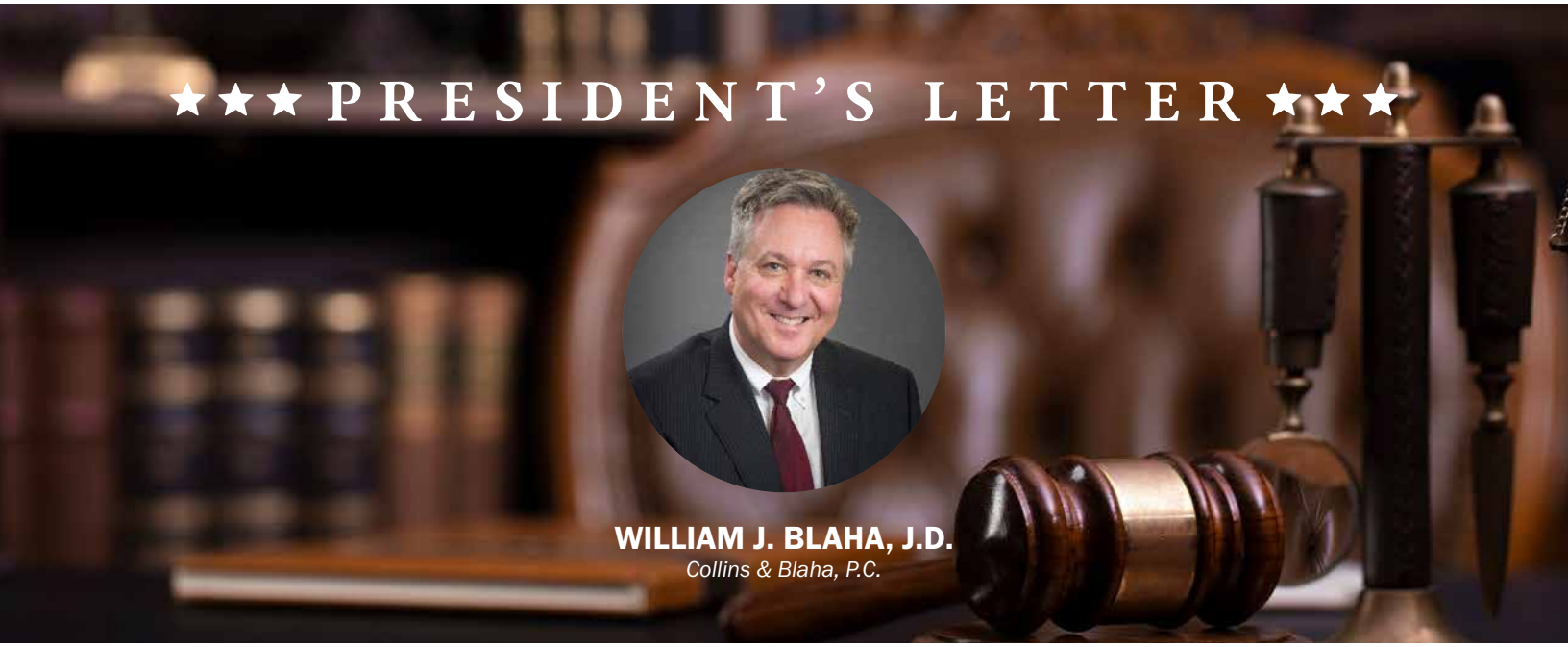
MICHIGAN COUNCIL *of* SCHOOL ATTORNEYS

COUNCIL NEWS

MASB
MICHIGAN ASSOCIATION OF SCHOOL BOARDS

SPRING 2022 NEWSLETTER



WILLIAM J. BLAHA, J.D.
Collins & Blaha, P.C.

Role of School Attorneys During the COVID-19 Pandemic

Vaccines are here, herd immunity will potentially exist in the future and there is a sense of renewed hope that we will soon be returning to some sense of normalcy as school classrooms, hallways and athletic fields show robust student activity and where smiles can readily be seen that have been, and in some cases remain, covered by masks.

In the last couple of years, with schools in varying stages of shutdown and remote learning, parents have had to balance work and child care while education continued—our school clients have been tested like never before. Boards of education and school administrators across the state have faced relentless pressure to open or close schools, to wear or not to wear masks, to let sports activities continue or not, and to take on the responsibilities of COVID-19 contact tracing, all while exerting leadership to maintain a calm school environment and educate students, talking and negotiating with union leaders, managing staff concerns and keeping students engaged. This seemed like an exhausting task of attempting to satisfy competing demands to most people on the periphery. School leaders, however, navigated this pandemic admirably.

