STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SHIAWASSEE INTERMEDIATE SCHOOL
DISTRICT EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

MERC Case No. CU15 F-019
-and- Hearing Docket No. 15-040854

SHIAWASSEE REGIONAL EDUCATION
SERVICE DISTRICT,
Public Employer-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Erin M. Hopper and Jeffrey S. Donahue, for Respondent

Thrun Law Firm, P.C., by Lisa L. Swem, for Charging Party

DECISION AND ORDER

On January 12, 2016, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order on Motions for Summary Disposition in the above matter. The ALJ found that by demanding to arbitrate a grievance over prohibited subjects of bargaining, Respondent Shiawassee Intermediate School District Education Association, MEA/NEA (Union), breached its duty to bargain in good faith in violation of § 10(2)(d) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(2)(d). The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

The Union filed exceptions to the ALJ's Decision and Recommended Order, along with a supporting brief, on February 1, 2016. Charging Party, Shiawassee Regional Education Service District (Employer), requested and received an extension of time to file its response to the Union's exceptions. The Employer filed its brief in support of the ALJ's Decision and Recommended Order and a request for oral argument on March 14, 2016.

In its exceptions, the Union contends that the ALJ erred by concluding that 2011 PA 103 (Act 103), prohibits bargaining over all decisions related to teacher discipline. The Union asserts that the ALJ erred by finding that it violated § 10(2)(d) by demanding that the Employer arbitrate a grievance relating to teacher discipline. In particular, the Union contends that the grievance at

issue alleged that the Employer had violated the *Weingarten*[1] rights of a member of a bargaining unit represented by the Union and that the Employer had also violated due process provisions contained in articles of the Parties' collective bargaining agreement. According to the Union, the ALJ erred by concluding that language in the collective bargaining agreement providing for constitutional due process in matters of teacher discipline relates to a prohibited subject of bargaining under Act 103. Additionally, the Union claims that the ALJ erred by failing to apply the standards set forth in our decision in *Van Dyke Pub Sch*, 29 MPER 32 (2015) (no exceptions).

The Employer has requested oral argument in support of the ALJ's decision. After reviewing the exceptions and the briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, the Employer's request for oral argument is denied.

Upon reviewing the record and the exceptions filed by the Union, we find that the ALJ's decision should be affirmed.

Factual Summary:

The facts in this case are not materially in dispute. We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order; we will not repeat them here, except as necessary.

The Employer gave Amber Creech, a member of a bargaining unit represented by the Union, a two-day unpaid disciplinary suspension in late January 2015. The Union filed a grievance on February 9, 2015, which sought rescission of the discipline and back pay for Creech. In its grievance, the Union alleged that the Employer violated Creech's *Weingarten* rights, Articles 1E, 6A, and 6C of the Parties' collective bargaining agreement, and Board Policies 3139 and 3211.

Articles 1E, 6A, and 6C of the Parties' collective bargaining agreement provide:

> Article 1E. Nothing contained herein shall be construed to deny or restrict any employee or the Board rights either may have under Michigan law.
>
> Article 6A. Recognizing the importance of adequate space, facilities, and other environmental conditions which are conducive to educational achievement, the Board will cooperate with the local school district in a joint effort to provide such teaching conditions for the itinerant staff. If an employee reports hazardous or otherwise unfavorable working conditions to a representative of this Board, such representative will investigate the situation at the earliest possible time and then in his/her best judgment and within the scope of his/her authority, take whatever action is necessary to improve the situation.

[1] The right of an employee to representation, where the employee reasonably believes that an investigatory interview by the employer may lead to his or her discipline, was set forth in *NLRB v J. Weingarten Inc*, 420 US 251 (1975). The doctrine was adopted by this Commission in *Univ of Michigan*, 1977 MERC Lab Op 496.

Article 6C. An employee shall at all times be entitled to have present a representative of the Association. When a request for such representation is made, no action shall be taken with respect to the employee until such representation of the Association is present.

The Employer's Board Policies 3139 and 3211 state:

Policy 3139. Whenever it becomes necessary to discipline a member of the staff, the Board of Education directs the Superintendent to utilize related procedures described in the current negotiated agreement, if applicable.

* * *

Using due process procedures, the Superintendent shall conduct an investigation, as appropriate to the situation, including providing the employee with reasonable notice and the opportunity to respond.

Policy 3211. The Board of Education expects all its employees to be honest and ethical in their conduct, and to comply with applicable State and Federal law, Board policies and administrative guidelines. The Board encourages and requires staff to report possible violations of these Board expectations.

* * *

Any employee making such a report shall be protected from discipline, retaliation, or reprisal for making such report as long as the employee had a good faith belief as to the accuracy of any information reported.

The Employer denied the grievance at each step of the grievance process. On May 29, 2015, the Union filed a demand to arbitrate the grievance. Contending that the Union was attempting to advance prohibited subjects of bargaining to arbitration, the Employer filed the unfair labor practice charge in this matter.

