STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

IONIA COUNTY INTERMEDIATE EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

Case No. CU15 H-024
Docket No. 15-050935-MERC

-and-

IONIA COUNTY INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Charging Party.
____/

APPEARANCES:

Kalniz, Iorio & Feldstein, LPA, by Fillipe S. Iorio, for Respondent

Thrun Law Firm, P.C., by Eric Delaporte and Ryan Nicholson, for Charging Party

DECISION AND RECOMMENDED ORDER
ON MOTION FOR SUMMARY DISPOSITION

On August 24, 2015, the Ionia County Intermediate School District (the Employer) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Ionia County Intermediate Education Association, MEA/NEA (the Union) 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.

The Employer filed a motion for summary disposition at the same time it filed the charge. The Union filed a brief in opposition to the motion on October 21, 2015, and I held oral argument on the motion on November 23, 2015. With my permission, the Employer filed a supplemental pleading on November 25, 2015, and the Union filed a second pleading on December 4, 2015. Based on facts set out in the charge and the pleadings and not in dispute, I make the following conclusions of law and recommend that the Commission issue the order set forth below.

The Unfair Labor Practice Charge:

The Union represents a bargaining unit of the Employer's employees that includes teachers. The parties have a collective bargaining agreement covering the term August 14, 2014 to June 30, 2016. On April 1, 2015, the Employer issued a written reprimand to Renee Eis, a teacher in the Union's bargaining unit. On April 17, 2015, the Union filed a grievance on Eis'

behalf. On July 2, 2015, the Union demanded to arbitrate the grievance. The Employer asserts that the subject of the grievance is teacher discipline, a prohibited subject of bargaining under §15(3)(m) of PERA. It alleges that the Union violated its duty to bargain in good faith under PERA by insisting on processing the grievance through the grievance procedure over the Employer's objection and by demanding that the Employer arbitrate.

Facts:

The following facts are undisputed. Renee Eis is employed by Respondent as a probationary special education teacher. She teaches health occupational skills. Sometime before March 20, 2015, the Employer received information suggesting Eis had allowed male and female students to change clothes together in the locker room next to her classroom. On March 20, 2015, Eis was called to a meeting with her principal. Eis was not told that this was an "investigatory" interview or that it might result in discipline, although the principal may have suggested that Eis have a union representative present to take notes. During the meeting, the principal questioned Eis about the locker room situation.

On March 31, 2015, Respondent gave Eis a written reprimand. The reprimand stated that Respondent had discovered that she was improperly allowing male and female students to change together in the locker room, and also that students had been improperly permitted to change behind patient bed station curtains in the classroom. The reprimand stated that in the future she needed to maintain the locker room so that only one sex of student was changing at one time, and that students were not to be allowed to change in the classroom.

On April 17, 2015, the Union filed a grievance alleging that the reprimand violated Article 6, Section 4 of the collective bargaining agreement. Article 6 is entitled "Personnel Policies." Article 6, Section 4 reads as follows:

> No employee shall be disciplined or discharged arbitrarily or capriciously. Employees recommended for dismissal during a school year will be informed, in writing, either personally or by certified mail. A non-probationary employee being recommended for dismissal during the school year will have the right to a hearing before the Board. For all tenured and probationary teachers covered by the Michigan Teachers' Tenure Act, all procedures specified in the Michigan Teachers' Tenure Act will be adhered to regarding discharge, demotion, and non-renewal. Professional employees not specifically covered by the State Tenure Act will follow the same timeline provisions as specified by the Act.

The collective bargaining agreement also includes this language, in Article 6, Section 5:

> The Board of Education reserves the right to discipline, up to and including the dismissal of, any employee for any of the following reasons:
>
> a. Failure to perform duties;
>
> b. Neglect of duties;

c. Insubordination;

d. Improper conduct;

e. Incompetency;

f. Violation of this Agreement.

> The District will use progressive discipline for all non-probationary employees. Depending on the severity of the offense and the employee's past disciplinary record, the following disciplinary steps may be omitted and/or followed.

a. Oral warning or reprimand;

b. Written warning or reprimand;

c. Disciplinary suspension with pay;

d. Disciplinary suspension without pay;

e. Dismissal.

Article 20 of the parties' contract contains a grievance procedure ending in binding arbitration. Article 20(1) reads:

> A grievance shall be defined as an alleged violation of the expressed [sic] terms and conditions of this contract relative to hours, wages, and working conditions. It is expressly understood that the grievance procedure shall not apply to those areas in which the Tenure Act prescribes a procedure or authorizes a remedy (discharge and/or demotion). The following matters shall not be the basis of any grievance filed under the procedure outlined in this article.

a. The dismissal of, or failure to re-employ any probationary employee;

b. Any matter involving staff member evaluation content;

c. The determination not to appoint or reappoint any employee to a summer assignment which is different from the employee's regular assignment or when the appointment is made from among two (2) or more unit members.

d. Any matter involving a prohibited topic for negotiation under state or federal law.

In the grievance the Union filed on Eis' behalf on April 17, 2015, the Union alleged that Eis' discipline was arbitrary because she was not given due process during the Employer's

investigation. The Union asserted that the investigation was not fair or thorough and that Eis was deprived of due process because she was not told that the March 20 meeting was investigatory. The grievance also alleged that a written reprimand was excessive discipline in this case and that the written reprimand should be replaced by a verbal (oral) reprimand in writing. The Union also requested, as part of the relief, that Eis be provided with assistance in setting up separate gender-specific changing areas. At some point during the discussion that followed the filing of the grievance, the Union complained that the discipline was unfair because Eis could not be expected to supervise one group of students in the locker room while simultaneously teaching the other students in the classroom.

On May 13 or 14, 2015, the Employer and the Union held a level two meeting on the grievance. During this meeting, and in the Employer's formal grievance response dated May 14, 2015, the Employer asserted that because discipline was a prohibited topic, it was within the sole discretion of the Employer and that any challenge regarding Eis' discipline was a prohibited subject. The Employer also said: (1) no violation of due process had occurred during the investigatory or disciplinary process, and (2) in any case, as a probationary employee, Eis could be terminated for any reason or no reason at all and therefore had no property rights in her employment giving rise to due process rights. Finally, the Employer reaffirmed that it believed that a written reprimand was appropriate given the nature of the infraction.

