STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LANSING,
Respondent-Public Employer,

Case No. C99 L-226

-and-

CARL SCHLEGEL, INC., and ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,
Charging Parties-Private Employers.
_____/

APPEARANCES:

Office of the City Attorney, by Jack C. Jordan Esq., Chief Deputy City Attorney, and James D. Smiertka Esq., for the Respondent - Public Employer

Masud, Gilbert & Patterson, P.C., by David John Masud, Esq., and Kraig M. Schutter, Esq., for the Charging Parties - Private Employers

DECISION AND ORDER

On March 5, 2001, Administrative Law Judge (ALJ) James P. Kurtz issued his Decision and Recommended Order in the above matter dismissing the charges for lack of subject matter jurisdiction. On April 27, 2001, Charging Parties Carl Schlegel, Inc., and Associated Builders and Contractors of Michigan filed timely exceptions to the Decision and Recommended Order of the ALJ. Respondent, City of Lansing filed a timely brief in support of the Decision and Recommended Order of the ALJ on June 11, 2001.

The facts in this case were set forth fully in the Decision and Recommended Order and need not be repeated in detail here. Briefly, Charging Party Carl Schlegel, Inc. (Schlegel) is a nonunion trucking and excavating contractor. Charging Party Associated Builders and Contractors of Michigan is a voluntary association of construction contractors. The Charging Parties contend that Respondent violated Section 10(1)(b) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(b) and (c), by entering into and enforcing a project labor agreement (PLA) on the General Motors Plant #1 infrastructure construction project in the City of Lansing.

Respondent began a construction project to improve the infrastructure relative to a new General Motors assembly plant. Respondent entered into a PLA with the Michigan State

Building and Construction Trades Council on May 12, 1999. The PLA required the contractor and subcontractors on the project to be signatories to the agreement or to have a collective bargaining agreement with a labor organization or trade union that was a signatory to the PLA. Thus, the PLA effectively limited Respondent to using a contractor and subcontractors employing unionized workers.

Respondent entered into a contract with Angelo Iafrate Construction (Iafrate), a union contractor, to serve as the general contractor on the project. Iafrate contracted with Schlegel to haul materials to and from the project site. Schlegel is a nonunion trucking contractor. Schlegel began work under its contract with Iafrate on June 10, 1999. On or about June 15, 1999, Iafrate notified Schlegel that Schlegel would need to sign the PLA. On June 18, 1999, Respondent requested confirmation from Iafrate that Schlegel had either signed the PLA or been replaced. Schlegel did not sign the PLA and was therefore removed from the project effective 5:00 p.m., on June 18, 1999. Charging Parties allege that Respondent violated Section 10(1)(b) and (c) of PERA by entering into the PLA and by forcing Schlegel's removal from the project.

By letter dated June 28, 1999, Local 580 of the Teamsters Union notified Respondent of its claim against Schlegel for $23,410.00 for initiation fees, union dues and fringe benefits contributions. Schlegel alleges that, pursuant to instructions from Respondent, Iafrate withheld the amount claimed by the Teamsters from monies due to Schlegel. Charging Parties contend that this was a further violation of Section 10(1)(b) and (c) by Respondent.

On or about November 11, 1999, Schlegel filed an unfair labor practice charge with the National Labor Relations Board (NLRB) against Respondent asserting that Respondent coerced Iafrate into breaching its contract with Schlegel and thereby violated Section 8(b)(4) of the National Labor Relations Act (NLRA). The unfair labor practice charge was withdrawn by Schlegel based on a determination by the NLRB that Respondent is not a covered "employer" as that term is defined under the NLRA, 29 USC 152(2).

Discussion And Conclusions Of Law:

Charging Parties take exception to the ALJ's conclusion that PERA is not applicable to project labor agreements such as the one at issue. Charging Parties challenge the ALJ's conclusion that MERC lacks subject matter jurisdiction over the dispute between Charging Parties and Respondent, and disagree with his statement that PERA is not applicable to employees of a private employer. Additionally, Charging Parties assert that the ALJ erred by determining that PERA is to be strictly construed so as to provide subject matter jurisdiction only over those matters identified explicitly in the statute.

