employees as invalid and void.

Sec. 14. (1) An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held. The commission shall determine who is eligible to vote in the election and shall promulgate rules governing the election. In an election involving more than 2 choices, if none of the choices on the ballot receives a majority vote, a runoff election shall be conducted between the 2 choices receiving the 2 largest numbers of valid votes cast in the election. 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.

(2) An election shall not be directed for, and the commission or a public employer shall not recognize, a bargaining unit of a public employer consisting of individuals who are not public employees. A bargaining unit that is formed or recognized in violation of this subsection is invalid and void.

History: Add. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 1976, Act 18, Imd. Eff. Feb. 20, 1976;—Am. 2012, Act 76, Imd. Eff. Apr. 10, 2012;—Am. 2012, Act 349, Eff. Mar. 28, 2013.

Compiler's note: Enacting section 1 of Act 349 of 2012 provides:

"Enacting section 1. If any part or parts of this act are found to be in conflict with the state constitution of 1963, the United States constitution, or federal law, this act shall be implemented to the maximum extent that the state constitution of 1963, the United States constitution, and federal law permit. Any provision held invalid or inoperative shall be severable from the remaining portions of this act."

Popular name: Public Employment Relations

Administrative rules: R 423.101 et seq. of the Michigan Administrative Code.

423.215 Collective bargaining; duties of employer, public school employer, and employees' representative; prohibited subjects between public school employer and bargaining representative of employee; placement of public school in state school reform/redesign school district or under chief executive officer; effect of financial stability and choice act; selection method for certain departments or boards; prohibited subjects of bargaining; duties; costs of independent examiner verification.

Sec. 15. (1) A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession.

(2) A public school employer has the responsibility, authority, and right to manage and direct on behalf of the public the operations and activities of the public schools under its control.

(3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

(a) Who is or will be the policyholder of an employee group insurance benefit. This subdivision does not

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 1/24/2023 3:31:14 PM

regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.

(b) "Increased costs" in regard to insurance benefits means the difference in premiums or illustrated rates between the prior year and the current coverage year. The difference shall be calculated based on changes in costs by category of coverage and not on changes in individual employee marital or dependent status.

History: Add. 2011, Act 54, Imd. Eff. June 8, 2011;—Am. 2014, Act 322, Imd. Eff. Oct. 15, 2014.

Compiler's note: In subsection (4)(b), the reference to "15.269" evidently should be a reference to "15.569."
In subsection (4)(b), the reference to "15.264" evidently should be a reference to "15.564."

Popular name: Public Employment Relations

423.216 Violations of MCL 423.210 as unfair labor practices; remedies; procedures.

Sec. 16. Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the commission in the following manner:

(a) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the commission, or any agent designated by the commission for such purposes, may issue and cause to be served upon the person a complaint stating the charges in that respect, and containing a notice of hearing before the commission or a commissioner thereof, or before a designated agent, at a place therein fixed, not less than 5 days after the serving of the complaint. No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge. Any complaint may be amended by the commissioner or agent conducting the hearing or the commission, at any time prior to the issuance of an order based thereon. The person upon whom the complaint is served may file an answer to the original or amended complaint and appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the commissioner or agent conducting the hearing or the commission, any other person may be allowed to intervene in the proceeding and to present testimony. Any proceeding shall be conducted pursuant to chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.271 to 24.287 of the Michigan Compiled Laws.

(b) The testimony taken by the commissioner, agent, or the commission shall be reduced to writing and filed with the commission. Thereafter the commission upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the commission is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the commission is not of the opinion that the person named in the complaint has engaged in or is engaging in the unfair labor practice, then the commission shall state its findings of fact and shall issue an order dismissing the complaint. No order of the commission shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause. If the evidence is presented before a commissioner of the commission, or before examiners thereof, the commissioner, or examiners shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the commission, and if an exception is not filed within 20 days after service thereof upon the parties, or within such further period as the commission may authorize, the recommended order shall become the order of the commission and become effective as prescribed in the order.

(c) Until the record in a case has been filed in a court, the commission at any time, upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any finding or order made or issued by it.

(d) The commission or any prevailing party may petition the court of appeals for the enforcement of the order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings. Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction of the proceeding and shall summarily grant such temporary or permanent relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the commission. No objection that has not been urged before the commission, its commissioner or agent, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 1/24/2023 3:31:14 PM

commission with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive. If either party applies to the court for leave to present additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to present it in the hearing before the commission, its commissioner or agent, the court may order the additional evidence to be taken before the commission, its commissioner or agent, and to be made a part of the record. The commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file the modifying or new findings, which findings with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the supreme court in accordance with the general court rules.

(e) Any party aggrieved by a final order of the commission granting or denying in whole or in part the relief sought may within 20 days of such order as a matter of right obtain a review of the order in the court of appeals by filing in the court a petition praying that the order of the commission be modified or set aside, with copy of the petition filed on the commission, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the commission. Upon the timely filing of the petition, the court shall proceed in the same manner as in the case of an application by the commission under subsection (d), and shall summarily grant to the commission or to any prevailing party such temporary relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the commission. The findings of the commission with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive. If a timely petition for review is not filed under this subdivision by an aggrieved party, it shall be conclusively presumed that the commission's order is supported by competent, material, and substantial evidence on the record considered as a whole, and the commission or any prevailing party shall be entitled, upon application therefor, to a summary order enforcing the commission's order.

(f) The commencement of proceedings under subdivisions (d) or (e) shall not, unless specifically ordered by the court, operate as a stay of the commission's order.

(g) Petitions filed under subdivisions (d) and (e) shall be heard expeditiously by the court to which presented, and for good cause shown shall take precedence over all other civil matters except earlier matters of the same character.

(h) The commission or any charging party shall have power, upon issuance of a complaint as provided in subdivision (a) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any circuit court within any circuit where the unfair labor practice in question is alleged to have occurred or where such person resides or exercises or may exercise its governmental authority, for appropriate temporary relief or restraining order, in accordance with the general court rules, and the court shall have jurisdiction to grant to the commission or any charging party such temporary relief or restraining order as it deems just and proper.

(i) For the purpose of all hearings and investigations, which in the opinion of the commission are necessary and proper for the exercise of the powers vested in it under this section, the provisions of section 11 of Act No. 176 of the Public Acts of 1939, as amended, being section 423.11 of the Michigan Compiled Laws, shall be applicable, except that subpoenas may issue as provided in section 11 without regard to whether mediation shall have been undertaken.

(j) The labor relations and mediation functions of this act shall be separately administered by the commission.

History: Add. 1965, Act 379, Imd. Eff. July 23, 1965;—Am. 1965, Act 397, Imd. Eff. Oct. 26, 1965;—Am. 1976, Act 18, Imd. Eff. Feb. 20, 1976;—Am. 1976, Act 99, Imd. Eff. Apr. 27, 1976;—Am. 1977, Act 266, Imd. Eff. Dec. 8, 1977;—Am. 1978, Act 441, Imd. Eff. Oct. 9, 1978.

Constitutionality: The exercise of jurisdiction by the Michigan Employment Relations Commission under the provisions of the public employment relations act with regard to an unfair labor practice claim by a district court employee whose job is essentially administrative or clerical and not central to the administration of justice, bordering on a judicial role, does not violate the constitutional provision for separation of powers. Teamsters Union Local 214 v 60th District Court, 417 Mich 291; 335 NW2d 470 (1982).

Popular name: Public Employment Relations

423.217 Bargaining representative or education association; prohibited conduct; violation of section; "education association" defined.

Sec. 17. (1) A bargaining representative or an education association shall not veto a collective bargaining agreement reached between a public school employer and a bargaining unit consisting of employees of the

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document L

Transcript – relevant pages

RECEIVED by MSC 1/24/2023 3:31:14 PM

IN THE MATTER OF: TECHNICAL, PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN v. DANIEL LEE RENNER, ORAL ARGUMENT HEARING

November 13, 2018

Prepared by

depos@networkreporting.com
Phone: 800.632.2720
Fax: 800.968.8653
www.networkreporting.com

Let us assist you GLOBALLY for all of your deposition needs.

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 STATE OF MICHIGAN

2 MICHIGAN ADMINISTRATIVE HEARING SYSTEM

3	In the matter of:	Docket No.:	18-019077-MERC
4	Technical, Professional and Officeworkers Association of	Case No:	CU18 J-034
5	Michigan,	Agency:	Michigan Employment Relations Commission
6	Respondent,		
7	v	Case Type:	MERC Unfair Labor Practice
8	Daniel Lee Renner,		
9	Charging Party. /		

10

11 ORAL ARGUMENT HEARING

12 BEFORE JULIA C. STERN, ADMINISTRATIVE LAW JUDGE

13 611 West Ottawa Street, Lansing, Michigan

14 Tuesday, November 13, 2018, 10:00 a.m.

15 APPEARANCES:

16	For the Respondent:	MR. FRANK A. GUIDO (P32023)
17		Police Officers Association of Michigan 27056 Joy Road
18		Redford, Michigan 48239 (313) 937-9000
19	For the Charging Party:	MR. DANIEL LEE RENNER 815 Grove Street
20		Saginaw, Michigan 48602 (989) 928-0742
21		
22	RECORDED BY:	Marcy A. Klingshirn, CER 6924 Certified Electronic Recorder
23		Network Reporting Corporation Firm Registration Number 8151
24		1-800-632-2720
25		

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 TABLE OF CONTENTS

2 PAGE

3

Statement by Mr. Guido 11, 41

4 Statement by Mr. Renner 35

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 Lansing, Michigan
2 Tuesday, November 13, 2018 - 10:11 a.m.
3 JUDGE STERN: On the record. This is a formal
4 proceeding before the Michigan Employment Relations
5 Commission in case number CU18 J-034, docket number
6 18-019077-MERC. The administrative law judge appearing for
7 the Commission is Julia Stern.
8 On October 2nd, 2018, Daniel Lee Renner, an
9 employer of Saginaw County -- employee of Saginaw County,
10 excuse me, filed the above Unfair Labor Practice charge
11 against the Technical Professional and Officeworkers
12 Association of Michigan. Renner is a member of a bargaining
13 unit represented by Respondent, but is not a member of that
14 labor organization. Renner alleges that Respondent violated
15 its duty of fair representation toward him and Section
16 10(2)(a) of the Public Employment Relations Act by refusing
17 on or about September 21st, 2018, to assist him in filing
18 and processing a grievance. On October 18th, 2018,
19 Respondent filed a Motion for Summary Disposition of the
20 charge. On October 23rd, 2018, Renner filed a Response in
21 Opposition to the motion. And the purpose of today's
22 proceeding is to hear oral argument on the motion.
23 Now, next I would like the parties to state their
24 appearances. For the Charging Party?
25 MR. RENNER: Daniel Lee Renner.

