STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

CHRIS JURRIANS, GAIL SCHULING, LILA DELINE, RINA SALA-BAKER, and TOM NORTON

Plaintiffs,

CASE NO. 10-12758-CL

vs

HON. JAMES ROBERT REDFORD

KENT INTERMEDIATE SCHOOL DISTRICT BOARD, KENT COUNTY EDUCATION ASSOCIATION, BYRON CENTER PUBLIC SCHOOLS, BOARD OF EDUCATION OF THE BYRON CENTER PUBLIC SCHOOLS, BYRON CENTER EDUCATION ASSOCIATION KCEA/MEA/NEA, BYRON CENTER EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, COMSTOCK PARK PUBLIC SCHOOLS, COMSTOCK PARK SCHOOL BOARD, COMSTOCK PARK EDUCATIONAL EMPLOYEES ASSOCIATION (CPEEA)/KCEA/MEA/NEA, SCHOOL DISTRICT OF GODFREY-LEE, GODFREY-LEE BOARD OF EDUCATION, GODWIN HEIGHTS PUBLIC SCHOOLS, GODWIN HEIGHTS BOARD OF EDUCATION, GODWIN HEIGHTS SUPPORT STAFF ASSSOCIATION, GRANDVILLE PUBLIC SCHOOLS, BOARD OF EDUCATION OF THE GRANDVILLE PUBLIC SCHOOLS, GRANDVILLE EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, SCHOOL DISTRICT OF KENOWA HILLS, KENOWA HILLS PUBLIC SCHOOLS BOARD OF EDUCATION, KENOWA HILLS EDUCATION ASSOCIATION, KENOWA HILLS SUPPORT STAFF ASSOCIATION (KHSSA/MEA/NEA), LOWELL AREA SCHOOLS, BOARD OF EDUCATION OF THE LOWELL AREA SCHOOLS, LOWELL EDUCATION ASSOCIATION-MEA-NEA, LOWELL EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION (LESPA)/MEA/NEA/KCEA, NORTHVIEW PUBLIC SCHOOLS, BOARD OF EDUCATION OF THE NORTHVIEW PUBLIC SCHOOLS, ROCKFORD PUBLIC SCHOOLS, ROCKFORD BOARD OF EDUCATION OF THE ROCKFORD PUBLIC SCHOOLS, ROCKFORD EDUCATION ASSOCIATION R.E.A., ROCKFORD EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION R.E.S.P.A.

Defendants.

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OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of this Court held on March 1, 2011
at the Kent County Courthouse, Grand Rapids, Michigan.

For the reasons set forth below, the Court grants summary disposition in favor of all defendants and against plaintiffs in the instant case pursuant to MCR 2.116(C)(4), (5) and (7).[1] This Court finds plaintiffs lack standing to sue, the Court is without subject matter jurisdiction and that the claim is barred because the pertinent period of limitations has run.

PROCEDURAL BACKGROUND

Plaintiffs, five taxpayers of Kent County are suing Defendants, Kent Intermediate School District, nine of its constituent local districts, and the unions who represent school staff employed in those school districts, alleging that the schools and the unions violated the Public Employment Relations Act ("PERA") by entering into a collective bargaining agreement that included a provision on privatization. Presently before the Court is Defendants' Motion for Summary Disposition arguing that (1) Plaintiffs have no standing; (2) the Michigan Employment Relations Commission ("MERC") has exclusive jurisdiction over the claim alleged in the Complaint; and (3) Plaintiffs' Complaint was filed outside of the applicable six-month statute of limitations. The Court heard oral arguments on February 18, 2011.

FACTUAL BACKGROUND

On March 8, 2010, the Kent Intermediate School District Board and the boards of nine of its constituent local districts entered into a one-year Collaborative Settlement

[1] The Court's grant of Defendants' Motion should not be construed as approval of language between a public employer and a collective bargaining agency of its employees which addresses a topic which is specifically excluded from consideration under MCL 423.215(3)(f). Furthermore, this Court is concerned that the Defendant Schools and Defendant Associations have included such a provision in a collective bargaining agreement despite both sides agreeing that the language is unenforceable under the law.

Agreement with the bargaining representatives of their unionized employees. As part of the agreement the schools included a provision on privatization. That provision states:

> **Privatization:** All districts agree not to privatize any KCEA/MEA unionized services for the life of this Agreement.

Plaintiffs have brought the present lawsuit to strike the privatization provision from the Collaborative Agreement as it violates MCL 423.215(3)(f), and prohibit the inclusion of any such provisions in the future.

