STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DAVISON COMMUNITY SCHOOLS,
Public Employer-Respondent in MERC Case No. C15 A-004;
Hearing Docket No. 15-002409,
Public Employer-Charging Party in MERC Case No. CU15 B-003;
Hearing Docket No. 15-005057,

-and-

DAVISON EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party in MERC Case No. C15 A-004;
Hearing Docket No. 15-002409,
Labor Organization-Respondent in MERC Case No. CU15 B-003;
Hearing Docket No. 15-005057.
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APPEARANCES:

Thrun Law Firm, P.C., by Raymond M. Davis and Jessica A. Walker, for the Public Employer

White, Schneider, Young & Chiodini, P.C., by William F. Young and Jeffrey S. Donahue, for the Labor Organization

DECISION AND ORDER

On April 28, 2016, Administrative Law Judge (ALJ) Travis Calderwood issued his Decision and Recommended Order in the above matter finding that neither the Employer, Davison Community Schools, nor the Union, Davison Education Association, MEA/NEA established that the other party violated PERA. In their collective bargaining agreement, the Employer and the Union agreed to a procedure that would allow them to deviate from the language of the collective bargaining agreement at certain times with respect to certain schools. Under the procedure, the Contract Management Committee would review requests for deviation from the contract if submission of the request had been approved by a two-thirds vote of the affected employees with the consent of the principal of the affected school. This provision was in the parties' collective bargaining agreement prior to the enactment of Act 349, which among other things, gave most public sector workers in Michigan the right to choose whether they would financially support the union representing their bargaining unit. Votes were conducted on proposed contract deviations on three occasions. In the first vote on a contract deviation, only affected bargaining unit employees who were members of the Union were permitted to vote. In the other votes, all affected bargaining unit members were permitted to vote without regard to their status in the Union.

The Union filed a charge against the Employer contending that permitting employees who were not union members to vote was a unilateral change in terms and conditions of employment and asserted that the Employer violated § 10(1)(a), (b), and (e) of PERA. The Employer subsequently filed a charge against the Union, which alleged that the Union was attempting to cause the Employer to discriminate against employees based on their union membership in violation of § 10(2)(c) and (d) of PERA. The ALJ concluded that neither party violated § 10 of PERA, and recommended that the Commission dismiss both charges. The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with § 16 of PERA.

The Union filed exceptions on June 26, 2016, but withdrew them later on the same day. The Employer did not file exceptions. Inasmuch as there are no longer exceptions to the ALJ's Decision and Recommended Order, said Order is adopted by the Commission.

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: September 20, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

DAVISON COMMUNITY SCHOOLS,
Respondent-Public Employer in Case No. C15 A-004; Docket No. 15-002409-MERC,
Charging Party-Public Employer in Case No. CU15 B-003;
Docket No. 15-005057-MERC,

-and-

DAVISON EDUCATION ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization in Case No. C15 A-004;
Docket No. 15-002409-MERC,
Respondent-Labor Organization in Case No. CU15 B-003;
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APPEARANCES:

Thrun Law Firm, P.C., by Raymond M. Davis and Jessica A. Walker, for the Public Employer

White, Schneider, Young & Chiodini, P.C., by William F. Young, for the Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On January 9, 2015, and February 6, 2015, respectively, the Davison Education Association, MEA/NEA ("Association" or "Union") and the Davison Community Schools ("District" or "Employer") filed competing unfair labor practice charges against each other with the Michigan Employment Relations Commission (Commission) under §10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, MCL 423.216, this case was assigned to Administrative Law Judge (ALJ) Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Commission. These proceedings were consolidated and heard on April 17, 2015, in Lansing, Michigan, before the undersigned. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties on or before June 18, 2015, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charges and Procedural History:

The competing unfair labor practice charges filed by the parties both stem from a November 12, 2014, polling of all teachers, regardless of their membership status with the Association, at the Davison Middle School. The polling occurred pursuant to a contract clause and served as an effort to gauge the teachers' support for a proposed temporary schedule change for days the school had scheduled pep assemblies. The Association's charge, Case No. C15 A-004, filed on January 9, 2015, alleges that the District violated Sections 10(1)(a), (b), and (e) of PERA by issuing ballots to all members of the bargaining unit at the school regardless of their status as members or non-members in good standing in the Union. The District's charge, Case No. CU15 B-003, filed on February 6, 2015, claims the Union's demands and attempts to limit the polling to only members in good standing with it violated Sections 10(2)(c) and (d) of PERA.

