STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

Case No. CU12 J-047
Docket No. 12-001715-MERC

-and-

PONTIAC SCHOOL DISTRICT,
Public Employer-Charging Party.
_____/

APPEARANCES:

Law Offices of Lee & Correll, by Michael K. Lee, for the Respondent

The Allen Group, P.C., by George D. Mesritz, for the Charging Party

DECISION AND ORDER

On October 18, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent, Pontiac Education Association, MEA/NEA, (the Union) did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ held that the charge filed by Charging Party, Pontiac School District (the Employer), failed to establish that Respondent breached its duty to bargain in violation of PERA. The ALJ rejected the Charging Party's contention that the Union violated its duty to bargain by filing and pursuing a baseless lawsuit to enforce contract terms made unenforceable under § 15(3)(k) of PERA. The ALJ concluded that it would be improper to find that the Respondent violated PERA when the meaning and scope of § 15(3)(k) had not yet become established law. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with § 16 of PERA. On November 12, 2013, Charging Party filed exceptions to the ALJ's decision. On November 22, 2013, Respondent filed a brief in support of the ALJ's decision.

In its exceptions, Charging Party contends that the ALJ erred in concluding that it would be improper to find the Union guilty of pursuing a baseless lawsuit where the meaning of §15(3)(k) had not yet become established law. Charging Party also contends that the ALJ erred in dismissing the charge instead of finding a violation and ordering an appropriate remedy.

After carefully considering the record in this case, we find the Charging Party's exceptions to be without merit as discussed below.

Factual Summary:

Charging Party and Respondent were parties to a 2007-2011 collective bargaining agreement that set forth the parties' agreement with respect to the layoff and recall of teachers employed by Charging Party. This collective bargaining agreement expired on August 31, 2011.

In March 2012, Charging Party announced the layoff of certain teachers, effective April 16, 2012. As a result, on April 18, 2012, the Union filed a grievance alleging that the layoff violated several provisions of the expired collective bargaining agreement. According the Employer, the Union subsequently informed the Employer that it intended to file for arbitration of the layoff grievance.

On May 2, 2012, the Union filed a Complaint for Injunctive Relief in Oakland County Circuit Court alleging that the April 16, 2012 layoffs violated the expired contract. The Union sought an injunction requiring the Employer to restore the status quo, but the Court refused to grant injunctive relief. The Union, however, continued with the suit and commenced conducting discovery.

Charging Party alleges that the Union's filing and continued pursuit of the lawsuit constituted an unlawful attempt to enforce a contract provision pertaining to a prohibited subject of bargaining in violation of its duty to bargain.

Discussion and Conclusion:

Effective July 19, 2011, Public Act 103 amended § 15(3) of PERA to add several provisions prohibiting collective bargaining between public school employers and the representatives of their employees over decisions regarding teacher placement, personnel decisions when hiring or conducting a recall after a staffing reduction, or the impact of such decisions. Section 15(3)(j) and (k) of PERA provides:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> * * *
>
> (j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.
>
> (k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when

> conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

We agree that the Employer had no duty to bargain over the procedures used to lay off teachers in April 2012 as those procedures were prohibited subjects of bargaining under § 15(3)(k) of PERA. In interpreting § 15(3) and (4) of PERA, the Supreme Court, in *Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996), held that a "prohibited" subject of bargaining is synonymous with an "illegal" subject of bargaining. An employer is not required to bargain to impasse or agreement before taking unilateral action on an illegal subject of bargaining, and a contract provision regarding an illegal subject is unenforceable. *Michigan State AFL-CIO, Id*., n 9; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55, n 6 (1974).

After 2011 PA 103 was enacted, provisions of the parties' expired collective bargaining agreement applying to decisions regarding layoff that once were mandatory subjects of bargaining became prohibited subjects of bargaining pursuant to § 15(3)(j) and (k). Therefore, the Employer was no longer required to comply with those provisions of the expired contract. See *Pontiac Sch Dist*, 27 MPER ___ (Case No. C12 D-079, issued May 20, 2014) and *Pontiac Sch Dist*, 27 MPER ___ (Case No. C12 D-070, issued March 17, 2014).

In this case, the Employer alleges that the Union violated its duty to bargain by filing a lawsuit in Oakland County Circuit Court alleging that the April 16, 2012 layoffs violated provisions of the expired contract that are prohibited subjects of bargaining.