STANDARD OF REVIEW

Summary disposition pursuant to MCR 2.116(C)(4) for lack of subject matter jurisdiction is appropriate where the plaintiff has failed to exhaust administrative remedies or where a statutory exclusive remedy provision applies. *Bock v General Motors corp.*, 247 Mich App 705; 637 NW2d 825 (2001). Alleging that the court lacks subject matter jurisdiction, is an issue of law and may be raised at any time. *McCleese v Todd*, 232 Mich App 623, 627; 591 NW2d 375 (1998).

A motion brought under MCR 2.116(C)(5) tests the legal capacity of one of the parties to sue. When ruling on a motion under MCR 2.116(C)(5), the trial court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *McHone v Sosnowski*, 239 Mich App 674; 609 NW2d 844 (2000).

On a motion for summary disposition based on the affirmative defenses listed in MCR 2.116(C)(7), all well pleaded allegations are accepted as true, unless specifically contradicted by affidavits or other documentation, and construed most favorably to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A (C)(7)

motion should not be granted unless no factual development can provide a basis for recovery. *Traver Lakes Community Maintenance Assn. v Douglas Company*, 224 Mich App 335; 568 NW2d 847 (1997).

ANALYSIS

I. STANDING

The Court finds Plaintiffs lack standing to bring this lawsuit. The legal doctrine of standing has been the subject of several cases before the Michigan Supreme Court in recent years.[2] After nearly a decade of a more restrictive test rooted in the traditional case or controversy requirement of the United States Constitution, the Michigan Supreme Court recently adopted a broader approach in *Lansing Schools Education Association v. Lansing Board of Education*, 487 Mich 349; 792 NW2d 686 (2010), in an effort to restore "Michigan's long-standing historical approach to standing". *Id.*[3]

The Michigan Supreme Court in *Lansing Schools* explained that the purpose of the standing doctrine historically was to "ensure sincere and vigorous advocacy by litigants." The Court ultimately provided a new test and held that a litigant has standing:

> (1) whenever there is a legal cause of action,
> (2) whenever the litigant meets the requirements of MCR 2.605 to seek a declaratory judgment,
> (3) where he/she has a special injury, or right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large, or

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[2] *Lee v Macomb County Board of Commissioners*, 464 Mich 726; 629 NW2d 900 (2001); *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004); *Michigan Citizens for Water Conservation v Nestle' Waters North America*, Inc., 479 Mich 280; 737 NW2d 447 (2007); *Anglers of the AuSable, Inc. v Department of Environmental Quality*, 488 Mich. 69; --- NW2d --- (2010).

[3] *Lansing Schools* specifically overruled *Lee v Macomb County Board of Commissioners*, *National Wildlife Federation v Cleveland Cliffs Iron Co*, and *Michigan Citizens for Water Conservation* v *Nestle' Waters North America, Inc., infra.*

(4) if the statutory scheme implies that the legislature intended to confer standing on the litigant.

Id. at 372.

Plaintiffs in this case have abandoned tests two and three from *Lansing Schools* and argue that, as taxpayers, they have a legal cause of action pursuant to MCL 600.2041 or in the alternative, that the statutory scheme of the Public Employment Relations Act implies that the Legislature intended to confer standing.[4] This Court finds the teachings of *Lansing Schools* does not extend standing to the Plaintiffs under the remaining first or fourth tests.

A. Legal Cause of Action

Plaintiffs first argue that they have standing based on a legal cause of action. The Court disagrees. Plaintiffs, not being parties to the collective bargaining agreement in question, have brought this action as a "taxpayer lawsuit" under MCL 600.2041(3). The statute states in pertinent part:

> (3) an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in . . . the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside.

This provision of the statute unambiguously creates a legal cause of action in only two narrowly defined circumstances; (1) to prevent an illegal expenditure of state funds, or

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[4] Although Plaintiffs do not assert standing under the "third" test in *Lansing Schools*, the Court would note that Plaintiffs have not shown any special injury, right, or substantial interest that would be detrimentally affected in a manner distinct from the citizenry at large. The finding of such an interest was the basis on which the Michigan Supreme Court determined there was standing in *Lansing Schools*. 487 Mich at 378 (2010). The Court further notes, that the recent holding by the Court of Appeals in *Retired Detroit Police and Fire Fighters Association Inc v Detroit Police Officers Association*, 2010 WL 5129841 (Docket No. 293998; December 16, 2010), which denied standing to an association of retired police and firefighters to bring an action against a retirement board on the grounds that the retirees lacked a sufficient interest, would support the finding that Plaintiffs lack standing in this case.

(2) if a law relating to the expenditure of state funds is being challenged on constitutional grounds. Plaintiffs assert that they meet the expenditure of public funds requirement on the sole basis that the fact situation in this case is analogous to the claim in *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993).