Findings of Fact:

The parties are signatories to a collective bargaining agreement effective from July 1, 2013, through June 30, 2015. Article I of the contract recognizes the Association as the exclusive bargaining representative for:

> [A]ll professional personnel, (including personnel on tenure, probation, classroom teachers, learning disability consultants, guidance counselors, librarians, school psychologists, social workers, speech and hearing therapists, school nurses employed or to be employed by the Board) whether under contract, on leave, or on a per diem basis.

That Article continues on to define the term "teacher" as all employees represented by the Association in the unit as stated above.

Article XI covers many topics relating to negotiations and contract management. Section B of that Article is entitled "Contract Management Committee" and provides in Subsection 1 the following:

> In order to facilitate communications between the Board and the Association, a Contract Management Committee (CMC) comprised of representatives from the Association and the Board will meet on a regular basis, usually monthly, to discuss topics and resolve issues and problems.

Section C of Article XI is entitled "Contract Deviation" and provides in its entirety:

1. It is agreed that a school improvement program is mutually desirable and beneficial. In implementing such a program, the parties recognize that the contract needs to provide flexibility for experimentation and innovation in educational programs for the benefit of students and to meet the needs of parents and staff. Consideration for a contract deviation should only occur when there is strong support for it by the principal and by the affected staff in the building.

   To facilitate contract flexibility, buildings, grade levels, or departments may initiate contract deviation requests to the Contract Management Committee for review and action pursuant to guidelines adopted and disseminated by CMC. **Such deviation request shall require approval by a 2/3 vote of the building, grade level or department** and the building principal.

   The Contract Management Committee shall have the authority to adopt contract deviation requests by a 2/3 vote.

2. Deviation requests shall be on the form provided by the Contract Management Committee and in accordance with the Deviation Guidelines adopted by CMC. The contract deviation request form shall include a provision for a minority report or view.

3. Buildings, grade levels or departments and the building principal shall evaluate their approved contract deviations within one year as to whether to seek continuation, modification or approval on a permanent basis. Any requests for continuation of a deviation shall follow the procedures set forth above.

   [Emphasis Added.]

The "Deviation Guidelines" referenced in sub-section 2 is the embodied in the "Davison Contract Deviation Guidelines" ("Guidelines"), initially adopted on March 29, 1994, and most recently updated on January 10, 2001. In addition to restating, in a very similar manner, the language contained in the contract regarding the process by which a deviation is to be proposed and approved, the Guidelines also provides the following:

> Deviation requests shall require approval by a 2/3 vote of the **affected bargaining unit members** voting in the building, grade level, or department and approval of the building principal. [Emphasis Added.]

The Guidelines goes on to require, in italicized print at the bottom, that "[c]opies of the [Guidelines] shall be printed on the back side of the [contract deviation request form].

Article XII of the contract sets forth an agreed-upon grievance procedure; a procedure that culminates in final and binding arbitration.

Sometime in the spring of 2014, Association President Michael Hull and Matt Shanafelt, the Principal of Davison High School, worked together to address an issue regarding final examination schedules at the High School. Hull and Shanafelt developed a deviation from the contracted schedule to address teacher concerns for the last three days of the school year which Hull memorialized in a contract deviation form dated April 30, 2014. Hull then emailed the High School teachers and advised them of an upcoming meeting to discuss a possible final exam schedule.

Hull testified that prior to the vote on the April 30, 2014, contract deviation, he, along with the other association members on the Contract Management Committee, discussed the contract deviation and concluded that only Association members in good standing should be permitted to vote. At a morning meeting with the High School teachers, Hull introduced the contract deviation and advised the teachers that ballots would be placed in the mailboxes of those teachers who were eligible to vote. The contract deviation received the requisite approval of those teachers that voted and Shanafelt and Hull both signed the deviation from as principal and teacher representative. The deviation was approved by the Contract Management Committee. Testimony was provided by Assistant Superintendent Kevin Brown that the District was not aware at the time of the April 2014 polling that only union members in good standing had been allowed to vote on the deviation.