Network Reporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 JUDGE STERN: Okay. And for the Respondent?
2 MR. GUIDO: For Respondent, Frank Guido, general
3 counsel for the TPOAM.
4 JUDGE STERN: All right. As I said to the parties
5 off the record, I would like to begin this proceeding before
6 I get to the actual arguments by reading a statement of what
7 I believe are the actual facts surrounding this case which I
8 do not think are in dispute, but I want to make sure that
9 that's the case. So I'm going to read -- try to read slowly
10 and if the parties will bear with me, if you make a note on
11 anything you think is not correct, I'd appreciate it. Okay.
12 The grievance in question in this case challenged
13 a written warning that Renner received on September 9th,
14 2018, for making what the employer claimed was a false claim
15 against one of his coworkers. According to documents Renner
16 submitted, Renner began the grievance at the first step as
17 the Collective Bargaining Agreement requires by presenting
18 the grievance orally to his supervisor on or about September
19 20th, 2018. It appears from the supervisor's written
20 response that Renner filed the grievance under the County's
21 grievance procedure for employees not covered by a
22 Collective Bargaining Agreement. Renner, however, sent an
23 e-mail to Respondent requesting that Respondent provide him
24 with the forms for filing a written grievance under the
25 contract at the second step. Respondent sent him the forms,

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 but informed him that there would be a charge for its
2 assistance in processing the grievance.
3 On September 26th, 2018, Renner received a written
4 answer from his supervisor denying the grievance. In his
5 answer, the supervisor stated that he believed that Renner
6 was not entitled to file a grievance under the County policy
7 for nonrepresented employees because he was covered by a
8 Collective Bargaining Agreement, and denied the grievance on
9 that basis, but also denied it on the merits.
10 It appears that pursuant to the contract, the
11 written grievance had to be filed within ten working days of
12 either the date of the warning or the supervisor's answer.
13 I can't tell which. On September 26th, Renner sent
14 Respondent an e-mail asking to whom he should send the
15 grievance and he also sent some supporting documents. On
16 September 27th, he received an e-mail from Respondent's
17 counsel, Mr. Guido, stating that he understood Renner to be
18 asking for assistance in the processing of the grievance.
19 The e-mail provided Renner with an estimate of the cost to
20 the union in pursuing his grievance through Step 3 of the
21 grievance procedure. That estimate was $1,290, and the
22 e-mail also informed Renner that he must pay this amount to
23 Respondent before it would provide any representation
24 services for the grievance.
25 As indicated in Respondent's motion, Respondent

1 and its affiliated unions adopted a written policy on or
2 about August 10th, 2018, stating that nonmembers would be
3 charged for certain representational services, including
4 grievance processing, and the September 27th e-mail from
5 Respondent's counsel appears to be in accord with that
6 policy.
7 Now, in his response to the motion, Respondent
8 (sic) asserts that Respondent missed the deadline under the
9 contract for filing the grievance. Mr. Renner attached to
10 his response to the motion a copy of a signed grievance form
11 filled out apparently by him dated October 1st, 2018. Above
12 Renner's signature on this form is this statement,
13 "I authorize the Union to act for me in the
14 disposition of this grievance and authorize the
15 employer to release any information requested by the
16 Union regarding this grievance."
17 On this form there is a space for the union
18 representative's signatures next to Renner's signature, but
19 the document Renner sent me was not signed by Respondent and
20 the spaces for the dates of the 1st and 2nd written steps
21 for the grievance are left blank.
22 And that is what I understand is the -- the
23 essence of the facts here. I do have some questions about
24 what happened to this grievance. But first of all, Mr.
25 Renner, is there anything that I have said in my statement

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 that is incorrect?
2 MR. RENNER: The only thing I would add is that
3 when I submitted the oral step, or the first step per the
4 Collective Bargaining Agreement on September the 20th, I
5 cited County policy, I cited the Bullard-Plawecki Employee
6 Right-To-Know Act to have it placed in my file, and I also
7 cited Article 5, Section 4, step one of the TPOAM union
8 contract on that same document.
9 JUDGE STERN: Okay. So despite what your
10 supervisor wrote in the answer, you cited both the County
11 policy and the contract?
12 MR. RENNER: Correct. On the original document.
13 JUDGE STERN: Okay. Mr. Guido, is there anything
14 in there that I've read that's incorrect?
15 MR. GUIDO: I would not say that there is anything
16 incorrect. I'm not sure if by virtue of the statement of
17 facts that you are -- you have stated that the October 1st,
18 '18 grievance form, I don't have any recollection of that.
19 I don't believe I have seen that and I can't make a
20 representation that my client has seen it.
21 JUDGE STERN: Right.
22 MR. GUIDO: Now, I'm not disputing that it
23 existed. I just don't know that we've ever seen it or been
24 aware of it.
25 JUDGE STERN: That part of the statement is really

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 questions I need to ask Mr. Renner because I want to get
2 this started. What happened -- what was that form that you
3 sent me?
4 MR. RENNER: The form was the form that I was
5 provided by TPOAM.
6 JUDGE STERN: You filled that out; right?
7 MR. RENNER: Correct.
8 JUDGE STERN: Okay. And then what did you do with
9 it?
10 MR. RENNER: I submitted it to them originally on
11 October the 1st, 2018.
12 JUDGE STERN: "Them" being Respondent?
13 MR. RENNER: TPOAM, correct.
14 JUDGE STERN: Yes. Okay.
15 MR. RENNER: I followed up again on October the
16 5th, October the 9th, and October the 16th, all
17 electronically, and all have been provided to yourself as
18 well as the union.
19 JUDGE STERN: Okay. So this was the grievance
20 form that you filled out you wanted the union to file and it
21 did not file?
22 MR. RENNER: That is correct.
23 JUDGE STERN: Right. And with respect to the
24 deadline for filing the written grievance, I don't have a
25 copy of the contract so what -- what -- it's ten working

Network Reporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 days from -- what? -- the date of the warning or the date of
2 the first step, the supervisor's response?
3 MR. RENNER: Well, for step one -- well --
4 JUDGE STERN: Yeah. Well, at step one I assume is
5 the discussion you had with your supervisors.
6 MR. RENNER: Oh, yes, yes. That is correct.
7 JUDGE STERN: The first written step, I assume.
8 MR. RENNER: Correct. Ten working days after the
9 receipt of the supervisor's or the employer's response.
10 JUDGE STERN: Yeah. Okay. That was my question.
11 It's ten working days from the supervisor's response and not
12 from the date of the warning itself?
13 MR. RENNER: Correct; correct.
14 JUDGE STERN: Okay. All right.
15 MR. RENNER: Ten working days from the date of --
16 JUDGE STERN: And Mr. Guido says he hasn't
17 personally seen this grievance form. Do you -- from in
18 there can you tell me who --
19 MR. RENNER: Who it was sent to originally?
20 JUDGE STERN: To, yes; yes.
21 MR. RENNER: The chapter president, Blanca, and
22 the business agent, Jim.
23 JUDGE STERN: Okay.
24 MR. RENNER: And those were the same individuals
25 on the 5th, the 9th -- or, excuse me, the very first time.

Network Reporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 JUDGE STERN: Okay. And can I assume, Mr. Guido,
2 you just don't have any personal information about this?
3 MR. GUIDO: I don't and I have no reason to doubt
4 that.
5 JUDGE STERN: But can we -- can you agree that
6 since you have already -- since you already did inform Mr.
7 Renner that you would not file this grievance for him
8 without him paying the fee --
9 MR. GUIDO: Correct.
10 JUDGE STERN: -- that you would not have -- if you
11 had received it, if the Respondent did receive it, they
12 would not have filed it?
13 MR. GUIDO: Yes. I would also note -- and I don't
14 know if you want to add it to the statement of facts, but it
15 is part of the exhibit that we attached -- that on September
16 27th, which preceded that date, as part of my communication
17 with Mr. Renner, I did alert him to his individual right
18 under PERA to pursue a grievance under Section 11.
19 JUDGE STERN: Right.
20 MR. GUIDO: And I did make clear to him that to be
21 cau- -- I believe I made clear to be cautious regarding the
22 time limits.
23 JUDGE STERN: Okay. Well, I have that
24 September --
25 MR. GUIDO: Okay.

Network Reporting
800-632-2720

1 JUDGE STERN: That's the September 27th e-mail.
2 MR. GUIDO: 27th e-mail, yes.
3 JUDGE STERN: Yes; right.
4 MR. GUIDO: That's Exhibit 2 attached to our
5 Answer.
6 JUDGE STERN: All right. With that, since it's
7 your motion, Mr. Guido, would you like to start out?
8 MR. GUIDO: Yes. I would be pleased to. Thank
9 you. We are here today on oral argument pertaining to the
10 union's Motion for Summary Disposition. You have already --
11 "you" being the administrative law judge, have already
12 stated the fundamental background facts to the case. It is
13 principally a legal issue as you have identified it.
14 Our motion is predicated on there being an absence
15 of any genuine issue of material fact as well as what we
16 believe a failure to state a claim based on what you've also
17 indicated is somewhat of a novel issue in terms of Michigan
18 law. As we all know, Michigan adopted a Right-To-Work law
19 or sometimes called a Freedom-To-Work law, depending on what
20 nomenclature you want to use, which allows employees --
21 allowed employees to opt out of union membership and this
22 was done by Mr. Renner back in March of 2017. March 1st,
23 2017, he opted out -- around that date, opted out of
24 membership in the union.
25 That process continued and then we had something

NetworkReporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 what we think is -- has an impact on the law in Michigan and
2 on the respective roles and rights of the parties, which is
3 the U.S. Supreme Court decision in the Janus case. That
4 decision issued in June of 2018. Now, there is no question
5 that the court in that decision said that the ideology it
6 was choosing to follow was a departure from the ideology
7 that a prior Supreme Court, U.S. Supreme Court, had followed
8 and that being the Abood decision. The court said Abood in
9 its opinion now was wrongly decided and that ultimately the
10 conclusion was that a First Amendment issue was at hand,
11 therefore agency shop or compelled service fees would no
12 longer be allowed. And because of the nature of the
13 decision and the constitutional underpinning to it, in
14 essence the court nationalized Right-To-Work for all public
15 employees.
16 But to reach the conclusion -- and this is where
17 the action of the TPOAM and its brethren union, the POAM and
18 COAM and FOAM have taken action -- was the court's
19 declarations regarding the historic, I'll call it, defense,
20 so to speak, of free ridership. It had long been and has
21 long been the argument of the unions that to go to a system
22 in which individuals can opt out of union membership, either
23 actually paying dues or a service fee, creates a free
24 ridership scenario and forces the union to provide not just
25 collective representation services where the individual is

NetworkReporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 one of many, but also direct representation services in
2 concept. However, the court indicated that well, you know,
3 that free ridership argument doesn't hold water and gave
4 reasons why, in its opinion, in its restatement of ideology
5 in this whole area, that that would not be the case. And I
6 will quote several of the passages which we believe relevant
7 to the decision and to the course of action then that TPOAM
8 has taken.
9 At page 12 of the slip opinion, the court stated
10 and I quote,
11 "It is now undeniable that labor piece can readily
12 be achieved through means significantly less
13 restrictive of associational freedoms than the
14 assessment of agency fees."
15 At page 17 the court stated, and I quote,
16 "In any event, whatever unwanted burden is imposed
17 by the representation of nonmembers in disciplinary
18 matters can be eliminated through means significantly
19 less restrictive of associational freedoms than the
20 imposition of agency fees."
21 And following from that the court, also at page
22 17, stated, and I quote, "Individual nonmembers could be
23 required to pay for the services or could be denied
24 representation all together."
25 So we sat back when we read this decision and we

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 asked ourselves what are the important words that the court
2 used in those statements? Well, the court said "whatever
3 unwanted burden." Well, we look at the word "whatever" and
4 we give it its common meaning and that to us suggests
5 anything, all without limitations. So "whatever unwanted
6 burden." Well, what are the unwanted burdens? Well, the
7 unwanted burdens are having to provide free, direct
8 representation services to a nonmember; they are the union
9 actually having to bear the costs of those free
10 representation services such as arbitration hearings,
11 arbitrators, costs, anything else associated with that
12 process; and also the burden on nonmembers, the fact that
13 they will have to -- excuse me, the burden on members, not
14 nonmembers, on members. That they will have to subsidize,
15 in essence, the nonmembers through whatever they are paying
16 because their resources are now being proportionally reduced
17 in use because of a necessity to support the nonmember.
18 So the court in its statement also used the words
19 "can be eliminated." We looked at those words and we said,
20 what does the court mean? Well, the court answered its own
21 question. The court said, "Can be eliminated because
22 nonmembers could be required to pay for services or could be
23 denied representation all together." The court didn't say
24 "somewhat." The court didn't say "kind of." The court said
25 "denied representation all together."

