STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WASHTENAW-LIVINGSTON EDUCATION ASSOCIATION,
Respondent – Labor Organization,

Case No. CU03 I-036

- and -

WILLOW RUN COMMUNITY SCHOOLS,
Charging Party – Public Employer.
_____/

APPEARANCES:

Amberg, Firestone and Lee, P.C., by Michael K. Lee, Esq., for Respondent

Thrun, Maatsch and Nordberg, P.C., by Donald J. Bonato, Esq., for Charging Party

DECISION AND ORDER

On April 15, 2004, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Maris Stella Swift, Commission Member

Dated: _____

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

I. The Unfair Labor Practice Charge:

Willow Run Community Schools (Charging Party or Employer), a public employer within the meaning of Section 1(g) of the Public Employment Relations Act (PERA), and Washtenaw-Livingston Education Association (Respondent or Union), the exclusive bargaining representative for teachers employed by Charging Party, were parties to a collective bargaining agreement that expired on August 31, 2002. Bargaining for a successor contract began in mid-2002.

On August 6, 2003, Charging Party filed an unfair labor practice charge against Washtenaw-Livingston Education Association.[1] It claims that since May 1, 2003, Respondent has bargained in bad faith in violation of Section 10(1)(e) and/or Section 10(3) of PERA by circumventing Charging Party's authorized representatives, publicly casting its chief negotiator in a bad light and publicly misrepresenting the Union's bargaining positions. Charging Party's allegations are summarized as follows:

1. On May 1, 2003, Adrienne Washington, a member of the Union's bargaining team, addressed the Board of Education regarding actions and

[1]In a December 19, 2003 amended charge, the Willow Run Education Association, which had been named as a party, was deleted.

discussions that occurred during the mediation process in an attempt to undermine the Employer's bargaining team's authority. Referring to negotiations regarding prescription co-pay rates, Washington allegedly told the Board: "The Board of Education needs to get more creative. The teachers made a very creative proposal in mediation, and do you know what your Chief Negotiator told us? It was too much paperwork for the administrators! I have been in this district for 25 years, and I have never been told that I wasn't worth a little more paperwork."

2. On June 5, 2003, Elias Chapa, a member of the Michigan Education Association's Board of Directors, violated PERA by falsely telling the Board of Education regarding that, "Willow Run teachers will not accept a $5 co-pay – We'll agree to a $2 co-pay." After being told by the Board President that the Board would not negotiate in public, Mr. Chapa repeated that the teachers " . . . will accept a $2 co-pay, but not a $5 co-pay." In the August 7, 2003, edition of the *Ann Arbor News*, Kathleen Miller, the Union's President, committed an unfair labor practice by falsely saying that, "Willow Run teachers have agreed to increase their co-payments for prescription drugs from $.50 to $2.00, but in return they expect a decent raise." According to Charging Party, the statements by Chapa and Miller were false because the Union had not offered or otherwise agreed at the bargaining table to increase their co-payments for prescription drugs from $0.50 to $2.00.

3. A July 24, 2003, unfair labor practice charge filed by the Union in Case No. C03 G-159 constitutes an unfair labor practice because it is replete with mischaracterizations and is a deliberate attempt to misrepresent the Employer's conduct to Union members and the community.

II. Motion for Summary Disposition, First Amended Charge and Response:

On November 5, 2003, the Union filed a Motion for Summary Disposition. According to the Union, the charge contains allegations that are indisputably false because Chapa has not been an officer or a member of the Association's bargaining team for more than a decade, and is not a union representative, and that on December 9 and December 16, 2002, the Union proposed to increase its prescription co-pay from .50 cents to $2. Respondent also contends that the First Amendment of the United States Constitution protects the statements made by Washington and Chapa and as a matter of law, filing of an unfair labor practice charge does not, in and of itself, constitute an unfair labor practice.

On December 19, 2003, the Employer filed an amended charge. In addition to deleting the Willow Run Education Association as a party, the Employer alleges that the statements made by Chapa and Miller were false because the Union's most recent bargaining proposal, made on January 21, 2003, did not include an offer to increase its member's prescription drug co-payments from .50 cents to $2.