Following the Davison High School contract deviation, Hull learned of another proposed contract deviation, this time at Thomson Elementary. That proposed deviation sought to alter the elementary teachers' daily schedules. Tim Rutkowski, the Association's building representative, sought Hull's advice regarding the deviation's ballot and was advised by Hull that the Association was to conduct the vote and that only teachers who were in good standing with the Association should be allowed to vote; Hull subsequently shared the same with Thomson Elementary Principal Natalie Miller. At a Thomson Elementary staff meeting, Miller began to pass out ballots she had prepared when Rutkowski stopped her and objected to all teachers voting on the deviation. After discussing the issue with Brown, Miller allowed all building teachers to vote; Rutkowski and Miller then signed the contract deviation form and provided it to the Contract Management Committee.

In the fall of 2014 another contract deviation proposal was being considered, this time at Davison Middle School. The deviation as proposed would reduce the duration of classes on days that pep assemblies were scheduled. Prior to the deviation proposal, pep assemblies were held during homeroom and part of the first hour; by allowing the proposed deviation, all classes on assembly days would be able to provide equal instructional time. On November 17, 2014, all building staff were provided ballots for the proposed deviation. Once again Hull asserted that only Association members in good standing should be allowed to vote; Brown disagreed. Davison Principal Shelley Fenner prepared the ballot and a cover sheet which were both

disseminated to the entire building teaching staff. The deviation proposal was supported by less than the necessary 2/3 of the affected staff and was never submitted to the Contract Management Committee for consideration.

Hull testified that there had been contract deviation proposals made under the parties' prior collective bargaining agreement and that in those instances voting had not been restricted to members in good standing with the Association.

Discussion and Conclusions of Law:

At the onset, it is necessary to clarify that the gravamen of the dispute between the parties is premised on a contractual clause and the interpretation of said clause. In the instant case the parties devised a mechanism that would allow them both the flexibility to propose, consider, and implement temporary changes to their contractual obligations.

Under Section 15 of PERA, a public employer is required to bargain collectively with the representatives of its employees over "wages, hours, and other terms and conditions of employment." Once a specific subject has been classified as a mandatory subject of bargaining, neither party to a collective bargaining relationship may take unilateral action on the subject absent an impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277 (1978). A party may satisfy its obligation to bargain over a mandatory subject of bargaining when it negotiates a contract provision that fixes the parties' rights with respect to that subject, for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 318 (1996). Agreement on such a subject enables both parties to rely on the language of that agreement as the statement of their obligations regarding that topic as covered by the agreement.

When a term or condition of employment is covered by a provision in a current collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of such provision are generally left to arbitration. *Port Huron Ed Ass'n*, 317-321. As our Supreme Court recently reaffirmed in *Macomb Co v AFSCME Council 25*, 494 Mich 65 (2013), when a charging party claims that a respondent has failed to bargain over a mandatory subject and "when the parties have agreed to a separate grievance or arbitration process, the [Commission's] review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim." *Id.* at 81.

Here, under the precedent established by *Macomb Co*, supra, the contract's plain language undoubtedly covers the subject of who is allowed to vote. Additionally the contract provides for grievance arbitration culminating in binding arbitration. Consequently, it is my finding that the parties' dispute over what that language means or requires, with respect to who is allowed to vote in the contract deviation process, is a dispute to be settled pursuant to the parties' agreed upon grievance and arbitration process.

The Association argues that the April 2014 contract deviation should be seen as establishing a past practice that only union members are allowed to vote, and that the District's actions during the November 2014 contract deviation is a unilateral change undertaken without bargaining. The Association bases this argument on the fact that all deviations prior to the April 2014 deviation, and the Contract Deviation Guidelines, were from a time when all bargaining unit members were either required to be members of the union or in the least required to financially support the union, i.e., pre right-to-work. [1] However, the Court in *Macomb Co* held that an arbitrator, not the Commission, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment. *Id* at 82.