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 So what did TPOAM do in response to that
2 circumstance? In July of 2018 we took an internal operating
3 procedure which actually we've had in existence but never
4 adopted because we were waiting for some more clarification,
5 I suppose. And in this internal operating procedure we
6 dealt with rules that would affect issues of, in essence, we
7 believe things of acquisition or retention of
8 membership-like services. What did we do? Well, one thing
9 we did was to distinguish between collective labor
10 representation and direct labor representation services. In
11 essence, collective representation services in our position
12 were things like collective bargaining where you don't
13 separate out whether it's a member or nonmember because it's
14 affecting everybody by classification. What else? There
15 may be things like class action grievances that affect
16 everybody. That would be a collective action. But then
17 there are direct cases and we identified in our policy
18 things that we believe are direct matters, things such as
19 investigatory interviews that pertain to the individual
20 directly, things like disciplinary matters, the whole
21 panoply of events from first stage all the way through and
22 including perhaps arbitration, and other matters that we
23 identified specifically in that policy. And what we
24 declared was that if you choose to be a nonmember -- and
25 that is your absolute right by law and by declaration of the

NetworkReporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 Supreme Court -- that if you choose to be a nonmember, we
2 will still represent you provided that you pay for the
3 services that you are asking us to give. So this is not a
4 scenario where the union has said, "Absolutely you're a
5 nonmember, you're not getting anything." We are not saying
6 that. But we are making it clear that if you want direct
7 services, we will give them, but you have to pay for those
8 services.
9 JUDGE STERN: All right. Let's stop. Before we
10 leave Janus now.
11 MR. GUIDO: Yes.
12 JUDGE STERN: Janus was a constitutional case as
13 you just said --
14 MR. GUIDO: Yes; yes.
15 JUDGE STERN: -- and it involves the First
16 Amendment and the state -- I think Illinois, which is not a
17 Right-To-Work state in any way shape or form, and a fair
18 share fee -- that the Illinois statute that had a fair share
19 fee; is that right?
20 MR. GUIDO: Correct.
21 JUDGE STERN: That's right. And so what the Janus
22 clearly did was prohibit states from having fair share
23 agreements -- fair share -- allowing fair share agreements
24 and incidentally for the public safety employees in Michigan
25 that wiped out that part of PERA which exempts them from the

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 Freedom-To-Work statute.

2 And in this footnote, it -- the Court of Appeals

3 clearly said, well, that you shouldn't have a fair -- you

4 don't have to have a fair share provision. You don't have

5 to require -- allow unions to require fair share because

6 there's a less restrictive way to deal with the free rider

7 problem which is charging nonmembers for services. Is that

8 correct?

9 MR. GUIDO: There is a footnote --

10 JUDGE STERN: Yeah.

11 MR. GUIDO: -- which is not the principal

12 decision, but it is a footnote.

13 JUDGE STERN: Sure; right.

14 MR. GUIDO: And there is a footnote -- it

15 indicates footnote 6 -- which identifies -- I believe it's

16 two states, both of which are not Right-To-Work states.

17 JUDGE STERN: Right.

18 MR. GUIDO: And it does indicate in those

19 circumstances that were -- they were using an analogy to the

20 religious belief exceptions that have existed in some of

21 those places. In other words, where they have had service

22 fee or agency shop service fee arrangements in those states,

23 there was an allowance that would say if you are -- I'll

24 call it a conscientious objector -- but if you're a

25 religious objector, you don't have to pay the service fee to

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 the union, but you have to pay it to some other entity like
2 a charity. And there was an exception in at least one of
3 those two statutes also that stated that, however, to the
4 extent that you may have arbitration type cases, the union
5 could charge you and you would have to pay directly.
6 Now, I don't think that either of those cases
7 stand up to state that perhaps the only way this can be done
8 is if there is some legislative enactment to allow the union
9 to charge and there's going to be a number of things I'm
10 going to say in that regard. You kind of caught me by one
11 page ahead of --
12 JUDGE STERN: Oh, okay. All right.
13 MR. GUIDO: No, but that's fine. That's fine.
14 No, I'm happy to address it.
15 JUDGE STERN: That's -- that's -- that's -- excuse
16 me.
17 MR. GUIDO: I'm happy to address because I think
18 it is -- it's important to recognize, in our opinion, that
19 the footnote is subordinate to the very strong -- what we
20 believe strong language in the case. When the court uses
21 words that it has used such as "whatever unwanted burden"
22 and when it says "can be eliminated and denied
23 representation altogether," there's no reference in the body
24 of the statute or in that footnote or any other footnote
25 that said, "And by the way, this must only be done by way of

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 some state legislation." There's no suggestion to that.
2 There is no statement of that in the case. So I will talk
3 of PERA and what we believe are the allowances anyways and
4 I'm going to get to that point.
5 JUDGE STERN: Okay. However, are we clear here,
6 though, that the real issue here is the statute Michigan
7 has, PERA, and whether or not that statute allows or
8 prohibits a union from charging a nonmember for this
9 so-called individual representational services?
10 MR. GUIDO: I believe that's a substantial issue
11 in this case. It is one of five, six, seven arguments that
12 we will put forward to you saying that we believe it does
13 allow this to occur.
14 JUDGE STERN: Okay.
15 MR. GUIDO: One thing that is very clear is that
16 this is not a collective bargaining issue. I don't think
17 anyone, management or labor, would submit that we could go
18 to the table and try to negotiate with an employer to say
19 whether we should have language in a contract that says the
20 union can charge a member for -- to do services. That's an
21 internal union matter. It wouldn't even, in our opinion, be
22 a mandatory subject of bargaining.
23 JUDGE STERN: So the context -- sorry to
24 interrupt, but as I said before, I don't have a copy of the
25 Collective Bargaining Agreement here. But from what you've

Network Reporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 said -- and I'll ask Mr. Renner if this is also true --
2 there's nothing in the current Collective Bargaining
3 Agreement between the Respondent --
4 MR. GUIDO: That would address that issue, none,
5 nothing whatsoever.
6 JUDGE STERN: Right. And what -- does the
7 grievance procedure -- and I know you have cited Section 11
8 of PERA -- but does the grievance procedure of the contract
9 allow an employee to pursue a grievance individually or does
10 it have to be the union pursuing it?
11 MR. GUIDO: Union.
12 JUDGE STERN: Union. Okay. So that's clear from
13 there, too.
14 MR. GUIDO: I don't have the language in front of
15 me, but it would certainly be a departure from our 500, 600
16 contracts of groups we have across the state to have any
17 independent employee right to pursue the grievance process.
18 JUDGE STERN: But any -- in any type -- excuse me,
19 but in any type of grievance, including the most individual,
20 which is what Mr. Renner has here, as challenging a
21 discipline; right?
22 MR. GUIDO: Yes. Their right, if any, would be
23 under Section 11 of PERA to go outside the union to bring --
24 to bring the grievance.
25 JUDGE STERN: Right. And so we know from Section

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 11 and a long history that the union can't prohibit a -- an
2 individual employee from going to the employer with his or
3 her grievance, problem, or whatever and working out an
4 agreement as long as it's not inconsistent with the
5 Collective Bargaining Agreement?
6 MR. GUIDO: Correct.
7 JUDGE STERN: But doesn't Mr. Renner and all
8 nonmembers, that they're all entitled to the benefits of the
9 Collective Bargaining Agreement, are they not?
10 MR. GUIDO: They are to the extent that it
11 provides substantive terms of wages, hours, and other
12 conditions of employment. Not we would submit --
13 JUDGE STERN: Isn't a grievance procedure a term
14 and condition of employment?
15 MR. GUIDO: Yes, it is. It is. They have access
16 to the right that is stated in the contract. The question
17 comes in then, in terms of the representation by the union
18 in that process. So their right of access to it may exist,
19 but that does not absolve them of a responsibility to -- at
20 least now based on our policy -- to share in the expense of
21 going forward through that process.
22 JUDGE STERN: Okay.
23 MR. GUIDO: The members pay by virtue of their
24 dues. Part of what we did in our policy was to recognize
25 the fact that if I draw a parallel between what members do

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 and pay dues over a general career, let's say 25 years,
2 they're getting credit for the cost of going to an
3 arbitration case by virtue of their relationship and paying
4 dues. The nonmember doesn't have that so there has to be
5 some other process to keep a level playing field so that
6 neither side is discriminated against and the process that
7 we've used is to adopt a requirement that if they want us to
8 provide the services of representation, that they do so and
9 pay a fee.
10 JUDGE STERN: Okay. All right. You can go back
11 to where you're at.
12 MR. GUIDO: Okay.
13 JUDGE STERN: I'm sorry if I interrupted your
14 train of argument.
15 MR. GUIDO: Oh, no; no; no; no. I welcome --
16 JUDGE STERN: But those are two points I wanted to
17 make.
18 MR. GUIDO: I think it is -- it's a fa- -- I'm not
19 going to disagree. I think it's a fascinating, novel issue,
20 and, but, you know, we certainly -- I welcome all questions
21 in this matter.
22 JUDGE STERN: So I -- you told me you were going
23 to tell me something about how you think PERA can be
24 interpreted to allow this.
25 MR. GUIDO: Yes; yes. You know, as we stated, you

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 know, our summary disposition motion in part is based on
2 what we believe as there being no claims stated. Now, we
3 submit that there's no duty of fair rep issue here because
4 there is no duty that is owed to provide free services.
5 PERA under Section 10(3) and its subsection 10(3)(c),
6 expressly prohibits charging fees or other charges or
7 expenses to an employee as a condition of continued
8 employment. That is the expressed language of the statute.
9 We submit that in this matter we are not charging fees or
10 other expenses as a condition of continued employment. We
11 are charging them if the individual wants direct labor
12 representation services. It does not affect his right to
13 continued employment with the employer. And that --
14 JUDGE STERN: Right. Those were -- I think I'd
15 agree with you, that the intent of that or the apparent
16 attempt of that section was to prohibit clauses and
17 contracts that required employees to pay dues or fees;
18 that's right.
19 MR. GUIDO: Yes. I mean, that is the intent.
20 JUDGE STERN: At penalty of being discharged;
21 right. That was the essence of it.
22 MR. GUIDO: Correct. And there is -- there is
23 the --
24 JUDGE STERN: And that's not here.
25 MR. GUIDO: That's not here and we are not -- in

Network Reporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 this circumstance our argument is that we -- nothing we have
2 stated to Mr. Renner, nothing we have done with this
3 employer is an attempt to say, "If he does not pay for
4 direct services that he is requesting, that he be
5 terminated." So we believe that language is significant
6 because it places a one restriction which is condition of
7 continued employment. That is not the case here. That is
8 not what our policy does and that is not what we stated to
9 Mr. Renner. My e-mail of September 27th, which preceded the
10 date of his submitting, apparently, on October 1 paperwork,
11 made that point clear; that this is for -- this is for
12 request for direct services that he has made and therefore
13 we believe we have the right to ask him to pay for those
14 services or we will not provide those direct services. We,
15 of course, also indicated to him in the course of my e-mail
16 of September 27th of his right under PERA itself under
17 Section 11 to pursue an individual grievance.
18 Section 10(2)(a) of PERA, this is a section that
19 is -- basically prohibits the restraining or coercing of
20 employees and the exercise of their Section 9 rights. But
21 that section also states that the provision of not
22 restraining or coercing rights under Section 9, quote, "Does
23 not impair the right of a labor organization to prescribe
24 its own rules with respect to the acquisition or retention
25 of membership." And we submit that the nature of our

Network Reporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 internal operating procedure is dealing with the issue of
2 membership-like rights, in essence, membership-like
3 benefits, membership-like representation matters. It is
4 without question an internal procedure. It's not one we had
5 to go to the employer and ask them to approve or adopt.
6 It's not one of collective bargaining. It was wholly and
7 completely an internal matter in terms of how we are
8 structuring our relationship with individuals who are
9 members of the bargaining unit, but perhaps not members of
10 the union per se.
11 JUDGE STERN: All right. Let's stop a minute
12 there. That caught me slightly off guard because I didn't
13 see that particular argument.
14 MR. GUIDO: I made a reference to it, but I did
15 not -- and I thought because we have the opportunity for
16 oral argument today that I should expound on -- on that
17 particular section of the statute because I think it is --
18 it's really why we did our internal operating procedure. It
19 was the underpinning for us to put forward what we thought
20 would be a process that would be fair for all individuals
21 and so that's why we're raising it now.
22 JUDGE STERN: What I was about to say, I mean, I'm
23 sure you are aware that the National Labor Relations Board
24 interprets the National Labor Relations Act which has
25 provisions quite similar to Section 10(2)(a) in AP1A, and it

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 interprets the duty of fair representation under that
2 statute to prohibit unions from charging fees to nonmembers
3 for -- for this. I can't remember whether AP1A includes the
4 language. I know it's the language about the unions being
5 allowed to set their own rules of membership. I can't
6 remember if that's in AP1A or not. It's similar in there,
7 but I don't know if it's there.
8 MR. GUIDO: Yeah. I do private sector work, too.
9 That language is similar in that statute.
10 JUDGE STERN: Is it in AP1A?
11 MR. GUIDO: Yes. But I am going to -- I will
12 address the fact that, you know, NLRB rulings in our opinion
13 all predate Janus and therefore -- and then, of course,
14 there are cases that you graciously provided to us to
15 review, some state court cases, that go the opposite
16 direction and I'm going to reference those in a moment here
17 as well.
18 One of the arguments, too, that I did not put in
19 our motion but I think I should preserve for at least for
20 the oral record here along with our 10(2)(a) argument that I
21 just made is that this action or requirement that would
22 state that the union must provide free services to a
23 nonmember really impinges on our organizational First
24 Amendment rights. And there are a number of -- I will not
25 call them legal precedent because they are not. They're

NetworkReporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 merely articles of opinion by professors and otherwise, but
2 I fully appreciate the argument and I believe it is one
3 worth preserving to state that there are genuine First
4 Amendment issues here. If the logic of the Supreme Court is
5 to say you are impinging on an individual's First Amendment
6 rights by an agency shop relationship requirement because of
7 what the union may or may not do in its political or
8 otherwise ideological activities, we think similarly there
9 is an argument that there's a First Amendment impingement on
10 our freedom of association. That, in essence, we are being
11 compelled to associate and provide free services to the
12 detriment of the organization and to its specific
13 membership. So we believe there is a First Amendment
14 argument to be had as well.
15 I wanted to touch on those NLRB cases. The
16 decisions -- the decision in the NLRB case, one from the
17 NLRB and I think the other was an administrative law judge,
18 and from the Nevada court which also in turn cited to, I
19 believe, a Missouri and a main court decision in the body of
20 that case clearly go in opposite directions. There's no
21 question that the concepts are different. We know, however,
22 that since those cases came out Janus evolved, and Janus was
23 a -- it rejected the ideology of the past even though the
24 prior case that it rejected was a Supreme Court decision.
25 So here we have a Supreme Court saying, "We don't like your

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 ideology." Our ideology is now better. Okay. That's fine.
2 That's what newer courts can do. To the same extent we
3 believe that whatever was in the past stated by the NLRB as
4 the ideology of the NLRB is now subject to revision and
5 reconsideration when they are confronted with it. Now I
6 don't know that they have been or will be.
7 JUDGE STERN: And all constitutional issue is
8 going to come up for the NLRB's policy because they're doing
9 with private sector there and not public sector, so there
10 isn't a constitutional issue.
11 MR. GUIDO: That is -- that is very true and that
12 is one of the critical driving points that are
13 distinguished, the relationship. That while we certainly
14 look at NLRB precedent, we are dealing with a structure that
15 is under some different levels of implication, one of which
16 you just alluded to which is the fact that the
17 constitutional implication in the private sector is far
18 different than it is in the public sector in which Janus
19 arose, which means, in our opinion, that the logic presented
20 by the Nevada Court, Missouri, and Maine make more sense in
21 application to our PERA and what should be done. Now, the
22 court --
23 JUDGE STERN: I want to say something here. I
24 mean, I haven't -- of course, I've read the Nevada decision
25 and that I think is really on point here and you're quite

Network Reporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 correct, it goes in completely opposite direction from the
2 NLRB's reasoning about this. The Missouri and Maine cases,
3 first of all, there again it involved fair share provisions
4 in states without Right-To-Work Acts, without Right-To-Work
5 laws. I mean, those were -- those were, in fact,
6 interpretations of state statutes but they're not really on
7 point like Nevada is. I have looked but I have yet to find
8 anything in any of the many Right-To-Work states which
9 have -- aside from Nevada, that have long had Right-To-Work
10 laws, anything addressing this issue. And if you're able to
11 come up with anything else other than Nevada --
12 MR. GUIDO: Your Honor --
13 JUDGE STERN: -- I would -- I would appreciate it.
14 MR. GUIDO: -- your Honor, I have looked as well
15 and, of course, it's a double-edged sword because, one,
16 there are -- there are -- there is no direction saying you
17 cannot do it, nor is there any indirection saying, you know,
18 you can or cannot do it. And so to us, the only
19 distinguishing fact is now the passage of time and what the
20 Supreme Court, we believe, in Janus said and what doors it
21 may have opened for reconsideration or consideration in the
22 first instance of how to deal with this issue.
23 JUDGE STERN: Okay.
24 MR. GUIDO: Now, one of the unique things for we
25 as the union, be it TPOAM, POAM, COAM, FOAM, all the

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 organizations under the umbrella, is that we've never had a
2 case since 2011, '12, '13, whenever Right-To-Work came into
3 effect, with an employee, a nonmember's case going to
4 arbitration. It just hasn't happened and so we haven't had
5 to address the issue.
6 JUDGE STERN: Right. You haven't had too many
7 nonmembers I assume.
8 MR. GUIDO: Well, we haven't had -- well, we still
9 don't. I mean, we have only a --
10 JUDGE STERN: Right.
11 MR. GUIDO: I mean, you know, knock on wood for us
12 as an organization, we've only had a handful of individuals
13 who have opted out, even after Janus. Certainly even though
14 Janus' real effect on us in the state of Michigan was to
15 eliminate the exemption for police and fire, you know, we've
16 lost -- none of the police or fire have left the
17 organization and, you know -- and we suspected that in a
18 state like Michigan that it was not going to be --
19 JUDGE STERN: Well, of course. Mr. Renner is
20 represented. He's not a police or fire employee.
21 MR. GUIDO: Right. That's correct.
22 JUDGE STERN: He's represented by your affiliate,
23 the TPOAM.
24 MR. GUIDO: TPOAM, correct.
25 MR. RENNER: Correct.

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 MR. GUIDO: Exactly.
2 MR. GUIDO: So, you know, where we're at now, to
3 the extent I'm not sure that based on the statement of facts
4 that your Honor presented that there's this need, but I feel
5 compelled for the record that I should still address this in
6 the context of what a DFR claim is because that was the
7 handwritten note I saw on the charge. The charge did not
8 really set forth any DFR issue and then the corner of the
9 charge handwritten says, "I am filing a duty of fair
10 representation charge against TPOAM."
11 JUDGE STERN: Well --
12 MR. GUIDO: I presume it is limited to the issue
13 of wanting to charge him for the services. That is the
14 nature.
15 JUDGE STERN: Let's -- you know, we give a
16 individual filing their own charges a good deal of leeway in
17 how they plead their charge. Let's get this from Mr.
18 Renner. Mr. Renner, is there any issue that -- anything
19 that the union did that violated its duty of fair
20 representation that other than refusing to pursue your
21 grievance through the grievance procedure? Is there
22 anything else encompassed by this charge? I know I'm kind
23 of --
24 MR. RENNER: Encompassed meaning in addition to
25 the charge of them failing to represent me?

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 JUDGE STERN: Yes; yes; yes. We want to know as a
2 legal issue. I think you picked up something out of all
3 this is there's a big legal issue --
4 MR. RENNER: Uh-huh; correct.
5 JUDGE STERN: -- about whether or not the unions
6 can charge for representational services and on top of it
7 whether or not they violate their duty of fair
8 representation if they try to. But is there anything else
9 encompassed by the -- anything else that the union did that
10 you're claiming violated their duty of fair representation?
11 Because I want to make sure that we -- that we're addressing
12 everything that you contented.
13 MR. RENNER: Other than the fact that they've
14 represented me before and I've not paid dues.
15 JUDGE STERN: Yeah; yes. Well, I understand
16 that -- Mr. Renner, I take it that Mr. Guido's response to
17 this would be "yes" and this was before Janus and before
18 they passed that policy, so --
19 MR. RENNER: And this is Michigan, so not
20 Illinois, nor Nevada, so this is Michigan.
21 JUDGE STERN: Right; right. This is the statute.
22 MR. RENNER: Correct.
23 JUDGE STERN: As you have made I think pretty
24 clear in your pleadings, that you believe that the statute,
25 PERA, including the Right-To-Work amendments, right to

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 Freedom-To-Work amendments, prohibit the union from doing
2 this?
3 MR. RENNER: This is correct.
4 JUDGE STERN: Correct. Okay. Well, back to you,
5 Mr. Guido.
6 MR. GUIDO: Okay. So I prepared to argue to
7 the -- you know, the typical three-part standard under
8 Right-To-Work or, excuse me, under duty of fair rop claim,
9 but I don't know that those are really necessarily of
10 necessity other than for us to say we do not believe that by
11 our conduct we are showing any hostility or discrimination
12 towards Mr. Renner. This is an action that we believe is
13 now going to be uniform toward all nonmembers and also
14 treats with some degree of mutuality of obligation what we
15 will do for the individual who requests our services and
16 what they will do correspondingly to pay for those services
17 so that they are not getting them for free. And we submit
18 that that creates balance then between what members are
19 doing and paying dues and getting services versus what --
20 what the nonmembers will get.
21 We also will submit for the record our perception
22 and argument that we believe we acted in good faith and with
23 honesty. We were operating because we believe that the
24 Janus case in conjunction with what PERA states and what it
25 does not state and what it does state allows us to create

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 this internal operating procedure that we have now
2 implemented. And, lastly, we believe that there's no
3 arbitrary conduct here. I mean, as arbitrary conduct has
4 often been described under case law, it requires some degree
5 of -- you know, you can be decisive but it has to be
6 unreasoned and that's not our case here. We believe that we
7 gave thoughtful consideration to this, we waited until there
8 was change in the law, and we believe we have acted
9 accordingly with the change in the law.
10 So if I were to try to summarize all that I have
11 presented to you by virtue of our request for this motion be
12 granted, it is our belief that while this is a novel issue
13 in Michigan, we are on new ground. We believe that if we
14 take what the court said in Janus in terms of the words the
15 court chose to use -- those were significant words that the
16 court used, denied services all together, no indication in
17 that court decision that there has to be a statutory
18 enactment to be able to do something like that -- if we take
19 those things of what the court stated and we add a review of
20 what PERA says and does not say, we've not made this a
21 condition of continued employment for Mr. Renner. If you
22 want the services, we will provide the services if you pay
23 for the services. So we believe what PERA allows us to do
24 in terms of internal operating procedures does not create
25 any violation, unfair labor practice, duty of fair rep

1 claim, and we believe that as long as PERA does not
2 expressly prohibit it, we believe there is sufficient
3 grounds to say that it is allowed, and therefore we ask that
4 the motion be granted.
5 JUDGE STERN: Okay. Mr. Renner, let's start. I
6 mean, you provided me copies of the statute and some of the
7 stuff off our web site with the Freedom-To-Work which
8 repeats the statute again.
9 MR. RENNER: Uh-huh; yes.
10 JUDGE STERN: But as I think I've said before,
11 this particular issue that you're raising here has not come
12 before the Commission before. As far as I know, until the
13 passage of the policy that Mr. Guido refers to by the
14 COAM/POAM/TPOAM, there wasn't any union that had ever
15 attempted to do this, charge fees. But yet we're talking
16 about these Right-To-Work amendment, Freedom-To-Work
17 amendments. I mean, there's two of them. There is, of
18 course, Section 10(3), which Mr. Guido says an individual
19 shall not be required as a condition of obtaining or
20 continuing employment to do any of the following, blah,
21 blah, blah, which means -- includes paying anything to a
22 labor organization.
23 MR. RENNER: Yes.
24 JUDGE STERN: But this is not a condition of
25 employment for you. And then there's another one, Section 9

RECEIVED by MSC 1/24/2023 3:31:14 PM

NetworkReporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 of the amendments prohibits any person, including a union,
2 from, by force, intimidation or unlawful threats compel or
3 attempt to compel any public employee to blah, blah, blah,
4 including financially support a union. Now, can this be
5 said to be forced intimidation or unlawful threats? I
6 mean --
7 MR. RENNER: I believe so, yes.
8 JUDGE STERN: You think so?
9 MR. RENNER: I believe so. As I have been
10 represented in the past by them, this is Michigan, not
11 Illinois, not Nevada. They indicated that what was fair
12 TPOAM did, while I stopped paying my dues in March of 2017,
13 listed out a laundry list of reasons why without even so
14 much as even asking me what they can modify, change, or
15 address or help with. Then another grievance had occurred.
16 They represented me, no questions. And then this Janus
17 ruling which allegedly talks about charging fees and a $1290
18 e-mail all of a sudden shows up to me while NLRB, he
19 indicated, predated the Janus ruling. Well, if TPOAM
20 adopted that in July of 2018, they never informed any
21 non-dues paying members that they've adopted something so
22 that we could or I could address or do something with it.
23 Then I am issued a reprimand and I followed the Collective
24 Bargaining Agreement, "An employee or designated member of a
25 group of employees having a grievance may discuss the

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 grievance with their immediate supervisor or may request
2 their steward." I did it on my own. I did that. It was
3 issued on September 19th. I issued my written response to
4 the supervisor on September 20th, did the form on October
5 the 1st that was provided by TPOAM, and followed up on the
6 5th, the 9th, and the 16th. I did my -- what I thought I
7 was supposed to do by law, citations, Googled it, looked it
8 up, said that they still had to represent me, whether I was
9 paying or not paying, whether it was for Michigan State
10 University, whether it was on the NLRB, the MERC web sites
11 and so on, and now all of a sudden they're trying to charge
12 me? I feel that that is a threat and I feel that that is
13 not reasonable nor is it lawful.
14 JUDGE STERN: Okay. This is kind of off the
15 point, but as far as the -- County has a grievance procedure
16 apparently for nonrepresented employees; right?
17 MR. RENNER: Yeah. I followed the Collective
18 Bargaining Agreement as well as I indicated. I cited all
19 three.
20 JUDGE STERN: Okay. Well, right. But what is
21 that County policy? Was there anything beyond the initial
22 meeting with the supervisor?
23 MR. RENNER: No.
24 JUDGE STERN: Is there another step that you can
25 take under a County policy?