In a written reply to the grievance answer, the Union listed what it believed the Employer should do to provide due process in its disciplinary procedures. The reply also stated that the Employer should "provide a consistent, orderly, efficient and safe operation of the District's locker room accessibility for female and male students." The Union subsequently notified the Employer that it was moving the grievance to level three of the grievance procedure.

On or about June 9, 2015, the parties held a level three grievance meeting. According to the Employer's written grievance answer dated the same day, the parties discussed the locker room in the health occupations classroom and agreed that a double tumbler lock would be installed so that the room could be secured from either side. According to the Employer's grievance answer, the Union said that at the meeting that it was "dropping [its] contention with [sic] the written reprimand component of the grievance."

On June 15, the Union provided a written response stating that it did not agree that the parties had reached agreement on a solution to prevent future incidents and that it did not agree that Eis did not have due process rights or that or her due process rights had not been violated.

On July 2, 2015, the Union sent the Employer a letter formally demanding arbitration. The letter provided the following synopsis of the alleged contract violations:

1. <u>Article 6 Section 4</u>

   No employee shall be disciplined or discharged arbitrarily or capriciously.

2. <u>Due Process</u>

The investigation by administration of “not maintaining separate changing areas for male and female students,” happened without allowing Renee to give her side of the story in a relaxed and non-structured manner.

The principal did not tell Renee that their meeting on 3/20/15 was an investigatory meeting (see attached email from 3/20/15). Suggestion was given to Renee that she bring Dave as “note taker.”[1] This is the first time that Renee knows that there are issues with students in changing rooms.

Written reprimand from 3/31/15 states that “we conducted a thorough investigation …” 3/31/15 was the first time that Renee knew that the meeting on 3/20/15 was an investigatory meeting.

Renee was excluded from this investigation until the alleged investigatory meeting on 3/20/15.

A parent and her son were interviewed on approximately March 12, 2015. Renee was unaware of the conversation and was not informed of that conversation.

The investigatory meeting was on Friday, March 20, 2015. Renee was ill the week of March 23-27. During that week, two parents and two paraprofessionals were interviewed regarding the changing area situation. Renee returned to work on Monday, March 30. Neither Anne nor Ted did a follow up with Renee telling her of those conversations. Renee was emailed one day after returning on March 31, 2015, (email attached) to meet with Anne the next day, April 1, 2015, where she received a written reprimand.

Renee was given no information between the investigatory meeting on March 20, 2015 and the written reprimand on April 1, 2015.

3. Excessive Reprimand

The setup of the changing areas don’t allow for separate gender specific changing areas and Renee was directed to not let the two boys use the boys’ restroom. On April 17, 2015, Anne and Ted agreed that no pictures had probably been taken. (As a result of the investigation by administration of boys and girls being together in the changing room.) This supports our stance that a written reprimand is excessive and a verbal warning in writing is more appropriate.

Relief Sought: Written reprimand be changed to a verbal warning in writing.

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[1] It appears from the pleadings that “Dave” may have been a union representative by that name. It is not clear from the pleadings whether any union representative was present when Eis was being questioned.

On or about July 8, the Union filed a formal demand for arbitration with the American Arbitration Association (AAA). On July 10, the Employer's counsel sent the Union a letter stating that the grievance involved the discipline of a teacher whose employment was regulated by the Michigan Teachers Tenure Act, MCL 38.71 et seq, and that grievance involved a prohibited subject of bargaining pursuant to §15(3)(m) of PERA. The letter also asserted that any reference to discipline in the collective bargaining agreement was "void" and could not be the subject of a grievance arbitration.

On or about July 16, 2015, the Employer's Board of Education authorized its superintendent to file this unfair labor practice charge. On July 17, 2015, the Employer notified the AAA that it objected to the arbitration on the basis that the nature of the grievance was a prohibited subject of bargaining under PERA. The Employer's letter stated that because the demand raised an issue of substantive arbitrability, the Employer would not participate in the arbitration unless it was ordered to do so by a court. The Employer then asked the AAA to hold the matter in abeyance so that the Employer could, if the Union refused to withdraw its demand, bring an action in circuit court to enjoin the arbitration.

The parties selected an arbitrator to hear the grievance. However, on July 20, 2015, the AAA notified the parties that the arbitrator had informed the AAA that he did not have jurisdiction to decide substantive arbitrability and that the selection of a hearing date should be held in abeyance until that issue was resolved. The Union filed a formal written objection with the AAA to the case being held in abeyance. In its objection, the Union stated:

> The Association clearly understands the law regarding teacher discipline and that it is a prohibited bargaining subject under the Michigan Public Employment Relations Act (PERA). The Association is willing to drop the discipline part of the grievance with the understanding that there is a very serious issue with the way the district failed to follow the due process of law and also set forth unhealthy and unethical working conditions re male and female high school students sharing a locker room in the classroom area. Please see the remaining issues and concerns listed below.

The Union reiterated the arguments it had made in its July 2, 2015, letter. It also alleged, apparently for the first time, that the Employer had violated Article 5, Section 6 of the contract, which reads as follows:

> A written complaint filed by a student or parent against an employee with the Board or its agents shall be reported to the employee involved as soon thereafter as is reasonably possible if the said complaint is to be used in any disciplinary action.

In the objection, the Union cited the following language from the preamble to Article 4 of the collective bargaining agreement, entitled "Board Rights," in support of its claim that the arbitrator had jurisdiction to decide whether the Employer had violated Eis' constitutional due process rights.

> The exercise of the following powers, the adoption of policies, and the use of judgment by the Board, shall be limited only by the terms of this contract, the Public Employees Act, and of the constitution and laws of Michigan and the United States and shall include, by way of illustration and not by way of limitation, the right to: (1) Manage and control the District's business, equipment operations and affairs as the employer; …

The Employer responded on August 19, 2015, with a motion to the arbitrator to dismiss the grievance for lack of substantive arbitrability. The motion argued that the grievance was not arbitrable because it involved a prohibited topic of bargaining. The Employer also filed the instant unfair labor practice charge, along with a motion for summary disposition, on August 24, 2015. In a conference call among the parties and the arbitrator held on September 9, 2015, the Employer asked the arbitrator to decide its motion. However, the arbitrator concluded that given the nature of the dispute, the arbitration hearing should be held in abeyance pending a decision on the unfair labor practice charge.

