STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KALAMAZOO PUBLIC SCHOOLS,
Respondent-Public Employer in Case No. C12 D-074,

-and-

KALAMAZOO EDUCATION ASSOCIATION,
Respondent-Labor Organization in Case No. CU12 D-018,

-and-

LORI ERK,
An Individual Charging Party.
_____/

APPEARANCES:

Smith Haughey Rice and Roegge, by Robert C. Stone and Craig Noland, for Respondent Employer

White, Schneider, Young and Chiodini, P.C., by Michael M. Shoudy, for Respondent Labor Organization

Marlo D. Smith, for Charging Party, *In Propria Persona*

DECISION AND ORDER

On October 23, 2012, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

KALAMAZOO PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C12 D-074/Docket No. 12-000677-MERC,

-and-

KALAMAZOO EDUCATION ASSOCIATION,
Labor Organization-Respondent in Case No. CU12 D-018/Docket No. 12-000679-MERC,

-and-

LORI ERK,
An Individual-Charging Party.
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APPEARANCES:

Smith Haughey Rice & Roegge, by Robert C. Stone and Craig Noland, for the Respondent Employer

White, Schneider, Young & Chiodini, P.C., by Michael M. Shoudy, for the Respondent Labor Organization

Marlo D. Smith, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On April 16, 2012, Lori Erk filed the above unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against her former employer, the Kalamazoo Public Schools, and her collective bargaining representative, the Kalamazoo Education Association, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charges were assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System.

On May 4, 2012, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, I issued orders directing Erk to show cause in writing why her charges should not be dismissed without a hearing because they failed to state claims upon which relief could be granted under PERA. Erk filed a detailed and timely response to my order on June 26, 2012, to which she attached her own affidavit and a number of documents. On June 29, I sent a letter to

Erk asking her to clarify a statement contained in her affidavit. On July 19, Erk filed an amended affidavit.

Based upon Erk's charge and the facts alleged in her pleadings, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

Erk was employed by the Employer, first as a guidance counselor and then as a special education teacher, from 1997 until her termination on February 20, 2012. At the beginning of the 2011-2012 school year, Erk went on an unpaid leave of absence. On February 21, 2012, Erk was notified by the Employer that she had been terminated, upon the Union's demand, for failing to pay union dues for the period of time on which she was on leave.

Erk's charge against the Employer alleges that her termination violated §10(1)(c) of PERA because: (1) the collective bargaining agreement between the Respondents did not require Erk to pay dues while she was on an unpaid medical leave; and (2) the Employer failed to give Erk a hearing before terminating her as the collective bargaining agreement required. Erk also alleges that she was, in fact, terminated because she engaged in activity protected by the Act. Specifically, Erk alleges that the Employer retaliated against her because of her efforts to pursue grievances and make the Employer fulfill its obligations to her under the collective bargaining agreement.

Erk's charge against the Union alleges that the Union violated PERA by demanding her discharge for failure to pay union dues when she was on an unpaid leave and the Union was fully aware that she was unable to pay. Erk also alleges that the Union breached its duty of fair representation toward her by failing to assist her in resolving her issues with the Employer during the 2010-2011 school year and by failing, in the fall of 2011, to process a grievance Erk filed over the Employer's refusal to allow her to transfer to a different position.

Facts:

Erks' Difficulties During the 2010-2011 School Year

The relevant facts, as set out in Erk's pleadings, are as follows. Between 1997 and 2010, Erk worked as a counselor, first at an alternative high school and then at a middle school. Throughout this period, Erk was represented by the Union and was a Union member. Dissatisfied with her position at the middle school, Erk applied for and was granted a transfer to a special education teaching position at Kalamazoo Central High School for the 2010-2011 school year. Erk was primarily assigned to "co-teach" classes which contained both special education and regular students. Although Erk was certified as a special education teacher, she admits in her pleadings that she was unprepared to perform important requirements of the job to which she had transferred, including the preparation of specialized lesson plans and individualized education programs (IEPs) for special education students.

