STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HOWELL EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Respondent,

MERC Case No. CU16 A-005
-and- Hearing Docket No. 16-002853

HOWELL PUBLIC SCHOOLS,
Public Employer-Charging Party.
_____/

APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Erin M. Hopper, for Respondent

Thrun Law Firm, P.C., by Roy H. Henley, for Charging Party

DECISION AND ORDER

On August 18, 2016, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: October 20, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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-And-

HOWELL PUBLIC SCHOOLS,
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APPEARANCES:

White, Schneider, Young & Chiodini, P.C., by Erin M. Hopper, for Respondent

Thrun Law Firm, P.C., by Roy H. Henley, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On January 28, 2016, the Howell Public Schools (the Employer) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Howell Education Association, MEA/NEA (the Union), pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and 423.216. The charge alleges that the Union violated Section 10(2) (d) of PERA by insisting, over the Employer's objection, on discussing a prohibited subject of bargaining and by demanding to arbitrate a grievance over that subject. Pursuant to Section 16 of the Act, the charge was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On February 11, 2016, pursuant to Rule 165(2)(f) of the Commission's General Rules, 2002 AACS, R 423.165, I issued an order to the Union to show cause why it should not be found to have committed an unfair labor practice. The Union filed a response to the order to show cause on March 21, 2016, and the Employer filed a reply brief on April 28, 2016. I conclude that there are no material disputes of fact in this case. Based on undisputed facts set forth in the pleadings and repeated in the fact section below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The Union represents a bargaining unit of the Employer's employees that includes teachers. The parties' current collective bargaining agreement became effective on September 1, 2015, and expires on June 30, 2017. On October 6, 2015, Respondent filed a grievance under the collective bargaining agreement contesting an unpaid suspension issued to a teacher in the bargaining unit. The Employer denied the grievance on several grounds, including that the subject addressed by the grievance, teacher discipline, was a prohibited subject of bargaining under Section 15(3)(m) of PERA. On December 10, 2015, the Union filed a demand to arbitrate the grievance with the American Arbitration Association. As noted above, on January 28, 2016, the Employer filed a charge alleging that the Union violated its duty to bargain in good faith by insisting, over the Employer's objection, on discussing a prohibited subject of bargaining and by demanding to arbitrate a grievance over that subject.

Facts:

On or about September 25, 2015, the Employer issued a five-day unpaid disciplinary suspension to Randy Schafer, a teacher in the Union's bargaining unit, for making offensive sexual innuendoes or suggestive comments during an incident that occurred on September 15, 2015. On October 6, 2015, the Union filed a grievance alleging violations of Articles I(C), IV(C), VI(A) and VI(B) of the collective bargaining agreement and violations of policies adopted by the Employer's School Board. The relief sought was withdrawal of the disciplinary action.

Article I of the parties' contract is entitled "Recognition." Article I(C) states:

> The parties further recognize and acknowledge that they are subject to all applicable laws of the State of Michigan and the United States and any amendments which may be enacted during the terms of this Agreement. All parties or individuals affected by this Agreement retain all rights, interests, and obligations provided by such statutes and have the right or recourse to whatever relief is available thereunder. Neither the District nor the Association shall discriminate against any teacher for the purpose of discouraging, depriving or coercing him/her in the lawful exercise of such rights and privileges.

Article IV is entitled "Teacher Rights." Article IV(C) is identical to Article I(C) with the addition of the following paragraph:

> No teacher shall suffer discrimination based upon religion, race, color, national origin, age, sex, height, weight, marital status or sexual orientation.

Articles VI(A) and (B) of the contract read:

> A.Subject to the provisions of this Agreement and Public Act 379 of the Public Acts of 1965, the District reserves and retains full rights, authority and discretion to control, supervise and manage the operation of all schools and the educational

process and to make all decisions and policies not inconsistent with the terms of this Agreement.

B.All existing policies relating to employment, not inconsistent with or abrogated by this Agreement shall continue in full force and effect. The parties recognize the right of the District unilaterally to make reasonable changes in such policies not inconsistent with the terms of this Agreement. Each teacher is accountable for noting, accessing and adhering to all existing, revised or new Board policies, provided all such policies are available on the Howell Public Schools website and up to date. Teachers shall be provided with an electronic copy when new Board policies are adopted or existing Board policies are revised.