Discussion and Conclusions of Law:

In *Pontiac Sch Dist*, 28 MPER 34 (2014), we first addressed the question of whether a party violates its duty to bargain by processing a grievance over a prohibited subject of bargaining to arbitration. In that case, we explained that prohibited subjects of bargaining can never become an enforceable part of a collective bargaining agreement, citing *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). Although the parties may discuss prohibited subjects, § 15(3) of PERA prohibits parties from bargaining over those subjects. See,

also, *Calhoun Intermediate Ed Assn, MEA/NEA*, 28 MPER 26 (2014), aff'd, ____ Mich App ____ (2016). We stated in *Pontiac Sch Dist*:

> The Union's actions in advancing the Lieberman grievance to arbitration are analogous to insistence on negotiating over prohibited subjects of bargaining when the other party has repeatedly refused to negotiate those matters, as in *Calhoun*. Here the Union was attempting to use the arbitration process to force the Employer to go beyond the discussion stage of the grievance process to unlawfully enforce contract provisions and/or past practices made unenforceable by § 15(3)(j) of PERA.

Act 103 amended § 15(3) of PERA to add several provisions prohibiting collective bargaining between public school employers and the representatives of their employees over certain issues, including decisions regarding the discipline or discharge of teachers. Act 103 was effective July 19, 2011, prior to the effective date of the collective bargaining agreement containing the provisions that the Union sought to enforce in the grievance filed on behalf of Creech. Therefore, those provisions of the Parties' collective bargaining agreement are unenforceable to the extent that they apply to prohibited subjects of bargaining.

Interpretation of § 15(3)(m) of PERA

Our goal in construing the language of § 15(3)(m) of Act 103 is to effectuate the Legislature's intent as inferred from the wording of the statute. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157 (2011); *Casco Twp v Sec'y of State*, 472 Mich 566, 571, (2005); *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748 (2002). The most reliable evidence of the Act's intent is the statute's wording. *Neal v Wilkes*, 470 Mich 661, 665 (2004); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). Each word of a statute should be given meaning, and no word should be treated as surplusage. *Apsey v Mem'l Hosp*, 477 Mich 120, 127 (2007); *Baker v Gen Motors Corp*, 409 Mich 639, 665 (1980). Where there is no statutory definition of the words used in the statute, those words and phrases must be given their plain and ordinary meaning. *Western Michigan Univ Bd of Control v State*, 455 Mich 531, 538-539 (1997); *Bingham v American Screw Products Co*, 398 Mich 546, 563 (1976). However, our determination of the meaning of undefined words and phrases may be aided by consulting a dictionary. See *Ionia Ed Ass'n v Ionia Pub Sch*, 311 Mich App 479, 491-92 (2015); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002).

The Union contends that the ALJ erred by concluding that Act 103 prohibits bargaining over all topics related to teacher discipline and any decision related to teacher discipline. As the ALJ observed, § 15(3)(m) is broadly worded to encompass decisions about the formulation and implementation of policies regarding teacher discipline or discharge, as well as decisions concerning the discipline or discharge of an individual employee or the impact of those decisions on that employee or the bargaining unit. Section 15(3)(m) does not provide exceptions to its prohibition against bargaining over decisions related to policies regarding teacher discharge or discipline, decisions regarding the discharge or discipline of individual teachers, or the impact of those decisions on individual teachers or the bargaining unit.

We note the Union's argument that the language of § 15(3)(m) is similar to the language of a proposed version of § 15(3)(j) contained in House Bill 4628 when it was passed by the House on June 9, 2011. At that time, § 15(3)(j) & (m) stated:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> * * *
>
> (j) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policy for placement of teachers required under section 1247 of the Revised School Code, 1976 PA 451, MCL 380.1247, any decision made by the public school employer pursuant to that policy, or the impact of those decisions on an individual employee or the bargaining unit.
>
> * * *
>
> (m) For public employees who are teachers as defined in Section 1 of Article 1 of 1937 (Ex Sess) PA 4, MCL 38.71, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees who are teachers as defined in Section 1 of Article 1 of 1937 (Ex Sess) PA 4, MCL 38.71, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under Section 1 of Article IV of 1937 (Ex Sess) PA 4, MCL 38.101.

The above quoted language of House Bill 4628 was amended and subsequently became Act 103. The language of § 15(3)(j) & (m) in Act 103, provides:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> * * *
>
> (j) Any decision made by the public school employer regarding the placement of teachers, or the impact of that decision on an individual employee or the bargaining unit.
>
> * * *
>
> (m) For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning

> the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 (Ex Sess) PA 4, MCL 38.101.

In *Ionia Pub Sch*, 27 MPER 55 (2014), we reviewed the difference between the language of § 15(3)(j) when it was passed by the House and the revised language of § 15(3)(j) when it was enacted as part of Act 103. We noted the similarity between the House-passed version of § 15(3)(j) and the language of several other subdivisions of § 15(3), including subdivision (m). In *Ionia Pub Sch*, we rejected the union's argument that the change in the language of § 15(3)(j) narrowed its scope and concluded that the coverage of the final language of § 15(3)(j) was broader in scope than that of the House-passed version. We found that the language "'any decision' necessarily includes decisions regarding the development, content, standards, procedures, adoption, and implementation of a public school employer's policies regarding teacher placement, and, therefore, those decisions as well as decisions directly affecting individual teachers are prohibited subjects of bargaining."