As school attorneys, we have listened, offered guidance and provided legal support to help school officials maneuver through COVID-19 challenges. Our role as school attorneys has been an integral part of the team to guide school districts through the evolving safety standards from the Centers for Disease Control and Prevention, Michigan Department of Health and Human Services, Michigan Governor orders and subsequent court challenges, Michigan High School Athletic Association rules and guidance, local health department rules and, of course, local community standards. We have kept current on all legal changes and collectively provided updates to the educational community during the pandemic. We have served, in my view, as much-needed, rational counsel. I hope you take a moment as school legal counsel to recognize your contributions during this challenging time, not just for our clients but for yourselves and your families as well.

Finally, I hope as we emerge from the pandemic, that more positive partnerships will be created between school officials, parents, community leaders and businesses to implement new ways to provide educational services to children, including exposure to new technology, and partnerships will continue to be developed and maintained in a way that promotes civil discourse, respect for differences of opinions, and solves problems collaboratively and respectfully among our fellow citizens. With our continued contributions as school attorneys, we can influence decisionmakers with whom we share more in common than not. We can collectively maximize how best to educate our children while navigating legal issues to achieve a better, more informed and educated society.

Virtual MCSA School Law Seminar

MAY 12, 2022

8:30 A.M. – NOON

SAVE THE DATE!

The Michigan Council of School Attorneys is presenting a virtual School Law Seminar on May 12. The half-day programming will include topics selected to help school districts avoid legal pitfalls at the end of the school year and prepare for next year's legal challenges.

Please make plans to virtually attend the Seminar from 8:30 a.m. – noon to hear school law experts discuss multiple legal issues relating to school district security, student discipline and personnel decisions. Look for details about the Seminar and registration information in your email inbox and masb.org/calendar.

"I Have Something to Say..." OMA and Public Comment

By Jennifer K. Starlin, J.D. and Ryan J. Murray, J.D., Thrun Law Firm, P.C.

If you've been to a school board meeting recently, you likely saw and heard some interesting public comment. Rules related to public comment have become a hot topic in some communities and often a target in Open Meetings Act lawsuits.

The OMA states that members of the public must be permitted to "address a meeting of a public body under rules established and recorded by the public body." In other words, every meeting must include at least one public comment period.

Reasonable Rules

The "rules established and recorded by the public body" must be designed to balance the board's interests in conducting meetings in an orderly manner with attendees' OMA rights and First Amendment free speech rights. The Michigan Attorney General has opined that the rules must be reasonable, flexible and encourage public participation.

A board-adopted policy or bylaw can satisfy the "rules established and recorded" requirement. The rules should be printed and available at each board meeting and referenced on the school website, where board meeting notices are posted so that the public is aware of their rights and responsibilities during public comment. Some boards read public comment rules at the beginning of each public comment period to ensure speakers are well-aware of the rules in place.

The rules may designate when public comment occurs on the meeting agenda. Therefore, a public body may

"I Have Something to Say..." OMA and Public Comment, continued on Page 4

"I Have Something to Say..." OMA and Public Comment, continued from Page 3

determine by rule whether members of the public may address the board at the beginning, middle or end of the meeting. Providing two public comment periods—one for agenda items and one for nonagenda items—is not legally required and may unnecessarily extend the duration of a public meeting.

A public body may *not* adopt a rule that completely denies a member of the public the right to address a public body. Therefore, a board cannot set a designated time limit (e.g., 30 minutes) for all public comments where doing so would deny a person the right to public comment. However, a public body may adopt a rule imposing a reasonable time limit on each speaker (e.g., three minutes each). Accordingly, a board may limit the time any one person addresses the board but should ensure the public comment period lasts as long as is necessary to ensure that everyone wishing to speak has an opportunity to do so. If your board imposes a per-speaker time limit, ensure that it is enforced for each speaker. Allowing one speaker to exceed the time limit and cutting off another speaker could expose the board to a First Amendment viewpoint discrimination claim.

Similarly, a board may not prohibit a person from addressing the public body based on that person's residency—even individuals who don't reside within the school's boundaries can participate in public comment.

Limits on Censorship

Any rule that limits comment at a public meeting must be viewpoint-neutral. That is, the public body may not censor speech merely because it disagrees with the speaker's viewpoint.