NetworkReporting
800-632-2720

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 MR. RENNER: Well --
2 JUDGE STERN: I know that there's a dispute --
3 MR. RENNER: Yes.
4 JUDGE STERN: -- but whether or not you're covered
5 by that policy, but -- under that policy is there another
6 step that you can take?
7 MR. RENNER: For as they indicated noncovered
8 employees? Yeah, I believe so; yeah.
9 JUDGE STERN: Yeah. Okay.
10 MR. RENNER: I went with the -- I did all to cover
11 my -- my -- you know, cover your own butt. I just cited
12 everything.
13 JUDGE STERN: Okay.
14 MR. RENNER: And I cited the County policy and the
15 Collective Bargaining Agreement, Article 5 grievance
16 procedure under TPOAM.
17 JUDGE STERN: But you didn't attempt to pursue
18 this through -- after you got the answer from your
19 supervisor whose name escapes me right now?
20 MR. RENNER: Bernie Delaney.
21 JUDGE STERN: Yeah. Mr. Delaney. And you didn't
22 try to pursue this to the next -- to the next step of the
23 County grievance procedure?
24 MR. RENNER: No, I did not. I followed the
25 Collective Bargaining Agreement as he indicated I was

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 covered by the Collective Bargaining Agreement, being Mr.
2 Delaney.
3 JUDGE STERN: Okay.
4 MR. ReNNER: The maintenance director. He
5 indicated that I did not have the right to follow the County
6 policy because I was covered under the Collective Bargaining
7 Agreement.
8 JUDGE STERN: Right; right.
9 MR. RENNER: So that's what I did. I requested
10 the form, who do I get it from, and then did that and
11 submitted it on October the 1st.
12 JUDGE STERN: Okay. You have anything more that
13 you'd like to add here?
14 MR. RENNER: Just the fact that if what's fair is
15 fair, they -- being TPOAM -- if they've adopted this in July
16 2018, why did they not subsequent business days inform non-
17 dues paying members that they've adopted this policy so then
18 we could do or I could do what I saw as fit legally,
19 financially, whatever the case may be? Instead, wait until
20 I receive a reprimand and they say that I could be
21 terminated. I mean, if there's subsequent violations that
22 the employer deems, I could lose my job.
23 JUDGE STERN: You mean as a result of progressive
24 discipline?
25 MR. RENNER: Correct.

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 JUDGE STERN: Right.
2 MR. RENNER: So I feel that there is coerce. You
3 know, I mean, I could lose my job. I mean, this stays in my
4 file I believe it is for 12 months. It occurred on
5 September the 19th. I mean, there are theoretically -- I'm
6 not saying I'm going to go out and violate a bunch of work
7 rules, but there is -- I mean, they could do progressive on
8 something and the union is just turning their back and
9 bullying me and trying to make me pay $1290 all of a sudden
10 out of a whim with next to no notice. And we don't make
11 that much money as employees there. They haven't negotiated
12 fair wages anyway. I mean, I'm adding that, yes, I am. So
13 how can you feasibly say, "Oh, pay $1290 for representation
14 on something"?
15 JUDGE STERN: So when you say you're adding
16 something, you're adding the fact that they didn't give you
17 an advanced notice that they had passed this policy, is that
18 what you mean?
19 MR. RENNER: No. I mean, he indicated July of
20 2018, and this is, you know, today's date, I mean --
21 JUDGE STERN: Yes. I asked you the question
22 before. In addition to their actual refusal to process your
23 grievance --
24 MR. RENNER: Right.
25 JUDGE STERN: -- you're also making a claim

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 relative to them not giving you advanced notice?
2 MR. RENNER: Well, I didn't know that until he
3 indicated it here today.
4 JUDGE STERN: Oh, okay. All right.
5 MR. RENNER: When he indicated July 2018, he said
6 that during his oral argument, that they adopted that in
7 July.
8 JUDGE STERN: Okay.
9 MR. RENNER: I didn't know that until today.
10 JUDGE STERN: Okay. Do you have anything more to
11 say, Mr. Guido?
12 MR. GUIDO: Simply that when Mr. Renner exercised
13 his right to opt out, he was given correspondence -- is it
14 in here? -- yes, Exhibit 1 which did give him some of the
15 indications of what he could do to come back to the union if
16 he chose to do it. The timing of this -- I believe this
17 policy was adopted by the board -- what is the date on
18 it? -- I think it was adopted in August, and then this event
19 happened with Mr. Renner within a month of it. I'm not sure
20 what we have or intend to do as an organization in terms of,
21 you know, broadcasting this information. We're not
22 obligated to do that necessarily, but it's probably
23 something we have internally talked about, but I don't
24 believe that that's a basis for a claim for Mr. Renner. He
25 was told what we could or could not do, what we would or

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 would not do for him and he had choices, and he chose not to
2 avail himself of our services and to pursue the matter
3 somewhat on his own apparently, perhaps not calling it a
4 Section 11 action, but that's on him in terms of what he
5 wants to do individual with the grievance. And I don't know
6 where it is, if it's a completely done issue or not. But in
7 any event, I really have nothing further to add other
8 than --
9 JUDGE STERN: Insofar it was filed as a grievance,
10 the grievance is done.
11 MR. GUIDO: Yeah.
12 JUDGE STERN: Right.
13 MR. GUIDO: That's my perception. I would take
14 exception to any even remote assertion by Mr. Renner that
15 that Section 9 language comes into play; that our conduct
16 was intended to be threatening toward him or the verbiage,
17 you know, that is used in the statute which is -- you know,
18 it's quite distinct in terms of how that language is worded.
19 JUDGE STERN: I can say it again because I --
20 MR. GUIDO: Yeah. No, I've got it right here.
21 "No person shall by force" -- clearly we didn't use any
22 force.
23 JUDGE STERN: Yes; right.
24 MR. GUIDO: "Intimidation or unlawful threats,
25 compel or attempt to compel any public employee to do any of

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 the following" and then, you know, it has the numbered
2 sections, one of which is to financially support the
3 organization. None of those -- none of those facts were
4 alleged or asserted and they're not remotely part of this
5 case. That's not the nature of what we do. We take
6 exception to those comments. This case is a legal issue
7 regarding whether we can or cannot do what we believe we
8 have done properly.
9 JUDGE STERN: Okay. Well, if both of you have had
10 your say and I have had my questions answered, I believe
11 that this oral argument is closed. Before we go off the
12 record, what happens here is I have to -- I'm going to write
13 something in response to this motion, Mr. Renner. I'll
14 either write an interim order denying the motion or I'll
15 write a decision and recommended order to the Commission.
16 That's what I do. I write decisions and recommended orders
17 which are then sent to the Commission for they -- they have
18 the chance if an appeal is filed to either adopt or reject
19 my findings and recommendations.
20 MR. RENNER: May I ask a question, your Honor?
21 JUDGE STERN: Yes.
22 MR. RENNER: In the event that this is ruled that
23 they did violate, okay, hypothetically, the time line has
24 been missed.
25 JUDGE STERN: Yes.

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 MR. RENNER: So therefore, I mean, if it's ordered
2 that TPOAM violated something, the employer is not going to
3 hear a grievance. I mean, I'm SOL regardless.
4 JUDGE STERN: Correct. I mean, the issue of
5 what -- what the proper remedy is, is a whole different
6 issue. Do you have a view on what the proper remedy should
7 be?
8 MR. RENNER: I mean, I cited in my written
9 response, I mean, there should be a fine or posted -- you
10 know, clearly posted in all employer sites for a duration
11 and a fine.
12 JUDGE STERN: Yeah. Posting is -- posting would
13 be a routine. Probably they have to send something to every
14 nonmember or maybe a posting for all members.
15 MR. RENNER: Something because --
16 JUDGE STERN: Yes.
17 MR. RENNER: -- because, again, I believe I'm
18 probably -- the employer is not going to say, "Oh, yeah,
19 okay. We'll hear his grievance now." I don't anticipate
20 any employer doing that.
21 JUDGE STERN: There's nothing in the contract that
22 compels the employer to do that.
23 MR. RENNER: Correct.
24 JUDGE STERN: So that's not going to happen and
25 the Commission can't compel the employer to do that.

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 MR. RENNER: Correct.
2 JUDGE STERN: So you're -- you're -- you're --
3 you're -- as I think I think you've said in your posting --
4 MR. RENNER: SOL.
5 JUDGE STERN: -- would be to -- fine, I don't
6 know. But the Commission has in a prior case; said that the
7 fine that's under Section 9 --
8 MR. RENNER: Is it $500 or something along those
9 lines, I believe?
10 JUDGE STERN: Yes. Has said -- and there's a case
11 before the Court of Appeals on whether or not -- right now,
12 on whether or not the Commission can order a union to pay
13 that $500 fine. So that's up in the air, too, so --
14 MR. RENNER: And I would like to go on record just
15 saying that I am not anti-union. I am pro-union. I'm not
16 going to go into my history of -- on anything, any prior
17 employment or nothing along those lines in my closing here.
18 But this union didn't even ask me when I opted out to meet
19 with me to discuss anything and so on and it just -- time --
20 it went on, and then all of a sudden this. They sent me a
21 letter about $500 if I wanted to join again. Now I know
22 legally they can't make me pay that $500. I knew that they
23 couldn't do that, but I could just start paying again. But
24 my concern was the laundry list of things I listed out that
25 they didn't even ask me about, and then the time passed and

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 class action grievance, I'm represented, and then a
2 reprimand and then not represented. So that's my closing.
3 JUDGE STERN: Yes. You're raising some other
4 issues. Whether or not they can charge you a -- after you
5 opt out can charge you an additional fee to rejoin the union
6 is not encompassed by the scope of your charge and I'm not
7 going to address that.
8 MR. RENNER: No; no; no. It's not.
9 JUDGE STERN: Yes.
10 MR. RENNER: No, I didn't -- I did not ask that.
11 JUDGE STERN: Nor really is your varying
12 dissatisfactions with the union.
13 MR. RENNER: Correct.
14 JUDGE STERN: If you're dissatisfied with the
15 union, you have the right under the Right-To-Work law to
16 become a nonmember.
17 MR. RENNER: Correct. I just was pointing out for
18 timing is more than anything.
19 JUDGE STERN: Correct; correct.
20 MR. RENNER: The timing.
21 JUDGE STERN: Okay. Anything more, Mr. Guido?
22 MR. GUIDO: Perhaps I should just indicate that if
23 to the extent that this were to -- let's submit, suppose the
24 motion were denied and then the matter proceeds on the issue
25 of the merits, there's still the collateral issue then of

RECEIVED by MSC 1/24/2023 3:31:14 PM

1 the underpinning to the merit of the grievance as part of
2 the -- you know, the other prong of a duty of fair rep case.
3 And I'm not going to address the right or wrong of that
4 right now, but simply indicate that I suppose we would
5 reserve our rights in that regard. I note that this charge
6 was not also filed in any respect against the employer.
7 JUDGE STERN: Right.
8 MR. GUIDO: That we are standalone on this case.
9 JUDGE STERN: What Mr. Guido is referring to is
10 that part of the standard law of the duty of fair
11 representation, that the burden that an employee has to
12 show, they have to show not only arbitrary, discriminatory,
13 or bad faith by the union, but also whether that the -- in
14 general, that the employee has to show that there was also a
15 breach of the Collective Bargaining Agreement. Now whether
16 or not this would apply in this case, I don't know. That's
17 an issue -- I guess if you want me to address it, I can
18 address it. And I think here, I do not clarify --
19 adequately state what is going to happen. I do not think
20 that there is a genuine issue of material fact here and I
21 believe that both parties agree with me; right? Is that
22 true?
23 MR. RENNER: That is correct. That's is true.
24 JUDGE STERN: That's true. All right. So I will
25 issue a decision and recommended order that will either