Current Board policies include Policy 3139, which states that before issuing discipline the Employer "shall conduct an investigation, as appropriate to the situation, including providing the employee with reasonable notice and the opportunity to respond." Policy 3139 also states that the Superintendent:

> … should determine the disciplinary action that should be taken and so inform the Board President who shall determine whether or not a report should be made to the Board in open session, unless a closed session is requested by the staff member. . . The Superintendent should ascertain whether or not the staff member wishes such a report to be made in a closed session of the Board.

The grievance, as filed on October 6, 2015, alleged that the Employer violated Article I(C), Article IV(C), and Policy 3139 by failing to provide Schafer with procedural due process prior to suspending him, including, but not limited to, failing to give him notice of the final charges and an opportunity to respond prior to issuing the suspension. It also asserted that the decision to suspend Schafer for a first offense was arbitrary and capricious in that the Employer had disciplined Schafer more severely for his first offense than it had had disciplined other employees for their first offenses. The grievance also stated:

> District has violated the general powers provision of the school code which requires the District to exercise its authority to run the District in accordance with the above cited laws, Board policy and within the general concepts of good faith and fair dealing.

Finally, the grievance alleged that the Employer violated Articles VI (A) and (B) of the collective bargaining agreement by "failing to properly supervise and manage the District as required by law by violating Board Policy #3139." The Union asserted that in addition to failing to provide Schafer with due process before disciplining him, the Employer violated Policy 3139 by refusing to provide Schafer with a closed session hearing before the Board.

On November 10, 2015, Liza Kelly, the Employer's Executive Director of Labor Relations and Personnel, sent the Union a three page letter denying the grievance and explaining the Employer's reasons for doing so.

Kelly first asserted that the Employer had no duty to process the grievance because it related to teacher discipline, and Section 15(3)(m) of PERA made "all aspects of certified teacher discipline, both procedural and substantive, prohibited bargaining subjects." She noted that in *Detroit Pub Schs*, 29 MPER 30 (2015) (no exceptions), a Commission ALJ held that the respondent employer in that case had no obligation under PERA to process grievances concerning teacher discipline or discharge, including grievances asserting that the discipline involved violations of state or federal laws.

Kelly stated that the Employer had no obligation to respond to the Union's claim that Schafer's penalty was arbitrary and capricious. However, she disputed the Union's claim that the Employer had denied Schafer due process. She asserted that Schafer had the opportunity to respond to the allegations at a meeting held with him and his Union representatives on September 23, 2015, and that Schafer knew of the allegations against him at least two days prior to that meeting. Finally, Kelly stated that Policy 3139 merely gave an employee the right to determine whether his or her disciplinary report would be read before the Board in a closed or in an open session, and that this policy did not give the employee either the right to a hearing before the Board or the right to be present when his or her disciplinary report was read in a closed session. On December 10, 2015, the Union made a demand to arbitrate the Schafer grievance.

The grievance procedure in the parties' collective bargaining agreement, Article XV, sets out a series of steps that the parties are required to follow in processing the grievance, including time limits for each action. The filing of a written grievance is step two. Step three requires the building principal to either resolve the matter or answer the grievance in writing within seven days of receipt of the written grievance. If the grievance is not resolved at step three, step four requires the Employer's superintendent or his/her designee to meet with the Union to discuss settlement of the grievance within fourteen days of the date the grievance is submitted to the superintendent. On March 8, 2016, the Union amended Schafer's grievance to assert that the Employer violated the grievance procedure by failing to provide a written step three answer and by failing to meet at step four.

On March 14, 2016, Kelly sent the Union a letter denying the amended grievance. The March 16, 2016, letter reiterated the arguments made in the November 10, 2015, letter, including that the grievance concerned a prohibited subject. It also asserted that the amended grievance was untimely as the grievance procedure required that grievances be filed within seven days of the date of the complained of occurrence or within seven days of when the occurrence became known.