In *Ionia Ed Ass'n v Ionia Pub Sch*, 311 Mich App 479, 491-92 (2015), the Court of Appeals affirmed our decision and agreed with our reasoning with respect to the change in the language of § 15(3)(j) stating:

> The IEA argues that 2011 HB 4628 demonstrates that the Legislature initially considered including among the lists of prohibited subjects of bargaining a public school employer's decisions about procedures and standards used in teacher placement decisions, but declined to adopt such a broad policy. Instead, according to the IEA, the Legislature elected to use the phrase "[a]ny decision," which the IEA contends is not as broad in its scope as the language that was initially proposed in 2011 HB 4628, but subsequently rejected.
>
> . . . Indeed, we find the language that the Legislature eventually adopted in § 15(3)(j) is *broader* in scope than the language proposed in 2011 HB 4628, as it applies to "[a]ny decision," without limitation. Decisions about policies and procedures regarding teacher placement would necessarily fall within the ambit of "[a]ny decision" about teacher placement. (Emphasis in original.)

Although § 15(3)(m) does not say that it prohibits bargaining over "any decision," the list of decisions over which bargaining is prohibited is extensive. As the ALJ noted, "the Legislature, in listing the subjects made prohibited bargaining topics by § 15(3)(m), prohibited bargaining over the 'content, standards, procedures . . . of a policy regarding discharge or discipline of an employee.' Webster's Unabridged Dictionary, 2nd edition (1987), defines 'content' as 'something that is contained in,' or 'the subjects or topics covered in a book or document.'" Moreover, the bargaining prohibition applies to "procedures . . . and implementation of a policy regarding

discharge or discipline of an employee." The Merriam-Webster online dictionary[2] defines "procedures" as "a particular way of accomplishing something or of acting." Thus, we can interpret § 15(3)(m) as prohibiting bargaining over procedures, or a particular way of accomplishing discipline or discharge as contained in a public school employer's policy. The language of § 15(3)(m) also prohibits bargaining over "decisions *concerning* the discharge or discipline of an individual employee." The Merriam-Webster online dictionary[3] defines concerning as "relating to" or "regarding." Full examination of the language contained in § 15(3)(m) extends not only to decisions to discharge or discipline particular employees, but also substantive or procedural decisions related to discharge or discipline of individual employees and decisions regarding the procedures set forth in an employer's policy regarding discipline or discharge. Therefore, we cannot say that the result in this matter would differ significantly if the Legislature had changed the language of § 15(3)(m) in a manner comparable to the change made in § 15(3)(j) and prohibited bargaining over "any decision made by the public school employer regarding the [discipline or discharge] of teachers, or the impact of that decision on an individual employee or the bargaining unit." We find nothing in the language of § 15(3)(m) to indicate that its applicability is limited to decisions on whether an individual employee should be disciplined or discharged.

The Union contends that the exclusion of the "any decision" language regarding discipline and discharge "shows the legislative intent that the prohibition on bargaining not extend to 'all decisions,' but only to those specifically listed." We agree that § 15(3)(m) only applies to the decisions specifically listed therein. However, the decisions listed in § 15(3)(m) are broad enough to include the Employer's decisions regarding the procedures it chose to use or to forego in its discipline of Creech.

Incorporation of Statutory or Constitutional Rights into the Collective Bargaining Agreement or Employer Policy

The Union asserts that § 15(3)(m) does not prohibit arbitrating a grievance alleging a violation of a statutory or constitutional right that has been incorporated into the collective bargaining agreement. However, where a grievance stemming from the discipline or discharge of a teacher alleges a violation of a statutory or constitutional right incorporated into the collective bargaining agreement, the arbitrability of that grievance depends upon whether the grievance seeks to enforce the statutory or constitutional right in the context of teacher discipline or discharge. Where a statutory or constitutional right has been incorporated into a collective bargaining agreement, an effort to enforce that provision of the collective bargaining agreement in arbitration is prohibited by § 15(3)(m) to the extent that the grievance concerns a decision by a public school employer related to teacher discipline or discharge. Therefore, to the extent that Articles 1E, 6A, and 6C of the Parties' collective bargaining agreement and Board Policies 3139 and 3211 apply to teacher discipline or discharge, those provisions cover prohibited subjects of bargaining and are unenforceable in grievance arbitration.

In looking at the plain language of § 15(3)(m), it is clear that this subdivision addresses decisions about employer policy as well as other decisions related to discipline or discharge.

[2] http://www.merriam-webster.com/dictionary/Procedures.
[3] http://www.merriam-webster.com/dictionary/concerning.

Section 15(3)(m) makes decisions about the development, content, standards, procedures, and adoption of a policy regarding the discharge or discipline of an employee prohibited subjects of bargaining. Therefore, demanding to arbitrate a grievance over alleged violations of the aforementioned board policies and articles of the collective bargaining agreement in the discipline of an employee is an effort to challenge decisions regarding the implementation of the Employer's policies regarding employee discipline. The Union's actions in attempting to arbitrate a grievance over the Employer's policy decisions about procedures used in the discipline of Creech, based on an alleged violation of the aforementioned articles and board policies, is an attempt to enforce provisions applying to prohibited subjects of bargaining.