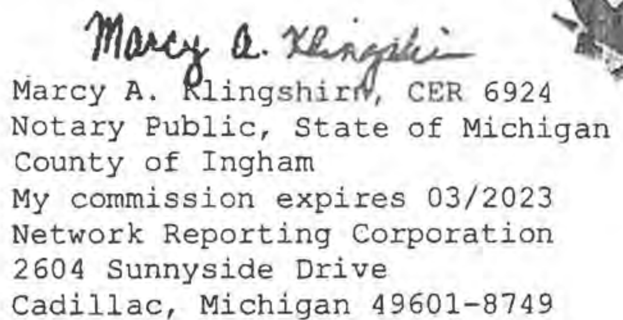
RECEIVED by MSC 1/24/2023 3:31:14 PM

1 dismiss the charge or find a violation. Okay.
2 MR. RENNER: Very good.
3 JUDGE STERN: So we will go forward with that. I
4 don't think we need to have a hearing. That would be a
5 waste of time.
6 MR. GUIDO: No. Thank you.
7 JUDGE STERN: All right. If there's nothing more
8 that either party wants to raise, the oral argument is
9 finished.
10 MR. RENNER: Thank you.
11 MR. GUIDO: Thank you, your Honor.
12 MR. RENNER: Thank you, your Honor.
13 JUDGE STERN: Okay. Thanks, everybody.
14 (Proceedings concluded at 11:13 a.m.)
15
16 -0-0-0-
17
18
19
20
21
22
23
24
25

RECEIVED by MSC 1/24/2023 3:31:14 PM

1
2
3
4
5 I certify that this transcript, consisting of 48 pages, is a
6 complete, true and correct transcript of the oral argument and
7 testimony taken in this case on November 13, 2018.
8
9
10
11
12
13
14
15
16
17
18 November 27, 2018

19



20 Marcy A. Klingshirn, CER 6924
21 Notary Public, State of Michigan
County of Ingham
22 My commission expires 03/2023
Network Reporting Corporation
23 2604 Sunnyside Drive
Cadillac, Michigan 49601-8749
24
25 Page 49

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document M

Employer's Answer to Renner's grievance, September 20, 2018

RECEIVED by MSC 1/24/2023 3:31:14 PM

County of Saginaw

MAINTENANCE DEPARTMENT

211 CONGRESS
SAGINAW, MICHIGAN 48602

Bernard G. Delaney
Director of Maintenance

Employers Answer to Daniel Renner Grievance dated September 20, 2018

The grievant requests adjustment of a written warning given to him on September 19, 2018. In doing so, the grievant presented information on the situation that led to the disciplinary action.

First, it should be noted that the grievance was filed in accordance with County Policy Number 337, Grievance Procedure. In section 6.1 of the policy, it indicates that regular full time and regular part-time employees not covered by a collective bargaining agreement shall have the right to use this grievance procedure. As your position is a part of TPOAM, I do not believe you can use this procedure as you are covered by a collective bargaining agreement. Therefore I believe the grievance should be denied for that reason.

However, even though I believe the grievance was not filed in accordance with the correct procedure, I am still providing the following response to the grievance:

I have reviewed the information provided by the grievant and believe the disciplinary action taken is still warranted. As such, the grievance is denied.

9/26/18
Bernard G. Delaney Jr.

Received 9-26-18

PHONE (989) 758-2333 FAX (989) 758-2338

RECEIVED by MSC 1/24/2023 3:31:14 PM

Document N

Court of Appeals Decision

RECEIVED by MSC 1/24/2023 3:31:14 PM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

TECHNICAL, PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN, Respondent-Appellant,	FOR PUBLICATION January 7, 2021 9:00 a.m.
v	No. 351991 MERC LC No. 00-000034
DANIEL LEE RENNER, Charging Party-Appellee.	

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

REDFORD, J.

Respondent appeals as of right the Michigan Employment Relations Commission's (MERC) decision and order affirming an administrative law judge's (ALJ) decision and recommended order. The ALJ found that respondent's pay-for-services procedure violated respondent's duty of fair representation and § 10(2)(a) of the Public Employment Relations Act (PERA), MCL 423.201 *et seq.*, by unlawfully discriminating against charging party Daniel Renner, a nonunion member, and restraining him from exercising his § 9 statutory rights by refusing to represent him in a disciplinary dispute with the employer unless he paid respondent a fee for its services. MERC considered respondent's exceptions to the ALJ's decision and ruled that they lacked merit. MERC found that respondent's pay-for-services procedure violated § 10(2)(a) by discriminating against nonunion employees and restrained them from exercising their § 9 statutory rights to refrain from joining or assisting a labor organization and respondent breached its duty of fair representation by refusing to file or process Renner's grievance unless he paid a fee for its services. We affirm.

I. BACKGROUND

Renner, an employee of Saginaw County's grounds department, opted out of union membership in 2017 as permitted under §§ 9 and 10(3) of PERA. On September 6, 2018, Renner sent an e-mail to the Director of Maintenance of the County of Saginaw, Bernard G. Delaney, Jr. regarding another employee smoking around Renner and the effect it had on his health. On

RECEIVED by MSC 1/24/2023 3:31:14 PM

September 19, 2018, Director Delaney responded in writing to Renner. In his response, Delaney concluded Renner had made false claims against fellow employees and he provided Renner a written warning that included a caution that "Any further incidents will lead to progressive disciplinary action, up to and including discharge." On September 20, 2018, Renner filed a document with Delaney which Renner described as a grievance procedure in accordance with Saginaw County Policy Number 300, number 337 and Policy 6.1.1 filing an appeal to his department head. Likewise, on September 20, 2018, Renner advised the president of the union local that he had submitted a grievance. On September 21, 2018, the business agent of the local union advised Renner that if he needed assistance in the grievance he would have to pay fees to the local.

On September 26, 2018, Delaney responded to Renner in writing stating:

> First, it should be noted that the grievance was filed in accordance with County Policy Number 337, Grievance Procedure. In section 6.1 of the policy, it indicates that regular full time and regular part-time employees not covered by a collective bargaining agreement shall have the right to use this grievance procedure. As your position is part of TPOAM, I do not believe you can use this procedure as you are covered by a collective bargaining agreement. Therefore, I believe the grievance should be denied for that reason.
>
> However, even though I believe the grievance was not filed in accordance with the correct procedure, I am still providing the following response to the grievance:
>
> I have reviewed the information provided by the grievant and believe the disciplinary action taken is still warranted. As such, the grievance is denied.

As indicated above, after receiving the written reprimand in 2018, Renner submitted a Step 1 grievance opposing the reprimand. He also sent an e-mail to respondent asking for the forms needed to complete a Step 2 grievance. Although Renner remained a member of the bargaining unit after opting out of union membership, respondent took the position that it owed Renner no duty to provide "direct representation services" unless he complied with the "Union Operating Procedure: Nonmember Payment for Labor Representation Services" that the union adopted by resolution on July 23, 2018, which required nonmember employees to pay for requested direct representation services.

On September 27, 2018, respondent, through legal counsel, advised Renner that "the only process allowed to pursue a grievance, through the CBA [collective-bargaining agreement] steps, is via the Union," because the county could not directly deal with an individual employee of the bargaining unit in a grievance covered by the CBA. Respondent told Renner that "pursuit of an individual grievance is allowed under section 11 of PERA[.]" The e-mail referred to the "Union Operating Procedure: Nonmember Payment for Labor Representation Services," which it called its "pay-for-services procedure." Respondent's pay-for-services procedure states that a nonmember of the union "shall pay for the services to be rendered, in advance, of the receipt of services . . . ." The resolution adopting the pay-for-services procedure distinguished between "direct labor representation services" and "collective labor representation services." According to the resolution, "direct labor representation services involve representation of a bargaining unit

RECEIVED by MSC 1/24/2023 3:31:14 PM

member in an individual capacity, in employment related issues including, but not limited to, critical incidents, investigatory interviews, grievance representation and arbitration, and administrative representation." Whereas, "collective labor representation services involve representation of the bargaining unit employees collectively, in circumstances such as collective bargaining, compulsory interest arbitration and certain unfair labor practice proceedings[.]" No payment is required for collective labor representation services.

Renner did not tender the $1,290 required by the union to assist him in the grievance process. The union took no further steps to assist Renner in the grievance process.

In October 2018, Renner filed a PERA charge with MERC alleging that respondent violated its duty of fair representation by demanding a fee in exchange for representation. Respondent admitted the factual grounds of Renner's charge but asserted that it could lawfully require payment for services under its procedure in light of the Supreme Court's decision in *Janus v American Federation of State, Co, & Muni Employees*, 585 US ___; 138 S Ct 2448; 201 L Ed 2d 924 (2018). Respondent sought summary disposition of the charge, arguing that its procedure did not violate any provision of PERA, and constituted action consistent with *Janus* and a decision of the Nevada Supreme Court that found a similar pay-for-services procedure permissible in the context of an analogous right-to-work statutory scheme.[1]

The ALJ denied respondent's motion and found that the pay-for-services procedure violated § 10(2)(a) [MCL 423.210(2)(a)] by unlawfully discriminating against nonunion members and restraining them from exercising their § 9 right to refrain from joining or assisting a labor organization. Respondent filed exceptions to the ALJ's decision which MERC rejected. Respondent now appeals.

II. STANDARDS OF REVIEW

Our review of MERC decisions is guided by Const 1963, art 6, § 28, and MCL 423.216(e). *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 639; 872 NW2d 710 (2015). "MERC's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Id.*, quoting *Branch Co Bd of Comm'rs v Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America*, 260 Mich App 189, 192-193; 677 NW2d 333 (2003) (quotation marks omitted). "An agency charged with executing a statute is entitled to respectful consideration of its construction of that statute and should not be overruled absent cogent reasons; however, an agency's interpretation cannot bind the courts or conflict with the Legislature's intent as expressed in the statutory language." *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 634; 928 NW2d 709 (2018). In other words,

---

[1] Respondent relied on a Nevada case, *Cone v Nev Serv Employees Union/SEIU Local 1107*, 116 Nev 473, 998 P2d 1178 (2000), in which the Nevada Supreme Court concluded that a fee for service arrangement that charged the nonunion members for the union's representation of them in grievance proceedings was permissible. In that case, however, the nonunion employees were free to either represent themselves or have a lawyer represent them in any grievance proceeding. In the matter at bar, an employee, whether a union member or not, may only proceed with the grievance process provided for in the collective bargaining agreement with union representation.

RECEIVED by MSC 1/24/2023 3:31:14 PM

although MERC's interpretation of PERA is entitled "respectful consideration," we review de novo legal issues such as statutory interpretation. *Van Buren Co Ed Ass'n*, 309 Mich App at 639. Similarly, we review de novo questions of constitutional law. *Saginaw Ed Ass'n v Eady-Miskiewicz*, 319 Mich App 422, 450-451; 902 NW2d 1 (2017). "MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Van Buren Co Ed Ass'n*, 309 Mich App at 639, quoting *Branch Co Bd of Comm'rs*, 260 Mich App at 193.

"The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Van Buren Co Ed Ass'n*, 309 Mich App at 639, quoting *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). Absent ambiguity in the statutory language, we must enforce the statute as written, "without any additional judicial construction." *Wayne Co*, 325 Mich App at 634. We must also strive to "give effect to every word, phrase, and clause in a statute, avoiding a construction that would render any part of the statute nugatory or surplusage." *Id.* Decisions of the National Labor Relations Board (NLRB) regarding comparable provisions of the National Labor Relations Act (NLRA), 29 USC 151 *et seq.*, comparable to PERA provisions, serve as persuasive authority respecting interpretation of PERA. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 53; 214 NW2d 803 (1974); *Saginaw Ed Ass'n*, 319 Mich App at 446 n 4.