The issue involved in this dispute has been addressed in cases involving the First Amendment and the National Labor Relations Act (NLRA), 29 USC §150 et seq. In considering the circumstances under which the filing and maintenance of a lawsuit could constitute an unfair labor practice, the Supreme Court, in *Bill Johnson's Restaurant, Inc v NLRB*, 461 US 731 (1983), distinguished between ongoing lawsuits and completed lawsuits. The Court, in *Bill Johnson's*, held that, for the National Labor Relations Board (the Board) to find an ongoing lawsuit to be an unfair labor practice, "[r]etaliatory motive and lack of reasonable basis are both essential prerequisites." 461 US at 748. As to completed lawsuits, however, the *Bill Johnson's* Court indicated that if the lawsuit "result[ed] in a judgment adverse to the plaintiff … and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief." *Id*. at 749.

Subsequent to this, in *BE&K Construction Co v NLRB*, 536 US 516 (2002), the Court reconsidered the circumstances under which the Board could find the filing of a

completed civil lawsuit to constitute an unfair labor practice. To avoid a potential conflict with the First Amendment right to petition the government for redress of grievances, the Court held that its remarks in *Bill Johnson* regarding completed lawsuits were dicta, and concluded that the NLRB had improperly extended its reach under *Bill Johnson*, and infringed on First Amendment rights, by attempting to penalize a party for filing a reasonably based, if ultimately unsuccessful, lawsuit.

On remand, the Board held that "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit." *BE&K Construction Co*, 351 NLRB 451, 456 (2007) (BE&K II). The Board concluded that the *Bill Johnson's* principles regarding right of access to courts are equally applicable to both completed and ongoing lawsuits. In either case, the Board recognized that declaring a lawsuit to be an unfair labor practice has a chilling effect on the right to petition. Therefore, the Board concluded that *Bill Johnson's* no longer warrants lesser protection for reasonably based but unsuccessful completed litigation. Accordingly, it found that, as with an ongoing lawsuit, a completed suit that was reasonably based cannot constitute an unfair labor practice.

Turning to the determination of reasonable basis, the Board held that "a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'" *Id*. at 457, quoting *Professional Real Estate Investors, Inc v Columbia Pictures Industries*, 508 US 49, 60 (1993). In determining whether a lawsuit is reasonably based, the Board, thus, explicitly adopted the *Professional Real Estate Investors* standard set forth by the Supreme Court in the antitrust context. See also *Ray Angelini, Inc*, 351 NLRB 206 (2007), *Children's Hospital Oakland*, 351 NLRB 569 (2007), and *National Labor Relations Board v Allied Mechanical Services*, 734 F3d 486 (2013).

Applying these principles to the present case, we agree with the ALJ that Respondent's lawsuit had a reasonable basis. As noted by the ALJ, when the Union filed its lawsuit and request for injunctive relief with the Oakland County Circuit Court on May 2, 2012, there were no reported decisions by either the Commission or any of its ALJs on the meaning and scope of §15(3)(k). The interpretation of the applicable law was uncertain at the time that the suit was filed, and the suit could not be considered frivolous or plainly foreclosed. Similarly, the evidence in the record is not sufficient to show that Respondent's motive, in filing suit, was specifically to retaliate against Charging Party for its exercise of protected rights by punishing Charging Party through litigation costs. Under such circumstances, Charging Party has not met its burden of showing that Respondent violated its duty to bargain.

We have considered all other arguments submitted by Charging Party and conclude that they would not change the result in this case. We agree with the ALJ that the facts alleged in the charge do not support a finding that Respondent breached its duty to bargain. Accordingly, we affirm the ALJ's Decision and Recommended Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission. The unfair labor practice charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 18, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

PONTIAC EDUCATION ASSOCIATION, MEA/NEA,
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APPEARANCES:

Law Offices of Lee & Correll, by Michael K. Lee, for the Respondent

The Allen Group, P.C., by George D. Mesritz, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On October 15, 2012, the Pontiac School District (the Employer) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Pontiac Education Association, MEA/NEA, (the Union) alleging that the Union violated §10(3)(c), now §10(2)(d), of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(3)(c), by seeking to enforce, through arbitration and by means of a suit filed in Oakland County Circuit Court, a provision in the parties' expired collective bargaining agreement dealing with a prohibited subject of bargaining. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On December 20, 2012, I issued an order to the Union pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, requiring it to show cause in writing why an order should not be issued finding it to have violated its duty to bargain in good faith by attempting to enforce a contract provision or provisions involving a prohibited subject of bargaining. On January 24, 2013, the Union filed a response to the order to show cause. Although the Union did not title its response a motion for summary disposition, it asserted in this response that the charge should be dismissed as a matter of law. On February 19, 2013, the Employer filed a reply to the response. Based on facts set