The Union contends that the grievance at issue alleged that the Employer had violated Creech's *Weingarten* rights and the due process provisions contained in articles of the Parties' collective bargaining agreement and the Employer's board policies. According to the Union, the ALJ erred by concluding that language in the collective bargaining agreement providing for constitutional due process in matters of teacher discipline relates to a prohibited subject of bargaining under Act 103. We find no error. The Employer's board policies that require the use of due process in investigating and determining whether an employee should be disciplined cover prohibited subjects of bargaining. A contractual provision indicating that employees are entitled to union representation upon request may be construed as a promise not to violate employees' *Weingarten* rights. Similarly, a contractual provision that promises not to deny or restrict any rights an employee may have under Michigan law, under certain circumstances, may be viewed as a promise not to violate an employee's *Weingarten* and constitutional due process rights. Where those promises apply to employee discipline or discharge and are made in a collective bargaining agreement between a public school employer and a union representing that employer's employees, § 15(3)(m) makes those promises unenforceable. Therefore, such statutory and constitutional rights incorporated into a collective bargaining agreement are also unenforceable in grievance arbitration to the extent that they apply to teacher discipline or discharge.

The Union contends that the procedures the Employer used in determining whether to discipline Creech violated Creech's due process rights and that it is the violation of those rights that the Union sought to redress in the grievance. However, the Union fails to distinguish rights derived from PERA and the Constitution from the alleged contractual rights. The question of whether Creech's due process rights were violated by the procedures used by the Employer when it disciplined her is not a matter to be determined in grievance arbitration. The Employer's decisions about procedures used in discipline are prohibited subjects of bargaining. Under § 15(3)(m), provisions in the collective bargaining agreement that apply to teacher discipline or discharge are prohibited and unenforceable. Where, as here, the grievance seeks to enforce provisions of the collective bargaining agreement or board policies that the Union contends were violated in the disciplinary process, the fact that the grievance did not expressly contest the appropriateness of the discipline does not make the grievance arbitrable. In filing the grievance, the Union was attempting to challenge the disciplinary procedures the Employer decided to use, as well as any policy decisions the Employer made to implement the procedures used in Creech's discipline. Section 15(3)(m) prohibits bargaining regarding decisions made regarding the "content, . . . procedures, . . . and implementation of a policy regarding discharge or discipline of an employee. Therefore, where the collective bargaining agreement or the Employer's policies contain provisions promising to honor employees' *Weingarten* and due process rights, those

provisions are not enforceable in grievance arbitration when the grievance addresses teacher discipline or discharge.

Enforceability of Statutory or Constitutional Rights outside the Context of Grievance Arbitration

However, the fact that the promises regarding employees' statutory or constitutional rights in the collective bargaining agreement and an employer's policies are not contractually enforceable in cases of discipline or discharge, does not change public employees' *Weingarten* or constitutional due process rights. Section 15(3)(m) does not affect statutory or constitutional rights or the enforcement of those rights in forums other than grievance arbitration. Public employees continue to have rights to union representation under *Weingarten* as adopted by this Commission in *Univ of Michigan*, 1977 MERC Lab Op 496, and to constitutional due process as interpreted by the courts. As the ALJ explained:

> It is important to note that while § 15(3)(m) removes disciplinary procedure from the sphere of collective bargaining, including grievance arbitration, it does not eliminate the duty of a public school employer to afford its employees the due process and/or right to union representation to which they are entitled by law. Nor does § 15(3)(m) prevent a union from assisting its members in enforcing their constitutional or statutory rights or Board policies in venues outside of the grievance procedure.

Disciplinary or Discharge Decisions Motivated by Antiunion Animus

The Union contends that the ALJ's decision would prevent an arbitrator from looking at due process violations when determining whether a violation of the collective bargaining agreement has occurred. The Union's argument goes beyond the scope of the ALJ's decision. The Union points to the decision in *City of Flint*, 27 MPER 31 (2013) (no exceptions) in support of its contention that where an employee has been denied statutory or constitutional rights in the context of employee discipline or discharge, the union representing the employee should be able to challenge that denial through grievance arbitration. In *City of Flint*, the ALJ relied on precedent finding that a decision by an employer, about which the employer had no duty to bargain, may be unlawful if the employer's actions are motivated by antiunion animus, citing *Southfield Pub Sch*, 25 MPER 36 (2011); *Detroit Pub Sch*, 25 MPER 84 (2012) (no exceptions); *Coldwater Cmty Sch*, 2000 MERC Lab Op 244; and *Parchment Sch Dist*, 2000 MERC Lab Op 110 (no exceptions). *Southfield Pub Sch*, and the other cases cited in *City of Flint* explained that otherwise lawful actions, such as the subcontracting of noninstructional support services by a public school employer in *Southfield Pub Sch*, might be unlawful if motivated by antiunion animus. Similarly, where a public school employer's discipline or discharge of a teacher is motivated by antiunion animus, the employer's decision is unlawful. See, e.g. *Detroit Pub Sch*, 30 MPER 2 (2016).