The Michigan Attorney General opined that the purpose of a board meeting "is to discuss public business and not to deal with individual personalities." Therefore, a board may adopt rules prohibiting personal attacks on an individual during public comment *if* the comments are entirely unrelated to an employee or board member's performance of their public duties. For example, a board may prohibit a personal attack on an employee concerning the employee's religion.

However, attempting to prohibit certain personal attacks during public comment may violate the First Amendment. The Sixth Circuit Court of Appeals, whose decisions are binding in Michigan, determined that public comment at a board meeting is typically protected First Amendment speech, subject only to legitimate, viewpoint-neutral restrictions. Therefore, a board may not restrict speech that it finds harassing or objectionable based solely on the speaker's viewpoint.

Meeting Disruptions

The OMA states that a person must not be excluded from a meeting otherwise open to the public except for a breach of the peace *actually committed* at the meeting. While the OMA does not define "breach of the peace," Revised School Code Section 1808 states:

> If a person conducts himself or herself in a disorderly manner at a board of education meeting or a school district meeting and, after notice from the officer presiding, persists therein, the officer presiding may order the disorderly person to withdraw from the meeting, and on the person's refusal may order a law enforcement officer or other person to take the disorderly person into custody until the meeting is adjourned.

Further, in 2020, the Michigan Court of Appeals interpreted "breach of the peace" under the OMA as "seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence."

Accordingly, only seriously disruptive behavior that continues after notice from the presiding officer will justify a board's decision to exclude a person from a meeting for a breach of the peace. The OMA does not permit a board to exclude someone from an open meeting based on disruptive conduct at past meetings or concerns that the individual might become disruptive. Thus, a person must be permitted to continue to attend meetings, regardless of how many previous meetings they have been removed from.

We have recently seen an uptick in OMA legal challenges, some of which have stemmed from public comment rules. Becoming familiar with your board's public comment rules may help avoid such challenges. It is also good to periodically review the public comment rules to ensure that the written process aligns with actual practice.

Crowdfunding Has Big Implications for Schools*

By Kevin T. Sutton, J.D., Miller Johnson, Detroit Office

Either as a parent or as a student, we all remember the days of the school bake sale. And we've all probably uttered or heard the words: "Mom, the school bake sale is tomorrow and I need three dozen cupcakes!"

Once upon a time, raising money for school programs, activities and supplies mostly involved flour, frosting and the occasional last-minute trip to the grocery store. Now, thanks to technology, school staff and affiliated groups are turning to the web to raise cash fast for a neverending list of school needs. It's called "crowdfunding" and it's an increasingly desirable, no-strings-attached revenue stream for educators to access to combat stagnant funding and limited resources for schools.

Consider the fourth-grade teacher who creates a "campaign" on a crowdfunding site—and there are plenty to choose from—seeking funds to purchase two tablets for their class. The posting explains that the devices will be used for academic games and student enrichment. The campaign carries the school district logo and lists the school the teacher works at. In other words, it looks official, suggesting the teacher has school district permission to create the campaign. A generous community member may see the posting and assume it would be a great way to spend an extra $100 that they earmarked for charitable giving.

But there are a host of unanswered questions that the casual web surfer/donor might not think to ask. Did the teacher obtain permission from the school district before creating the campaign? Did they need to? Assuming the funds are raised and the devices purchased, who do the devices belong to? What if the teacher leaves the school district next year? Or gets transferred to a different grade at a different building? What if the campaign was for something a little more suspect than tablets? In other words, will these devices actually end up with the students they were intended for? What controls, if any, are in place to regulate this high-tech fundraising practice?

To be clear, this is not to suggest that staff and school support organizations are trying to dupe anyone or raise funds for anything other than legitimate educational needs. The need for additional resources in schools is well-chronicled and unquestionably predates the internet. But opportunities for malfeasance are always present in the absence of thoughtful regulation. Knowing that the potential for misuse, miscommunication or misguided intentions exists, schools would be well-advised to consider crafting policies or administrative procedures to take control of these activities that are often being undertaken in the name of the school.

The question then becomes, how far do you go; ban all crowdfunding? That seems like it might be an overreaction. After all, there are people out there who want to help schools and students and have money to give. If they want to support a legitimate campaign to provide resources to schools, there's no rational need to stop them. How about putting some guardrails in place, just to ensure that no staff or affiliated groups go rogue and do anything too wild? Such protections will also provide the necessary firepower to reel in (or punish) those actors who engage in crowdfunding activities that fail to comport with the school district's expectations.