<u>Discussion and Conclusions of Law</u>:

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

§15(4) of PERA now states:

> Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

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), aff'd ___Mich App ___ (2016), 29 MPER 42; *Pontiac Sch Dist,* supra. 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.

Among the new sections added to PERA by 2011 PA 103 was §15(3)(m), which reads as follows:

> 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.

The statute cited in §15(3)(m), 1937 PA 4, MCL 38.71 to 38.191, is the Teachers' Tenure Act. The Tenure Act covers teachers, including those who have achieved continuing tenure and those serving the probationary period provided by the act, employed for a full school year by any board of education or controlling board. MCL 38.71. The Tenure Act requires a school district to follow certain procedures in making decisions to discharge or demote a teacher on continuing tenure. It also gives teachers with continuing tenure the right to administratively appeal a school district's decision to discharge or demote them. MCL 38.101 states, "Except as otherwise provided in Section1a of this article [addressing criminal conduct], discharge or demotion of a teacher on continuing tenure may be made only for a reason that is not arbitrary or capricious and only as provided in this act." "Demote" is defined by MCL 38.74, as "suspend without pay for 15 or more consecutive days or reduce compensation for a particular school year by more than an amount equivalent to 30 days; compensation or to transfer to a position carrying a lower salary."

Although the "arbitrary and capricious" standard in §15(3)(m) is the same as the standard in the Tenure Act, only teachers on continuing tenure have a right to challenge a school district's disciplinary decisions under the Tenure Act. Probationary teachers, although their employment is regulated by the Tenure Act, do not have this right. The Tenure Act also does not provide a forum to appeal disciplinary actions that do not fall within the Act's definition of a "demotion," such as a written reprimand.[2] In sum, not all disciplinary actions that a teacher covered by the Tenure Act may receive can be appealed under that act. The written reprimand issued to Eis fell into this category, both because Eis was a probationary teacher and because Eis was neither discharged nor demoted.

The Union's first argument is that the charge lacks merit because the Employer consented to arbitrate the grievance. As noted above, the Employer, after the Union had made a demand to arbitrate, filed a motion with the arbitrator asking him to dismiss the grievance because it lacked substantive arbitrability. Later, in a conference call held on September 9, it asked the arbitrator to rule on the motion. The arbitrator declined and concluded that the arbitration should be held in abeyance. The facts do not support the Union's assertion that the Employer agreed to arbitrate the grievance. Moreover, even if the Employer had consented to arbitration, this would not constitute a defense to the charge that the Union violated its duty to bargain in good faith by pursing the grievance to arbitration under the contract.

[2] If the teacher is later discharged or demoted, prior misconduct is admissible in a Tenure Act proceeding to show past similar and continuing conduct. However, if no appeal procedure was available to the teacher to challenge the finding of prior misconduct, the school district is required to prove the facts underlying the misconduct. See *Sanders v Bd of Education of the Willow Run Public Schools, Docket No. 00-8,* Decision of the State Tenure Commission issued March 5, 2001.

The Union also asserts that the subject or subjects of the grievance are not prohibited subjects of bargaining under §15(3)(m). As noted above, the parties agreed to contract language stating that "no employee shall be discharged or disciplined arbitrarily or capriciously." According to the Union, the second sentence of §15(3)(m) mandates that that public school employers adopt the arbitrary and capricious standard in making disciplinary and discharge decisions. It argues that because the arbitrary and capricious standard is mandated by law, it cannot, by definition, be a prohibited subject of bargaining. The Union also asserts that nothing in PERA prohibits parties from entering into a labor agreement that requires that the Employer utilize the arbitrary and capricious standard in making disciplinary and discharge decisions. To the contrary, according to the Union, the parties complied with §15(3)(m) by including the legislatively-mandated standard in their contract. It asserts that since a contract provision that requires a public school employer to utilize the arbitrary and capricious standard in disciplining teachers covered by the Tenure Act is not a prohibited subject of bargaining, it follows that the Union did not violate PERA by pursuing a grievance to enforce the contract language in this case.

The Union also argues that the first sentence of §15(3)(m) does not prohibit a union from contesting discipline through a grievance and binding arbitration procedure once discipline is imposed by the school district. According to the Union, the first sentence of the subsection prohibits bargaining only over the "lead up" to the decision and impact. The Union asserts that any holding to the contrary would constitute a rewriting of the plain language of the statute.

The Union also argues that §15(3)(m), if read in conjunction with amendments to the Tenure Act that were made at the same time, indicates the Legislature's intent to preserve the rights of teachers to grieve discipline. Amendments to the Tenure Act at the time PERA was amended in 2011 both increased the number of suspension days constituting a "demotion" under the Tenure Act from three to fifteen consecutive days and amended the standard to be used by the Tenure Commission in assessing discipline from "reasonable and just cause" to not "arbitrary and capricious." According to the Union, the two statutes, read together, indicate that the Legislature intended to remove the right of tenured teachers to challenge disciplinary suspensions of less than fifteen days through Tenure Commission procedures but preserve their right to challenge these suspensions by filing grievances under a union contract.

Similar arguments were recently addressed, and rejected, by ALJ David Peltz in his Decision and Recommended Order in *Ionia Pub Schs,* Case No. C13 F-107/13-004684-MERC, issued on February 22, 2016. In *Ionia Pub Schs*¸ a union representing a unit of teachers filed a charge against a public school employer alleging that it had violated its duty to bargain by refusing to bargain over certain union contract proposals which the employer asserted were prohibited subjects of bargaining. Among these proposals was a provision which stated, "No teacher shall be disciplined, reprimanded, reduced in compensation, or deprived of any professional advantage in an arbitrary and capricious manner." The proposal also explicitly made "discipline, reprimand [and] reduction in compensation or advantage" grievable under the contract's grievance arbitration procedure. The union argued in that case that §15(3)(m) did not prohibit bargaining over the arbitrary and capricious standard. Like the union here, it asserted that the second sentence of §15(3)(m) mandated the adoption of this standard for all employees whose employment was covered by the Tenure Act. It also argued, like the union here, that the Legislature did not intend to preclude a union and school district from incorporating the mandated standard in their collective

bargaining agreement or agreeing that alleged violations of this standard would be subject to mandatory arbitration.