Article 10(E) of the collective bargaining agreement between the Respondents states,

"Teachers should request and receive instructional assistance from the appropriate administrator/supervisor when needed in order to improve their teaching performance." In the fall and winter of 2010, Erk sought help from her department chair and the director of special education for the local intermediate school district. However, Erk came into conflict with her immediate supervisor, an assistant principal, over missing classes and coming late to classes. According to Erk, she did not have enough time outside the classroom to meet with the students for which she was assigned to do IEPS or the teachers who had agreed to help her. However, according to Erk, she was not allowed, as other special education teachers were, to leave her assigned classes to meet with students individually.

In December 2010, Erk's assistant principal conducted a classroom observation and gave her a written evaluation rating her as unsatisfactory. The assistant principal accused Erk of not taking an active enough role in the classroom, criticized her preparation of lesson plans and IEPS, and rebuked her for failing to be in her assigned classroom during scheduled hours. On January 13, 2011, Erk and Union President Mildred Lambert met with Erk's assistant principal, the Employer's director of special education, and other administrators to discuss the evaluation. During this meeting, Erk learned that the assistant principal had been monitoring her movements on the school's security cameras for some time. During discussion of her attendance, the assistant principal called Erk a "liar" for denying that she was late to school on a particular date. In addition, after Erk complained that she had not been given enough assistance to relearn the job of special education teacher, the director of special education picked up the Employer's special education manual and shoved it in Erk's face.

Article 13 of the collective bargaining agreement provides that a teacher who receives an unsatisfactory evaluation will be given a plan of assistance. At the January 13 meeting, Erk was put on a plan of assistance to expire on March 1, 2011. The plan set out requirements for both Erk and her assistant principal, including that they meet regularly to discuss her progress. However, the assistant principal did not contact Erk or attempt to schedule any meetings. In late January, Erk asked her principal to assign another administrator to monitor her plan and evaluate her, but her request was denied. On February 24, the director of special education did a second classroom observation of Erk. The director also rated Erk's performance as unsatisfactory. In particular, she noted that Erk did not have her lesson plans with her and that the plans, when Erk provided them, were inadequate.

When March 1 arrived, Erk did not hear anything from her administrators about the status of her plan of assistance. Erk consulted Lambert, who told her that getting off a plan of assistance generally involved a final meeting with the administrators involved. However, Lambert advised Erk not to raise the issue so that the Union could argue, if necessary, that the Employer had not complied with the plan. Erk told Lambert that she wanted the matter resolved before the deadline for applying for transfers for the next school year. Erk's assistant principal later confirmed, in an email, that her plan of assistance had expired on March 1.

Article 12 of the collective bargaining agreement covers involuntary and voluntary transfers. It requires the Employer to post, in April and again in early May of each year, all known vacancies for the upcoming school year resulting from resignations, retirements, terminations, out of unit transfers and newly created positions, and to prepare a master list of

teachers who have requested transfer or reassignment. The contract, as written, requires the Employer to fill all vacancies occurring before August 1 using this master list. Article 12 also states that teachers on a plan of assistance do not have transfer rights to move from their building during the period of time they are on a plan of assistance, except by the mutual agreement of the Union and the Employer.

In late March, Erk put in a request to transfer to counseling positions at Kalamazoo Central High School and a counseling position at another school. On May 4, Erk submitted another request to transfer to a counseling position at Kalamazoo Central High School. After the Employer did its first round of staffing assignment adjustments for the 2011-2012 school year on May 12, 2011, Erk received a form notice from the Employer stating that she had not received a transfer. Erk later heard from Lambert that the Employer had said that Erk was not transferred because she was on a plan of assistance. Around this time, Erk spoke to the Employer's assistant superintendant for human resources, Sheila Dorsey, who told her that if she was not on a plan of assistance when she made her transfer request she would be allowed to transfer. However, when Erk tried to get confirmation of this statement in an email, Dorsey denied saying this.