The ALJ was correct in concluding that we lack subject matter jurisdiction over the dispute between Charging Parties and Respondent. PERA grants the Commission jurisdiction over disputes between public employers and their employees. We have no jurisdiction under PERA over private employers or employees of private employers. In this case, Charging Party

Schlegel is a private employer apparently acting to assert the right of its employees to be free to choose whether they want to join a union or not.[1]

Charging Parties contend that PERA is to be liberally construed and given broad application to the labor relations decisions of public employers. However, if we were to adopt Charging Parties' arguments we would be going beyond the parameters of liberal construction and extending PERA's coverage to private sector employees. Nothing in PERA, in its legislative history, or in subsequent cases construing PERA, indicate that it is to apply to private sector employees.

Charging Parties contend that the prohibitions contained in Sections 10(1)(b) and (c) apply "to all public employers regardless of whether the union being assisted represents public employees and regardless of whether the discriminatees are public employees". However, Charging Parties have cited no case law, legislative history or other authority for this proposition. Charging Parties have provided no support for their contention that PERA's protections extend to private sector employees, beyond their own reading of the statute. Charging Parties argue that since Subsections (b) and (c) of Section 10(1) do not expressly refer to "public employees" and Subsections (a), (d) and (e) do contain such references, the application of Subsections (b) and (c) is not limited to public employees.

However, the rules of statutory construction tell us that, much like any literary composition, a statute is enacted and is meant to be read as a whole. *Metropolitan Council 23, AFSCME* v *Oakland Co Prosecutor,* 409 Mich 299, 317-318 (1980). As such, it must be read as a whole and any provision that is in dispute must be read in the light of the general purpose of the act. *Romeo Homes, Inc* v *Commissioner of Revenue,* 361 Mich 128, 135 (1960). When Subsections (b) and (c) are read in the light of the PERA's expressed purposes, and are read in context with the remainder of Section 10, it is evident that the legislature intended Subsections (b) and (c) to regulate the activities of public employers in their dealings with public employees and with labor organizations representing or seeking to represent public employees.

Moreover, as stated in *Common Council of Detroit* v *Rush*, 82 Mich 532, 542 (1890) "a thing which is within the spirit of a statute is within the statute, although not within the letter; and a thing within the letter is not within the statute, unless within the intention." Thus, any examination of the extent of PERA's coverage must look at the purposes behind the Act.

Act 336 of 1947, originally known as the Hutchinson Act, was enacted to provide for mediation of disputes in an effort to avoid strikes by public employees and to prohibit such strikes. The provisions of the Hutchinson Act were held to apply only to public employees. *Detroit* v *Div 26, Amalgamated Ass'n of Street Elec Ry & Motor Coach Employees*, 332 Mich 237, 245 (1952).

The Hutchinson Act was amended in 1965[2] pursuant to the legislature's constitutional authority "to establish procedures for settling disputes in public employment."[3] In construing the

[1] The rights of some private employees to join, or refrain from joining, a labor organization are protected under the Labor Relations and Mediation Act, 1939 PA 176, MCL 423.1 – 423.30, which is also administered by the Commission.

provisions of the Michigan Constitution that granted the legislature the authority to enact the 1965 amendment, the Michigan Supreme Court, noted that "'[p]ublic employment' is clearly intended to apply to employment or service in all governmental activity, whether carried on by the state or by townships, cities, counties, commissions, boards or other governmental instrumentalities. It is the entire public sector of employment as distinguished from private employment."[4] The 1965 amendment added protections for the organizational rights of public employees. *Local 79, Service Employees Int'l Union v Lapeer Co Gen Hosp,* 111 Mich App 441, 446 (1981); *Hillsdale Community Schs v Labor Mediation Board*, 24 Mich App 36, 40 (1970); *Dearborn Sch Dist v Labor Mediation Bd*, 22 Mich App 222, 226 (1970).

The preamble to the Public Employment Relations Act now sets forth PERA's purpose as:

> 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**; and to prescribe means of enforcement and penalties for the violation of the provisions of this act. (Emphasis added.)

PERA's preamble does not indicate that regulating the labor relations activities of public employers, apart from their dealings with their own employees, was part of the reason for PERA's enactment. Charging Parties have compared the wording of PERA with that of the Labor Relations and Mediation Act (LMA), MCL 423.1 - 423.30, in support of their argument that the legislature intended that all employment relationships under the state's jurisdiction be covered by PERA or the LMA. However, in comparing the two Acts, we note that the preamble of the LMA specifically includes protecting "the rights and privileges of employers"[5], whereas such language is not included in PERA. Certainly if the legislature had intended that PERA regulate all actions by public employers affecting labor relations, apart from public employers' dealings with their own employees, the legislature would have expressly indicated this to be part of PERA's purpose.