ALJ Peltz disagreed with the union's interpretation of §15(3)(m). He concluded, first, that the union's argument ignored the fact that the first sentence of §15(3)(m) explicitly prohibits bargaining over disciplinary "standards," and that "arbitrary and capricious" is a disciplinary standard by any reasonable definition of that term. He held that the union's demand that the employer bargain over the inclusion of "arbitrary and capricious" language in the contract was, by definition, a demand to bargain over a prohibited topic. Second, he noted that if the parties were to agree to the contract language proposed by the union in that case, decisions made by the school district to discharge or discipline an individual teacher could be grieved by the labor organization and subject to review and possible reversal by an arbitrator. He concluded that the Legislature clearly intended to prohibit this when, in the first sentence of §15(3)(m), it made "decisions concerning the discharge or discipline of an individual employee," prohibited subjects. He found that the union's interpretation of §15(3)(m) was clearly contrary to the plain language of the statute. He held that the employer did not violate PERA by refusing to bargain over the union's proposals because these proposals were prohibited subjects of bargaining.

I agree with ALJ Peltz's analysis. As I stated recently in my Decision and Recommended Order in *Shiawasee ISD,* Case No. CU 15 F-019/ Docket No. 15-040854-MERC, issued January 12, 2106, I conclude, for reasons I will restate below, that the Legislature's intent in §15(3)(m) was to ensure that teacher discipline and any topic related to it be removed entirely from the realm of collective bargaining. While it is true that the Legislature amended the Tenure Act to narrow the scope of employer disciplinary decisions that could be challenged under that act, I see nothing in either PERA or the Tenure Act indicating that the Legislature intended that teachers would have the right to grieve under their union contracts disciplinary decisions that were no longer subject to challenge under the Tenure Act. I do not find persuasive, and in fact do not understand, the Union's argument that the Legislature intended only to prohibit bargaining over the "lead up" to a disciplinary decision, while allowing the parties to agree that the decision itself could be grieved. I agree with ALJ Peltz that when the Legislature made "decisions concerning the discharge or discipline of an individual employee" a prohibited subject of bargaining between school districts and the unions representing their teachers, it clearly intended that these decisions not be subject to review and reversal by an arbitrator under a mandatory arbitration provision contained in a union contract.

I also disagree with the Union that because the second sentence of §15(3)(m) mandates that school districts adopt the arbitrary and capricious standard in making discharge and discipline decisions, this standard cannot be a prohibited subject of bargaining. First, it is not at all clear that the Legislature intended to require school districts to adopt any standard in making disciplinary decisions not falling within the scope of the Tenure Act. That is, it may have been the Legislature's intention to allow school districts to use their discretion to make disciplinary decisions on a case-by-case basis, as long as they did not adopt a disciplinary standard, such as "just cause," different from that in the Tenure Act. However, whether or not school districts are required to formally adopt the arbitrary and capricious standard, it is nevertheless clear that §15(3)(m) prohibits inclusion of this standard as an enforceable provision of a collective bargaining agreement.

Unlike the collective bargaining agreement in *Shiawasee,* the contract in this case contains language that might be interpreted as giving the Union the right to grieve, as arbitrary or capricious, disciplinary actions for which the Tenure Act does not provide a remedy. What the contract says, however, is irrelevant, since contract provisions covering prohibited topics are unenforceable. *Michigan State AFL-CIO v MERC,* at 487 (1995).

The Union here also argues that its grievance does not involve a prohibited subject because the subject of the grievance is not discipline, per se, but due process rights and working conditions. Similar arguments were made by the union in *Shiawassee*. In that case, the union filed a grievance after a teacher in its bargaining unit received a two-day disciplinary suspension. The grievance cited a provision in the collective bargaining agreement giving employees a right to the presence of a union representative upon request and a written policy adopted by the employer's school board. The latter read, "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." The grievance alleged that the employer failed to give the disciplined employee an opportunity to have a meeting with the employer with her union representative present before disciplining her and violated board policy by not giving the employee adequate notice and an opportunity to respond to the allegations. The grievance also cited another provision of the contract which the union argued required the employer, as a matter of contract, to provide employees with constitutional due process before disciplining them.

The union in *Shiawasee* asserted that the subject of its grievance was violations of the employee's right to due process, not discipline, and that it did not contest the employer's right to discipline the teacher after following the necessary procedures. As set forth above, I held that the Legislature intended to remove all topics related to teacher discipline, including disciplinary procedures and disciplinary due process, from the realm of collective bargaining. I stated my reasoning as follows:

> 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).
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> 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 concluded that because §15(3)(m) explicitly includes disciplinary "procedures" as well as disciplinary "standards" in its list of prohibited topics, an attempt by a labor organization to enforce any contract language which could be interpreted as requiring a school district to follow certain procedures in disciplining teachers constituted an attempt to enforce a contract provision made unenforceable by §15(3)(m). Accordingly, I found that the union in *Shiawassee* had violated its duty to bargain by demanding to arbitrate a grievance advancing an interpretation of the collective bargaining agreement that would require the employer to afford teachers due process rights and prohibit the employer from disciplining teachers without holding a disciplinary meeting in the presence of union representatives. However, I noted that although §15(3)(m) removed disciplinary procedures from the sphere of collective bargaining, it did not eliminate a school district's duty to afford its employees the due process they were entitled to by law or prevent the union from assisting its members in enforcing their due process rights outside of the contractual grievance procedure.

In this case, the Union asserts that in disciplining Eis, the Employer failed to accord her the procedural due process she was entitled to under Article 6, Section 4 and Article 5, Section 6 of the collective bargaining agreement. It also asserts that Eis had a constitutional right to due process which the Employer violated, and that the Employer was contractually bound by the preamble to Article 4 to honor her constitutional due process rights. I find, however, that because §15(3)(m) has made disciplinary procedures for teachers a prohibited subject of bargaining, due process in the investigation of grievances has been removed from the sphere of collective bargaining. As I did in *Shiawasee,* I find that the Union in this case violated its duty to bargain in good faith by demanding to arbitrate a grievance advancing an interpretation of the collective bargaining agreement that would require the Employer to follow certain procedures in making a decision to discipline a teacher.

As noted above, the Union also asserts that the subject of the grievance is Eis' working conditions. It notes that the relief the grievance requests includes that the Employer provide Eis with assistance in setting up separate gender-specific changing areas, and that it argued to the Employer that the discipline was improper because Eis could not both monitor one group of students in the locker room while conducting class for the other in the classroom. The Union's argument is disingenuous. A grievance asserting that Employer was required to provide separate changing areas, or additional supervision, in Eis' classroom would not have constituted a demand to bargain over a prohibited subject. The subject of the grievance filed on April 17, 2015, however, was not the Employer's failure to provide separate changing areas, but the Employer's decision to discipline Eis for the way she handled the problem. I find that the Employer's decision to discipline Eis was a prohibited subject of bargaining under §15(3)(m). I also conclude that the Union's insistence on processing Eis' grievance through the grievance procedure, and its demand that the Employer arbitrate the grievance, violated its duty to bargain in good faith under §10(2)(d) of

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

RECOMMENDED ORDER

The Ionia County 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 Ionia County Intermediate School District, grievances concerning prohibited subjects of bargaining under §15(3)(m) of PERA.

2. Advise the arbitrator that the Ionia County Intermediate Education Association, MEA/NEA, is withdrawing the grievance it filed on April 17, 2015, regarding discipline issued to Renee Eis.

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 Ionia County Intermediate School 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: April 25, 2016

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

IONIA COUNTY INTERMEDIATE EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

MERC Case No. CU15 H-024

-and-

Hearing Docket No. 15-050935

IONIA COUNTY INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Charging Party.
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APPEARANCES:

Kalniz, Iorio & Feldstein, Co., LPA, by Fillipe S. Iorio and Julia A. Kelly, for Respondent

Thrun Law Firm, P.C., by Eric D. Delaporte and Ryan J. Nicholson, for Charging Party

DECISION AND ORDER

On April 25, 2016, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order on Summary Disposition in the above matter finding that by demanding that Charging Party, Ionia County Intermediate School District (Employer), arbitrate a grievance over prohibited subjects of bargaining, Respondent, Ionia County Intermediate 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.

After requesting and receiving an extension of time, Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on June 14, 2016. Charging Party filed its brief in support of the ALJ's Decision and Recommended Order on June 23, 2016.

In its exceptions, Respondent contends that the ALJ erred by concluding that § 15(3)(m) of PERA prohibits bargaining over all subjects relating to teacher discipline and by finding that the arbitrary and capricious standard mandated by the statute is a prohibited subject of bargaining. Respondent cites as error the ALJ's finding that the issue of due process in disciplinary procedures has been removed from the sphere of collective bargaining by § 15(3)(m) and her conclusion that the Union violated § 10(2)(d) by demanding that Charging Party arbitrate a grievance related to teacher discipline. Respondent also contends that the ALJ erred by relying upon previous ALJ

decisions in *Shiawassee Intermediate Sch Dist Ed Ass'n*, __MPER__ (Case No. CU15 F-019, issued July 25, 2016), and *Ionia Pub Sch*, Case No. C13 F-107.

Upon review of the record and Respondent's exceptions, we find no error in the ALJ's decision.

Procedural Matters:

The exceptions to the ALJ's Decision and Recommended Order were due on May 18, 2016. On May 12, 2016, Respondent filed a request for an extension of time to file its exceptions. On May 16, 2016, Charging Party filed a response to Respondent's request for an extension of time to file exceptions. Charging Party asked that the Commission deny Respondent's extension request. Charging Party argued:

> Since December 2014, Rule 423.176(8) no longer uses the word "will" in relation to granting extensions. The Commission's authority to grant an extension of time in which to file exceptions is explained in Rule 423.176a. After December 2014, a party does not have a guaranteed right to an extension of time in which to file exceptions to an administrative law judge's decision and recommended order. Now the Commission's Rule states: "One 30-day extension may be granted, unless a shorter period is ordered by the commission." R 423.176a(3).
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> Respondent has offered no reason or explanation as to its need for additional time in which to file exceptions to Administrative Law Judge Julia S. Stern's Decision and Recommended Order issued on April 25, 2016. As such, the District requests that the Commission deny Respondent's request for additional time or grant a minimal extension of time so as to prevent any unnecessary delay in this matter.

Prior to December 16, 2014, Rule 176(8) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176(8), applied to requests for extensions of time to file exceptions, cross exceptions, and responses to exceptions or cross exceptions. Rule 176(8) provided:

> A request for extension of time in which to file exceptions, cross exceptions or briefs in support of the decision and recommended order shall be filed in writing and filed with the commission before expiration of the required time for filing. At the same time, copies of the request for extension shall be served on each of the other parties. One extension of not longer than 30 days will be granted to the moving party upon the filing of the request. Subsequent extensions will be granted only upon a showing of good cause. Good cause does not include inexcusable neglect by a party or a representative thereof.

The Commission's General Rules were amended effective December 16, 2014 and, with respect to extensions of time, now provide at Rule 176a:

> (1) A party may file with the commission a written request for an extension of time to file 1 of the following:

(a) Exceptions.

(b) Cross exceptions and supporting brief.

(c) Brief or legal memorandum in support of the decision and recommended order.

(d) Responses to cross exceptions.

(2) Written requests to extend the filing deadline for such pleadings shall be filed with the commission and served on the other party before the expiration of the filing deadline.

(3) One 30-day extension may be granted, unless a shorter period is ordered by the commission.

(4) The new filing deadline shall apply to all parties and no subsequent extensions of time for filing that same form of pleading shall be granted unless all parties to the case consent to the additional extension of time or the requesting party shows exceptional circumstances, which justify another extension under subrule (5) of this rule.

(5) Exceptional circumstances for the purposes of a subsequent extension of time under this rule include any of the following:

(a) Severe injury, severe illness, or death of an individual who is either a party or party representative.

(b) Severe injury, severe illness, or death of a member of that individual's immediate family or household.

(c) Similarly dire circumstances.

(6) Medical documentation supporting an assertion of a severe injury or illness shall be submitted with any request for a subsequent extension unless all parties to the case have consented to the additional extension.