On May 21, 2011, Erk was placed on another plan of assistance. This plan was to remain in effect until March 1, 2012. On May 25, Erk received a written reprimand for allegedly being absent from her classroom on four dates without permission. The following day, Erk applied for and was granted a paid disability leave for the remainder of the 2010-2011 school year because she was experiencing anxiety symptoms.

In June 2011, after the end of the 2010-2011 school year, the Employer did another round of staffing assignment adjustments for the next school year. On June 15, Erk was notified that she had not received a transfer in this round of adjustments, and was told by someone that this was because she was on leave. Erk spoke to Mary Ann Zimmerman, the Union's UniServ Director, about her desire to transfer back to a counseling position. She told Zimmerman that she had not been on a plan of assistance when she requested a transfer and that her leave of absence had expired at the end of the school year. Zimmerman helped Erk file a grievance demanding that Erk be awarded a transfer. However, to Erk's frustration, she was advised by the Union in July that the Employer did not have to respond to the grievance until the following fall, since the contract described the grievance timelines in terms of "work days."

Erk was also advised by the Union in July that if she did not intend to go back to her special education position in the fall, she would have to request a second leave of absence. On July 26, 2011, Erk notified the Employer that she "would be going on long-term disability effective August 24, 2011," and attached a disability insurance form filled out by her physician's office. According to the form, Erk had no physical impairment and only slight or no impairment in mental functioning. In response to a question on the form as to when Erk might be able to return to work, the form stated "pending change in hostile work situation." Shortly thereafter, Erk was informed in a phone call that her claim for disability payments had been denied because "it was not a medical issue." Erk twice appealed the denial of her disability claim and submitted a statement from another physician, but both her appeals were denied.

Erk was, however, allowed to take an unpaid leave of absence for the 2011-2012 school

year. Her leave was treated by the Employer as leave under the Family Medical Leave Act (FMLA) and, therefore, she continued to receive insurance coverage for twelve weeks. Erk did not hear anything from the Union or Employer about the status of her grievance over the denial of her transfer requests after the 2011-2012 school year began.

Provisions in Collective Bargaining Agreement
Requiring Employees to Pay Union Dues or Fees

Article 5(A) of the Respondents' current collective bargaining agreement requires the Employer to deduct union dues from the paychecks of union members who authorize such deductions in writing. Article 5(A) says nothing about the consequences for union members of failing to pay dues. However, Article 5(B) reads as follows:

> Any teacher who is not a member of the Association in good standing *(including bargaining unit members on leave status)* or who does not make application for membership within thirty (30) calendar days beginning with the date of the commencement of teaching duties or any teacher hired thereafter within thirty (30) calendar days after the date of employment, as a condition of employment, shall pay as a fee to the Association an amount equal to membership dues payable to the association, the NEA and the MEA, provided; however, that the teacher may authorize payroll deduction for such fee in the same manner as provided Section A. *Teachers who fail to comply with the above requirement shall be dismissed from their employment by the District according to the following procedures:* [Emphasis added]
>
> > 1. The Association shall notify the teacher of noncompliance by certified mail, return receipt requested. Said notice shall detail the noncompliance and shall provide ten (10) days for compliance, and shall further advise the recipient that a request for discharge may be filed with the District in the event compliance is not effected.
> >
> > 2. If the teacher fails to comply, the Association may, in writing, with a copy sent to the teacher, demand that the District terminate the teacher's employment.
> >
> > 3. *The District or its authorized agents, upon receipt of such demand for termination, shall conduct a hearing on the said charges*, and to the extent that said teacher is protected by the provisions of the Michigan Tenure of Teachers Act, all proceedings shall be in accordance with said act. In the event of compliance at any time prior to discharge, charges shall be withdrawn. [Emphasis added]
>
> Pursuant to Chicago Teachers Union v Hudson, 106 S Ct 1066 (1966), the Union has established a "policy regarding objections to political-ideological expenditures." That policy, and the administrative procedures (including the timetable for payment) pursuant thereto, applies only to non-union bargaining unit

members. The remedies set forth in such policy shall be exclusive, and unless and until such procedures, including any administrative or judicial review thereof, shall have been availed of and exhausted, no dispute claim or complaint by an objecting bargaining unit member concerning application and interpretation of this article shall be subject to the grievance procedure set forth in this agreement, or any other administrative or judicial procedure.