If indeed one of the purposes of PERA is to regulate public employers, it seems that the Act would include a definition of "public employers" to clarify who fell under its purview. PERA defines "public employees", but it does not define "public employers". Thus, it appears that the legislature intended that PERA regulate public employers only to the extent necessary to protect the rights and privileges of public employees.

PERA defines 'public employee' to distinguish those it covers from those in private employment. *Hillsdale Community Schs* v *Michigan Labor Mediation Bd*, 24 Mich App 36 (1970) quoting *Saginaw Co Road Comm*, 1967 MERC Lab Op, 196, 201. Prior to its amendment

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[2] 1965 PA 379.
[3] *Eastern Michigan University v Labor Mediation Board*, 384 Mich 561, 565-566; 77 LRRM 2685 (1971),quoting Official Record, Constitutional Convention of 1961, Vol II, p 3377.
[4] *Eastern Michigan Univ*, at 566.
[5] Preamble to Labor Relations and Mediation Act, Act 176 of 1939 as amended,

in 1996, Section (1)(e) of PERA, MCL 423.201(e) included the following definition of public employee:

> "Public employee" means a person 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.

Senate Bill 1015 was enacted as Public Act 543 of 1996, in part, to amend PERA by changing the definition of public employee. The legislative analysis of the Bill explains that one of its purposes was to exclude from PERA's coverage workers hired by private entities having contracts with the State. Prior to the passage of SB 1015 the State had been named as an employer in a number of cases involving attempts to form a union by employees of private companies that had contracted with the Michigan Department of Community Health to run community mental health homes. The legislative analysis stressed the need to prevent the State from being drawn into a collective bargaining relationship with the "thousands of private sector employees who work for contractors doing business with the State."[6] SB 1015 was to make it clear that such employees were not "public employees" within the meaning of PERA and added the following language to Section (1)(e):

> Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.

It is therefore evident that under the present definition of "public employee", PERA does not cover the employees of Charging Parties. See also *Flushing Association in Transitional Housing, Inc* v *American Federation of State, County and Municipal Employees*, 1997 MERC Lab Op 565.

Charging Parties have argued that construing PERA to apply only to public employees creates a "'no man's land' void of labor relations" with respect to employees of private employers who have contracted to provide services to public employers. The legislative analysis of SB 1015 noted this possibility stating:

> [I]f the NLRB, which deals with private employees, denies jurisdiction, and these employees are explicitly excluded from the state public employees [sic] relations act (Public Act 336 of 1947), they could well be left without any collective bargaining protection at all.[7]

Thus, it appears that the legislature considered that certain groups of employees might be left without statutory protection of their rights to join, or refrain from joining, a labor

[6] House Legislative Analysis, SB 1015, December 11, 1996.
[7] House Legislative Analysis, SB 1015, December 11, 1996.

organization.[8] Despite the risk that this might have resulted in the loss of statutory protections for thousands of employees, the legislature proceeded to enact Public Act 543 of 1996.

In this case, the "void" in the coverage of Charging Parties' employees, is clearly minimal, if indeed it exists at all. Charging Parties argue that if the Commission declines to take jurisdiction over this matter, the Commission would be giving public employers a "free pass" to assist unions of their choice in performing public jobs. By way of example, Charging Parties contend that "a public school whose teachers are represented by the MEA, but whose transportation work is subcontracted to a non-union, private third party busing company," could pressure the busing company to have its employees join the MEA. While PERA would not regulate the public employer's actions in such a case, either the LMA or the NLRA would protect the rights of the employees from any unlawful actions by their own employer. Thus, no void in coverage is present.

Respondent's exemption from coverage under the NLRA does not create a "void" as significant as that contemplated by the legislative analysis of SB 1015 since Respondent's actions would not have been an unfair labor practice under the NLRA, if Respondent was not exempt. Project labor agreements are permitted in the construction industry under Section 8(f) of the NLRA, 29 USC 158(f).