In those cases, a remedy may be available if the injured party files an unfair labor practice charge with this Commission. However, contrary to the Union's argument, that situation is not analogous to an arbitration where the grievant has asserted a denial of statutory or constitutional rights in the context of a public school employer's discipline or discharge of a teacher. Arbitration is a process by which contractual rights are enforced. Adjudication of an unfair labor practice charge by this Commission is the process by which statutory rights under PERA are enforced.

After the enactment of § 15(3)(m) of PERA, even the incorporation of PERA into a collective bargaining agreement would not permit an arbitrator to enforce provisions of a collective bargaining agreement, for the benefit of a public school teacher or a labor organization, where those provisions apply to a public school employer's decisions regarding the discharge or discipline of a teacher. Contrary to the Union's suggestion, we cannot interpret Act 103 to give arbitrators authority to address grievances over decisions relating to teacher discipline or discharge when the Legislature has made it clear that those issues are prohibited subjects of bargaining and, therefore, not subject to grievance arbitration.

Van Dyke Pub Sch, 29 MPER 32 (2015) (no exceptions)

Finally, the Union contends that the reasoning of *Van Dyke Pub Sch*, 29 MPER 32 (2015) (no exceptions), should apply to this case. We adopted the ALJ's decision and recommended order in *Van Dyke Pub Sch* when neither party filed exceptions in that case. Pursuant to § 16(b) of PERA, when no exceptions are filed to an ALJ's decision, the Commission must adopt the ALJ's decision and recommended order without regard to whether the commissioners agree with that decision. Therefore, decisions in which no exceptions have been filed do not constitute binding precedent with respect to the Commission. *City of Saline*, 29 MPER 53 (2016); *Keego Harbor*, 28 MPER 24 (2014).

Moreover, in this case, unlike *Van Dyke Pub Sch*, the Union sought to enforce provisions protecting employees' statutory and constitutional rights that were contained in the collective bargaining agreement and the Employer's policies. With the exception of the Employer's Board Policy 3211, the provisions the Union sought to enforce do not expressly address teacher discipline or discharge. However, the Union specifically sought to enforce those provisions in attempting to challenge the Employer's decisions regarding the procedures used in Creech's discipline. To the extent that those provisions applied to teacher discipline or discharge, they are prohibited subjects of bargaining and unenforceable. By attempting to enforce provisions covering prohibited subjects of bargaining, the Union breached its duty to bargain in good faith and violated § 10(2)(d) of PERA.

Conclusion

To the extent that the Union sought to use arbitration to enforce provisions in the Parties' collective bargaining agreement or the Employer's board policies that the Union contends were not applied properly with respect to the procedure the Employer used in disciplining Creech, the Union was attempting to use arbitration to enforce provisions covering prohibited subjects of bargaining. In this case, as in *Pontiac Sch Dist*, 28 MPER 34 (2014), the Union went beyond the discussion stage of the grievance process by attempting to use the arbitration process to enforce contract provisions that apply to prohibited subjects of bargaining. By so doing, the Union has violated § 10(2)(d) of PERA.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we find the Union's exceptions to be without merit and affirm the ALJ's decision. Accordingly, we adopt the Order recommended by the ALJ.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 25, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

SHIAWASSEE INTERMEDIATE SCHOOL
DISTRICT EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

Case No. CU15 F-019
Docket No. 15-040854-MERC

-and-

SHIAWASSEE REGIONAL EDUCATION
SERVICE DISTRICT,
Public Employer-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Erin M. Hopper and Jeffrey S. Donahue, for Respondent

Thrun Law Firm, P.C., by Lisa L. Swem, for Charging Party

DECISION AND RECOMMENDED ORDER
ON MOTIONS FOR SUMMARY DISPOSITION

On June 19, 2015, the Shiawassee Regional Education Service District filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Shiawassee Intermediate School District Education Association, MEA/NEA, pursuant to §§10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of the Act, the charge was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On September 14, 2015, both parties filed motions for summary disposition and requested oral argument. On September 24, 2015, both parties filed briefs in oppositions to the other's motion. Both parties also filed supplemental motions on October 8, 2015. Oral argument on the motions was held on October 19, 2015.

The Unfair Labor Practice Charge:

The Respondent Union represents a bargaining unit of the Charging Party Employer's employees that includes teachers. The most recent collective bargaining agreement covering this unit ran from July 1, 2014 through August 31, 2015.

On or about January 20, 2015, the Employer issued a two-day disciplinary suspension to a member of the Union's bargaining unit, Amber Creech. On February 9, 2015, the Union filed a grievance asserting that the Employer violated certain contract provisions, as set forth more fully below. As a remedy for the alleged contractual violations, the Union sought to have the discipline rescinded and Creech made whole. The Employer denied the grievance and asserted in its denial that the grievance involved a prohibited subject of bargaining under §15 of PERA because its subject was the discipline of a teacher. The Union, however, advanced the grievance through the grievance procedure and, on May 29, 2015, filed a demand to arbitrate the grievance with the American Arbitration Association.