Union's Attempts to Collect Dues and Erk's Termination

As noted above, Erk was on an unpaid leave of absence from her teaching position for the 2011-2012 school year. On October 10, 2011, Charging Party Vice-President Ruth Schafer sent Erk the following letter:

> The records of the Kalamazoo Public Schools indicate that you will be on Leave of Absence from August 2011 through June 2012.
>
> During your leave, you are assessed dues for NEA, MEA and KEA. Your payment and your continued membership maintains the free insurance provided by the NEA, all mailings of local, state and national organizations, your right to vote in elections at all levels, and qualifies you to participate in many programs available to members only.
>
> Article 5, Section A and B of our current contract requires members on leave to pay these dues. If a member does not comply with this requirement, he or she will be recommended to the Board of Education for termination of employment.
>
> The amount levied for your dues during your leave is $411.25. This includes $59.75 NEA, $157.50 MEA, $10.00 Aim and $184.00 KEA. Your dues payment covers your united profession membership (NEA, MEA, KEA) from September 1, 2011 through August 31, 2012.
>
> Your dues should be received no later than November 1, 2011. Checks should be made payable to:
>
> Kalamazoo Education Association
> 5600 Portage Rd.
> Portage, MI 49002
>
> If you return to work prior to the end of the school year, all amounts paid by your return date will be credited to you.
>
> Thank you for your prompt payment of your dues. It takes all of us together to make the KEA work. If the KEA can assist you, or if you have questions during your time of leave, feel free to call Millie Lambert at the KEA office.

In her affidavit, as amended, Erk states that she did not contact Lambert or any other

Union representative to request a payment plan for, or deferral of, her dues obligations. According to Erk, she did not do this because Lambert was already fully aware of Erk's circumstances, including that her disability claim had been denied and that she had no income in the fall of 2011, and therefore knew that Erk could not afford to pay union dues. Erk also states that she was appalled that the Union was demanding that she pay dues after allegedly failing to assist her in her dispute with her administrators.

On November 15, 2011, Erk received what was labeled a "second notice" from Schafer indicating that the Union's records indicated that she had not paid her dues and that if she did not pay them within ten days a letter would be sent to the Employer to begin termination proceedings.

Sometime around this time, Erk sent emails to the Union's new UniServ Director, Tonya Karpinski, regarding the Union's threats to terminate her if she did not pay her dues. Erk also asked Karpinski to check on the date that her leave of absence was to end. On December 1, Erk met with Karpinski in Karpinski's office. Erks' account in her pleadings of her conversation with Karpinski was as follows. Karpinski began the conversation by explaining the Employer's procedure for employees returning from work from a medical leave of absence. Erk told Karpinski that she felt her situation "warranted a different approach due to the fact that my leave was initiated by my doctor in response to negative treatment, not a traditional situation." Karpinski replied that in her experience, the Employer treated the situations the same. Karpinski also told Erk that because her leave of absence had been approved for the entire 2011-2012 school year, the Employer did not have to allow her to return to work until the following fall. In addition, Karpinski told Erk that she would have to return to her position as a special education teacher. When Erk brought up her pending grievance over her transfer, Karpinski said that she had been told that "this situation was not Erk's only problem," and that she had problems in the past, but had been allowed to transfer. Erk became angry, and pointed out that she never before been on a plan of assistance and, with a few exceptions, had received only positive evaluations. As Erk started to leave, stating that Karpinski was wasting her time, Karpinski tried to stop her by stating that she had more to say. Karpinski also told Erk, as she left, that if Erk did not pay her dues she would be terminated.