The NLRA was amended by the passage of the Labor Management Reporting and Disclosure Act of 1959, commonly known as the Landrum - Griffin Act, Pub L No 86-257. The Landrum - Griffin Act added Section 8(f), 29 USC 158(f), which permits the use of pre-hire or project labor agreements in the building and construction industry. Accordingly, construction industry employers coming under the jurisdiction of the NLRA may enter into an agreement with a labor organization that requires the employer to hire only union members or to make union membership a condition of employment for new hires. Such an agreement does not violate the NLRA prohibitions in Subsection 8(a), 29 USC 158(a), against employer encouragement and support of membership in a labor organization. Thus, if the City of Lansing were a private employer in the construction industry, and under the jurisdiction of the NLRA, the Respondent's agreement to, and enforcement of, the PLA would not be an unfair labor practice.

The 1965 amendments to PERA adopted, at Sections 9 and 10, language substantially similar to that of Sections 7 and 8 of the NLRA, with the exception of Subsections 8(e) and (f). Charging Parties contend that the omission of the Subsection 8(f) language from PERA indicates that the Michigan Legislature did not want to permit public employers to enter into PLAs. We

[8] The concern stemming from the possibility that the NLRB would deny jurisdiction over these employees was based on past NLRB rulings finding the State and a private employer to be co-employers and, due to the State's exemption from coverage under the NLRA, thereby exempt from the coverage under the NLRA. *Res-Care, Inc*, 280 NLRB 670; 122 LRRM 1265 (1986). In 1995, the NLRB reconsidered that position and decided it would no longer employ a joint employer analysis when considering cases involving a private employer and an exempt entity. *Management Training Corp*, 317 NLRB 1355; 149 LRRM 1313 (1995). However, the NLRB was free to revisit the issue. Thus, enacting Public Act 543 of 1996 created the risk that if the NLRB returned to its former position on the issue, those employees not covered by the LMA, because their employers engaged in interstate commerce and fell under the jurisdiction of the NLRA, would not be covered by the NLRA. Accordingly, there was a risk that such employees would have no statutory protection for their right to choose whether to join a labor organization or refrain from doing so.

cannot jump to that conclusion as it is equally possible that the legislature did not view the issues that led to the enactment of Subsection 8(f) of the NLRA to be relevant to public employment.

It is said that Section 8(f) was added to the NLRA "in response to the special characteristics and needs of the building and construction industry. The short duration and occasional nature of employment in that industry make ordinary collective bargaining negotiations which must await the employees' choice of a bargaining representative difficult at best." *NLRB* v *Haberman Constr Co*, 641 F2d 351, 363-364 (1981) (footnotes omitted). Those issues are not present with public employment. It was not necessary for the legislature to include language similar to that of NLRA Section 8(f) in PERA because public employees are not faced with the impediments to collective bargaining that were present in the construction industry before the Landrum-Griffin Act. Moreover, if a public employer enters into a PLA, the public employer is not affecting the rights or privileges of public employees.

We have carefully considered the remaining arguments set forth by Charging Parties in their exceptions and brief and find them unpersuasive. For the reasons set forth above, we find the exceptions of Charging Parties to be without merit. Accordingly, we adopt the findings and conclusions of the ALJ and find that the Commission does not have subject matter jurisdiction over the dispute between Charging Parties and Respondent.

ORDER

The charges in this case are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LANSING,
Respondent-Public Employer

- and - Case No. C99 L-226

CARL SCHLEGEL, INC., and ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,
Charging Parties-Private Employers
/

APPEARANCES:

Jack C. Jordan, Chief Deputy City Attorney, for the Respondent Public Employer

Masud, Gilbert & Patterson, P.C., by David John Masud, Atty (Kraig M. Schutter, Atty, on the brief), for the Private Employers-Charging Parties

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This matter came on for hearing at Detroit, Michigan, on July 12, 2000, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission (MERC), pursuant to a complaint and notice of hearing dated December 9, 1999, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216, MSA 17.455(16).[9] Based upon the record, including post-hearing briefs and reply briefs filed by both parties on or before December 6, 2000, the undersigned makes the following findings of fact, conclusions of law, and recommended order under Section 16(b) of PERA, and the contested case provisions of the Administrative Procedures Act of 1969, MCL 24.271, *et seq.,* MSA 3.560(171), *et seq.*:

[9]Due to the fact that this case presents the unusual situation of private employers as charging parties with a public employer respondent, notice will be taken of the Labor Mediation Act (LMA), 1939 PA 176, as amended, MCL 423.1 *et seq.*, MSA 17.454(1) *et seq.* The charge also named as a separate respondent the mayor of the City, David Hollister. Consistent with the usual practice of this Commission, such named individual respondents are treated as agents of the entity named as the public employer or labor organization respondent.