Consider policy/procedure that accomplishes the following:

- Require written superintendent permission to commence any crowdfunding campaign in the name of the school district or an affiliated school.
- Prohibit the use of the school district name, logo or likeness by any staff member or school group for crowdfunding purposes (absent written permission).
- Make it clear that any property secured or purchased through such fundraising activities shall become the property of the school district and not the employee.

The development of simple, streamlined expectations will ensure that your staff and related groups can develop crowdfunding campaigns with fidelity while giving the school district the authority it needs to control such undertakings.

**This article originally appeared in the January 2022 edition of AASA School Administrator.*

Michigan Teacher Tenure Commission Update

By Gary J. Collins, J.D. and William J. Blaha, J.D., Attorneys, Collins & Blaha, P.C.

The following four decisions issued by the Michigan Teacher Tenure during the past two years may be of interest to school districts. The decisions address the subject areas of dereliction of duties, misconduct and the teacher performance evaluation process.

MISCONDUCT

Nichols v Bay City Public Schools

In *Nichols v Bay City Public Schools*[i], a teacher, placed in a classroom for students with emotional impairments, was discharged for misconduct relating to physical and verbal abuse of students. The district alleged that the teacher disciplined students by secluding them in a room next to the classroom on numerous occasions.

On one occasion, the teacher placed her foot on a student's buttocks and pushed him into the seclusion room. The student was left there for an hour and a half. On Dec. 18, 2018, there was an incident between the teacher and another student where the teacher got close to the student's face and yelled at him. The teacher and the student engaged in a verbal confrontation and ended up on the floor (testimony is unclear how they got to be there). The teacher continued to verbally abuse the student before she dragged him to the seclusion room by his wrists with his back, legs and buttocks dragging on the floor. The teacher lied to administration when questioned about the incident. The ALJ upheld the discharge finding the testimony of a witness to the incident to be more credible.

The issue was whether seclusion and physical restraint are appropriate disciplines for students with emotional impairments. The teacher argued that the witness who testified during the initial hearing lied about the events and influenced other witness perceptions. The teacher also argued she placed students in seclusion because they were a danger to other students. The TTC deferred to the ALJ findings as it related to witness credibility and further concluded that the teacher should have involved administration or other school personnel if other students were in danger.

Next, the teacher argued that her conduct did not violate board policies or the code of ethics because cited provisions were overbroad and unclear. She also challenged testimony she was insubordinate and untruthful to school authorities. The TTC found that a reasonable person would understand the teacher's conduct violated district policy. Additionally, the TTC determined the witness' testimony revealed that the teacher was not truthful in her recounting of the incident.

Finally, the teacher argued the ALJ did not apply the *Szopo* factors. The TTC held that applying the *Szopo* factors is not a requirement if the decision was based on deliberate, principled reasoning supported by evidence as noted in *ReVoir v Ann Arbor Public Schools*, TTC 18-5. In this case, the investigation supported the teacher violated district policy and state law.

The TTC upheld the teacher's discharge, finding state law clearly provides that seclusion and restraint should only be used in emergent situations by trained professionals while upholding a duty of care to the student.

Davenport v Detroit Public Schools

In *Davenport v Detroit Public Schools*[ii], the discharge of a special education teacher was upheld for misconduct stemming from an incident involving verbal abuse of students. On Oct. 3, 2019, the teacher, who was having a conversation with another staff member, was overheard by students in the classroom saying they were learning disabled and would not go to college. One of the students who overheard the teacher said, "We're not LD. Are you LD?" The teacher reacted to this by telling them if they did not change their attitudes, they would not go to college and would become "bums with no money."

The incident led to the teacher engaging in a verbal altercation with a student, "getting in her face" and yelling at her. According to witness testimony, the student was silent and had her head bowed. The staff member who witnessed the incident said the other students were seated, and none exhibited aggressive behaviors.

Based on witness testimony and other supporting evidence, the ALJ determined the teacher's behavior and conduct violated board policies on ethics and professional conduct and did not support student growth and development. The ALJ agreed with district arguments that the incident exposed students to harassment and unnecessary embarrassment and that a professional special education teacher is expected to use sound judgment by refusing to engage with students in this manner.