In its January 27, 2004, response to the Union's Motion for Summary Disposition, Charging Party states that it is not contending that Washington and Chapa's statements do not

enjoy First Amendment protection or that they engaged in unlawful direct dealing. Rather, according to Charging Party, it claims that Washington, in her statement to the Board of Education, improperly disclosed and mischaracterized confidential discussions made during the mediation process. Charging Party also argues that Chapa and Miller's statements were false because they were inconsistent with the Association's most recent proposal.

Finally, Charging Party asserts that the Respondent provided no support for its claim that filing an unfair labor practice charge cannot constitute an unfair labor practice. Charging Party cites Michigan Court Rule (MCR) 2.114 to bolster its assertion that pursuing claims that are not well grounded in fact or supported by law is contrary to public policy.

III. Conclusions of Law:

The first issue to be addressed is Charging Party's claim that Respondent committed an unfair labor practice because Washington improperly disclosed and mischaracterized discussions made during the mediation process while addressing the Board of Education. Commission Rule R 423.122 reads:

> Rule 122. Information disclosed by a party to a mediator in the performance of mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents, or other papers received or prepared by a mediator while serving as a mediator shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by the mediator, on behalf of any party to any cause pending in any type of proceeding.

The Commission has interpreted this rule to prohibit the mediator from producing confidential records and testifying about mediation conducted by him/her. The Commission has also interpreted this rule to preclude parties from introducing statements made by the mediator. *Menominee County Board Commission*, 1976 MERC Lab Op 446, 450 (no exceptions). There, the ALJ found no denial of due process by his refusal to subpoena a mediator to testify about events that occurred during bargaining. He observed that any breach of the rule prohibiting the mediator from producing confidential records or testifying would destroy the effectiveness of mediation. The ALJ concluded that the rule worked no hardship on the parties because both had personnel attending the negotiations who were capable of reciting the facts. See also *Mecosta County Park Commission*, 2001 MERC Lab Op 28, 32 (no exceptions); *Unionville-Sebewaing Area Schools*, 1988 MERC Lab Op 86, 96; *St Clair Community College*, 1979 MERC Lab Op 541, 546. The Commission has never held that a party commits an unfair labor practice by publicly disclosing statements made by a party during a mediation session.

I find nothing in Washington's comments to the Board that can remotely be construed as violating Commission Rule 122. Neither her exhortation to the Board to make more creative proposals nor her statement decrying the Employer's chief negotiator's claim that too much paperwork would be required to be more creative, divulge any statement that was made by the mediator.

Charging Party next contends that Respondent violated PERA because statements made by Chapa to the Board and by Miller to the *Ann Arbor News* on June 5 and August 7, 2003, respectively, were inconsistent with the Association's most recent proposal made on January 21, 2003. I find no merit to this argument. In *Genesee County Board of Road Commissioners*, 1995 MERC Lab Op 193, 195, the Commission, citing *St. Clair Community College, supra; Grass Lake Community Schools*, 1978 MERC Lab Op 1186, *aff'd* 95 Mich App 635 (1979); *American Vitrified Products Co,* 127 NLRB 701, 46 LRRM 1076 (1960); *Crater Lake Machinery Co, 131 NLRB 1106, 48 LRRM 1211 (1961),* reiterated the long-established rule that PERA is not violated when either the employer or the union communicates a bargaining proposal that has already been introduced at the bargaining table to employees, or to other union or employer representatives. The facts in this case demonstrate that Respondent did not commit an unfair labor practice because comments made by Chapa and Miller refer to proposals that were introduced at the bargaining table by the Union on December 9 and 16, 2003.[2]

Charging Party's final argument that the Union violated PERA by filing Case No. C03 G-159, a case Charging Party claims is not grounded in facts or supported by law, requires little comment. There is no statutory authority or case law that supports this assertion. Public employers, public employees and labor organizations have a right to file unfair labor practice charges to remedy alleged violations of PERA. MCL 423.216. Compare *Garden City Public Schools*, 1977 MERC Lab Op 600, where the Commission refused to adopt an Administrative Law Judge's comment that a refusal to bargain charge warranted dismissal because it was superfluous and frivolous. Moreover, contested case proceedings before administrative tribunals are governed by the Administrative Procedures Act (APA), MCL 24.201, et.seq., and rules promulgated by agencies; not by Court Rules, as Charging Party argues.

Based on the above discussion, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charge is summarily dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____

[2]For purposes of this Summary Disposition Motion, I take as true Charging Party's assertion that Chapa was a member of the Union's Board of Directors.