The Charge and Background Matters:

The charge filed by Carl Schlegel, Inc. (Schlegel), a Michigan private corporation, and an amended charge adding the Associated Builders and Contractors of Michigan (ABC) as a charging party, collectively referred to as Charging Party, were both filed on December 2, 1999, against the Respondent Public Employer, City of Lansing. ABC is a voluntary association of nonunion construction contractors. The charge, in summary and as litigated and briefed, alleges that the City violated Section 10(1)(b) and (c) of PERA by entering into and enforcing a prehire or project labor agreement (PLA) on the General Motors (GM) Plant #1 infrastructure project near downtown Lansing by forcing its general contractor, Angelo Iafrate, Inc. (Iafrate), to refuse to allow a nonunion subcontractor, Schlegel, to continue to work on the project. The City filed an answer to the charge on February 3, 2000, admitting the essential facts as outlined below, but denying any violation of PERA. Specifically, the City defended the charge on the ground that there is no privity of contract between the City and Schlegel; and, more important, that this Commission has no subject matter jurisdiction under PERA over this dispute, since Schlegel is a private contractor and its employees are not public employees.

A telephonic prehearing conference was held on February 15, 2000, wherein the undersigned ruled that this charge would be held in abeyance pending the outcome of a similar charge in Case No.7-CE-48(4) filed with the National Labor Relations Board (NLRB) on November 23, 1999. At that time the NLRB charge was pending before the division of advice on the question whether the NLRB would assert jurisdiction. After the NLRB refused to proceed on the charge, it was withdrawn by Schlegel on or about March 30, 2000, and this case was thereafter rescheduled for hearing. The other NLRB charges filed by Schlegel against the private employers or labor organizations involved in the same incident were settled, leaving only the Public Employer City's case unresolved.

At the July 12 hearing the Charging Party proposed 31 factual stipulations and 10 corresponding exhibits, and the City placed two proposed stipulations of fact on the record. While many of the factual stipulations were neither admitted nor denied for lack of knowledge by the other party, the documentation entered into the record, and the pleadings and briefs of the parties establish that there is no dispute as to the facts essential for a determination of this case. See MCR 2.111(c)(3), and 2.116(A)(2). In view of the disposition below and the nature of this case, only a brief summary of the facts is necessary, since the details of who said and did what to whom and when in regard to Schlegel being taken off the GM project are irrelevant to this decision.

Factual Summary:

In early 1999, the City began planning a large scale construction project involving the building of a new automotive assembly plant by General Motors on the existing GM Plant No. 1 site at the southern end of downtown Lansing. On May 12, 1999, the City entered into the PLA, a prehire construction industry project labor agreement, with the Michigan State Building and Construction Trades Council for the infrastructure improvements undertaken by the City relative to the construction site. This agreement provided that all contractors and subcontractors working

on the project were required to become parties to the PLA, or to have a collective bargaining agreement with the labor organization or trade that was signatory to the PLA. In exchange for the requirement that only unionized employees be employed on the project, the PLA ensured that "all construction work for the Project shall proceed economically, efficiently, continuously and without interruption." As explained in detail by the Charging Party in its brief, these prehire agreements in the construction industry usually arise under the provisions of the National Labor Relations Act (NLRA), and they are authorized by Sections 8(e) and (f) of that federal statute, 29 U.S.C. 158(e) and (f). These agreements are an exception to the general rule that a private employer subject to federal jurisdiction cannot lawfully recognize a bargaining representative without proof of majority support among the employees involved. There is no similar legislated exemption under Michigan law.