Michigan Teacher Tenure Commission Update, continued on Page 7

Michigan Teacher Tenure Commission Update, continued from Page 6

The teacher filed exceptions with the TTC that focused on credibility of witness testimony, due process, inadequate investigation procedures and a lack of evidence demonstrating she violated district policies. Arguing that witness testimony was not credible, the teacher noted the witness was not a certified special education teacher. Additionally, the teacher alleged that she was denied her due process right to confront the witnesses against her because students who provided written statements to administration officials about her conduct did not testify at the hearing.

Ultimately, TTC agreed with the ALJ's findings stating, "As a veteran special education teacher, appellant was reasonably expected to act at all times in a manner consistent with those standards and with other standards generally required of teaching professionals." The TTC noted the teacher's record demonstrated prior discipline for similar behaviors and interactions with students. As to the exceptions regarding witness credibility and due process, the TTC upheld the ALJ's finding that there was sufficient evidence to support discharge, and the teacher's due process rights were not violated due to other sufficient witness testimony. Thus, the discharge of the teacher was upheld.

DERELICTION OF DUTIES: *Lewis v Detroit Public Schools Community District*

In *Lewis v Detroit Public Schools*[iii], a tenured teacher was discharged for unprofessional conduct and violation of several work rules. The teacher violated an established district policy prohibiting student discipline to carry over into the next school year. Notwithstanding this policy, the teacher refused to allow a student back into his classroom after he had been suspended for throwing firecrackers in the teacher's classroom the prior year.

Additionally, the district charged the teacher with the following: failing to implement the required classroom curriculum; failing to adhere to established protocols, including hiding district books in drawers rather than giving them to students; failing to submit lesson plans regularly; failing to report student grades; failing to adhere to student discipline procedures; and failing to properly supervise his students which created a disruption. The teacher became aggressive and threatened an administrator after an inquiry about the classroom supervision incident. The teacher's aggressive behavior required police intervention. The ALJ determined that sufficient evidence existed, including credible witness testimony, to support discharge based upon dereliction of duties, insubordination and misconduct.

Ultimately, the TTC upheld the ALJ's decision to discharge the teacher. Several exceptions filed by Lewis were beyond the scope of the TTC's authority and dismissed, and evidentiary support demonstrated the teacher's failure to uphold his duties and violation of several work rules. The vast majority of the exceptions filed concerned witness credibility, to which the TTC gave great deference to the ALJ's determinations.

TEACHER EVALUATION PROCESS: *Escareno v Muskegon Public Schools*

In *Escareno v Muskegon Public Schools*[iv], a drop-out prevention teacher received three consecutive ineffective ratings between 2016 and 2019. The district alleged it was obligated to dismiss her under MCL 380.1249(2)(j).

Upon review, the ALJ determined that a miscalculation of the teacher's student growth percentage occurred during the 2017-2018 school year, which changed her rating from "ineffective" to "minimally effective." Despite the error, the ALJ analyzed whether the teacher's performance during the 2018-2019 school year was ineffective and whether she should be discharged for receiving one ineffective rating. The teacher appealed to the TTC arguing the witness testimony was not credible. However, she was not able to demonstrate evidence of dishonesty, bias or prejudice. Therefore, the TTC denied the exceptions.

The teacher also alleged her discharge was arbitrary and capricious because it was not an "established practice" to discharge a teacher for a single ineffective rating. The TTC found her record was thoroughly documented with evidence of efforts to help improve the teacher's performance. The TTC noted, "Discharge of a tenured teacher based on one performance rating of ineffective is not prohibited by the Teacher's Tenure Act or any other controlling authority."

Next, the teacher argued the ALJ erred in considering a final evaluation that was never presented to her and not entered into the record at the hearing. However, the teacher failed to make a timely objection. By failing to do so, the issue was not preserved for review by the TTC.

Additionally, the teacher alleged she had no notice her lesson plans were inadequate and that she did not receive consistent feedback. However, concerns were regularly discussed with the teacher and her IDP addressed the issue. She was required under the IDP to collaborate

Michigan Teacher Tenure Commission Update, continued on Page 8

Michigan Teacher Tenure Commission Update, continued from Page 7

with administration, but the teacher's "blunt rejection" to attend meetings was reasonably interpreted as a lack of commitment. To evaluate teachers and give feedback, the district uses the "5 Dimensions of Teaching and Learning" evaluation tool for its statutorily required evaluations. The teacher had access to the observation notes and had opportunities to discuss and refute conclusions, as well as seek clarification. Therefore, the TTC found the district did uphold its duty to evaluate and give feedback.