III. ANALYSIS

Respondent first argues that MERC erred by concluding that the pay-for-services procedure violates PERA. We disagree.

PERA governs public employee labor relations, "reflecting legislative goals to protect public employees against [unfair labor practices] and to provide remedial access to a state-level administrative agency with specialized expertise in [unfair labor practices]" *Wayne Co*, 325 Mich App at 619. Under § 9, public employees are free to organize or join collective bargaining units or, conversely, refrain from doing so. *Saginaw Ed Ass'n*, 319 Mich App at 429. Section 10(1)(a) "prohibits a public employer from interfering with, restraining, or coercing public employees 'in the exercise of their rights guaranteed in section 9.' " *Saginaw Ed Ass'n*, 319 Mich App at 429, quoting MCL 423.210(1)(a). Section 10(2)(a) prohibits labor organizations from restraining or coercing public employees in the exercise of their § 9 rights, but it " 'does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.' " *Saginaw Ed Ass'n*, 319 Mich App at 429, quoting MCL 423.210(2)(a).

To protect public employees' rights, § 10(3) provides:

> [A]n 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.

RECEIVED by MSC 1/24/2023 3:31:14 PM

(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. [MCL 423.210(3).]

In this case, MERC determined that respondent's pay-for-services procedure violated § 10(2)(a) by unlawfully discriminating against nonmembers of the union and restraining employees from exercising their § 9 right to refrain from joining or assisting a labor organization. Respondent argues that MERC erred in this regard because nothing in PERA prohibits the pay-for-services procedure and that § 10(2)(a) explicitly authorizes a union to implement internal rules of the sort at issue in this case. We disagree.

Respondent maintains that its pay-for-services procedure falls squarely within the § 10(2)(a) proviso allowing a labor organization to "prescribe its own rules with respect to the acquisition or retention of membership." MCL 423.210(2)(a). The plain language of the statute, however, cannot be read as respondent contends. Further, despite repeatedly insisting that this language applies, respondent has not explained how charging nonunion employees for direct representation services can be construed as a rule concerning "acquisition or retention of membership." The NLRA contains identical language regarding a labor organization's right to prescribe rules "with respect to the acquisition or retention of membership," 29 USC 158(b)(1), and courts have interpreted that language as referring to rules that govern admission or expulsion of employees from the union. *Pattern Makers' League of North America v Nat'l Labor Relations Bd*, 473 US 95, 109; 105 S Ct 3064; 87 L Ed 2d 68 (1985). In this case, respondent's pay-for-services procedure applies only to nonunion employees and has no connection to the admission of a member to the union or expulsion of a member from the union.

We note that ¶ 9 of respondent's pay-for-services procedure restricts a nonmember's right to join the union "during the pendency of an employment related issue," and permits the nonmember to "opt-in to dues paying union membership" after the employment related issue has been concluded. Nevertheless, the primary purpose of respondent's pay-for-services procedure is to require nonunion employees who are members of the collective bargaining unit to pay for direct representation services. Paragraph 9 of respondent's pay-for-services procedure when read in the context of the entire operating procedure furthers the union's purpose by preventing a nonmember from avoiding payment for requested services by joining the union when the need for direct representation services arises. In so doing, it advances the purpose of restraining or coercing nonmember employees in the exercise of their statutory rights.

A rule "that invades or frustrates an overriding policy of the labor laws" cannot be enforced without violating the NLRA's prohibition against restraining or coercing employees in the exercise of their statutory rights. *Scofield v Nat'l Labor Relations Bd*, 394 US 423, 429; 89 S Ct 1154; 22 L Ed 2d 385 (1969). See also *In re McLeodUSA Telecom Servs, Inc*, 277 Mich App 602, 609; 751 NW2d 508 (2008) ("Statutory language should be construed reasonably, keeping in mind the purpose of the act.") (quotation marks and citation omitted). Michigan has applied similar

RECEIVED by MSC 1/24/2023 3:31:14 PM

reasoning to PERA. Indeed, in *Saginaw Ed Ass'n*, 319 Mich App at 443-447, this Court agreed with MERC's conclusion that a policy limiting resignation from a union to a one-month period each year violated the "obvious intent" of the right-to-work amendment, which was designed to protect "public employees against barriers to acting on the desire to discontinue union affiliation or support." Thus, even if respondent's pay-for-services procedure could be viewed as a rule regarding acquisition of membership under § 10(2)(a), MERC properly could determine that respondent's pay-for-services procedure is unenforceable under PERA if it impermissibly restrained or coerced employee rights under § 9 or otherwise frustrated the purpose of PERA.

Respondent also emphasizes that, on the issue of fees, PERA only bars charges that are required as a "condition of obtaining or continuing public employment." MCL 423.210(3). Respondent reasons that its pay-for-services procedure does not run afoul of this prohibition because the procedure does not call for denial or termination of employment if an employee declines to pay for direct representation services. Respondent's contention in this regard, while alluring, is not persuasive because respondent's pay-for-services procedure impacts nonmembers' exercise of statutory rights that directly impact continuing public employment. MERC explained:

> Contrary to Respondent's argument, however, we believe that grievance handling is fundamental to a union's duty as the exclusive bargaining agent to represent all members of the bargaining unit without discrimination. Because a union's decision not to represent a unit member in a grievance or disciplinary matter has a clear impact on that unit member's terms or conditions of employment and the terms and conditions of other members of the bargaining unit, it is not merely an internal union matter. Moreover, by requiring non-member payment for representation services, a union interferes with an employee's § 9 right to refrain from union activities. As we noted in *Amalgamated Transit Union, Local 26*, 30 [Mich Pub Emp Rep] 22 (2016) [(Case No. CU16 D-026)], the language of § 10(2)(a) does not permit a union to deny an employee the rights provided by § 9, regardless of whether the union's actions have an impact on conditions of employment.

Respondent argues that by considering whether its pay-for-services procedure impacts "terms or conditions of employment," MERC misapplied concepts used to determine mandatory subjects of collective bargaining.[2] We disagree because MERC did not focus on violation of § 10(3)(c) for

---

[2] Section 15(1) of PERA provides:

> A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, *to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to* wages, hours, and *other terms and conditions of employment*, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but

its decision to strike down the pay-for-services procedure. MERC's decision clarified that "§ 10(2)(a) does not permit a union to deny an employee the rights by § 9, regardless of whether the union's actions have an impact on conditions of employment" because unions may not restrain or coerce employees in the exercise of their statutory rights. MERC correctly concluded that respondent's pay-for-services violated § 10(2)(a) by discriminating against nonmembers by restraining them from exercising their § 9 rights by refusing to do anything respecting nonmembers' grievances and thereby making it impossible for a nonmember to pursue a grievance unless fees for services are paid.

Section 11 of PERA provides that "[r]epresentatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer[.]" Substantially identical language in the NLRA has been interpreted as imposing on the representative a corresponding duty of fair representation owed to all members of the bargaining unit. *Ford Motor Co v Huffman*, 345 US 330, 337; 73 S Ct 681; 97 L Ed 2d 1048 (1953). As explained in *Wallace Corp v Nat'l Labor Relations Bd*, 323 US 248, 255-256; 65 S Ct 238; 89 L Ed 216 (1944):

> The duties of a bargaining agent selected under the terms of the [NLRA] extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation.

Our Supreme Court has explained that, because PERA is patterned after the NLRA, "PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees." *Goolsby v City of Detroit*, 419 Mich 651, 660 n 5; 358 NW2d 856 (1984). Respondent does not dispute this well-settled interpretation of PERA and, in fact, recognizes that its duty of fair representation extends to all members of the bargaining unit, regardless of whether they are also dues-paying union members. Respondent, however, contends that this general rule does not apply because nonunion members are treated equally for collective bargaining purposes. We disagree.

"Mandatory subjects of collective bargaining are comprised of issues that 'settle an aspect of the relationship between the employer and employees[.]' " *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 551; 581 NW2d 707 (1998), quoting *Allied Chem & Alkali*

> this obligation does not compel either party to agree to a proposal or make a concession. [MCL 423.215(1) (emphasis added).]

"The subjects included within the phrase 'wages, hours, and other terms and conditions of employment' are referred to as 'mandatory subjects' of bargaining." *Central Mich Univ Faculty Ass'n v Central Mich Univ*, 404 Mich 268, 277; 273 NW2d 21 (1978), quoting MCL 423.215.

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

Workers of America v Pittsburgh Plate Glass, 404 US 157, 178; 92 S Ct 383; 30 L Ed 2d 341 (1971). Among other recognized topics, mandatory subjects include grievance procedures, *St Clair Intermediate Sch Dist*, 458 Mich at 551, and disciplinary procedures, *Pontiac Police Officers Ass'n v Pontiac*, 397 Mich 674, 677; 246 NW2d 831 (1976). As exclusive representative of Renner's bargaining unit, respondent negotiated a grievance process that governed Renner's employer and all members of the bargaining unit. Although the CBA has not been produced in this case, respondent confirmed that the grievance process must be pursued by the union. An individual employee cannot take advantage of the negotiated process in his or her own right. In other words, respondent secured a valuable right for all members of the bargaining unit including Renner, but through its pay-for-services procedure, effectively foreclosed a nonunion employee's ability to use the grievance process absent payment for services.

Respondent asserts that this outcome did not involve discrimination in violation of its duty of fair representation because: (1) § 11[3] provides a method for nonunion members who are unwilling to pay for direct representation to pursue grievances with the employer directly, and (2) union members also pay for direct representation, albeit through their membership dues. Respondent's first rationale is unpersuasive considering the background of this case. When Renner attempted to pursue a grievance outside of the process outlined in the CBA, his employer, through his supervisor, indicated that the county's standard grievance procedure applied only to employees who were not covered by a CBA and told him that his grievance had been reviewed and denied. Thus, Renner exercised his § 11 rights to no avail, could not invoke his employer's standard grievance procedure applicable only to persons not members of the bargaining unit, and as an employee member of a bargaining unit covered by a CBA, could not exercise the bargained for right to the grievance procedure under the CBA. Renner, therefore, found himself in the position of either paying respondent for direct representation services under respondent's pay-for-services procedure to permit him to pursue the grievance, or refusing to pay and forfeit his contractual right to pursue a grievance under the CBA grievance procedure.

Respondent's second rationale also demonstrates the problematic nature of the pay-for-services procedure. To fully reap the benefits of the CBA, all members of the bargaining unit must pay something, either in the form of membership dues or service fees for direct representation services that are necessary to enforce rights afforded by the CBA. In this case, respondent told Renner that he must pay upfront $1,290, the estimated initial cost of processing Renner's grievance through Step 4. If he did not or could not pay in full, respondent would not take any action on his

---

[3] Section 11 specifies that the designated representative "shall be the exclusive representative of all public employees in a" collective bargaining unit regarding pay, wages, hours, and other conditions of employment,

> and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment. [MCL 423.211.]

RECEIVED by MSC 1/24/2023 3:31:14 PM

behalf. Additional fees would be required if the matter cost more or proceeded beyond Step 4. Even the preliminary estimate could be cost-prohibitive for many workers, especially considering the short timeframe within which union action must occur as required under the CBA grievance procedure. Faced with that economic reality, employees who would otherwise exercise their § 9 right to decline union membership could feel compelled to join the union, if only to avoid the risk of forfeiting pursuit of a meritorious grievance. Given the effect of the pay-for-services procedure, MERC's decision and order did not involve a substantial and material error of law. MERC's decision properly interpreted and applied applicable law.

Next, respondent argues that MERC failed to appreciate the significance of the United States Supreme Court's *Janus* decision which it contends negated the rationale of the older NLRB decisions relied on by MERC. Respondent also argues that, in the wake of *Janus*, MERC should have relied on the reasoning stated by the Nevada Supreme Court in *Cone,* 116 Nev 473, which upheld a comparable pay-for-services procedure. We disagree.