In *House Speaker*, there was a claim that the Governor had no authority to restructure the Department of Natural Resources. The Michigan Supreme Court held that assuming the Governor did not have the authority to create the "new" department, any monies spent by the agency would be done so illegally. Unlike in *House Speaker*, where expenditures made by an allegedly improperly constituted state agency were by definition illegal, the instant case deals with a lawfully established school district that has been given broad statutory authority to expend school money on school employees' services. MCL 380.11a. Moreover, Plaintiffs concede that the school districts are not now, nor were they prior to entering into the Collective Agreement, under a duty to privatize. Thus even if the no-privatization clause were removed from the collaborative bargaining agreement, the school districts would likely spend the same amount of money. Therefore, Plaintiffs' claim that there would be illegal expenditures of state funds is speculation.

Regardless of the existence of illegal expenditures, Plaintiffs lack the capacity to sue as they do not satisfy the requirements for standing in a "taxpayer lawsuit" set forth in *Menendez v City of Detroit*, 227 Mich 476; 60 NW2d 319 (1953). The Michigan Supreme Court held in *Menendez* that to maintain a taxpayer action, a plaintiff-taxpayer must show that "he will sustain substantial injury or suffer loss or damage as a taxpayer,

through increased taxation and the consequences thereof" as a result of an illegal government expenditure. *Id.*

Plaintiffs have not suffered any injury or loss as a result of the no-privatization provision at issue in this case, and nowhere in the record do they identify how they will suffer any such injury or loss in the future. Instead, Plaintiffs argue that *Menendez, supra,* should be ignored because it was decided before the Legislature enacted MCL 600.2041. The Court finds this argument unpersuasive. The Michigan Court of Appeals in *Waterford School District v State Board of Education*, 98 Mich App 658; 296 NW2d 328 (1980), clearly explained that *Menendez's* "substantial injury" requirement must be established to maintain a taxpayer action under MCL 600.2041. The Court held:

> The Revised Judicature Act permits litigation to prevent the illegal expenditure of state funds or to test the constitutionality of a related statute "in the names of at least five residents of this state who own property assessed for direct taxation by the county wherein they reside". M.C.L. 600.2041(3), M.S.A. § 27A.2041(3). The taxpayers must demonstrate that they will sustain substantial injury or suffer loss or damage as taxpayers, through increased taxation and the consequences thereof. *Menendez v Detroit*, 337 Mich 476, 482, 60 NW2d 319 (1953), *Jones v Racing Comm'r*, 56 Mich App 65, 68, 223 NW2d 367 (1974). A taxpayer lacks standing unless these requirements are met.

This Court is satisfied that *Menendez, supra,* is binding precedent and controls in taxpayer actions under MCL 600.2041(3). This Court is also satisfied that Plaintiff taxpayers have not suffered an injury or loss different from the citizenry at large, and therefore have not articulated a legal cause of action.

B. Legislative Intent To Confer Standing On Taxpayers In The Statutory Scheme Of The Public Employment Relations Act.

Plaintiffs next argue they have standing under the fourth test from *Lansing Schools, supra*, because the statutory scheme of the Public Employment Relations Act (PERA) implies that the Legislature intended to give individual taxpayers standing to enforce the prohibited bargaining provisions of the statute. The Court disagrees.

Plaintiffs, in effect, are asking the Court to create an implied private right of action. Historically, Michigan courts have been reluctant to create implied remedies and have done so only "to give effect to the intent of the legislature as expressed by the plain meaning of the statute." *Grand Traverse County v State,* 450 Mich. 457, 463-464; 538 NW2d 1 (1995).

In the absence of an express private right of action, Michigan limits the creation of implied private rights of action. In *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd,* 472 Mich 479; 697 NW2d 871 (2005), when the Michigan Supreme Court addressed this issue in the context of a federal act, it also took the opportunity to review, revise and restate the appropriate judicial approach to implying private rights of action. At the outset, the Court stated: "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Rather, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." Thus, to determine whether plaintiff could bring a private cause of action to enforce a provision in a federal act required an assessment of whether Congress intended to create such a cause of action. *Id.* at 496. Finding that the act did not evidence such an intent, the Court concluded that plaintiff's action must be dismissed. *Id.*

The Michigan Supreme Court expressly articulated in *Office Planning* that:

> [i]n light of the clear indication of congressional intent, we are precluded from venturing beyond the bounds of the statutory text to divine support for the creation of a private claim to enforce § 9839(a). To do so would be to substitute our own judgment for that of Congress and thus to usurp legislative authority, something that we of course decline to do.

Id. at 505.

This Court is satisfied that nothing in the statutory text of PERA indicates an intent by the Legislature to grant a private cause of action to taxpayers to enforce "prohibited bargaining". Plaintiffs do not point to any language in the statute that suggests such an intent existed and instead rely on PERA's legislative history. The Court finds however, a review of the plain language of the statute fails to indicate that the Legislature intended to empower taxpayers to enforce this section of the statute.