Similarly any argument by the District, either as to establishment of past practices or other contractually based allegations, are not properly before the Commission and instead should be adjudicated pursuant to the parties' agreed upon grievance and arbitration procedure.[2]

The above holdings notwithstanding, the parties have alleged several violations of PERA that go beyond the scope of a mere dispute over what the contract provides; the Association, among other allegations, asserts that Section 10(1)(b) of PERA allows it to limit the vote over contract deviations to those members of the bargaining unit who are members of the Union in good standing, while the Employer argues first that the November 2014 contract deviation process, or at least the subject of the deviations, was in fact a "pilot program" under PERA and therefore a prohibited subject of bargaining. The Employer additionally argues that the Association's conduct, in either case, violated Section 10(2)(c) of PERA because the action attempted to cause the Board to discriminate on the grounds of membership in the Association. Despite the fact that the contract between the parties explicitly covers who gets to vote on a contract deviation, and a dispute over its interpretation is properly disposed of in binding arbitration, both the Association's and the District's claims that the other violated PERA involve statutorily based allegations that cannot be adequately dealt with in arbitration. As such they will be discussed below.

A. [1] Public Act 349 of 2012 (PA 349), effective March 28, 2013, removed language from Section 10 of PERA that had made it lawful for a public employer and labor organization to require, as a condition of employment, that all bargaining unit members share fairly in the financial support of their exclusive bargaining representative by paying to the labor organization an agency or service fee. Additionally, PA 349 also expressly provided that public employees have the right to refrain from union activity.

B. [2] With respect to the District's claim that the Association's actions resulted in a unilateral change in a mandatory subject of bargaining, whereby the mandatory subject of bargaining was the term and condition of employment that required all bargaining unit members be allowed to vote on contract deviation proposals, similar to the above discussion on "attempt," there is no evidence on the record that establishes that the District, in the November 2014 deviation, did in fact do anything differently because of the Union. While it is conceivable that the District could argue that the Association's actions in the April 2014 deviation process, whereby the Union limited the vote to only members in good standing, constituted a unilateral change, such a claim is untimely as the deviation in April 2014 occurred more than six months prior to the District's February 2015 filing with the Commission. MCL 423.216(a).

The Association claims that it has its right under Section 10(1)(b) of PERA to limit the vote over contract deviations to those members of the bargaining unit who are members of the Union in good standing. The Association, in support of its claim, seeks to compare the present situation to that which occurs with contract ratification and points to *AFSCME Council 25 Local 1583,* 28 MPER 33 (2014), correctly claiming that the Commission has not required a union to open its decision making process to non-members.[3] See also *Lansing School Dist,* 1989 MERC Lab Op 210 [2 MPER 20054] (supplemental decision and order on remand).[4] The Association's argument is misguided because the contract deviation process at issue here is clearly separate and distinct from a typical contact ratification vote, i.e., the contract has already been ratified and the parties are simply trying to exercise a provision of said agreement.

In *ASFCME Council 25 Local 1583,* the ALJ who issued the initial Decision and Recommended Order considered and distinguished a case decided by the National Labor Relations Board (NLRB), *Branch 6000, National Assn of Letter Carriers,* 232 NLRB 264 (1977). There, the employer and union executed a memorandum of agreement that provided that "carriers shall be allowed to vote each year on having fixed or rotating days off." The union initially allowed all carriers, union members and non-union members alike to vote but set aside the election upon complaints of union members that non-members should have been excluded. The NLRB held that the union violated its duty of fair representation by refusing to allow nonmembers to vote and distinguished this vote from the ratification of a contract at n. 1 by stating:

> This is unlike the ratification of an otherwise agreed-upon contract, in which the required ratification is an integral part of the union's representation process, and thus an internal union matter properly determinable by union members alone, for the same reasons the members alone may choose the negotiators. Here, in contrast, the voting was on the choice of one work schedule or another, so that the voting became a substitute for negotiation and thereby eliminated from the situation the union representation element, and with it the propriety of limiting to union members a voice in the choice.

C. [3] In *AFSCME Council 25, Local 1583,* the union refused to allow three bargaining unit members, who had previously been expelled from membership in the union, to vote on the ratification of a new collective bargaining agreement. The Commission held, in accordance with its decision in *Lansing School Dist,* that PERA does not require that all members of a bargaining unit be allowed to vote in a contract ratification proceeding.