forth in the charge and pleadings of both parties and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The Union represents a bargaining unit of teachers employed by the Employer. On or about April 16, 2012, the Employer laid off thirty-seven members of the Union's unit. On April 18, 2012, the Union filed a grievance asserting that the layoff violated several provisions of the parties' expired collective bargaining agreement. According to the charge, sometime thereafter the Union told the Employer that it intended to file for arbitration of this grievance. The charge asserts that the contract provisions the Union sought to enforce through this grievance concerned employer decisions about layoff, and that such decisions are prohibited subjects of bargaining under PERA. It alleges that the Union's attempts to enforce these provisions through arbitration violated its duty to bargain in good faith.

On May 2, 2012, the Union filed an action in Oakland County Circuit Court alleging that the April 16, 2012 layoffs violated certain terms of the expired contract. The Union sought an injunction requiring the Employer to restore the status quo. The Court refused to grant injunctive relief, but the Union continued with the suit and commenced conducting discovery. The charge alleges that the Union's filing and continued pursuit of the lawsuit constituted an unlawful attempt to enforce a contract provision dealing with the prohibited subject of decisions about layoffs.

Facts and Background Facts:

On July 19, 2011, in 2011 PA 103, the Legislature amended §15 of PERA to make certain topics prohibited subjects of bargaining for public school employers and the unions representing their teachers. Pursuant to §15(3)(j) and (k) of PERA, the following became prohibited topics:

> (j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.
>
> (k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380. 1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

The parties' collective bargaining agreement expired on August 31, 2011. This collective bargaining agreement and the parties' past practice required the Employer to notify the Union in advance before conducting layoffs. An individual whose position was eliminated was entitled to a meeting with an administrator prior to the effective date of the elimination. An employee whose position was eliminated, but who had sufficient seniority to avoid layoff was entitled to choose a vacant position for which he or she was qualified when displaced. Lastly, the Employer was prohibited from laying off unit employees at any time other than the beginning of a school semester.

In December 2011, the Employer laid off members of the Union's bargaining unit. In conducting these layoffs, the Employer complied with the layoff and transfer practices, including those mentioned above, that had been established by contract and past practice.

In early April 2012, the Employer issued a new layoff and recall policy that merely quoted §15(3)(k) of PERA; the new policy did not set out any specific procedures that the Employer intended to follow in conducting future layoffs or recalls. As noted above, on April 16, 2012, in the middle of a semester, the Employer laid off thirty-seven teachers.

On April 18, 2012, the Union filed a grievance asserting that the layoff violated the contract. As noted above, the charge asserts that the Union told the Employer that it intended to file for arbitration of the grievance. However, the Employer attached to its pleadings a copy of a deposition taken in connection with the Oakland County Circuit Court lawsuit on October 22, 2012. In this deposition, Union UniServ Director Dan McCarthy testified that the Union had not yet received a response from the Employer at level two of the grievance procedure, and that as of that date Respondent had not yet decided whether it would pursue the grievance to the next step of arbitration.

On April 23, 2012, the Union filed an unfair labor practice charge (Case No. C12 D-079/12-000690-MERC), alleging that the Employer repudiated the parties' expired collective bargaining agreement when it laid off the teachers in April 2012. The charge was assigned to me. There was no dispute in that case that the Employer had laid off the teachers in the middle of a semester and had also failed to comply with layoff procedures, including notice requirements, set out in the expired contract. On December 11, 2012, I issued a Decision and Recommended Order on the Employer's motion for summary disposition in which I found that the Employer did not violate PERA when it laid off teachers in the middle of the semester and failed to follow established procedures in conducting the April 2012 layoffs. I found that the provisions in the expired contract relative to layoffs, and any requirement established by practice that employees be allowed the opportunity to meet with an administrator before their position was abolished, became prohibited subjects of bargaining with the addition of §15(3)(k) to PERA. The Union argued that, regardless, the layoff procedures established by contract and past practice remained "in effect" in April 2012 because the Employer had not explicitly announced that it was altering them. However, I found that since these layoff procedures, and the restriction on the Employer's right to layoff teachers during the

middle of a semester, were no longer mandatory subjects of bargaining, Respondent was not obligated to follow these procedures after the collective bargaining agreement expired. My Decision and Recommended Order is currently pending on exceptions before the Commission. Whether the Union could lawfully grieve the alleged violations of the contract or pursue a grievance over these issues to arbitration was not an issue in Case No. C12 D-079.