The City entered into a contract with Iafrate, a union contractor, on June 7, 1999, as the general contractor on the project. Under the contract, Iafrate was obliged to abide by the PLA. On June 8, Iafrate contracted with Schlegel, a nonunion trucking subcontractor, to deliver aggregate to the project site and to haul away waste materials and recyclables. Schlegel began performing work on the project on June 10, hauling aggregate to the site and then Iafrate loading the empty trucks with debris. On or about June 15, Iafrate notified Schlegel that the company would have to sign the PLA or the unions would shut the job down. Schlegel refused to sign the PLA, and was again informed by Iafrate on June 18 that it was being pressured by the unions, the City, and the engineering consultant for the City, to replace Schlegel on the job. That same day, the City had given Iafrate written notice that two of its subcontractors, including Schlegel, had not signed the PLA and were not in compliance with the contract. The City requested confirmation by 5:00 p.m. that same day "that these subcontractors have either signed the Project Agreement or have been replaced." That afternoon, after a meeting between representatives of Iafrate, the City's engineering consultant, and Schlegel, the latter was removed from the job when it still refused to sign the PLA.

Thereafter, Schlegel was replaced by a contractor which had a collective bargaining relationship with the Teamsters Union, Local 580. Subsequently, the Teamsters sought damages for lost dues, fees, and fringe benefit contributions. The details of this claim, and how it was resolved in subsequent proceedings between the parties, are not pertinent herein. The City insisted on the record that it paid Iafrate all that was due and owing under its contract, and how the money was distributed between Iafrate and Schlegel was not its affair. In November, Schlegel filed a series of charges with the NLRB, including the charge against the City referred to above.

Discussion and Conclusions:

The use of prehire PLA's by public employers is not new, and their legality was upheld by the U.S. Supreme Court in what is known as the *Boston Harbor* case, *Building and Construction Trades Council v ABC of MA/RI*, 507 US 218, 142 LRRM 2649 (1993). For a more recent decision by a federal district court, finding no subject matter jurisdiction over the particular action, see *Betal Environmental Corp v Laborers, Local 78*, 165 LRRM 3012 (SDNY, 2000); see also, the recent use of such an agreement in Oregon, *Assoc Builders and Contractors,*

Inc. v Tri-County Metropolitan Transp Dist of Oregon, 166 LRRM 2300 (Ore App 2000). Charging Party argues that PLA's are illegal under Michigan law, citing the early common law case, predating more modern views of labor relations, *Lewis v Detroit Bd of Ed*, 139 Mich 306 (1905). *Lewis* held that a contract similar to the PLA in this case was an unlawful restriction on competition. The City argues that the Supreme Court held in *Boston Harbor* that each state must determine whether prehire labor agreements violate state laws, and that Michigan has not found a PLA as in this case to be invalid or to violate the laws of this state. These arguments, of course, must be left to the legislature or the courts to work out, since they do not involve the provisions of PERA or the LMA entrusted to this Commission.[10]

Further, and more specifically, the Charging Party contends that the PLA and its enforcement by the City violate both Section 10(1)(b) of PERA, unlawful assistance to a labor organization, and Section 10(1)(c) of PERA, discrimination in employment to encourage membership in a labor organization. Charging Party argues that out of the five subsections of Section 10 (1) that enumerate the unfair labor practices that public employers can commit, only Sections (b) and (c) use the word "employee" or "employees" without modifying it with the word "public." Thus, contends Charging Party, the legislature must have intended that these two sections apply regardless of whether the actual discriminatees are public employees. Since PERA must be construed as legislative regulation of public employers in their conduct of <u>any</u> labor relations, any other construction of the statute, according to the argument of Charging Party, would allow public employers to be "unregulated in vast areas of their labor relations within the State of Michigan," and would create a "no-man's land" contrary to the intent of PERA.

Despite the ingenious and comprehensive arguments of Charging Party for the assertion of jurisdiction by the Commission, I must agree with the Public Employer that this Commission has no subject matter jurisdiction over this dispute, "no-man's land" or not. Put succinctly, PERA has no application to employees of a private employer. PERA, and its predecessor statute, 1947 PA 336, known as the Hutchinson Act, have always been limited in their history, wording, and application to defining the rights of public employees, who under the common law had no right to join labor organizations or bargain collectively. The Michigan Supreme Court, in the case upholding the constitutionality of the Hutchinson Act, *Detroit v Div. 26, Motor Coach Employees*, 332 Mich 237, 29 LRRM 2312 (1952), *app dism'd* 343 US 805, 30 LRRM 2712 (1952), stated at 245: "In reaching decision in the instant case it is essential to keep in mind that the provisions of the Hutchinson act apply only to 'public employees.'" See also, *Eastern Mich Univ v Labor Mediation Board*, 384 Mich 561, 566 (1971), *aff'g* 18 Mich App 435 (1969), and 1966 MERC Lab Op 520, wherein the Court upheld the jurisdiction under PERA of the Labor

[10]There is some confusion in some of the arguments briefed by the parties as to what or whom the Michigan statutes are designed to protect, employers, or employees, or both. The LMA and PERA were specifically passed to define the collective bargaining rights of, and the statutory protection afforded to, employees, not employers. Thus, Section 8 of the LMA defines the rights of only employees of private employers, and Section 9 of PERA defines the rights of only employees of public employers.