D. [4] In *Lansing School Dist,* the Commission held that barring non-members from voting on a contract ratification does not violate a union's duty of fair representation. The Commission stated:

E.

F. We have never held that a union is required to open up its contract ratification procedures or other decision making mechanisms to non-members. PERA does not set standards for internal union democracy or even mandate that a contract be submitted to the union's membership for ratification before becoming effective.

Similar to the situation in *Branch 6000*, the parties in the instant case sought to use their contract deviation mechanism as a substitute to the negotiation process, thereby removing it from the "union representation element." The language of the contract deviation clause, as well as the purpose behind it, sought to give those employees most affected by or who could most benefit from a proposed contract deviation a voice in its potential implementation. The fact that the deviation is only temporary and does not act as an amendment to the contract further evidences that the mechanism was removed from the "union representation element." Accordingly, it is the conclusion of the undersigned that the language contained in Article XI, Section C, clearly establishes that the contract deviation process contained therein is a substitute for the normal negotiation process and as such is outside of the Associations' statutory right to govern its internal affairs under Section 10(1)(b) of PERA.[5]

Addressing next the Board's argument that the subject of this dispute involves a "pilot program" it is my opinion that such an argument has no merit. Section 15(3) of PERA lists several subjects which the state legislature wished to prohibit bargaining over and instead vested all decision making power with the public school employer. See *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 487 (1995); aff'd 453 Mich 362 (1996). Section 15(3)(h) identifies the following as a prohibited subject of bargaining:

> Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.

While neither PERA nor the Commission has provided a definition of what constitutes a "pilot program" it is clear that the legislature, by making such a "prohibited subject," the intent was to allow a public school employer the ability to exercise all decision making authority thereto. In the present case, regardless of whether the subject of the November 2014 deviation could indeed be considered a "pilot program," I find that the District's action of approaching the proposed schedule change in the manner that it did, as a contract deviation, precludes it from now making the claim that it was a "pilot program."

With respect to the Employer's discrimination claims, Section 10(1)(c) of PERA states that a public employer shall not "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." Section 10(2)(c) states that a union shall not "[c]ause or attempt to cause a public employer to discriminate against a public employee in violation of subsection (1)(c)." With the caveat that the situation herein represents a matter of first impression following the enactment of the state's "right-to-work" laws, there are no facts in the record which establish that the District, in the November 2014 deviation polling, did indeed discriminate in violation of PERA at the behest of the

G. [5] Further supporting this conclusion is the mechanism's language regarding who can propose deviations, i.e., buildings, grade levels, or departments may initiate the request as opposed to limiting the initiation to the Association or some enumerated subset therein.

Association. In fact, the District disagreed with the Union's position, informed it of that fact, and conducted the polling in the manner that it deemed would not be discriminatory or otherwise violate PERA.

The District's claim, therefore, focuses on the word "attempt." In cases involving prohibited subjects under PERA the Commission has not found an unfair labor practice violation against a union for merely discussing the issue. Instead the Commission has required something more, such as demanding to arbitrate prohibited subjects of bargaining. See *Calhoun Intermediate Ed Assn, MEA/NEA*, 28 MPER 26 (2014); See also *Pontiac Schools Dist*, 28 MPER 34 (2014). I find the Commission's above requirement that something more than merely discussing an issue to find a violation to be appropriate to resolve the question of whether conduct arises to the level of an "attempt." In the present case, the Association merely communicated its position; a position that was rejected by the District. The Association never took any step to "attempt" to cause the District to discriminate.

Based on the above discussions, I find that the District did not violate PERA by refusing to limit the voting on the November 2014 contract deviation to only those bargaining unit members who were members in good standing with the Association. Additionally, I find that Association's actions during the November 2014 contract deviation did not cause or attempt to cause the District to discriminate against bargaining unit members on the basis of union membership, nor did its actions constitute a unilateral change in a mandatory subject of bargaining. All other arguments raised by the parties, both at hearing and in post hearing filings, have been carefully considered and do not warrant a change in the result. I recommend that the Commission issue the following order:

Recommended Order

The unfair labor practice charges in Case No. C15 A-004; Docket No. 15-002409-MERC and Case No. CU15 B-003; Docket No. 15-005057-MERC, are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 28, 2016