The Employer alleges that the Union violated §10(2)(d) of PERA and its duty to bargain in good faith by insisting, over the Employer's objection, on discussing a prohibited subject and by demanding to arbitrate a grievance over a prohibited subject. As discussed below, the Union concedes that teacher discipline is a prohibited subject of bargaining under §15(3)(m) of PERA. It also concedes that under Commission case law, including *Pontiac Sch Dist*, 28 MPER 34 (2014), a union violates its duty to bargain in good faith if it attempts to advance to arbitration a grievance filed over a prohibited subject. However, it maintains that the subject of the February 9, 2015, grievance is not the Employer's decision to discipline Creech, but rather violations of her contractual rights to due process, union representation and freedom from retaliation.

Facts:

In addition to those set forth above, the following facts are undisputed. The grievance filed by the Union on February 9, 2015, alleged violations of Articles 1E, 6A, and 6C of the collective bargaining agreement and Board Policies 3139 and 3211. These articles state:

> Article 1E. Nothing contained herein shall be construed to deny or restrict any employee or the Board rights either may have under Michigan law.
>
> Article 6A. Recognizing the importance of adequate space, facilities, and other environmental conditions which are conductive to educational achievement, the Board will cooperate with the local school district in a joint effort to provide such teaching conditions for the itinerant staff. If an employee reports hazardous or otherwise unfavorable working conditions to a representative of the Board, such representative will investigate the situation at the earliest possible time and then in his/her best judgment and within the scope of his/her authority, take whatever action is necessary to improve the situation.
>
> Article 6C. An employee shall all at times be entitled to have present a representative of the Association. When a request for such representation is made, no action shall be taken with respect to the employee until such representation of the Association is present.
>
> The cited Board policies read as follows:

> Policy 3139. Whenever it becomes necessary to discipline a member of the staff, the Board of Education directs the Superintendent to utilize related procedures described in the current negotiated agreement, if applicable . . . Using due process procedures, the Superintendent shall conduct an investigation, as appropriate to the situation, including providing the employee with reasonable notice and the opportunity to respond.
>
> Policy 3211. The Board of Education expects all its employees to be honest and ethical in their conduct, and to comply with applicable State and Federal law, Board policies and administrative guidelines. The Board encourages and requires staff to report possible violations of these Board expectations . . . Any employee making such a report shall be protected from discipline, retaliation, or reprisal for making such report as long as the employee had a good faith belief as to the accuracy of any information provided.

In December 2014, Creech complained to Union president Janine Elbing about certain building conditions, and Elbing conveyed these complaints to Employer Assistant Superintendent Trent Toney. In the course of their conversation, Toney correctly guessed that Creech was the source of the complaint. According to Elbing, when Toney mentioned Creech he "rolled his eyes."

On January 20, 2015, Creech was called to a meeting with Employer administrator Jan Cox and Katherine Hodge. When she arrived, she saw that Toney was there as well. Creech asked Toney if the meeting was disciplinary. Toney said that it was, and that it was "going to go in [her] file." Creech said that she wanted to postpone the meeting until Union UniServ Director June Pettyplace could attend. Toney said that he would not postpone the meeting. He also said something about telling Creech "what this was about." The meeting then went forward without Pettyplace. Elbing was present during the meeting. However, according to her affidavit attached to the Union's motion, Elbing was under the impression that the purpose of the meeting was simply to give Creech notice of the allegations and that another meeting would be held before any discipline was issued. During the meeting, Toney went over a list of Creech's actions which the Employer considered unprofessional and unacceptable behavior. Creech responded to some of the allegations. However, according to her affidavit, she refrained from addressing others because she believed she would have another opportunity to respond after speaking to Pettyplace. After Toney finished speaking, Creech asked if she could respond after talking to Pettyplace. Toney said, "It may be too late." Toney then told Creech that she was being given a two-day unpaid disciplinary suspension, and that the suspension would begin the following day.

On January 22, 2015, the second day of Creech's suspension, Creech, Pettyplace, and Elbing met with Toney and Superintendent David Schulte. Creech asked for another opportunity to respond to the allegations, but her request was refused. Pettyplace asked that the allegations be put in writing. Schulte told her that a document had not yet been created but that it would be produced the following day. On January 23, 2015, Creech was sent a letter, back dated to January 21, 2015, notifying her that she had been given a two day suspension and that an individual development plan (IDP) would be created for her to follow in the future.

The letter listed the infractions which formed the basis for the discipline. These included some infractions that had not been mentioned at the January 20, 2015, meeting.

Creech received her copy of the letter on January 27, 2015. After receiving it, she sent Toney an email complaining that he had not shown her a copy of the letter before sending it out, as she thought he had promised to do. She also pointed out that the disciplinary letter included incidents that Toney had not mentioned on January 20, 2015. Pettyplace, who also received a copy of the January 21 letter, sent Toney and Schulte an email asking for an opportunity to respond to the allegations in the letter. She did not receive a response. On February 9, 2015, Pettyplace filed a grievance which cited the above contract provisions and Board policies. The relief sought in the grievance was retraction of the January 20, 2015, disciplinary action and for the Employer to make Creech whole for her loss of pay.

The Employer denied the grievance on February 27, 2015. Among the reasons it gave was that the grievance involved a prohibited subject of bargaining. The Union then moved the grievance through the steps of the grievance procedure, with the Employer denying the grievance at each step for the reasons stated in its February 27, 2015, denial. On May 29, 2015, the Union filed a demand for arbitration with the American Arbitration Association.