The changes in the rules regarding extensions were made for three reasons. First, a change was made to conform the rules to expressly reflect the long-standing practice of permitting extensions of time for filing responses to cross exceptions. Second, the rules were changed in order to limit requests for extensions at each stage of the proceedings. Thus, under the amended rules, if one party files a request for an extension of time to file exceptions, that extension applies to all parties. Similarly, if a party files a request for an extension of time to file a response to exceptions, that extended period of time would apply to each party that was in the position to respond to exceptions. Additionally, no more than one extension would be granted at each stage unless all parties agreed to a subsequent extension or the requesting party showed exceptional circumstances. The third reason for amending the rules with respect to extensions of time was to give the Commission the discretion to reduce the amount of time given in an extension to less than

30 days in matters where the Commission has determined that the case should be more promptly decided.

Under the previous rules, the first extension of time for filing exceptions, the first extension of time for filing a response to exceptions, and the first extension of time for filing a response to cross exceptions were each granted automatically, if the request was for an extension of 30 days or less. With the exception of cases that the Commission determines must be decided more promptly, there was no change in the procedure for granting initial extension requests. While the Commission has retained the discretion to limit the length of any extension of time to less than 30 days where it has determined that it is necessary to decide a case more promptly, the Commission did not elect to do so in this matter.

As under the prior rules, it is not necessary for a party to give a reason for a request for a first extension of time at the exceptions stage, the response to exceptions stage, or the response to the cross-exceptions stage of the proceedings.

Therefore, pursuant to Rule 176a(3) of the Commission's General Rules, 2014 AACS, R 423.176a(3), an order was appropriately issued on May 16, 2016, granting Respondent an extension of time until June 17, 2016.

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.

On March 20, 2015, the Employer questioned Renee Eis, a probationary special education teacher in a bargaining unit represented by the Union. The Employer had heard from a third party that male and female students had been permitted to change clothes together in a locker room next to Eis' classroom, and questioned her about that incident. Eis was not told that the questioning was an investigatory interview or that it might lead to her being disciplined. On March 31, 2015, the Employer gave Eis a written reprimand. The Union filed a grievance on April 17, 2015, which alleged that Eis was denied due process because the Employer failed to tell her that the questioning on March 20 was investigatory. The Union also asserted that the Employer's investigation was not fair or thorough and that the discipline given to Eis was arbitrary and excessive. The Union also contended that the Employer violated Article 6, Section 4 of the parties' collective bargaining agreement, which provides as follows:

> No employee shall be disciplined or discharged arbitrarily or capriciously. Employees recommended for dismissal during a school year will be informed, in writing, either personally or by certified mail. A non-probationary employee being recommended for dismissal during the school year will have the right to a hearing before the Board. For all tenured and probationary teachers covered by the Michigan Teachers' Tenure Act, all procedures specified in the Michigan Teachers' Tenure Act will be adhered to regarding discharge, demotion, and non-renewal. Professional employees not specifically covered by the State Tenure Act will follow the same timeline provisions as specified by the Act.

In mid-May, the parties held a level two meeting on the grievance. At that time, the Employer informed the Union that because teacher discipline is a prohibited subject of bargaining, the matter was within the sole discretion of the Employer. The Employer denied that there had been a due process violation during the investigation or during the disciplinary process and pointed out that because Eis was a probationary employee she could be terminated for any reason. At that meeting, the Union proposed steps it believed the Employer should take to prevent incidents of the type for which Eis had been reprimanded.

Around June 9, 2015, the Union and Employer met regarding level three of the grievance procedure. They discussed procedures that could be employed to prevent future occurrences of the type of incident for which Eis had been reprimanded. The Employer agreed to make certain changes regarding the locker room and stated in its answer to the grievance that the parties had resolved the issue of the written reprimand.

On June 15, the Union responded by stating that it did not believe the parties had reached agreement on a solution to prevent future incidents. The Union further stated that it did not agree with the Employer's assertion that Eis lacked due process rights; nor did it agree with the Employer's assertion that her due process rights had not been violated.

On July 2, 2015, the Union formally demanded arbitration. In the Union's letter demanding arbitration, the Union asserted that the Employer violated Article 6 Section 4 of the parties' collective bargaining agreement, which provides: "No employee shall be disciplined or discharged arbitrarily or capriciously." The Union also contended that the Employer violated Eis' due process rights, that the written reprimand was excessive discipline, and that the reprimand should be changed to a verbal warning in writing.

Around July 8, the Union filed its demand for arbitration with the American Arbitration Association. The Employer responded on July 10, with a letter stating that the grievance involved a prohibited subject of bargaining under § 15(3)(m) of PERA and that the discipline could not be the subject of grievance arbitration. The Employer further asserted that unless it was ordered to participate in arbitration by a court, it would not do so. The Employer requested that the arbitration be postponed until it could petition a court for an injunction against the arbitration. Subsequently, the arbitrator determined that he lacked jurisdiction to decide the arbitrability of the matter and that the case should be held in abeyance until the issue of arbitrability was resolved.

The Union objected to the arbitrator's ruling and stated that it would no longer pursue the discipline part of the grievance, but would only ask the arbitrator to decide the due process issue and the issue of the working conditions that resulted in Eis' discipline. In its letter of objections, the Union pointed to language in the preamble to Article 4 of the parties' collective bargaining agreement to support its contention that the due process issue was properly before the arbitrator. In that letter, the Union also alleged that the Employer had violated Article 5, Section 6 of the parties' collective bargaining agreement, which states:

> A written complaint filed by a student or parent against an employee with the Board or its agents shall be reported to the employee involved as soon thereafter as is reasonably possible if the said complaint is to be used in any disciplinary action.

On August 19, 2015, the Employer responded by asking the arbitrator to dismiss the grievance for lack of substantive arbitrability. On August 24, 2015, the Employer filed the unfair labor practice charge in this matter, as well as a motion for summary disposition. On September 9, 2015, during a conference call between the parties and the arbitrator, the arbitrator determined that the matter should be held in abeyance until the issuance of a decision on the unfair labor practice charge.

