STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TEAMSTERS STATE, COUNTY &
MUNICIPAL WORKERS, LOCAL 214,
Respondent-Labor Organization,

Case Nos. CU02 A-001
CU02 B-006

-and-

ANN ARBOR PUBLIC SCHOOLS,
Charging Party-Public Employer.
_____/

APPEARANCES:

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Respondent

Esordi Hornby, PLLC, by Scott G. Hornby, Esq., for the Charging Party

DECISION AND ORDER

On July 23, 2002, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that the charges filed by Ann Arbor Public Schools (the Employer) failed to state a claim for which relief can be granted. The Employer charges that Respondent Teamsters State, County & Municipal Workers, Local 214 (the Union) initiated and participated in an unlawful work stoppage, and/or failed to dissuade or prevent employees from engaging in said work stoppage. The Employer also charges that the Union, through its stewards, interfered with the job bidding process; the Union stewards engaged in material misrepresentations prior to the resumption of the bidding process; and the Union's business agent failed to properly supervise the Union membership and acquiesced in the steward's promotion of labor strife. The Employer asserts that the aforementioned actions attributed to the Union constitute violations of Sections 1, 2, 6, and 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.201, 423.202, 423.206 and 423.210 or Sections 1, 2, 6, and 10 of the Labor Relations and Mediation Act (LMA), 1939 PA 176 as amended, MCL 423.1, 423.2, 423.6, and 423.10.

In examining each of the Employer's charges, the ALJ found that the Employer failed to allege violations of PERA or the LMA. Inasmuch as the ALJ found the charges filed by the Employer did not state a claim for which relief can be granted under PERA or the LMA, the ALJ granted Respondent's motion for summary disposition.

On September 15, 2002, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order, a brief in support of the exceptions, and a request for oral argument. On October 18, 2002, Respondent filed timely cross-exceptions to the ALJ's Decision and Recommended Order and a brief in support of the ALJ's Decision and Recommended Order and the cross-exceptions. We have reviewed the exceptions, cross-exceptions and briefs filed by the parties. Based on that review, it is our conclusion that oral argument would not materially assist us in deciding this case. Therefore, Charging Party's request for oral argument is denied.

Discussion And Conclusions Of Law:

In its exceptions, Charging Party asserts that the ALJ abused his discretion by dismissing the unfair labor practice charges without an evidentiary hearing or oral argument; that Charging Party was denied the right to an impartial hearing, that the ALJ committed reversible error by recommending dismissal of the unfair labor practice charges; and that there is substantial evidence that PERA was violated. We have carefully and thoroughly reviewed the record and for the following reasons find no merit in those exceptions.

Charging Party first takes exception to the ALJ's dismissal of the unfair labor practice charges without an evidentiary hearing or oral argument. It is Charging Party's contention that the ALJ's dismissal of the unfair labor practice charges in this matter without an evidentiary hearing or oral argument violates the Administrative Procedures Act (APA). Specifically, Charging Party relies on Section 72 of the APA which provides: "The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact."

In *Smith* v *Lansing Sch Dist,* 428 Mich 248 (1987), the Supreme Court reviewed the issue of whether the Commission is empowered to grant summary disposition in a case where the charge does not state a claim upon which relief can be granted. The court held that MERC could dismiss such a case without holding an evidentiary hearing but required that the charging party be given an opportunity for oral argument.

In this case, Charging Party had the opportunity for oral argument. Rule 161(4) of the Commission's general rules, R 423.161(4), provides:

> Unless otherwise ordered by the commission or administrative law judge, all motions made before or after hearing shall be ruled upon without notice or oral argument. A request for oral argument may be made by the moving party by separate statement at the end of the motion as filed, or by an opposing party by a separate pleading filed within 10 days after service of the motion, or within any other period as designated by the commission or administrative law judge designated by the commission.

Respondent filed its motion to dismiss or for a bill of particulars in CU02 A-001 on February 7, 2002. Accordingly, under Rule 161(4), Charging Party had ten days from that

date to request oral argument. Charging Party did not do so. The ALJ notified Charging Party by letter dated February 12, 2002 that it had ten days to respond to the motion. Charging Party did not request oral argument in any response to the motion.