Discussion and Conclusions of Law:

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

> (m) For public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 PA 4, MCL 38.101.

2011 PA 103 also made teacher placement decisions and their impact prohibited. Section §15(3)(j) of PERA states that the following are prohibited subjects:

> (j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.

Topics made prohibited subjects by §15 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); *Pontiac Sch Dist,* 28 MPER 34 (2014).

Although the parties may lawfully discuss a prohibited subject, neither party may insist on carrying that discussion beyond the limits set by the other party. *Calhoun Intermediate Ed Assn*, 28 MPER 26 (2014*); Pontiac Sch Dist*, supra. Accordingly, a union commits an unfair labor practice when it attempts to use the grievance arbitration clause in its collective bargaining agreement to force an employer to go beyond the discussion stage of the grievance process and enforce contract provisions and/or past practices made unenforceable by §15(3) of PERA. *Pontiac Sch Dist*, supra.

As noted above, the parties agree that "teacher discipline" is a prohibited subject under §15(3)(m) of PERA, and that a union's demand to arbitrate a grievance over teacher discipline violates its duty to bargain in good faith and §10(2)(d) of PERA. The Employer argues that §15(3)(m) is so broadly written that it renders teacher discipline and anything related to it a prohibited subject. Therefore, according to the Employer, §15(3)(m) prohibits a union from filing a grievance challenging any aspect of a public school employer's discipline of a teacher. It also makes unenforceable any contract provision that relates to discipline of that teacher. According to the Employer, the Union's February 9, 2015, grievance clearly challenges its decision to discipline Creech, and the Union's demand to arbitrate this grievance thus violates its duty to bargain. The Employer describes the Union's actions as attempting to pry open a "back door" into arbitration of discipline after the Legislature shut all doors and locked them.

The Union maintains that Creech's discipline is not the subject of the February 9, 2015 grievance. It Union asserts that it does not contest the Employer's right to discipline Creech after following the necessary procedures. The subject of the grievance, according to the Union, is the Employer's failure to follow non-discipline related provisions of the collective bargaining agreement. The first is Article 1E, which the Union interprets as incorporating fundamental principles of due process such as those set out in Board Policy 3139. The second is Article 6C, which, according to the Union, prohibited the Employer from disciplining Creech without honoring her request to have Pettyplace present during a discussion of the charges against her. The third is Article 6A, which the Union interprets as incorporating the protections from retaliation set out in Board policy 3211.

The starting point for resolving any dispute over the meaning of a statute is the plain language of the statute. *Van Buren Co Ed Assn & Decatur Ed Support Personnel Assn, MEA/NEA v. Decatur Pub Sch*, 309 Mich App 630 (2015). In interpreting a statute, both the plain meaning of the critical words or phrases must be considered as well as its placement and purpose in the statutory scheme. The goal is to give effect to the intent of the Legislature by focusing on the statute's plain language. *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133-134 (2014). If statutory language is clear, the statute must be enforced as written. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352 (2014). It may be appropriate to consult a dictionary to determine the plain and ordinary meaning of statutory terms that are undefined. *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565, 574 (2014).

I find it significant that the Legislature, in listing the subjects made prohibited bargaining topics by §15(3)(m), prohibited bargaining over the "content, standards, procedures . . . of a policy regarding discharge or discipline of an employee." Webster's Unabridged Dictionary, 2nd edition (1987), defines "content" as "something that is contained in," or "the subjects or topics covered in a book or document."

The term "content" arguably subsumes both standards and procedures. The Legislature, however, also explicitly listed both these other terms. Not satisfied, the Legislature then went on to list both "decisions over the discipline or discharge of an individual employee," and the impact of such decisions on individual employees and the union as prohibited subjects. Plainly, the Legislature's intent in §15(3)(m) was to ensure that teacher discipline and any topic related to it be removed from the realm of collective bargaining.

I am not persuaded by the Union's argument that if the Legislature had intended that broad interpretation, it would have prohibited bargaining over "any decision" as it did in §15(3)(j) with respect to teacher placement. The Legislature used different phraseology in §15(3)(m). However, I find no substantive difference between prohibiting bargaining over "any decision regarding..." and prohibiting it over "decisions about. …" when the latter includes no terms of limitation. I agree with the Employer that the Legislature intended to prohibit bargaining over all topics related to teacher discipline.

The parties' collective bargaining agreement contains no contract language addressing standards for discipline, e.g., there is no provision requiring the Employer to refrain from making disciplinary decisions that are "arbitrary and capricious." However, as noted above, §15(3)(m) explicitly includes disciplinary "procedures" as well as disciplinary "standards" in its list of prohibited topics. Article 1A of the collective bargaining agreement is certainly not limited in its application to discipline or any other prohibited topic, nor is it clear from the language of that provision that the parties' intended to incorporate constitutional due process rights into their agreement. In the February 9, 2015, grievance, however, the Union argues for an interpretation of Article 1A that would require the Employer, as a matter of contract, to follow certain procedures in disciplining teachers covered by the agreement, i.e., to afford employees the due process rights with respect to disciplinary decisions that they are entitled to by law and under the Board's policies. I conclude that by demanding arbitration of a grievance advancing that interpretation of the contract, the Union is attempting to enforce a contract provision made unenforceable by §15(3)(m).