On December 20, Erk received a certified letter from Schafer stating that if she did not pay her dues within ten days of date of receipt of this third notice the Union would ask the Employer to terminate her. This letter noted that termination stripped teachers of their tenure rights, and advised Erk that if she did not intend to return to work for the Employer she should immediately submit a letter of resignation. A copy of Article 5 of the contract was attached to this letter. The Union sent a copy of this letter to the Employer's human resources department. On December 28, Lambert sent Erk an email with the December 20 letter as an attachment, and asked her to read the letter and respond as soon as possible.

Lambert re-sent the email on January 9, 2012. Erk replied to Lambert by email on January 12. In her email, Erk stated that she had no income, and asked Lambert why she was "coming after me." Lambert replied that she was not going after Erk, but that the contract was clear regarding the payment of dues while on leave of absence. Lambert said that all members "who had not paid dues or made arrangements to make payments on the amount owed were sent

the letter and the same process must be used for all."

On February 13, Assistant Superintendent Dorsey sent Erk a letter stating that the Union had notified the Employer that she had failed to pay her dues despite receiving three separate written requests for payment. The letter stated that if she failed to pay her dues by February 20, she would be terminated pursuant to Article 5(B) of the contract.

On February 21, Dorsey sent Erk a letter stating that her employment had been terminated effective February 20, 2012. The letter informed Erk of "her rights to request arbitration with a third party arbitrator by filing a grievance" if she disagreed with her termination. The letter stated that the arbitration would be limited to the question of whether she "wrongfully or consciously failed to pay union dues." The letter also stated that Erk had the right to appeal her termination decision to the State Tenure Commission. Attached to Dorsey's letter was a copy of Article 5 and an email sent that same day to Dorsey from the Union's office secretary. The email stated:

> You asked if I could memorialize the conversation we had today regarding how KEA works with members on their Leave of Absence Dues, and specifically whether Lori Erk had contacted this office with regard to paying her dues.
>
> Because KEA understands that often leaves of absence can be due to medical issues, and therefore member's finances can be affected, we respond to any requests for a payment plan or a delay in payment. In my experience, no reasonable offer of payments has ever been denied when a member asks if they can make payments on their Leave of Absence Dues.
>
> In the matter of Lori Erk, this office has not been contacted either via email or U.S. Post from Lori Erk asking for a payment plan or a delay in payment of her dues.

Erk did not file a grievance over her termination as she felt that the Union would not fairly represent her in this matter.

Discussion and Conclusions of Law:

Erk's Charge Against the Employer

Section 10(1)(c) of PERA prohibits a public employer from discriminating in regard to hire or other terms or conditions of employment in order to encourage or discourage membership in a labor organization. Without the proviso to §10(1)(c), an employer who discharged an employee for failing to pay dues or fees to the union would violate the prohibition against encouraging union membership. The proviso, however, reads as follows:

> Nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the

> bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

Respondents' collective bargaining agreement says nothing per se about the obligation of an employee, either active or on leave, to pay union dues. However, Article 5(B) states, "Any teacher who is not a member of the Association in good standing (including bargaining unit members on leave status) . . . shall pay a fee equal to the amount of dues." Since a bargaining unit member who has signed a membership authorization but is not paying dues would not generally be considered a member in good standing, I conclude that Article 5(B) can reasonably be construed as an agreement to require all members of the unit, including those on leave, to pay either dues or a service fee to the Union. Between August 2011 and her termination in February 2012, Erk was still an employee of the Employer and a member of the Union's bargaining unit entitled to certain benefits under the collective bargaining agreement, including the right to return to work with salary and benefits as provided in that agreement after expiration of her leave, if medically able to do so. Erk concedes that she did not pay dues or a service fee to the Union after August 2011. Since the Employer and the Union had an agreement that all employees in the bargaining unit pay dues or a service fee or be subject to discharge, I conclude that the Employer did not violate §10(1)(c) of PERA by terminating Erk for failing to make these payments.