Discussion and Conclusions of Law:

We first addressed the question of whether a party violates its duty to bargain by seeking arbitration of a grievance over a prohibited subject of bargaining, in *Pontiac Sch Dist*, 28 MPER 34 (2014). Recently, the issue came before us again in *Shiawassee Intermediate Sch Dist Ed Ass'n*, __MPER__ (Case No. CU15 F-019, issued July 25, 2016).[3] In that case, we examined the issue in the context of a grievance over the discipline of a teacher. We explained that a public school employer's decision regarding the discipline of a teacher is a prohibited subject of bargaining under § 15(3)(m) of PERA and, as such, can never become an enforceable part of a collective bargaining agreement. See, also, *Michigan State AFL-CIO v MERC,* 212 Mich App 472, 487 (1995), aff'd 453 Mich 362 (1996).

Although public school employers and the labor organizations representing their employees may discuss the employer's decisions about disciplinary policies and procedures, as well as decisions to discipline individual teachers, § 15(3)(m) prohibits them from bargaining over those issues. Moreover, if a union insists on negotiating over prohibited subjects of bargaining when the employer has repeatedly refused to do so, the union's actions will constitute a breach of the duty to bargain. See *Calhoun Intermediate Ed Assn, MEA/NEA*, 28 MPER 26 (2014), aff'd, ____ Mich App ____ (2016); *Ionia Pub Sch*, 28 MPER 58 (2014) aff'd unpublished opinion per curiam of the Court of Appeals, issued May 12, 2016 (Docket No. 321728). Moreover, if the parties do bargain over prohibited subjects and reach an agreement on those subjects, that agreement is unenforceable. See *Pontiac Sch Dist*, 27 MPER 60 (2014), aff'd unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015, (Docket No. 322184).

Processing a grievance regarding teacher discipline may be considered to be no more than discussion of the public school employer's decisions regarding teacher discipline. However, attempting to arbitrate that grievance goes beyond the discussion stage, it is much like insistence upon bargaining a prohibited subject when the other party has refused to do so. See, for example, *Calhoun Intermediate Ed Assn*. Grievance arbitration regarding a prohibited subject of bargaining, constitutes an effort to unlawfully enforce contract provisions or other agreements that have been made unenforceable by § 15(3). See *Pontiac Sch Dist*, 28 MPER 34 (2014). Since § 15(3)(m) prohibits parties from bargaining over a public school employer's decisions regarding teacher discipline, a union's demand to arbitrate a grievance over teacher discipline is an unlawful effort to attempt to enforce contract provisions made unenforceable by § 15(3)(m) and is a breach of the

[3] We note Respondent's argument that the ALJ erred in applying the reasoning of her decision in *Shiawassee Intermediate Sch Dist Ed Ass'n* to this case. We find no error in the ALJ's reliance on her reasoning in the earlier case, which we found to be sound. We have affirmed the ALJ's decision in *Shiawassee.* We also note Respondent's argument that the ALJ erred by relying on ALJ Peltz's decision in *Ionia Pub Sch*, Case No. C13 F-107. Since exceptions are currently pending before us in *Ionia Pub Sch*, it would not be appropriate for us to comment here on ALJ Peltz's decision in that case.

union's duty to bargain in violation of § 10(2)(d). See *Shiawassee Intermediate Sch Dist Ed Ass'n*, __MPER__ (Case No. CU15 F-019, issued July 25, 2016).

Grievance Arbitration Regarding the Issue of Due Process in Disciplinary Procedures

In its exceptions, the Union contends that the ALJ erred by finding that the issue of due process in disciplinary procedures has been removed from the sphere of collective bargaining by § 15(3)(m). As the ALJ noted, the issue of teacher discipline has been removed from the sphere of collective bargaining by § 15(3)(m); thus, due process issues related to teacher discipline have also been removed from the sphere of collective bargaining. As we explained in *Shiawassee*:

> [W] here 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.

We note the Union's assertion, in its objections to the arbitrator's decision to hold the matter in abeyance, that it would drop the part of the grievance with respect to Eis' discipline, but wished to pursue the due process issue and the issue of the working conditions that resulted in Eis' discipline. Where a grievance raises the question of whether a public school employer's disciplinary procedures comply with constitutional due process requirements, that grievance is questioning the employer's decisions about procedures used in the discipline. If the Union pursued the arbitration solely with respect to the due process issue, the Union would be demanding that the arbitrator examine the procedure the Employer decided to use in disciplining Eis. To the extent that the grievance addresses a public school employer's decisions relating to the discipline or discharge of a teacher, arbitration of that grievance is unlawful under § 15(3)(m). See *Shiawassee*. Thus, if the Union had limited its request for arbitration of the grievance to the issue of whether the Employer failed to provide Eis with due process, the Union would be seeking review of a decision the Employer made related to the disciplinary procedures, even if the Union did not challenge the appropriateness of the discipline.

Where there is a question of whether a public school teacher was denied due process when disciplined or discharged by his or her employer, that issue may be raised in forums other than grievance arbitration. Public employees continue to have constitutional due process rights as interpreted by the courts. Public school employers continue to have the responsibility of providing their employees with the due process rights to which those employees are entitled. Section 15(3)(m) does not limit the enforceability of those constitutional rights in venues other than grievance arbitration. *Id*.

If the Union had limited its request for arbitration to the conditions under which Eis taught the health class, that would not have been a demand to bargain over a prohibited subject. However, the request for arbitration was not limited to working conditions issues such as whether the Employer was required to provide separate changing areas, to give Eis additional assistance in supervising the students, or to make some other changes to the working conditions that would have prevented the circumstances under which male and female students changed clothes together in the same room. Even when the Union sought to limit the scope of arbitration, it continued to seek

review of whether the disciplinary procedure implemented by the Employer denied due process to Eis, and, by doing that, it continued to seek arbitration regarding a prohibited subject of bargaining. That was a violation of the Union's duty to bargain under § 10(2)(d).