The Union's claim that the Employer violated Article 6C of the collective bargaining agreement is also based on an interpretation of that provision that requires the Employer to follow certain procedures before disciplining a teacher. The Union not only argues that the Employer is obligated by Article 6C to permit teachers, on their request, to have a union representative present when the Employer meets with them regarding discipline, but that the Employer cannot thereafter discipline them without holding such a meeting in the presence of the union representative. As with the Union's claim that the Employer violated Article 1A, I conclude that by demanding arbitration of a grievance advancing that interpretation of Article 6C, the Union is attempting to enforce a contract provision made unenforceable by §15(3)(m).

It is important to note that while §15(3)(m) removes disciplinary procedure from the sphere of collective bargaining, including grievance arbitration, it does not eliminate the duty of a public school employer to afford its employees the due process and/or right to union representation to which they are entitled by law. Nor does §15(3)(m) prevent a union from assisting its members in enforcing their constitutional or statutory rights or Board policies in venues outside of the grievance procedure.

In addition to removing disciplinary procedure as a subject for collective bargaining, §15(3)(m) also prohibits bargaining over "decisions concerning the discharge or discipline of an individual employee." In its February 9, 2015, grievance, the Union asserts that the Employer violated Article 6A of the contract and Board policy 3211 when it disciplined Creech because her discipline was in retaliation for her earlier complaints about building conditions. In demanding to arbitrate a grievance advancing this theory, the Union seeks to have an arbitrator determine why the Employer disciplined Creech, including whether the reasons it gave were mere pretext. As the Employer points out, it is not clear that the language of the collective bargaining agreement gives the arbitrator the authority to make this type of determination. Even if the arbitrator has this authority under the contract language, I find that when the Legislature made "decisions concerning the discharge or discipline of an individual employee" a prohibited subject of bargaining for teachers, it removed the authority of an arbitrator to review or set aside an employer's decision to discipline or discharge a teacher. I conclude that by demanding arbitration of a grievance seeking review of the Employer's reasons for disciplining Creech teacher, the Union attempted to enforce a contract provision made unenforceable by §15(3)(m).

In *Van Dyke Pub Schs*, 29 MPER 32 (2015), a decision in which the Commission adopted my recommendation when no exceptions were filed, a public school employer filed a charge against the union representing its teachers alleging that a union violated its duty to bargain by demanding to arbitrate a grievance over the transfer of a teacher because the subject of the grievance was teacher placement, a subject made a prohibited subject of bargaining by §15(3)(j) of PERA. The union had filed a grievance asserting, among other theories, that the transfer had violated the employer's implied obligation of good faith and fair dealing. At the time the union demanded arbitration, the Commission had not yet issued a decision interpreting §15(3)(j); by the time I issued my decision, the grievance had been denied by an arbitrator. I recommended that the charge be dismissed on several grounds, including that, as the union argued, no effective purpose would be served by issuing an order against the union under the particular circumstances of that case. One of the grounds on which I based my recommendation, however, was my conclusion that the union had not violated its duty to bargain by demanding to arbitrate a grievance asserting that the teacher's transfer violated the employer's implied duty of good faith and fair dealing. I concluded in that decision that a union's demand to arbitrate a grievance claiming that the employer breached its obligation of good faith and fair dealing did not violate its duty to bargain in good faith, even though the relief sought was rescission of a teacher transfer, as long as the union's claim was made in good faith and had a reasonable basis. I found that as the union's claim in *Van Dyke* met both these tests, no unfair labor practice had been committed.

While *Van Dyke Pub Schs* involved a different section of PERA, §15(3)(j), I concluded there that the union was not precluded by that section from pursuing a grievance seeking arbitral review of an individual teacher placement decision. I comment on this point only to note that I have now concluded that I may have erred in this conclusion.

In accord with the facts and the conclusions of law set forth above, I conclude that the Union violated its duty to bargain in good faith and §10(2)(d) of PERA by insisting, over the Employer's objection, on pursuing a grievance over prohibited subjects of bargaining and by demanding to arbitrate that grievance.

I recommend that the Commission grant the Employer's motion for summary disposition and deny the Union's motion, and that it issue the following order.

RECOMMENDED ORDER

The Shiawassee Intermediate Education Association, MEA/NEA, its officers and agents, are hereby ordered to:

1. Cease and desist from demanding to arbitrate, or insisting on pursuing over the objection of the Shiawassee Regional Educational Service District, grievances concerning prohibited subjects of bargaining under §15(3)(m) of PERA.

2. Advise the arbitrator that the Union is withdrawing the grievance it filed on February 15, 2015 regarding discipline issued to Amber Creech.

3. Refrain from taking action to enforce any arbitration award which may have been issued pursuant to that grievance.

4. Post the attached notice to members of its bargaining unit at places on the premises of the Shiawassee Regional Educational Service District where notices to unit members are normally posted for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 12, 2016