In addition to filing the grievance and the unfair labor practice charge, on May 2, 2012, the Union filed a complaint against the Employer in Oakland County Circuit Court alleging that the Employer had breached the several provisions of the parties' contract in connection with the April 16, 2012 layoffs. The complaint asked for injunctive relief, which was denied by the Court. However, at the time the charge was filed the suit was proceeding.

In addition to this charge and Case No. C12 D-079, several other unfair labor practice charges involving these parties are currently pending. These include the charge in Case No. C11 K-197/11-000563-MERC, filed by the Union against the Employer on November 17, 2011, and consolidated with the charge in Case No. CU12 D-019/12-000694-MERC, filed by the Employer against the Union on April 25, 2012. On September 27, 2013, ALJ David Peltz issued a Decision and Recommended Order on Summary Disposition on the consolidated charges. The conclusions reached by ALJ Peltz in his Decision and Recommended Order were consistent with statements made by him during oral argument held on September 14, 2012. He concluded that the Employer did not violate its duty to bargain under PERA by unilaterally reassigning teacher Sue Lieberman from a position as a speech pathologist at the high school to a position at an elementary school without bargaining with the Union because the decision to reassign her was a "decision made by the public school employer regarding teacher placement," and a prohibited subject of bargaining under §15(3)(j) of PERA. With respect to the charge filed by the Employer against the Union, he found that the Union would not have violated its duty to bargain in good faith under §10(3)(c), now §10(2), of PERA merely by filing a grievance over the Lieberman transfer. However, he concluded that the Union did violate its duty to bargain by advancing to arbitration a grievance it filed over the Lieberman transfer. He held that by this action, the Union was seeking to enforce through the grievance procedure contract provisions and/or past practices which were explicitly made unenforceable by §15(3)(j). Finally, he found that the Union did not violate PERA by filing an unfair labor practice charge alleging that the disciplinary transfer of another teacher, Janet Threlkeld-Brown, constituted an unlawful unilateral change in established conditions of employment.[1] He noted that unlike a grievance proceeding, an unfair labor practice charge is not a part of the bargaining process. Moreover, in filing the charge over Threlkeld-Brown's transfer, the Union was seeking a Commission determination on an issue within its exclusive jurisdiction and not previously decided by it. He stated that while it was conceivable that the filing of multiple charges in the face of established

[1] This charge, Case No. C12 D-70/12-000646-MERC, was assigned to me. On March 12, 2013, I issued a Decision and Recommended Order recommending dismissal of the charge on the basis that Threlkeld-Brown's transfer was a prohibited subject of bargaining under §15(3)(j). This decision is also pending on exceptions before the Commission.

contrary case law might constitute a violation of a party's duty to bargain, the mere filing of a single charge under the circumstances of that case did not constitute a violation of the Union's statutory responsibilities. As of the date of this decision, the period for filing exceptions with the Commission to ALJ's Peltz's decision had not yet expired.

Discussion and Conclusions of Law:

The Union argues that the Employer's allegation that it violated PERA by seeking to arbitrate the April 18, 2012 grievance should be dismissed on the grounds of res judicata and collateral estoppel based on ALJ Peltz's decision in Case No. CU12 D-019 and/or my decision in Case No. C12 D-079.

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action when the evidence or essential facts are identical. Res judicata prohibits parties from retrying the same claim and applies when: (1) a decision on the merits was issued in the earlier case; (2) the decision in the earlier case has become final; (3) the same parties or their privies were involved in both matters; and (4) the disputed matter in the later case was or could have been resolved in the earlier one. *Teamsters Local 214*, 26 MPER 43 (2013), citing *Dart v Dart*, 460 Mich 573, 586, (1999) and *Ditmore v Michalik*, 244 Mich App 569, 576(2001). As of the date of this decision, the period for filing exceptions to ALJ Peltz's decision had not yet expired, and my decision in Case No. C12 D-079 was pending before the Commission on exceptions. Since neither of these decisions has become final, res judicata does not serve to bar the Employer's charge.

Collateral estoppel prohibits the litigation of an issue in a new action between the same parties or their privies when the original case resulted in a final judgment and the issue in question was actually litigated and necessarily determined in the earlier matter. *Leahy v Orion Twp*, 269 Mich App 527, 530, (2006). A court's judgment is final when all appeals have been exhausted or the time for further appeal has elapsed. *Cantwell v City of Southfield*, 105 Mich App 425, 430, 306 (1981). Since neither ALJ Peltz's decision nor my decision is final, the doctrine of collateral estoppel also does not apply here.