Mediation Board (Commission) over the employees of the University and emphasized the distinction between public sector employment and that of private employment.

The Labor Mediation Act, 1939 PA 176, which originally established this Commission, then known as the Labor Mediation Board, as principally a mediation agency, has a different history and purpose. In *Local 876, Electrical Workers v Labor Mediation Board*, 294 Mich 629, 633-634 (1940), the Michigan Supreme Court held that the statute was intended to prevent industrial strife, and that its language was "broad and all-inclusive so as to promote the settlement of all labor disputes occurring in the State." Thus, the Court upheld the former provisions of the LMA regulating labor disputes in public utilities and hospitals, even though the employees thereof may be employed by public employers. Despite the broad application of certain provisions of the LMA, by the explicit terms of Sections 2(f) and 16, the City, as a public entity, is not an "employer" subject to the unfair labor practice provisions of that statute. With the passage of PERA in 1965 granting collective bargaining rights to all public employees in Michigan, except State and federal employees, the use of the LMA in public employment became limited, for the most part, to mediation functions.

The use of the word "employee(s)" in PERA without the modifier "public" before it is insufficient to change the clear legislative intent that PERA is limited in its application to public employees only. The use of the word "employee(s)" alone in PERA is not limited to the two subsections of Section 10(1) relied upon by Charging Party, but the unmodified word also appears at random in at least Sections 6, 15, and 16. The intent of PERA to cover only public employment is clear in all sections, including the wording of the preamble. Nothing in the history, wording, application, administration, or precedent relating to PERA would justify a finding that it may be applied to private employees or employers. See *Michigan Dep't of Corrections*, 1974 MERC Lab Op 273, where a majority of the Commission found no subject matter jurisdiction over prison inmates.

Charging Party would argue that PERA should not be so narrowly construed, and in this era of widespread judicial lawmaking or legislating such an argument might seem plausible. However, the Michigan Supreme Court has held this Commission to a literal or strict construction of PERA, as exemplified by its decision in *Smigel v Southgate Sch Dist*, 388 Mich 531, 81 LRRM 2944 (1972). In *Smigel* the Court found no statutory language allowing contractual agency shop clauses, despite the previous ruling of this Commission finding agency shop to be a mandatory subject of bargaining under PERA in *Oakland County Sheriff*, 1968 MERC Lab Op 1, 15-41. Thus, if PERA does not explicitly cover the subject matter, in this case its application to private employment, then it is up to the legislature to amend the statute, rather than for the Commission to provide a creative interpretation of it. See also, *Kent County Ed Ass'n*, 1994 MERC Lab Op 110, 114-116, *app dism'd* Mich App No. 173032 (Unpub., 5-5-95), where the Commission noted that despite the illegality of strikes under PERA, the statute provides no direct remedy for an illegal strike.[11]

[11]The following year after the *Smigel* decision, the legislature amended Section 10 of PERA to provide for agency shop in public employment by the passage of 1973 PA 25.

The above conclusions may or may not leave Charging Party in a "no-man's land" without a remedy, depending on whether there is still a common law action available to pursue, but that is a matter beyond the scope of this decision. Charging Party briefed the issue of the standing of the two private companies to file this charge under PERA. This issue did not appear to concern the Respondent, and in any event I find that such standing exists under PERA in this particular case. But see those cases, such as *Kent County, supra*, that hold that certain violations, such as refusals to bargain, may be asserted only by the parties to the obligation, the employer and the exclusive bargaining representative. Accordingly, based on the foregoing, I recommend that the Commission issue the following order:

ORDER DISMISSING CHARGE

Pursuant to Section 16 of PERA, and based upon the findings and conclusions set forth above, the charge filed in this matter is dismissed for lack of subject matter jurisdiction.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

James P. Kurtz
Administrative Law Judge

Dated: