STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

VAN DYKE PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C13 G-143/Docket No. 13-008852-MERC,
Charging Party in Case No. CU13 I-045/Docket No. 13-013012-MERC,

-and-

PROFESSIONAL PERSONNEL OF VAN DYKE, AFT, AFL-CIO,
Labor Organization-Respondent in Case No. CU13 I-045/Docket No. 13-013012-MERC,
Charging Party in Case No. C13 G-143/Docket No. 13-008852-MERC.

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APPEARANCES:

Lusk & Albertson, P.C., by Robert T. Schindler, for Van Dyke Public Schools

Mark H. Cousens, for Professional Personnel of Van Dyke

DECISION AND ORDER

On August 25, 2015, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents 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 either 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: October 30, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

VAN DYKE PUBLIC SCHOOLS,
Public Employer-Respondent in Case No. C13 G-143/Docket No. 13-008852-MERC,
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APPEARANCES:

Lusk & Albertson, P.C., by Robert T. Schindler, for the Van Dyke Public Schools

Mark H. Cousens, for Professional Personnel of Van Dyke

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Detroit, Michigan, on June 13, 2014, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the charges, motions and briefs, testimony and exhibits presented at the hearing, and post-hearing briefs filed by the parties on August 8, 2014, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge Against the Employer:

The Professional Personnel of Van Dyke (the Union) is a labor organization representing a bargaining unit of employees of the Van Dyke Public Schools (the Employer) that includes teachers. The Union filed the charge in Case No. C13 G-143/Docket No. 13-008852-MERC against the Employer on August 29, 2013. The charge was amended on September 13, 2013, and again on January 20, 2014.

The parties' collective bargaining agreement provides that the Union president will have up to two hours per day of paid release time to perform union duties, with the Employer paying for the first

hour and the Union covering the Union president's salary for the second hour. In April 2013, Sharon Rice, a fourth grade teacher at the Employer's Carlson Elementary School, was elected Union president. Effective with the beginning of the 2013-2014 school year, Sharon Rice was involuntarily transferred from her elementary school teaching position to a position teaching English at the Employer's middle school. There is no dispute that but for her election as Union president, Rice would not have been transferred. The charge against the Employer, as amended, alleges that Rice's transfer unlawfully restrained and coerced Rice in the exercise of her rights under §9 of PERA in violation of §10(1)(a) of PERA. It also alleges that when the Employer transferred Rice, it unilaterally implemented a change in a mandatory subject of bargaining, the implementation of union release time, in violation of §10(1)(e) of PERA.

The Unfair Labor Practice Charge Against the Union:

After Rice was transferred, the Union filed a grievance over her transfer and demanded that the Employer arbitrate the dispute. The grievance was heard by Arbitrator Theodore St. Antoine on October 15, 2013. On October 21, 2013, the Employer filed the charge in Case No. CU13 I-045/Docket No.13-013012-MERC against the Union, alleging that the Union violated its duty to bargain in good faith by grieving a prohibited subject of bargaining, teacher placement, and pursuing that grievance to arbitration.

Motions for Summary Disposition:

On January 15, 2014, the Employer filed a motion for summary dismissal of the charge against it and a motion for summary disposition of its charge against the Union. On February 3, 2014, after the Union amended its charge for the second time on January 20, 2014, the Employer filed an amended motion. On February 7, 2014, the Union filed a response opposing the Employer's motions and a motion for summary dismissal of the charge filed by the Employer against the Union. The Union argued in its motion that the charge against it was moot because the arbitrator had issued an award denying the grievance and the Union had agreed to comply with the arbitrator's finding that involuntary transfers were not arbitrable under the contract. In its response to the Employer's motion, the Union clarified that it was not alleging that the Employer had a duty to bargain over Rice's transfer, per se, but that the Employer had unlawfully unilaterally altered its method of implementing union release time.

At the conclusion of oral argument on May 27, 2014, I granted the Employer's motion for summary dismissal of the allegation that it unlawfully restrained and coerced Rice in the exercise of her rights under PERA, and granted the Union's motion for summary dismissal of the charge against it. The reasons are set forth in the discussion and conclusions of law section below. I concluded that I had insufficient facts to determine whether the Employer had violated §10(1)(e) of PERA, and a hearing was scheduled to take testimony on this allegation.

Facts and Findings of Fact:

The parties' 2013-2015 collective bargaining agreement, like earlier collective bargaining agreements between the parties going back approximately twenty years, contained this provision:

> The President of the Professional Personnel shall have one (1) hour released time without loss of salary for the purpose of implementing the terms of this Agreement. The

President of the Professional Personnel may have an additional hour of released time at union expense…

For fifteen years prior to the 2013-2014 school year, the position of Union president was held by John Moher, a high school math teacher. For most of this period, Moher was allotted two unscheduled class periods at the end of each school day to perform union duties. At the beginning of the 2012-2013 school year, the Employer created a schedule that gave Moher one hour of release time at the beginning of the day and another at the end. Moher complained about the change, but accepted the Employer's explanation that splitting the release time was necessary to accommodate the high school schedule.

Sharon Rice has been employed by the Employer for over four decades and, until her transfer in 2013, had always taught elementary school. Rice has held various Union offices over the course of the past twenty years, although she was not elected Union president until 2013. Rice was Union vice-president when Moher, during the last month of the 2007-2008 school year, took leave for a scheduled surgery. Moher was expected to return to work at the beginning of the 2008-2009 school year, but was forced to take an extended absence that lasted the remainder of that school year. While Moher was on leave, Rice served as acting Union president. During this period, the Employer, on its own initiative and without discussing the matter with the Union, provided a substitute teacher for Rice's classroom for the last two hours of every school day to allow Rice to perform union duties. Rice wrote lesson plans for the substitute and was responsible for all grading. Moher returned to work for the 2009-2010 school year and resumed his role as Union president. Moher was forced to take another brief leave for health reasons near the end of that school year, and Rice was again allowed to use the Union president's release time with a substitute assigned to her classroom as before.

Joseph Pius became the Employer's superintendent during the 2010-2011 school year. In early 2013, the parties were engaged in negotiating a new collective bargaining agreement to replace an agreement that was to expire on June 30, 2013. A successor agreement was reached in March 2013. No change was proposed by either party to the Union release time language in the contract, and the language was carried over without change into the parties' 2013-2015 agreement.

The parties hold labor-management meetings throughout the school year on at least a monthly basis. During the 2012-2013 school year, the meetings were attended by Moher, Union vice-president Rice, Pius, and Employer Human Resources Director Edie Shelton. At the January 2013 meeting, Shelton asked Moher about rumors that he might retire. Moher confirmed that he planned to retire at the end of the school year. Moher and Rice also said that it was likely Rice would replace him as Union president.

After hearing this news, Pius became concerned about how the Employer would accommodate Rice's union release time if she became Union president. As noted above, the Employer had accommodated Moher's release time by reducing the number of classes he was assigned to teach at the high school. However, the Employer's elementary school teachers, like Rice, typically have their students for the entire school day. Pius asked Shelton to determine how other school districts handled union release time for elementary school teachers. On January 24, 2013, Shelton sent an email to members of an organization of school human resources managers in Macomb County to which Shelton belongs. Shelton asked if they provided release time for the union president and, if the union president was an elementary school teacher, how that release time was provided. Shelton received about a dozen responses. She also spoke to members of another organization to which she belonged, the Council of

Chief Negotiators. According to Shelton, all the respondents said either that they did not have an elementary school teacher as union president or that their elementary school teacher union president was on full-time release.

At some point, Pius was made aware of the arrangement in effect while Rice was acting Union president. Pius was troubled by the idea that Rice would not be in the classroom and in contact with students for some of the subjects that she was preparing and grading and discussed these scheduling concerns with his administrators.

At the labor management meeting in March 2013, Pius told Moher and Rice that he did not see how it would work to have an elementary school teacher with release time. He also told them that Shelton had contacted all the human resource directors in school districts in Macomb County and that none had an elementary teacher on release time. Moher and Rice said that they believed that at least two nearby school districts had had elementary school presidents at one time. Rice also said that it could be handled the same way it had been when she was covering for Moher while he was on leave. Rice said that she felt that the arrangement in place while she was filling in for Moher had worked well. Pius said again that he did not see how this arrangement would work. Pius did not explain to Moher and Rice that he felt that it was inappropriate to have one teacher doing the lesson plans and grading for a subject and another teacher presenting the subject to the students. According to Pius, he and Shelton suggested that a part-time teacher might be hired to split a positon with Rice. There was no mention during this meeting of transferring Rice to another assignment.

In April 2013, Rice was, as expected, elected Union president to succeed Moher upon his retirement on July 1, 2013. Pius told Shelton to post an internal opening for a half-day position, to teach fourth grade at Carlson, but not to do this until Moher actually submitted his retirement letter. The position was posted on May 29, 2013, and Shelton called Rice and told her that the Employer had posted a half-time position for her classroom. One teacher sent an email to Shelton to express interest and called Rice to ask her about different arrangements for splitting the position. A few days later, however, Shelton was informed by the teacher's principal that the teacher was not interested in the position because it would require her to teach a half-day every day of the week as opposed to working two-and-one-half days per week. There were no other internal applicants, and Pius concluded that it would not be appropriate to post the position externally and hire a new employee since the Employer was closing an elementary school and eliminating positions at the end of the 2012-2013 school year. Since Rice was certified to teach middle school, Pius decided that Rice should be transferred to teach English at the middle school where she could be given a reduced class schedule that would accommodate her release time without the necessity to hire a substitute.

On June 7, 2013, Rice and Moher met with Employer Human Resources Director Edie Shelton to go over the list of employees who would be laid off and employees who would be transferred to new positions for the 2013-2014 school year because of the closing of the elementary school. The Employer had decided to allow teachers who were being displaced to choose from among the available open positions based on their seniority as well as their qualifications. After Shelton and Moher had finished reviewing the list, Shelton told Rice that she was also being transferred from her position at Carlson to a position teaching English at the middle school. Rice was shocked, and asked Shelton why she was being transferred. Rice and Shelton disagree over Shelton's response. According to Rice, Shelton refused to provide any explanation, but simply reiterated several times that Rice was moving to the middle school. According to Shelton, Shelton said something to the effect that it was not in the best interest of students to have two teachers with students. Rice also asked Shelton what happened to the

shared time position. According to Rice, Shelton said it was no longer available. According to Shelton, she told Rice that the teacher was not interested because it was not a two-and-one half day position, and that it was too late to get someone else. Later that day, a displaced teacher selected Rice's fourth grade assignment.

On June 10, 2013, Rice submitted a letter to the Employer's Board of Education claiming that the decision to transfer her constituted discrimination against her based on her sex, her seniority, and being "the elementary union president." Rice argued that her transfer could not be in the best interest of students because the middle school assignment would not take advantage of her long teaching experience in elementary school. In this letter, Rice said that she had been told that the Employer was "concerned about two different teachers for an elementary school classroom." She said that she did not understand this concern because teachers were encouraged to team teach, and, when elementary school teachers team taught, their students had more than one teacher.[1] She also said that while she was filling in for Moher, she had team taught English and math with another teacher in addition to having a substitute cover her science and social studies classes. Rice appeared at the Board's June meeting and read the letter aloud during the public comment period. On July 1, 2013, Rice received a letter from the Board stating that it had determined that her assignment to the middle school was consistent with the contract language involving involuntary transfers and was made without prejudice to the individual, the position she held within the Union, or her gender.

The parties normally hold labor management meetings every month except July. The Employer cancelled the scheduled June meeting. During the summer recess, Rice sent the Employer several emails asking to meet with Shelton and Pius. Rice did not mention in her emails that she wanted to discuss her transfer or union release time in these meetings. In either July or August, Rice met with Shelton to discuss several matters, including some fourth-grade positions that had become open due to retirements or resignations. Rice testified that she asked Shelton if she could have one of the openings but that Shelton told her that when someone is involuntarily transferred they cannot apply for another position. Shelton denied that Rice asked if she could request one of these openings. According to Shelton, two other teachers who had been involuntarily transferred to the middle school wanted the positions, and she told Rice that they could not because they had been involuntarily transferred to where they were needed most. Rice testified that she did not ask about the reasons for her transfer or attempt to discuss alternatives to the transfer at this meeting because she felt that these subjects had to be discussed with Pius. Pius has not been available to meet because he was out of town.

On August 6, 2013, the Union filed a grievance over Rice's involuntary transfer and sought, as a remedy, that the transfer be rescinded. The grievance did not cite specific articles of the collective bargaining agreement and Rice rejected Pius' subsequent request that she amend the grievance to cite the contract provisions allegedly violated. On August 16, 2013, Pius sent Rice a letter denying the grievance. The letter cited Article XV of the collective bargaining agreement, giving the Employer the right to "approve class schedules, assignments of teachers, and related non-teaching activities." It also cited Article VII, which stated, "Involuntary transfers are not grievable." In addition, Pius's letter quoted §15(3)(j) of PERA, which states that, "any decision made by a public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit," is a prohibited subject of bargaining.

[1] Pius testified that team teaching is different because in team teaching each teacher is fully responsible for the subject he or she taught. However, there is no indication that Pius explained this distinction to Rice.

The Union demanded arbitration of the grievance, and an arbitration hearing was held before Arbitrator Theodore St. Antoine on October 15, 2013. At the arbitration hearing, the Employer argued that the grievance was not arbitrable because: (a) teacher placement is a management right under the contract; (1) the parties' contract explicitly states that involuntary transfers were not grievable; (3) any limitation on teacher placement is unenforceable, because teacher placement is a prohibited subject of bargaining under §15(3)(j) of PERA; and (4) the Commission has exclusive jurisdiction over the dispute. The Employer argued that even if the issue was arbitrable, the grievance should be denied because no violation of the collective bargaining agreement had been established.

The Union asserted that the arbitrator should not consider §15(3)(j) because it had not yet been interpreted by the Commission or the courts. It argued that the grievance was arbitrable, despite the contract language stating that involuntary transfers were not grievable, because the Employer breached its underlying obligation of good faith and fair dealing in the circumstances of this case. The Union argued that an employer cannot arbitrarily and capriciously exercise its rights under a collective bargaining agreement and that the Employer breached its obligation of good faith and fair dealing by failing to provide any cogent reason for Rice's transfer or discuss alternative arrangements with Rice or the Union. The Union also argued that because Rice would not have been transferred but for her status as Union president, her transfer was not made in good faith.

On January 6, 2014, St. Antoine issued an award denying the grievance. He held that the contract language cited by the Employer should be interpreted in light of applicable law, including in this case §15(3)(j), and that the classification of "teacher placement" as outside the subject matter of collective bargaining was consistent with the conclusion that involuntary transfers were also not subject to the grievance process. He concluded, therefore, that the current grievance concerning Rice's involuntary transfer was not arbitrable.

Despite his finding that involuntary transfers were not arbitrable, St. Antoine held that the Union was entitled to try and demonstrate that the Employer breached its obligation of good faith and fair dealing. However, he concluded that the Union had the burden of proof since under the contract the Employer was generally entitled to act unilaterally and its transfer decisions were ordinarily not grievable or arbitrable. Reviewing the Union's arguments, St. Antoine stated that there may have been some unnecessary abruptness in the way Shelton communicated the Employer's decision to transfer her. However he noted that Rice was an experienced Union officer who was capable of initiating further discussions about the matter. Antoine also found that Pius had made a professional judgment that having a substitute teacher follow a lesson plan prepared by someone else was of less educational value than having the same teacher prepare and present the lesson. He concluded that whether that decision was right or wrong, it was not irrational or evidence of bad faith. He found that while the Employer might have made additional inquiries about other school districts' experience with release time for elementary school teacher union officers, this was information that the Union could also have acquired fairly easily. St. Antoine found no substantial evidence that Pius was motivated by union animus. He concluded that the Union had failed to prove that Rice's transfer was arbitrary, capricious, irrational, or otherwise a breach of the Employer's duty of good faith and fair dealing.

Discussion and Conclusions of Law:

Findings of fact made in an arbitration proceeding are binding in subsequent proceedings between the same parties under the principal of collateral estoppel when the parties had a full and fair opportunity to litigate these facts in the first proceeding. *Porter v. Royal Oak,* 214 Mich App 478, 485

(1995). The parties agree that to the extent that facts found by Arbitrator St. Antoine are relevant in the instant case, they should be given collateral estoppel effect.

The Union argued in its motion for summary disposition that the charge filed against it by the Employer should be dismissed as moot. It pointed out that at the time the Union submitted the grievance to arbitration, the Commission had yet to issue any decision regarding the proper construction of §15(3)(j) of PERA. Therefore, it asserted, the Union was entitled to argue to an arbitrator at that time that the term "placement" in the statute did not include an involuntary transfer. According to the Union, it has accepted the arbitrator's conclusion that the current collective bargaining agreement precludes arbitration of a transfer. According to the Union, it will not, therefore, attempt in the future to arbitrate a grievance regarding a transfer under the current contract language. Moreover, if the Commission were to adopt a broad reading of the statutory language, as it now has, the parties would be precluded from modifying the current language prohibiting grievances over involuntary transfers. Therefore, according to the Union, there was no longer a live dispute.

Mootness precludes the adjudication of a claim where an actual controversy no longer exists, such as where the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Michigan Chiropractic Council v Comm'r of Insurance,* 475 n 363, 371, n15 (2006), cited by the ALJ in *Waterford Sch Dist,* 23 MPER 91 (2010). A finding that an unfair labor practice dispute is moot is warranted where the improper conduct was later corrected; where there exists no practical remedy; and where the passage of time has diminished the significance of the posting of a notice and might do more to rekindle tensions than to relieve them. *City of Bay City*, 22 MPER 60 (2009). Even if a dispute is technically moot, resolution of the underlying dispute between the parties does not require dismissal of the charge for mootness if the statutory issues presented are of sufficient importance. *Wayne State Univ*, 1991 MERC Lab Op 496, 499.

As the Union notes, when the Union submitted the grievance to arbitration, the Commission had not yet issued any decision interpreting §15(3)(j) of PERA. On March 13, 2013, ALJ David Peltz issued a recommended decision and order in *Ionia Pub Schs,* Case No. C12 G-136, concluding that §15(3)(j), "unambiguously gives the Employer broad discretion to make placement decisions without bargaining the decision or the effects thereof, and that any limitation on that discretion would be contrary to the plain reading of the statute." On April 22, 2014, the Commission affirmed his decision, and his broad reading of §15(3)(j), in *Ionia Pub Schs,* 27 MPER 55 (2014). The Court of Appeals affirmed the Commission on July 28, 2015, in *Ionia Pub Schs v Ionia Ed Ass'n,* ____ Mich App _____.

On September 13, 2013, shortly before the arbitration in this case took place, ALJ Peltz issued another decision and recommended order interpreting §15(3)(j). In *Pontiac Sch Dist,* Case Nos. C11 K-197 and CU12 D-019, ALJ Peltz held that the involuntary transfer of a member of the charging party's bargaining unit was a prohibited subject of bargaining under §15(3)(j). He also concluded that the union in that case violated its duty to bargain in good faith by processing a grievance over the unilateral transfer to arbitration. The Commission affirmed both these findings on October 16, 2014, in *Pontiac Sch Dist*, 28 MPER 34 (2014). The Commission held in that case that the union violated its duty to bargain by attempting to use the arbitration process to unlawfully enforce contract provisions and/or past practices made unenforceable by §15(3)(j). The Commission's decision is currently pending before the Court of Appeals.

At the conclusion of oral argument in this case on May 27, 2014, I granted the Union's motion for summary dismissal. The fact that at the time the Union demanded arbitration of the grievance there had been no Commission decision interpreting §15(3)(j) is not a basis for dismissing the charge. This is also not a case where the Union corrected the alleged misconduct, e.g., by withdrawing the grievance before arbitration. However, the grievance was ultimately denied by the arbitrator. In addition, the arbitrator ruled that the Employer's transfer decisions are not arbitrable under the parties' collective bargaining agreement and that the Employer is generally free under the contract to make transfer decisions unilaterally. The Commission has also now held that §15(3)(j) makes involuntary transfers a prohibited subject of bargaining. Thus, to the extent there existed a dispute between the parties over the proper interpretation of §15(3)(j), this dispute has been resolved. In addition, the parties are now precluded by §15(3)(j) from entering into any new agreements restricting the Employer's right to make teacher transfer decisions. I note that in *Pontiac Sch Dist,* the Commission held that the ALJ had exceeded his authority by ordering the union to reimburse the employer for costs and attorney fees incurred as a result of the arbitration of the grievance in that case. Therefore, were I to find the Union guilty of an unfair labor practice, the relief would be limited to a cease-and-desist order. I find that under the circumstances of this case, no evident purpose would be served by an order requiring the Union to cease and desist from seeking to arbitrate grievances over teacher transfers.

However, underlying the Employer's charge, although not squarely addressed by the parties, is the question of whether the Union violated its duty to bargain in good faith by seeking arbitration of a grievance alleging that the Employer violated its obligation of good faith and fair dealing and seeking, as a remedy, that Rice's transfer be rescinded. *Pontiac Sch Dist* did not present this issue. In *Pontiac,* as the Commission noted, the union demanded arbitration in an attempt to enforce provisions in its expired collective bargaining agreement and/or past practices that restricted the employer's ability to make involuntary transfers. It is well established that prohibited subjects can never become an enforceable part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC,* 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). In the instant case, there was no contract provision or enforceable past practice that restricted the Employer's ability to transfer teachers without their consent. In fact, the contract explicitly precluded grievances over involuntary transfers. The Union, however, attacked the transfer on the basis that, in the circumstances of this particular case, Rice's transfer violated the Employer's obligation of good faith and fair dealing. These circumstances included that Rice was transferred after and because she was elected Union president and the lack of advance notice or adequate explanation of the reasons for the transfer. In effect, the Union attempted, unsuccessfully, to convince the arbitrator that the Rice's transfer was not made in good faith and that the Employer's alleged concern over assigning a substitute to her classroom to cover her union release time was not the real reason for the transfer.

Obviously, permitting a union to demand arbitration of every involuntary teacher transfer as "arbitrary," or "capricious" would eviscerate §15(3)(j). However, I conclude that a union's demand to arbitrate a grievance claiming that the employer breached its obligation of good faith and fair dealing does not violate its duty to bargain in good faith, even if the relief sought is rescission of a teacher transfer, as long as the union's claim is made in good faith and has a reasonable basis. I find that the Union's claim in this case met both these tests. I conclude, therefore, that the Employer's charge against the Union should be dismissed.

I also granted the Employer's motion for summary dismissal of the Union's charge that the Employer committed an independent violation of §10(1)(a) of PERA. The Union's charge alleged that Rice's transfer unlawfully restrained and coerced Rice in the exercise of her rights under §9 of PERA

in violation of §10(1)(a) of PERA. The Union argued that the fact that Rice would not have been transferred but for her election as Union president established a *prima facie* violation of §10(1)(a) because the Employer transferred her solely because she was Union president.

The Union did not allege in this case that Rice's transfer constituted unlawful discrimination against her because of her union activity in violation of §10(1)(c) of PERA. Proof of union animus is a necessary element of a violation of Section 10(1) (c) of PERA. See, e.g., *Waterford Sch Dis,* 19 MPER 60 (2006).Therefore, in order to prove a §10(1)(c) violation, the Union would have to demonstrate that the Employer had union animus or hostility toward Rice's exercise of her §9 rights. As noted above, St. Antoine concluded that there was no substantial evidence of union animus.

However, proof of union animus is not required for a violation of §10(1)(a). *City of Keego Harbor,* 28 MPER 24 (2014). Conduct which is inherently destructive of employee rights granted by §9 of PERA may violate §10(1)(a) of PERA irrespective of the Employer's motivation. *City of Detroit (Fire Dept),* 1988 MERC Lab Op 561, 564; *City of Detroit (Fire Dep't),* 1982 MERC Lab Op 1220, 1226. It is the chilling effect of the conduct and not its subjective intent that PERA was created to address. *University of Michigan,* 1990 MERC Lab Op 272. Rather than motivation, in a §10(1)(a) case the question is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under PERA. *St Clair Co Intermediate Sch Dist,* 1999 MERC Lab Op 38, 46, aff'd, *St Clair Intermediate Sch Dist v St Clair Co Ed Ass'n,* 245 Mich App 498 (2010). In making this determination, the Commission considers both the conduct and the context in which it occurs. *Inkster Fire Fighters Union, Local 1577,* 26 MPER 5 (2012).

There is no dispute that Rice would not have been transferred but for her election as Union president. However, Rice's election was not the sole cause of her transfer. Other "but for" causes included the union release provision in the contract, the parties' longstanding interpretation of this provision as allowing the Union president to have up to two hours of release time per day, and Pius' concern over having a substitute teach Rice's classes during her release time while Rice prepared the lesson plans and did the grading. Serving as union president is a right protected by §9 of PERA. However, union release time, paid or unpaid, is not. See, e.g., *City of Detroit (Dept of Public Works),* 2001 MERC Lab Op 73 (no exceptions); *City of Birmingham,* 1974 MERC Lab Op 642 (no exceptions). Nor did Rice have a right under §9 not to be transferred to a new assignment. The evidence here indicates that Rice did not get a full explanation of the Employer's reasons for transferring her before she was informed of the Employer's decision on June 7, 2013. Rice may have reasonably believed at that time that the Employer's explanation for the transfer was merely a pretext. St. Antoine, however, concluded that Pius made a professional judgment that having a substitute in Rice's classroom would have less educational value than having the same teacher prepare and present the lesson. This is a finding of fact, and as noted above, I am bound by St. Antoine's findings of fact under the principal of collateral estoppel. I conclude that the transfer of an employee because the Employer has made a professional judgment that retaining the employee in his or her current position would adversely affect the employee's students cannot be reasonably said to interfere with an employee's exercise of her §9 rights, even where, as here, the issue would not have arisen had the employee not become Union president. I conclude, therefore, that the Union's allegation that Rice's transfer constituted an independent violation of §10(1)(a) of PERA should be dismissed.

The Union also alleges that the Employer's transfer of Rice violated its duty to bargain over the implementation of union release time. Release time to perform union duties is a mandatory subject of bargaining. *Central Michigan Univ,* 1994 MERC Lab Op 527. I accept, for purposes of this case, the

Union's argument that the Employer's duty to bargain over union release time is not limited to the total number of hours of release time made available, but extends to how union release time will be implemented, including how and when release time can be used and which union representatives will be permitted to use it. However, an employer is not required to initiate bargaining. An employer's duty to bargain under PERA is conditioned upon there being a demand for bargaining by the union. *SEIU Local 586 v Village of Union City*, 135 Mich App 553,557 (1984). An employer cannot unilaterally alter existing terms and conditions of employment without giving the union the opportunity to demand bargaining, but a union has no obligation to demand bargaining if such a request would have been futile because the change was a *fait accompli* when it first received notice of the change. *Southfield Pub Schs*, 25 MPER 38 (2011); *Intermediate Ed Ass'/Michigan Ed Ass'n*, 1993 MERC Lab Op 101, 106.

The Union argues that after Rice's transfer was announced on June 7, 2013, a demand to bargain would have been futile because the transfer had been implemented and could not have been reversed without impacting other teachers. However, I find it irrelevant whether Rice's transfer was a *fait accompli* on June 7, 2013, because I conclude that the Employer did not unilaterally change existing terms and conditions of employment when it transferred Rice to the middle school rather than assigning a substitute to cover her union release time in an elementary school classroom.

As the Supreme Court stated in *Amalgamated Transit Union, Local 1564 v SEMTA*, 437 Mich 441, 454-55 (1991):

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that such a practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment."

Where a contract is silent or ambiguous on a subject for which a past practice has developed, there need only be tacit agreement that the practice will continue in order to create a term or conditions of employment. *Port Huron EA v Port Huron Area School District*, 452 Mich 309, 325 (1996). Here, the right of the Union president to two hours of union release time was established by contractual agreement. Under the parties' longstanding interpretation of this contract language, the Union president was allowed up to two hours per day of union release time. The Employer did not alter this practice; Rice, in her position at the middle school, is granted up to two hours per day of release time to perform her duties as Union president just as Moher was during his tenure. There is no evidence, however, of a longstanding practice of assigning a substitute to cover the release time of the Union president. From the spring of 2008 through the 2008-2009 school year, and again for a brief period in the following year, the Employer assigned a substitute to allow Rice to use the full amount of the Union president's release time while continuing to teach in the elementary school. However, this was during the absence of the elected Union president, an absence that was longer than had been originally anticipated. I find that the evidence does not support a finding that the parties' had a tacit agreement that this was or would be the arrangement if an elementary school teacher was elected Union president. I conclude that in transferring Rice to a middle school to accommodate her Union release time, the Employer was acting in accord with contract language and past practice, and that the transfer did not

constitute a unilateral change in its method of implementing the union release time provision. I conclude, therefore, that the Employer did not violate §10(1)(e) of PERA.

In accord with the facts, findings of fact, and conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in Case No. C13 G-143 and the charge in Case No. CU13 I-045 are both dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 25, 2015