Respondent filed its motion to dismiss and response to the filing in CU02 B-006 on April 9, 2002. Again, under Rule 161(4), Charging Party had ten days from that date to request oral argument. Again, Charging Party failed to request oral argument. By letter dated April 11, 2002, and referencing both cases, the ALJ notified Charging Party that it had ten days to respond to this motion to dismiss. On April 29, 2002,[1] Charging Party filed a motion to strike Respondent's motion in CU02 B-006 and moved for an extension of time in which to file a bill of particulars. Charging Party's motion did not request oral argument. By letter dated May 3, 2002, the ALJ notified Charging Party that its motion to strike had been denied and it was granted seven days to respond to the motion to dismiss. Charging Party filed its response to Respondent's motion to dismiss on May 10, 2002, but made no request for oral argument.

Charging Party never filed a request for oral argument in either case. By not requesting oral argument, Charging Party agreed to have the ALJ decide the issues before him on the basis of the documents contained in the record. Charging Party thereby waived its right to oral argument before the ALJ in both cases.

The second procedural issue raised by Charging Party's exceptions is the assertion that Charging Party was denied the right to an impartial hearing. Charging Party contends that the ALJ is not impartial because he presided over the hearing on Charging Party's Act 112 petition in the case of *Ann Arbor Public Schs, -and- Teamsters State, Co & Municipal Workers Local 214, -and- Ladeedra Conners*, 2002 MERC Lab Op _____. Charging Party argues that the same facts, parties and circumstances were involved in both cases and further argues that the fact that the ALJ granted the Union's motion to dismiss the portion of the petition applicable to the Union in the earlier case indicates he prejudged this matter. We disagree.

The fact that a judge has ruled on similar matters in the past does not disqualify him from ruling on a separate, though somewhat related matter. In fact, judges frequently try the same case more than once and decide identical issues each time, although such issues involve questions of both law and fact. Indeed it is not contrary to due process to allow judges who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. See *Withrow* v *Larkin*, 421 US 35, (1975); *FTC* v *Cement Institute*, 333 US 683, 702-703 (1948); *NLRB* v *Donnelly Garment Co*, 330 US 219 (1947).

We note that in both *Donnelly Garment Co*, and in *Brandon Sch Dist* v *Insurance Comm*, 191 Mich App 257 (1991), the case relied upon by Charging Party, the courts found no error in the denial of the petitioner's request that the decision maker be removed or recuse himself. In the matter before us, Charging Party did not ask the ALJ to recuse himself and never objected to the ALJ's participation in this matter prior to the ALJ's recommendation

[1] Charging Party was subsequently granted an extension to April 29, 2002 to file a response.

that the charges be dismissed. Charging Party did not raise the allegation of bias until it filed its exceptions. The failure to raise a timely objection constitutes a waiver of that objection. See *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 540. See also *Plymouth-Canton Community Schs*, 1998 MERC Lab Op 545, 554. Therefore, even if impropriety had existed, which it did not, Charging Party's failure to request that the ALJ recuse himself at the time it responded to the motion to dismiss bars it from filing an exception on that basis.

Charging Party's remaining exceptions challenge the ALJ's conclusions that the charges did not state a claim for which relief can be granted under PERA. We find no merit to those exceptions. As the ALJ explained in his Recommended Decision and Order, Section 16 of PERA, MCL 423.216 expressly provides that only violations of Section 10 of PERA are unfair labor practices remediable by the Commission. Section 10(3), the provision applicable to labor organizations, provides:

> It shall be unlawful for a labor organization or its agents (a) to restrain or coerce: (i) public employees in the exercise of the rights guaranteed in section 9: Provided, That this subdivision shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (ii) a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances; (b) to cause or attempt to cause a public employer to discriminate against a public employee in violation of subdivision (c) of subsection (1); or (c) to refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees subject to section 11.

With respect to the first of the two charges filed, Charging Party merely alleges that Respondent and its agents induced or participated in an illegal strike and Respondent failed to denounce such actions. Although a strike by public employees is illegal and subject to sanctions under Section 2a, MCL 423.202a, nothing in Section 10 of PERA makes participation in an illegal strike an unfair labor practice. The sanctions that may be administered by the Commission for participation in an illegal strike by public school employees are limited to those contained in Section 2a and are not applicable to an unfair labor practice charge.