Erk asserts that her termination was unlawful because the Employer did not provide her with a pre-termination hearing as it was required to do under Article 5(B) of the contract. She also argues that it was unreasonable to require her to file a grievance in order to obtain a hearing. There is, however, no requirement in PERA that an Employer give employees a hearing before terminating them for failure to pay union dues or fees. I conclude that whether the Employer complied with contract language requiring a hearing is not relevant to the question of whether the Employer violated PERA in this case.

Erk also asserts that she was terminated in retaliation for engaging in protected activity. Section 9 of PERA protects the rights of public employees to engage in union activity or other "lawful concerted activities for . . . other mutual aid and protection." A public employer violates §10(1)(c) and/or §10(1)(a) of PERA if it discharges or takes any other adverse employment action against employees because of their union activities or other activities protected by §9. Because a collective bargaining agreement is the result of collective action, employees' individual efforts to pursue grievances under a collective bargaining agreement are considered to be protected by §9, as are their good faith attempts to enforce rights they claim are given them by the collective bargaining agreement. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 265-267 (1974).

In June 2011, Erk filed a grievance over the Employer's refusal to allow her to transfer to a counseling position. Erk does not assert that she filed, or sought to file, formal grievances over the Employer's failure to provide her with instructional assistance or any other issue during the 2010-2011 school year. However, she argues that in asking for assistance, she was attempting to enforce her contractual right under Article 10(E) to receive that assistance from her supervisors.

During the 2010-2011 school year, by her own admission, Erk's work performance was severely criticized by her supervisors. Erk maintained that because she had not been a special education teacher for a long time, she needed more assistance, including time away from the classroom, to learn her job. Erk was twice put on plans of assistance designed to help her remedy the defects in her performance. Correctly or incorrectly, Erk was clearly considered by the Employer to be an unsatisfactory employee at the time that she was terminated for failing to pay her union dues or fees. However, as discussed above, the Employer terminated Erk only after it had received a demand from the Union that it do so, in compliance with its contractual obligations, because Erk had failed to pay union dues or fees. The facts as alleged by Erk offer no support for her claim that her termination was caused, in whole or in part, by the fact that she had requested assistance in performing her duties the previous year or filed a grievance over the Employer's denial of her transfer request. I conclude that Erk's charge against the Employer should be dismissed because, based on the facts as she alleges them, the charge does not state a claim upon which relief can be granted under PERA.

Erk's Charge Against the Union

A labor organization representing public employees violates §10(3)(b) of PERA if it causes or attempts to cause a public employer to discriminate against a public employee in violation of §10(1)(c) if PERA. Without the proviso to §10(1)(c), a labor organization could not lawfully demand that an employer discharge an employee for failing or refusing to pay union dues, but the proviso authorizes a labor organization and public employer to agree to make the payment of a service fee to the union a condition of employment. As discussed above, I find in this case that the Employer and the Union had an agreement, as authorized by the proviso, that all employees in the bargaining unit, including those on leave, pay dues or a service fee or be subject to discharge. Erk admittedly did not pay either after August 2011.

Erk argues that it was unlawful for the Union to demand her termination because Charging Party President Lambert knew that Erk had no source of income in the fall of 2011 and could not afford to pay the amount that the Union was demanding. According to an email that the Employer attached to Erk's termination letter, the Union told the Employer that it accepted "reasonable offers of payments" when unit members on medical leaves asked for deferral of their dues obligations or a payment plan. The Union did not suggest that this was an option in any of the letters it sent to Erk demanding payment. However, Erk also failed to broach this issue with either the Union or the Employer, despite receiving four letters from the Union in four months and an email from Lambert stating that all members who had not "paid dues or made arrangements to make payments" were treated the same way. I conclude that under the facts as alleged by Erk, the Union did not violate §10(3)(b) of PERA by demanding that the Employer terminate Erk for failing to pay union dues or a service fee during her leave of absence.