The "Arbitrary and Capricious Standard" Provided in the Teachers' Tenure Act

The Union contends that the ALJ erred by relying on her decision in *Shiawassee Intermediate Sch Dist Ed Ass'n.* According to the Union, the legal issue to be addressed here, which was not addressed in Shiawassee, is the enforceability of the contract provision that contains the "arbitrary and capricious standard." The Union contends that the ALJ erred by finding that the "arbitrary and capricious standard" mandated by the statute is a prohibited subject of bargaining. The Union argues that in a public school employer's decision regarding the discipline of an individual teacher, § 15(3)(m) requires the use of the "arbitrary and capricious standard" provided in the Teachers' Tenure Act at MCL 38.101. The Union asserts that the parties' collective bargaining agreement incorporates the requirement of § 15(3)(m) by prohibiting arbitrary or capricious discipline. On that basis, the Union contends that the ALJ erred by finding that the Employer's discipline of Eis could not be challenged in arbitration as being arbitrary and capricious.

The language of § 15(3) (m) of PERA, provides:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
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> * * *
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> (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.

Our goal in construing the language of § 15(3)(m) of PERA 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). In interpreting a statute, we consider "both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133–34 (2014) quoting *Shinholster v Annapolis Hosp*, 471 Mich 540, 549 (2004). The rules of statutory construction tell us that a statute is enacted and meant

to be read as a whole. *Metropolitan Council 23, AFSCME* v *Oakland Co (Prosecutor's Investigators)*, 409 Mich 299, 317-318 (1980).

Accordingly, we cannot read § 15(3)(m) without reference to § 15(4), which states:

> (4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, *are within the sole authority of the public school employer to decide.* (Emphasis added.)

While § 15(3)(m) prohibits public school employers from adopting any standard for discharge or discipline other than the "arbitrary and capricious standard" contained in the Teachers' Tenure Act, it does not require public school employers to include that standard in a collective bargaining agreement. Thus, if a public school employer and the labor organization representing its employees chose to incorporate the "arbitrary and capricious" standard in their collective bargaining agreement, the provision incorporating that standard would be no more enforceable by the labor organization than any other contract provision regarding teacher discipline or discharge. As we explained in *Shiawassee*, contract provisions regarding teacher discipline or discharge are unenforceable when they are contained in a collective bargaining agreement between a public school employer and the labor organization representing teachers.

Moreover, § 15(3)(m) makes it clear, particularly when read in the light of § 15(4), that decisions by a public school employer regarding teacher discipline or discharge are prohibited subjects of bargaining and are "within the sole authority of the public school employer to decide." Therefore, where a labor organization representing a teacher believes that the public school employer's decision to discipline that teacher was arbitrary or capricious, the labor organization has no authority to challenge the employer's disciplinary decision through grievance arbitration. Although there may be avenues for challenging a public school employer's decision related to teacher discipline, grievance arbitration is not one of them. We find it to be clear from the wording of § 15(3)(m) and § 15(4) that the Legislature intended to eliminate grievance arbitration as an available means for challenging public school employers' decisions regarding teacher discipline.

<u>Grievance Arbitration Is Not a Prohibited Subject of Bargaining</u>

Respondent argues that grievance arbitration is not a prohibited subject of bargaining. We agree. Grievance arbitration is a recognized means of enforcing lawful contractual provisions contained in collective bargaining agreements between employers and the labor organizations representing their employees. Nothing in § 15(3)(m) or § 15(4) prohibits bargaining over the grievance process or over whether the parties have the right to resolve their grievances over mandatory or permissive subjects of bargaining through arbitration. Neither § 15(3)(m) or § 15(4) mention grievance arbitration.

While the Legislature has not prohibited grievance arbitration or made it unlawful to bargain over grievance arbitration, it has made it unlawful to attempt to enforce contractual provisions regarding matters specifically designated as prohibited subjects of bargaining in § 15(3). Under § 15(4), such matters are within the sole authority of public school employers.

Contractual provisions covering prohibited subjects of bargaining cannot be enforced through grievance arbitration or through any other means. Thus, it is not the process of grievance arbitration that has been prohibited; what is prohibited is any attempt to enforce contractual provisions that have been made unenforceable by § 15(3), whether that attempt is by grievance arbitration or by other means. See *Michigan State AFL-CIO v MERC,* 212 Mich App 472, 487 (1995).

Limitations on Teacher Recourse to the Tenure Commission

The Union complains that the Legislature increased the number of suspension days that would vest the Tenure Commission with jurisdiction over a challenge to discipline. Based on recent changes to the Teachers' Tenure Act made at the same time that the Legislature amended § 15(3) by adding subdivision (m), the Union argues that "[d]iscipline less than 15 consecutive days, while not subject to the Tenure Act, is still subject to challenge through a negotiated grievance procedure." Respondent opines that the Legislature "intended to allow for an employee to contest such discipline through existing contract procedures." We disagree. Although recent changes to the Teachers' Tenure Act altered the jurisdiction of the Tenure Commission, it cannot be implied from those changes that the Legislature intended to maintain public school teachers' ability to challenge such disciplinary decisions by extending the scope of grievance arbitration to include public school employers' decisions regarding teacher discipline or other prohibited subjects of bargaining. See *Pontiac Sch Dist*, 28 MPER 1(2014), where we explained:

> [I]n interpreting § 15(3) and (4) of PERA, the Supreme Court in *Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996), held that a "prohibited" subject of bargaining is synonymous with an "illegal" subject of bargaining. An employer is not required to bargain to impasse or agreement before taking unilateral action on an illegal subject of bargaining, and although the parties to a collective bargaining relationship are not expressly forbidden from discussing an illegal subject, a contract provision regarding an illegal subject is unenforceable. *Michigan State AFL-CIO, Id.*, n 9; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55, n 6 (1974).

According to the Union, "courts will not hesitate to compel arbitration of grievances when the grievance, on its face, is governed by the contract." However, the Michigan Supreme Court clearly explained in *Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996), that matters made prohibited subjects of bargaining under § 15(3) cannot be the subject of enforceable contract provisions. Thus, even where parties have agreed to include prohibited subjects of bargaining in a contract, those provisions are unenforceable. Michigan courts will not compel arbitration of a grievance that seeks to enforce a contract provision regarding a prohibited subject of bargaining. See *Pontiac Sch Dist*, 27 MPER 60 (2014), aff'd unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015, (Docket No. 322184). As the ALJ concluded, the Union's efforts to obtain enforcement of provisions of the parties' collective bargaining agreement related to teacher discipline are a breach of the duty to bargain in good faith in violation of § 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 Respondent'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: August 15, 2016