Charging Party states in its brief in support of its exceptions: "The Administrative Law Judge's position seems to be that the Charging Party stated no claim simply because PERA has no provision or remedy directly in point. Frankly, this is a cop-out (sic)." On the contrary, the ALJ's refusal to create a violation of PERA, where none has been authorized by the Legislature, is in keeping with the limits on the ALJ's authority and that of the Commission. Inasmuch as the Legislature did not include illegal strikes as unfair labor practices prohibited by Section 10 of PERA, we cannot presume that it intended to do so. We cannot speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. See *Indenbaum* v *Michigan Bd of Med*, 213 Mich App 263, 270-71 (1995); and *Nat'l Exposition Co* v *Detroit*, 169 Mich App 25, 29 (1988). Moreover, Charging Party has failed to indicate any authority that would support its contention that participation in an illegal

strike or a labor organization's encouragement of an illegal strike constitutes an unfair labor practice under PERA.

Charging Party also argues that since there is no directly related PERA provision, the ALJ should have deferred to the National Labor Relations Act (NLRA). Charging Party points out that Michigan courts have recognized that PERA is patterned after the NLRA and case law interpreting the NLRA has often provided guidance for the interpretation of analogous provisions of PERA. However, PERA and the NLRA are not necessarily analogous in their treatment of strikers. Instead of citing authority for its contention that participation in, or encouragement of, an illegal strike is an unfair labor practice within the meaning of PERA, Charging Party merely asserts "[h]ad the NLRB jurisdiction of this dispute, it would have proceeded to a hearing." Such assertion is insufficient to make participation in an alleged strike a violation of PERA.

With respect to the second charge, Charging Party contends that the Union, through its stewards, interfered with the job bidding process and the Union stewards engaged in material misrepresentations prior to the resumption of the bidding process. Although it appears to be the Charging Party's contention that the Union's alleged interference with the job bidding process was either a refusal to bargain or an interference with the Section 9 rights of the Union members, Charging Party has cited no authority that supports either contention.

Charging Party takes exception to the ALJ's conclusion that there was no refusal to bargain because no demand for bargaining was made. Charging Party relies on *St. Clair Intermediate Sch Dist* v *Intermediate Educ Ass'n/Michigan Educ Ass'n*, 458 Mich 540 (1998) to support its contention that it was not required to demand bargaining before the Respondent's actions can constitute a refusal to bargain. Charging Party's reliance is misplaced. The issue in *St. Clair Intermediate Sch Dist* was whether the union committed an unfair labor practice when its subsidiary unilaterally changed the terms of the health care benefits provided to the union's members under the collective bargaining agreement. The employer in that case was not required to demand bargaining before charging the union with an unfair labor practice since the union's subsidiary had already imposed the change. In the case before us, the Respondent had not imposed any unilateral change in the terms or conditions of employment.

For the reasons set forth above, we find the exceptions of Charging Party to be without merit and adopt the Administrative Law Judge's findings of fact and conclusions of law. Accordingly, we find that Respondent did not violate Section 10 of PERA.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
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

TEAMSTERS STATE, COUNTY & MUNICIPAL WORKERS,
LOCAL 214
Respondent-Labor Organization

Case Nos. CU02 A-001
CU02 B-006

-and-

ANN ARBOR PUBLIC SCHOOLS
Charging Party-Public Employer,
_____/

APPEARANCES:

Rudell & O'Neill, P. C., by Wayne A. Rudell, Esq., for the Respondent

Esordi Hornby, PLLC, by Scott G. Hornby, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTIONS TO DISMISS

Charging Party Ann Arbor Public Schools filed unfair labor practice charges against Respondent Teamsters State, County & Municipal Workers, Local 214 (the Union) on January 11, 2002, and on February 11, 2002. The Union filed motions for summary disposition on February 7 and April 9, 2002. The motions and responses are discussed below:

Case No. CU02 A-001:

In its January 11, 2002, charge, Charging Party claims that the Union, or its agents, engaged in unfair labor practices within the meaning of Sections 1, 2, 6, and 10 of the Labor Mediation Act (LMA) or the Public Employment Relations Act (PERA). MCL 423.201 *et seq*.[2] Charging Party asserts that the Union: initiated and participated in an unlawful work stoppage or strike on December 20, 2001;[3] represented to the Employer that it did not authorize or have any

[2]The LMA, Act 176 of 1939, as amended, is a law governing labor relations for private sector employers and employees who are not within the exclusive jurisdiction of the National Labor Relations Act, and has no application to the conduct of public sector employers and employees.