When the Legislature intends to create a private cause of action, it generally includes a statutory provision stating as much in clear and unambiguous terms. The Michigan Environmental Protection Act, for example clearly provides:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

MCL 324.1701(1).

Similarly, the Legislature created private causes of action in other provisions of PERA. In Section 17, which prevents bargaining representatives and education associations from improperly interfering with agreements made between a public employer and a

bargaining unit, the Legislature specifically granted "any other person adversely affected by the violation [of Section 17] to bring an action to enjoin the violation." MCL 423.217.

If the Legislature had intended to grant taxpayers the right to bring an action to enforce the prohibited bargaining provisions under MCL 423.215(3), it could have easily done so. It is not the place of this Court to venture beyond the statutory text and substitute its own judgment for that of the Legislature. Because Plaintiffs are unable to establish standing under *Lansing Schools, supra*, the Court dismisses Plaintiffs' Complaint pursuant to MCR 2.116(C)(5).

II. SUBJECT MATTER JURISDICTION

The Public Employment Relations Act, MCL 423.201 *et seq.*, gives the Michigan Employment Relations Commission (MERC), not the courts, exclusive jurisdiction over allegations of unfair labor practices. *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 NW2d 818 (1977). This reinforces Michigan's public policy goals of preserving the stability and effectiveness of public sector labor relations as MERC has the necessary "administrative expertise to entertain and reconcile competing allegations of unfair labor practices under PERA." *Rockwell v Board of Ed of School Dist of Crestwood*, 393 Mich 616, 630; 227 NW2d 736 (1975). Moreover, Michigan courts have uniformly recognized the MERC's exclusive jurisdiction for claims brought under PERA.[5] The Court is therefore not persuaded by Plaintiffs' argument that the Legislature did not seek to use the Michigan Employment Relations Commission framework for unfair labor practices violations of MCL 423.215.

[5] See *Id.* at 640-41; (MERC alone has jurisdiction ... under the PERA); *Van Buren Public School Dist v Wayne Coutny Circuit Judge*, 61 Mich App 6, 14; 232 NW2d 278 (1975) ("It is clear that MERC has been given exclusive jurisdiction over all unfair labor practices.").

The Court reads Sections 10, 15 and 16 of the PERA *in pari materia. Jackson Community College v Michigan Dept. of Treasury*, 241 Mich App 673; 621 NW2d 707 (2000). The basic goal of PERA is the resolution of labor-management strife in the public sector through collective bargaining. *Detroit Police Officers Association v City of Detroit*, 428 Mich 79; 404 NW2d 201 (1987). Section 15 establishes and defines the duty to bargain by a public employer and labor organization. Section 10 identifies unfair labor practices that may be committed by public employers and labor organizations, including the refusal to bargain in good faith. Section 16 establishes the procedures for the determination of unfair labor practices and gives MERC exclusive jurisdiction.

The collective bargaining obligations discussed in Section 15 advance the same policy goal of resolving labor-management disputes as do the other sections of PERA. The Collective bargaining process is, in fact, an inextricable element in advancing that policy. Therefore, the Court finds no support for the argument that the Legislature did not intend for MERC to handle claims under Section 15 and dismisses Plaintiffs' claim for lack of jurisdiction to determine the merits of the alleged PERA violation.

III. APPLICABLE STATUTE OF LIMITATIONS

Section 1 of PERA provides that "the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes." MCL 423.1. The Legislature reinforced this policy by establishing a six-month period of limitations for unfair labor practices under PERA. MCL 423.216. The six-month statute of limitations has consistently been applied to unfair labor practice claims under PERA in the past, and the Court is satisfied that it applies in the instant case. Plaintiffs' Complaint alleges a violation of PERA. The Court therefore finds no merit in Plaintiffs' argument that this is

a contractual claim falling under the six-year statute of limitations pursuant to MCL 600.5807(8). Plaintiffs filed their Complaint in this case on December 15, 2010, over three months after the six-month limitation period had expired. Plaintiffs' claim is therefore dismissed pursuant to MCR 2.116(c)(7).

IV. CONCLUSION

Plaintiffs' action is hereby dismissed under MCR 2.116(C)(4) (5) and (7) because; (1) Plaintiffs, as taxpayers lack the capacity to sue under the current Michigan law relating to the doctrine of standing; (2) this Court lacks subject matter jurisdiction to hear an unfair labor practice claim under PERA; and (3) Plaintiffs' Complaint was filed more than three months after the expiration of the applicable statute of limitations.

WHEREFORE:

1. Defendants' joint Motion for Summary Disposition pursuant to MCR 2.116(C)(4), (5) and (7) is **GRANTED**.
2. Defendant Associations request for costs and other sanctions is respectfully **DENIED**.

This is a final order in this case.

IT IS SO ORDERED.

JAMES ROBERT REDFORD

James Robert Redford, Circuit Judge