I agree with ALJ Peltz's conclusion in Case No. CU12 D-019 that a union should not be found to have violated its duty to bargain in good faith merely by filing a grievance over a prohibited topic. As the Court of Appeals stated in *Michigan State AFL-CIO v MERC*, 212 Mich App 472,486 (1995), aff'd 453 Mich 262 (1996), parties are not foreclosed by PERA from discussing a prohibited subject of bargaining, and the filing of a grievance is merely an invitation to the employer to engage in such discussions. I also agree with ALJ Peltz, for the reasons stated in his decision and in my Decision and Recommended Order in *Grand Rapids Educational Support Personnel Ass'n*, 23 MPER 5 (2009), that a union violates PERA if it demands arbitration of a grievance over a prohibited subject, at least where the employer has a legal obligation to arbitrate the grievance.

However, there is no indication that the Union has actually sought to advance the April 18, 2012 grievance to arbitration. The charge as originally filed alleged that the Union told the Employer that it intended to arbitrate the grievance. However, the deposition testimony of Union UniServ Director Dan McCarthy provided by the Employer indicates that when the charge was filed, the Union had not made a demand to arbitrate the grievance. There is no indication in the parties' pleadings that it subsequently did so. Merely considering whether to demand arbitration does not, I conclude, constitute a violation of PERA. I recommend, therefore, that this allegation be dismissed.

The Employer's second allegation is that the Union violated its duty to bargain by filing the lawsuit in Oakland County Circuit Court and pursuing the lawsuit after injunctive relief was denied. Section 16(h) of PERA allows a charging party to petition the circuit court for temporary relief after issuance of an unfair labor practice complaint as provided in §16(a) of the Act. The complaint filed by the Union in Oakland County Circuit Court does not mention PERA, but appears to be purely a civil action for contract breach. However, the Employer does not dispute the Circuit Court's jurisdiction over the action or its jurisdiction to issue an injunction. It argues, nevertheless, that the filing of the request for the injunction was "a coercive attempt to secure the power of the Oakland County Circuit Court to obtain a favorable adjustment of the layoff grievance."

Although the defense of a lawsuit can involve considerable expense, access to the courts is a fundamental right under the First Amendment. Whether, or under what circumstances, a party to a collective bargaining relationship can be found to have committed an unfair labor practice by filing a lawsuit has been the subject of litigation under the National Labor Relations Act (NLRA), 29 USC §150 et seq. In *Bill Johnson's Restaurant, Inc v NLRB*, 461 US 731, 747, (1983), the Supreme Court held that the National Labor Relations Board (NLRB) had no authority to order an employer to cease and desist from prosecuting a pending State-court lawsuit brought to retaliate against employees for exercising rights protected by the NLRA without a finding that the lawsuit was "baseless," i.e., lacked a reasonable basis in fact or law. If the State plaintiff could show that genuine material factual or legal issues existed, the NLRB was required to await the result of the State court adjudication regarding the merits. If a completed lawsuit resulted in a judgment adverse to the plaintiff, the NLRB could consider the matter further, and could also consider the judgment in determining whether the lawsuit was filed with retaliatory intent. However, in *BE & K Const Co v NLRB*, 536 US 516 (2002), the Supreme Court held that its remarks in *Bill Johnson* regarding completed lawsuits were dicta, and concluded that the NLRB had improperly extended its reach under *Bill Johnson*, and infringed on First Amendment rights, by attempting to penalize parties for filing reasonably based, if ultimately unsuccessful, suits.

The amendment to PERA which added §15(3)(k) to PERA became effective on July 19, 2011. However, when the Union filed its lawsuit and request for injunctive relief with the Oakland County Circuit Court on May 2, 2012, there were no reported decisions by either the Commission or any of its ALJs on the meaning and scope of §15(3)(k) of PERA. Several ALJ decisions have since been issued on this issue, including my decision

in Case No. C12 D-079. However, as of the date of this decision, the Commission has not yet decided any of the cases pending on exception and there are still no reported decisions. I conclude that to find the Union guilty of an unfair labor practice by pursuing a "baseless" lawsuit to enforce contract terms allegedly made unenforceable by §15(3)(k) would be improper when the meaning and scope of §15(3)(k) has not yet become established law. For this reason, I recommend that the Commission also dismiss the Employer's second allegation, and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 18, 2013