[3]On February 21, 2002, Charging Party filed a Notice of Public Employee Strike alleging that the Union and forty bargaining unit members engaged in a strike on December 20, 2001, in violation of Act 112 of the Public Acts of 1994. The Commission's decisions are reported at 2002 MERC Lab Op _____ (Issued April 19, 2002 and on July 1, 2002 on motions for partial reconsideration of Commission order and amendment of petition.)

prior knowledge of the unlawful strike; held an employee meeting on December 19, 2001, within hours of a second employee meeting that resulted in the unlawful strike, and prior to steward Monica Wafford's presentation to the Ann Arbor School Board; denounced Wafford's actions in a letter to the Charging Party, but failed to name her as the member who engaged in the unauthorized speech on the Union's behalf; failed to hold its members accountable for unauthorized activity; breached its duty to act in good faith despite its actual and/or constructive knowledge of the pending illegal work stoppage; and violated the no-strike clause of the collective bargaining agreement (CBA) and of PERA.

On February 7, 2002, the Union filed a motion to dismiss, or for a more definite statement. In a response filed on February 21, 2002, Charging Party claims that the chain of events laid out in the charge and the Notice of Employee Strike suggest that both the Union stewards and the Union's leadership knew of the events transpiring on December 19 and 20, 2001. It also contended that the Union violated Section 1 of PERA (MCL 423.201 - definitions and rights of employees); Section 2 (MCL 423.202 - prohibition against public employees engaging in a strike); Section 6 (MCL 423.206 - conduct considered to constitute a strike); and Section 10 (MCL 423.210 – prohibited conduct – service fee) of PERA. Since Section 16 MCL 423.216) of PERA expressly provides that only violations of Section 10 shall be deemed to be unfair labor practices remediable by the Commission, Charging Party's claim that the Union violated Sections 1, 2, and 6 will not be addressed.

Moreover, even if, as Charging Party asserts, the Union and its agents induced or participated in an illegal strike and the Union failed to denounce or hold its agents accountable for their actions, it has failed to state a claim for which relief can be granted under PERA. Section 10(3) delineates the unfair labor practices that may be committed by a labor organization. Generally, it is an unfair labor practice for a labor organization or its agents to: (a) restrain, or coerce public employees in the exercise of rights to form or join a labor organization and collectively bargain; (b) cause or attempt to cause a public employer to discriminate against a public employee; or (c) refuse to bargain collectively with a public employer. In commenting on whether strikes by a labor organization violate Section 10(3), the Commission observed in *Kent County Education Ass'n and Rockford Educational Support Personnel Association*, 1994 MERC Lab Op 110 that:[4]

> In drafting this section, the Legislature did not make striking or encouraging a strike an unfair labor practice although it presumably could have easily done so. We have held that a strike may, in the context of other conduct, be evidence of a refusal to bargain in good faith. *Warren Education Association*, 1977 MERC Lab Op 818. Striking prior to utilizing statutory dispute resolution mechanisms, *i.e.*, mediation and fact finding, has been held to be evidence of bad faith bargaining. *Wayne County MEA/NEA*, 1982 MERC Lab Op 1556; *Lake Orion Education Association*, 1984 MERC Lab Op 770; *Hart Public Schools*, 1989 MERC Lab Op 950. A strike does not constitute a *per se* failure to bargain in good faith, however. *Detroit Board of Education* v *Detroit Federation of Teachers*, 55 Mich App 499; *Lamphere School District* v *Lamphere Federation of Teachers*, 67 Mich App 485 (1976).

[4]Appeal dismissed as moot by the Court of Appeals, Docket No. 173032, May 5, 1995.

> In short, although PERA clearly prohibits strikes by public employees, it does not provide a direct statutory remedy. In order for a strike to be remedied as an unfair labor practice, it must be found to be evidence of a failure to bargain in good faith under Section 10(3)(c).