Erk also alleges that the Union breached its duty of fair representation toward her by failing to assist her in resolving her issues with the Employer during the 2010-2011 school year and by failing, in the fall of 2011, to process a grievance Erk filed over the Employer's refusal to allow her to transfer to a different position.

Under §16(a) of PERA, an unfair labor practice charge that is filed more than six months after the commission of the alleged unfair labor practice is untimely, and the Commission has no authority to remedy it. The limitation contained in Section 16(a) of PERA is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004); *Police Officers Labor Council, Local 355*, 2002 MERC Lab Op 145; *Walkerville Rural Cmty Schs*, 1994 MERC Lab Op 582. The six month period begins to run when the charging party knows, or should have known, of the alleged violation. *City of Detroit*, 18 MPER 73 (2005); *AFSCME Local 1583*, 18 MPER 42 (2005); *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836. When the claim is that a union breached its duty of fair representation by failing to take some action on the employee's behalf, the six months begins to run when the employee should reasonably have realized that the union would not take the action. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004).

Erk's charge was filed on April 16, 2012. Under §16(a) and the case law discussed above, any allegation that the Union breached its duty of fair representation by actions, or a failure to act, prior to October 16, 2011 was untimely. Since Erk knew, by the end of the 2010-2011 school year, that the Union had allegedly "failed to assist her in resolving her issues with the Employer" during that school year, she was required to file her charge within six months of the end of the school year. I find, therefore, that her April 16, 2012 charge was untimely filed with respect to this allegation. However, Erk also alleges that the Union breached its duty by "failing to follow through" on the grievance she filed in June 2011 over her failure to receive a transfer. Erk was told that the Employer would not respond to the grievance until the beginning of the 2011-2012 school year, and, according to her pleadings, she heard nothing more about the grievance until Union UniServ Director Karpinski implied, during their conversation in December 2011, that the Union was not going forward with it. I find that, given the circumstances, Erk could not have reasonably concluded, before October 16, 2011, that the Union did not intend to process the grievance. I conclude, therefore, that the allegation that the Union unlawfully failed to process this grievance was not untimely.

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(3) (a) (i) of PERA. The union's legal duty is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177 (1967). A union may violate its duty of fair representation if it acts with reckless diregard for the interests of its members. *Goolsby*. However, as long as it acts in good faith, a union has considerable discretion to decide how or whether to proceed with a grievance. *Lowe v Hotel Employees*, 389 Mich 123 (1973); *International Alliance of Theatrical Stage Employees, Local 274*, 2001 MERC Lab Op 1. Moreover, a union's delay or failure to communicate to a member that his or her grievance is no longer being processed is not a breach of the duty of fair representation unless that delay or failure results in some actual harm to the member. *Detroit Police Officers Assoc*, 1999 MERC Lab Op 227,230; *Wayne Co Sheriff Dept*, 1998 MERC Lab Op 101 (no exceptions); *Detroit Assoc of Educational Office Employees*, 1997 MERC Lab Op 475.

Erk alleges that she was not told why the Union did not pursue her transfer grievance, if, in fact, it did not. However, the Legislature, effective July 19, 2011, amended PERA to make certain topics "prohibited subjects of bargaining" between public school employers and the unions representing their teachers. Included in these topics is "any decision made by the public school employer regarding the placement of teachers." MCL 423.215(3)(j). A provision in a collective bargaining agreement covering a prohibited topic is unenforceable. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff'd 453 Mich 262 (1996). Accordingly, by August 2011, when Erk's transfer would have taken effect, the restrictions contained in Article 12 on the Employer's ability to determine assignments were no longer enforceable. Since Erk cannot show that the Employer breached the collective bargaining agreement by refusing to allow her to transfer, she cannot prevail on her claim that the Union breached its duty of fair representation by failing to pursue her transfer grievance. *Knoke v East Jackson Public School Dist.*, 201 Mich App 480, 488 (1993). I conclude, therefore, that Erk's charge against the Union should be dismissed because, based on the facts as she alleges them, the charge does not state a claim upon which relief can be granted under PERA. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____