Further, the teacher did not meet the goals set for her in her IDP. In reaching this conclusion, the ALJ relied on evidence showing that the teacher failed to meet the goals of her lesson plans or student growth plans and had a high number of disciplinary referrals. Despite these noted performance concerns, the teacher never sought to cure the problem through district coaching attempts. Despite her experience, the teacher remained confused about the curriculum and did not take the initiative to attend professional development. Moreover, the teacher had a poor rapport with her colleagues and appeared disengaged with teaching her students.

The teacher argued that she was denied her due process when the matter proceeded to the TTC without school board approval; however, evidence showed the board did, in fact, properly proceed with tenure charges. Accordingly, the TTC rejected the teacher's claim and determined she did receive adequate notice of the tenure charges to meet due process requirements. Therefore, the TTC upheld discharge due to the teacher's ineffective performance evaluation for the 2018-2019 school year.

[i] *TTC 19-7 (2019).*
[ii] *TTC 20-1 (2020)*
[iii] *TTC 19-10 (2020).*
[iv] *TTC, 19-12 (2020).*

Michigan Employment Relations Commission Update

By Gary J. Collins, J.D. and William J. Blaha, J.D., Attorneys, Collins & Blaha, P.C.

The following four decisions issued by the Michigan Teacher Tenure during the past two years may be of interest to school districts. The decisions address the subject areas of dereliction of duties, misconduct and the teacher performance evaluation process.

Over the past two years, the Michigan Employment Relations Commission issued decisions in 48 cases. Approximately half of the cases involved disputes between an employer and a union, including cases regarding alleged discrimination based on antiunion animus, bargaining over prohibited subjects, the duty to bargain and construction of management rights provisions. The other half of the cases involved internal union matters, such as the duty of fair representation and expulsion from a union. Of interest to school districts is a case of first impression addressing whether the Public Employment Relations Act's prohibition on bargaining over teacher placement extends to placement in nonteaching cocurricular roles and cases demonstrating MERC's approach to evaluating evidence of antiunion animus.

TEACHER PLACEMENT

In *Garden City Education Association and Garden City Public Schools*[i], the school district awarded a vacant high school varsity soccer coach position to an individual outside of the local education association, even though a member of the association applied for the position. The association filed a grievance over the assignment, alleging that the school district had established a past practice of giving such cocurricular assignments to bargaining unit members. The school district denied the grievance and warned the association that pursuing it further would violate PERA's prohibition on bargaining regarding teacher placement. The association advanced the grievance to arbitration despite the school district's warning, leading the school district to file an unfair labor practice charge with MERC.

MERC analyzed whether assignment to a cocurricular coaching position constituted teacher placement for the purpose of PERA's prohibition on bargaining regarding teacher placement. Pursuant to Section 15(1)(j) of PERA, MCL 423.215(1)(j), any decision made by a public school employer regarding teacher placement is a prohibited subject of bargaining.

MERC found little ambiguity in the phrase "teacher placement." According to MERC, the ordinary meaning of "teacher placement" is placement in a school, course, classroom or other curricular assignment for which the teacher is certified. Thus, MERC found the assignment to any nonteaching position is beyond the teacher's princi-

Michigan Employment Relations Commission Update, continued on Page 9

Michigan Employment Relations Commission Update, continued from Page 8

pal job, and that assignment for which no certification is necessary would not constitute a teacher placement decision. In reaching this conclusion, MERC found guidance issued by the Michigan Department of Education regarding teacher placement referred entirely to the assignment of teachers to particular classes or subjects and not to cocurricular assignments. Further, MERC concluded that the legislative history of the tie-barred bills adding teacher placement as a prohibited subject of bargaining supported the conclusion that teacher placement does not refer to cocurricular assignments. The legislative analysis for the bills demonstrated that they focused on improving teachers' classroom performance accountability. MERC concluded "teacher placement" does not include assignment to nonteaching cocurricular positions, such as coaching and only encompasses teaching positions. Thus, MERC dismissed the ULP charge.