In this case, even if, as Charging Party contends, the Union and its agents induced or participated in an illegal strike, it makes no claim that the Union engaged in any conduct in connection with the strike, such as striking before engaging in mediation or fact finding, that the Commission has found to violate Section 10(3)(c) of PERA. I also find that none of the other allegations set forth in the charge state a claim for which relief can be granted under PERA. Included are claims that the Union, despite prior knowledge of an unlawful strike, failed to hold its members accountable or specifically denounce their unauthorized activity. I, therefore, recommend that the Commission grant Respondent's motion for summary disposition.

CU01 B-006:

Charging Party also alleges in its February 11, 2002, charge that the Union, through its agents stewards Monica Wafford and Wendy Smith and other employees, engaged in unfair labor practices within the meaning of Sections 1, 2, 6, and 10 of PERA or the LMA. It claims that the stewards interfered with the job bidding process on August 20, 2001, and caused it to be suspended until August 21, 2001; the stewards engaged in material misrepresentations prior to the resumption of the bidding process; the Union's business agent failed to properly supervise the Union membership and acquiesced in the steward's promotion of labor strife; and the Union leadership support of the steward's egregious conduct amounted to a work stoppage in violation of the job bidding and no strike clauses of the collective bargaining agreement (CBA) and PERA. Charging Party also asserts that the Union and its agents impinged upon management's rights to efficiently and safely operate the transportation department and placed the Employer at risk of violating the CBA.

On April 9, 2002, the Union filed a motion to dismiss. Alternatively, the Union requested a more definite statement. In its May 2, 2002, response to the motion to dismiss, Charging Party claims that the Union's motion should be stricken because it was not filed within ten days from the date that the Union received the complaint and notice of hearing. In response to the request for a more definite statement, Charging Party claims that stewards Smith and Wafford's, with the Union's knowledge, conspired to violate PERA and the LMA by: interfering with and disrupting the proper and efficient administration of the CBA, including the job bidding process on August 20, 2001, and caused it to be rescheduled; unilaterally changing the terms and conditions of employment as set forth in the CBA without deference to the bargaining process through their efforts to increase the number of substitute bus driver positions allocated and bid under the CBA; refusing and failing to bargain regarding the number of substitute bus driver positions that could be bid and thereby adversely affecting route bids/assignments for other bargaining unit drivers; telling Respondent's transportation managers that in their capacity as stewards they were stopping the job bidding; and representing that the Union leadership was aware of their actions.

As noted above, only violations of Section 10(3) of PERA are deemed to be union unfair labor practices remediable by the Commission. It is, therefore, unnecessary to address Charging Party's contention that Respondent violated Section 1, 2, and 6. Charging Party, in its motion to strike the Union's motion to dismiss, cites Administrative Rule R 423.155, Rule 155, for the view that the Union's motion must be stricken because it was not filed within ten days of receiving the charge and notice of hearing. Rule 155, however, deals with answers to unfair labor practice charges and does not apply to summary disposition motions. Even if it did, Rule 155 states than an answer *may* be filed within 10. Thus, a party is not required to filed an answer to a charge. Moreover, R 423.165, Rule 165 governs motions for summary disposition. It expressly states that summary disposition motions may be made at any time, before or during the hearing. Thus, I find that Charging Party's motion to strike the Union's motion to dismiss is denied.

Assuming that the facts alleged by Charging Party are true, I find none that state a claim for which relief can be granted under PERA. Charging Party claims that the stewards, with the Union's knowledge, conspired to violate PERA and the LMA. As noted above, Charging Party is a public employer and the LMA has no application to this case. Moreover, there is no claim that the union restrained or coerced employers in the exercise of their right to form or join a labor organization, or caused or attempted to cause an employee to be discriminated against in violation of Section 10(3)(a) or (b) of PERA. While claiming that Charging Party refused to collectively bargain over terms and condition of employment, there is no assertion that the Employer made a bargaining request on August 20 or 21, 2001. Further, any effort by the Union stewards to increase the number of drivers does not constitute a unilateral change in terms and conditions of employment.

Based on the above discussion, I recommend that the Commission grant Respondent's motions for summary disposition and issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____