In *Janus*, 585 US ___; 138 S Ct 2448, the United States Supreme Court considered whether an Illinois statute that authorized unions to assess nonunion public employees "agency fees" to cover their proportionate share of union dues attributable to union activities conducted on behalf of nonunion members of the collective bargaining unit violated the First Amendment. The Court held the state law unconstitutional and overruled its earlier decision in *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), which previously held that nonmembers could be charged the portion of union fees attributable to collective bargaining issues. *Janus*, 585 US at ___; 138 S Ct at 2460. *Abood* justified its countenance of agency-fee arrangements by relying on the governmental interest in labor peace and avoiding "the risk of free riders . . . ." *Abood*, 431 US at 224 (quotation marks omitted). The Court noted that the first rationale had been based on an unfounded assumption that interunion rivalries would foster dissension within the workforce and force employers to face conflicting demands from different unions. The Court found no historical factual support for that assumption. *Janus*, 585 US at ___; 138 S Ct at 2465. Concerning the latter of these justifications, the *Janus* Court determined that avoiding free rider concerns was not a sufficiently compelling interest to overcome First Amendment objections. *Id.* at ___; 138 S Ct at 2466. The Court concluded that forcing public employees to subsidize a union they chose not to join and objected to the positions taken by the union in collective bargaining and related activities, violated "the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* at ___; 138 S Ct at 2459-2460.

The Court acknowledged that supporters of agency fees characterized them as unique because unions owe a duty of fair representation to all members of the bargaining unit, regardless of union membership. *Id.* at ___; 138 S Ct at 2467. The Court considered that one could argue "that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay." *Id.* The Court, however, found neither argument sound and explained:

> First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not

permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought. Why is this so?

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union.

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, and having dues and fees deducted directly from employee wages. The collective-bargaining agreement in this case guarantees a long list of additional privileges.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members."

What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers, but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit."

RECEIVED by MSC 1/24/2023 3:31:14 PM

RECEIVED by MSC 1/24/2023 3:31:14 PM

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. Individual nonmembers could be required to pay for that service or could be denied union representation altogether. Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers. [*Id.* at ___; 138 S Ct at 2467-2469 (citations and footnotes omitted; alterations in original).]

Respondent's support of its pay-for-services procedure is premised on the final paragraph of this passage and a footnote to that paragraph. *Id.* at ___ n 6; 138 S Ct at 2469 n 6. Respondent maintains that, via this dicta, the Court provided instructional guidance regarding a union's duty to nonmembers respecting direct representation services and established that the duty of fair representation does not extend to individualized services. According to respondent, MERC erred by denying the significance of *Janus* and relying on outdated NLRB decisions. Close reading of the paragraph and the footnote, within the context of the preceding paragraphs, however, does not support respondent's contention.

MERC correctly understood and properly interpreted *Janus* by recognizing that the case did not involve allegation of a breach of the union's duty of fair representation or restrain of a nonunion employee's statutory rights. Further, MERC correctly concluded that in the passage "the Supreme Court was only expressing its belief that a state statute could be enacted or modified to address a perceived 'free rider' concern that would allow a public sector union to charge a non-member for processing his or her grievance without violating the non-member's First Amendment rights." The Supreme Court did not hold that a union could unilaterally fashion a policy or procedure imposing fees for services on nonunion members of a collective bargaining unit and did not authorize such action.

This conclusion is buttressed by the Court's citation of state statutes as "precedent for such arrangements." *Id.* The Supreme Court cited Cal Gov't Code 3546.3 (West 2010) as its primary example and compared it to the Illinois statute, 5 Ill Comp Stat 315/6(g) (West 2016). The California statute provided that an employee who objects to joining or financially supporting a labor organization on religious grounds cannot be required, as a condition of employment, to join or support the organization. Importantly, the California statute also specified that if the employee "requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure." *Id.* According to *Janus*, "[t]his more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights." *Janus*, 585 US at ___; 138 S Ct 2469 n 6. Thus, *Janus* contemplated state legislative action to create a less restrictive method for responding to the "unwanted burden . . . imposed by the representation of nonmembers in disciplinary matters" but did not endorse or instruct unions to unilaterally impose fees upon nonunion employees within collective bargaining units in which the union enjoys being the exclusive bargaining agents for the bargaining units. *Id.* at ___; 138 S Ct at 2468.

The Michigan Legislature has not enacted a provision in PERA that authorizes respondent's pay-for-services procedure. As explained previously, respondent's procedure has a

RECEIVED by MSC 1/24/2023 3:31:14 PM

coercive effect on an employee's § 9 right to decline union membership in violation of § 10(2)(a). Further, even if we accepted respondent's reading of *Janus* as implicitly removing the duty of direct representation services from the scope of a union's duty of fair representation, the specific procedure adopted in respondent's pay-for-services procedure undermines respondent's fair representation of nonunion members. Grievance procedures are a mandatory subject of collective bargaining, *St Clair Intermediate Sch Dist*, 458 Mich at 551, and the subject CBA plainly provides as such. Respondent conceded below that Renner was entitled to all benefits of the CBA, yet only the union could pursue a grievance under the terms of the CBA. Respondent's duty of fair representation in collective bargaining would be rendered meaningless if it could lawfully secure equal employment rights for all members of the bargaining unit during the collective bargaining process, only to later implement a policy placing potentially prohibitive restrictions on a nonunion member's access to those rights. The combined effect of the negotiated grievance process and respondent's pay-for-services procedure results in unfair, discriminatory treatment of nonunion members—an end at odds with respondent's duty of fair representation. *Janus* does not stand for that proposition.

Considering these implications, respondent's contention that MERC erred by relying on NLRB precedent concerning the general duty of fair representation lacks merit. Respondent's repeated reliance on *Cone* is similarly unpersuasive. *Cone* is clearly distinguishable because nonunion members were not *required* to use, and thus pay for union representation to pursue grievance matters. *Cone*, 116 Nev at 475.

Lastly, respondent argues that MERC's decision violated respondent's First Amendment right to freedom of association. We disagree.

As part of this claim of error, respondent also asserts that MERC misunderstood the nature of respondent's argument regarding this issue. Respondent's exceptions to the ALJ's decision and recommended order included a complaint that requiring respondent to provide direct representation to nonmembers free of charge "is tantamount to compelling the Union to associate with the nonmember in circumstances that are diametrically opposed to the expressive message and viewpoint of the Union, as reflected in the Union's Operating Procedure." In pertinent part, respondent continued, "While the Union recognizes and accepts the non-member for associational purposes in labor representation matters that are 'collective' in nature, i.e., collective bargaining and class action grievances/unfair labor practice proceedings, the expressive message and viewpoint of the Union is to not associate with the non-member under circumstances which mandate, to the detriment of the membership, free direct representation services be given to the non-member." MERC incorrectly treated respondent's exception as though respondent sought to avoid association with nonunion members entirely.

Turning to the merits of respondent's First Amendment argument, the constitutional underpinnings of the freedom of association have been aptly summarized as follows:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and

RECEIVED by MSC 1/24/2023 3:31:14 PM

> cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. [*Roberts v US Jaycees*, 468 US 609, 621; 104 S Ct 3244; 82 L Ed 2d 462 (1984) (citations omitted).]

Conversely, "[t]he right to eschew association for expressive purposes is likewise protected." *Janus*, 585 US at ___; 138 S Ct at 2463 (citation omitted).

Respondent relies upon *Boy Scouts of America v Dale*, 530 US 640; 120 S Ct 2446; 147 L Ed 2d 554 (2000), to support its constitutional claim. In that case, the petitioner claimed that requiring it to reinstate the respondent—a former member who had been expelled from the organization because of his homosexuality and role as a gay rights activist—as a member of the organization violated the petitioner's right of expressive association. *Id.* at 644. The Supreme Court agreed. *Id.* The Court explained that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648.

As an initial matter, we find respondent's reliance on *Boy Scouts of America* misplaced because respondent's representation of nonunion members in grievance matters is not the type of "forced inclusion" at issue in that case. As explained more fully below, a public accommodations law barring discrimination on the basis of sexual orientation violated the petitioner's expressive association rights because reinstating the respondent's membership in the organization conveyed a message that the petitioner condoned the respondent's homosexuality, in direct conflict with the petitioner's organizational belief that homosexual conduct did not constitute "a legitimate form of behavior." *Id.* at 653.

This sort of message-attribution theory does not apply in this case. Respondent does not suggest that by representing a nonunion member in grievance proceedings, it is somehow endorsing that individual's personal beliefs on any particular subject. And even if union representation implied support of the employee's factual basis for pursing a grievance, rather than mere protection of CBA rights, it is evident that respondent is not concerned about the risk of message or viewpoint attribution in this context. This is evidenced by respondent's willingness to represent nonunion members, as long as they pay union defined fees.

Even if respondent's position fit within the framework of the Court's analysis in *Boy Scouts of America*, respondent's position is still unpersuasive. The Supreme Court began its analysis by determining whether the petitioner was protected by the First Amendment's expressive associational right, which only extends to groups that "engage in some form of expression, whether it be public or private." *Id.* at 648. The petitioner, a private, nonprofit organization engaged in "helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Id.* at 666, 649 (quotation marks omitted). It carried out this mission by having adult leaders spend time with youth members through various recreational activities while instructing the youth members both expressly and by example. *Id.* at 649-650. The Court found that, by conveying a system of values to its youth members, the petitioner undoubtedly engaged in expressive activity. *Id.* at 650.

RECEIVED by MSC 1/24/2023 3:31:14 PM

In this case, there can be little doubt that, as a general matter, respondent engages in expressive activity. A union representing public employees necessarily engages in speech regarding matters of substantial public concern given the nature of its role in the collective bargaining process. *Janus*, 585 US at ___; 138 S Ct at 2474-2475. It negotiates subjects like wages, benefits, and terms and conditions of public employees' employment that have a great impact on governmental spending. *Id.* Nor is it uncommon for unions to engage in political, public relation, or lobbying activities outside of collective bargaining. Because respondent engages in expressive activity, it is generally entitled to expressive associational rights. *Boy Scouts of America*, 530 US at 648.

In *Boy Scouts of America*, the Court next considered whether the state action significantly affected the petitioner's ability to advocate its viewpoints. *Id.* at 650. In doing so, the Court first explored the nature of the expressive message at issue. The petitioner premised its constitutional challenge on its belief that homosexuality was inconsistent with the values the group represented, such as maintaining a "morally straight" and "clean" lifestyle, and the petitioner argued that it did not want to "promote homosexual conduct as a legitimate form of behavior." *Id.* at 650-651 (quotation marks omitted). The Court accepted the petitioner's assertion regarding its message and indicated that it did not need to make further inquiry into the nature of the petitioner's message. *Id.* at 651. Nonetheless, the Court reviewed various statements the petitioner made regarding the issue and opined that the petitioner sincerely held its stated belief. *Id.* at 651-653. Considering this expressive message, the Court found merit in the petitioner's argument, agreeing that inclusion of the respondent in the organization "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept homosexual conduct as a legitimate form of behavior." *Id.* at 653.

In this case, respondent claims that MERC's decision interferes with the expressive message and viewpoint reflected in its pay-for-services procedure, which is to "not associate with the nonmember under circumstances which mandate, to the detriment of the membership, free direct representation services be given to the nonmember." This is different from the circumstances involved in *Boy Scouts of America*, where the petitioner's message related to the core values the organization determined to instill in its young members. Although the Court noted that a group "do[es] not have to associate for the 'purpose' of disseminating a certain message," there must be "expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655. Respondent's position is flawed because its characterization of the expressive message allegedly impaired by MERC's decision is not a "message" at all. Respondent has merely reframed the rationale underlying its procedure, without conveying any sort of recognizable ideal, belief, or viewpoint. Simply restating the purpose for a procedure does not transform it into a message. See, e.g., *Parks v City of Columbus*, 395 F3d 643, 651 (CA 6, 2005)[4] (rejecting a city's contention that the collective message of the council organizing an art fair was "to bring visual and performing artists to the City to be enjoyed by those who wish to go to the festival," reasoning that "[t]his is not an expressive message, but merely a purpose for the event"). Accordingly, we reject

[4] "Lower federal court decisions are not binding on state courts, but may be persuasive." *Vanderpool v Pineview Estates LC*, 289 Mich App 119, 124 n 2; 808 NW2d 227 (2010) (citation omitted).

respondent's argument that representation of nonunion members free of charge violates its right to expressive association.

We conclude that MERC's findings of fact in this case were supported by competent, material, and substantial evidence on the record considered as a whole. Further, its decision does not violate a constitutional or statutory provision nor does it constitute a substantial and material error of law.

Affirmed.

/s/ James Robert Redford
/s/ Colleen A. O'Brien
/s/ Michael J. Kelly

RECEIVED by MSC 1/24/2023 3:31:14 PM