DISCRIMINATION BASED ON ANTIUNION ANIMUS

In *Leland Public School and Leland Education Association*[ii], a member of the local education association had served as the varsity cross-country coach from 2013 through the end of the 2017-2018 school year. The bargaining unit member had also served as president of the local education association from 2014 through 2016, served as vice president in 2017 and served again as president in 2018. At the end of April 2018, the school district decided not to renew the bargaining unit member's position as varsity cross-country coach and, instead, opened the position for interviews. The bargaining unit member interviewed for the coaching position, but the school district awarded the position to the current middle school cross-country coach. The association filed a ULP charge alleging that not renewing the bargaining unit member's position was discrimination motivated by antiunion animus due to the bargaining unit member's activities as an association officer.

Since no exceptions were filed in this case, MERC adopted the administrative law judge's conclusion and dismissed the ULP charge. The ALJ had analyzed whether evidence existed demonstrating that the school district's decision was motivated by antiunion animus. Pursuant to Section 10(1)(c) of PERA, MCL 423.210(1)(c), public employers are prohibited from discrimination regarding hiring and the terms and conditions of employment stemming from prounion or antiunion animus. In examining cases involving alleged antiunion animus, MERC requires a charging party to present substantial evidence from which a reasonable inference of discrimination can be drawn.

The ALJ found the bargaining unit member's testimony at the hearing did not sufficiently establish that the school district acted with antiunion animus. The bargaining unit member testified her position as varsity cross-country coach had not been renewed based on her involvement in a grievance for another association member in her positions as vice president and president of the association. The bargaining unit member further testified her building principal was "cold" toward her and that he had repeatedly asked her to resign her coaching position in favor of the middle school coach. The ALJ concluded the bargaining unit member's testimony did not constitute substantial evidence of antiunion animus. According to MERC, the bargaining unit member failed to produce any direct evidence the ALJ could rely upon to conclude that the principal's comments were motivated by antiunion animus. Thus, MERC dismissed the ULP charge.

In *Ypsilanti Community Schools and Teamsters Local 243*[iii], the school district decided to bring their student transportation services back in-house after utilizing a private contractor for four years. The employees employed by the private contractor were covered by a collective bargaining agreement between the contractor and Teamsters Local 243. The school district interviewed approximately 60 applicants to fill 50 positions to staff its new transportation positions. The majority of interviewed applicants had previously provided transportation services to the school district through the private contractor. Two applicants who had served as union stewards at the contractor were not hired by the school district. The union filed a ULP charge against the school district, alleging it had declined to hire the two applicants due to their history of serving as union stewards. The school district denied the allegations and argued that it had not hired the two applicants due to the first applicant's alleged attendance problems while working for the contractor and due to the second applicant making interviewers feel uncomfortable during the interview when discussing diversity.

MERC concluded the union sufficiently demonstrated that the school district's decision was motivated by antiunion animus and ordered that the two applicants be granted the positions they applied for with backpay. MERC analyzed whether sufficient evidence existed demonstrating the school district's decision was motivated by antiunion animus. Pursuant to Section 10(1)(c) of PERA, MCL 423.210(1)(c), public employers are prohibited

Michigan Employment Relations Commission Update, continued on Page 10

Michigan Employment Relations Commission Update, continued from Page 9

from discrimination regarding hiring and the terms and conditions of employment stemming from prounion or antiunion animus.

The evidence presented in this case consisted of testimony by the two applicants and school district officials. MERC stated it would not overturn an ALJ's credibility determinations when evaluating witness credibility unless presented with clear evidence to the contrary. In this case, the ALJ had found the school district transportation manager's testimony regarding the school district's hiring decisions to be less credible than the testimony offered by the two applicants. The ALJ had found the transportation director's testimony to be disjointed, self-serving and full of gaps. MERC stated the ALJ had also found it significant that the transportation director testified he had been told stories regarding the applicants' activities as union stewards. Further, MERC found evidence that showed the transportation director had never checked the attendance records for the first applicant, negating the school district's argument that it had decided not to hire the applicant due to perceived attendance problems. Regarding the second applicant's interview, the ALJ found the transportation director was unable to articulate what statements made by the applicant during the interview caused offense, challenging the transportation director's reason for not hiring the second applicant. Thus, the ALJ concluded the reasons offered by the school district for declining to hire the two applicants were pretextual based on the lack of credibility of the transportation director's testimony. MERC concluded the school district had violated PERA by declining to hire the two applicants based on their previous protected activity as union stewards. Thus, MERC found the school district had committed a ULP.

---

[i] *34 MPER 19 (2020).*
[ii] *33 MPER 42 (2020) (no exceptions).*
[iii] *34 MPER 33 (2021).*