Discussion and Conclusions of Law:

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

> (m) For public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures,

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

The Legislature, in Section 15(3)(j), also made the following prohibited subjects of bargaining:

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

In *Michigan State AFL-CIO v MERC,* 212 Mich App 472, aff'd 453 Mich 362 (1996), the Court of Appeals held parties to a collective bargaining relationship are not prohibited by PERA from discussing topics made "prohibited subjects" under Section 15 of PERA. Rather, the Court concluded, the Legislature's intent was to ensure that prohibited subjects could never become an enforceable part of a collective bargaining agreement and that an employer could never be found to have committed an unfair labor practice by refusing to bargain over a prohibited subject. In *Pontiac Sch Dist,* 28 MPER 34 (2014), the Commission concluded that a union's action in advancing a grievance over a prohibited topic to arbitration was analogous to insisting on negotiating over that topic when the other party had repeatedly refused to discuss it. It also found that the union in that case was attempting to use the arbitration process to unlawfully enforce contract provisions and/or past practices made unenforceable by Section 15(3) of PERA. It concluded, therefore, that the union violated its duty to bargain in good faith by demanding to arbitrate a grievance over a prohibited subject of bargaining.

In *Shiawassee Intermediate Education Association, MEA/NEA,* 30 MPER ____ (2016), Case No. CU15 F-019/15-040854-MERC, issued July 25, 2016, the employer alleged that the union violated its duty to bargain in good faith by demanding to arbitrate a grievance challenging a disciplinary suspension issued to a teacher in the union's bargaining unit. The grievance asserted that in disciplining the teacher the employer had violated the teacher's *Weingarten* rights,[1] as guaranteed by the collective bargaining agreement, and had also failed to afford the teacher the procedural due process required by the collective bargaining agreement and the policies of the employer's school board. The grievance also asserted that the discipline constituted retaliation against the teacher for reporting unfavorable working conditions and that board policy prohibiting such retaliation was incorporated into the collective bargaining agreement.

[1] A public employee has a right to union representation, upon request, at an investigatory interview when the employee reasonably believes that the interview may lead to discipline. See *NLB v J. Weingarten, Inc,* 420 US 251 (1975); *Univ of Michigan,* 1977 MERC Lab Op 496.

The employer asserted in *Shiawassee* that it was unlawful for the union to demand to arbitrate the grievance because the subject of the grievance was teacher discipline, a topic made a prohibited subject by Section 15(3)(m). Noting the differences between the language of Section 15(3)(j) and that used by the Legislature in Section 15(3)(m), the union argued that Section 15(3)(m) does not prohibit bargaining over all decisions relating to discipline, and that PERA contains no prohibition on arbitrating grievances alleging violations of disciplinary procedures or statutory or constitutional rights that have been incorporated into the collective bargaining agreement.

The Commission rejected the union's argument that because Section 15(3)(m) does not prohibit bargaining over "any decision" relating to teacher discipline, it does not prohibit bargaining over disciplinary procedures. It explained:

> Although Section 15(3)(m) does not say that it prohibits bargaining over "any decision," the list of decisions over which bargaining is prohibited is extensive. As the ALJ noted, "the Legislature, in listing the subjects made prohibited bargaining topics by Section 15(3)(m), prohibited bargaining over the 'content, standards, procedures. . . of a policy regarding discharge or discipline of an employee.' Webster's Unabridged Dictionary, 2nd edition (1987), defines 'content as "something that is contained in," or the subjects or topics covered in a book or document.' Moreover, the bargaining prohibition applies to 'procedures . . . and implementation of a policy regarding discharge or discipline of an employee.' The Merriam-Webster online dictionary defines "procedures" as a "particular way of accomplishing something or acting." Thus, we can interpret Section 15(3)(m) as prohibiting bargaining over procedures, or a particular way of accomplishing discipline or discharge as contained in a public school employer's policy. The language of Section 15(3)(m) also prohibits bargaining over "decisions 'concerning' the discharge or discipline of an individual employee." The Merriam-Webster online dictionary defines concerning as "relating to" or "regarding." *Full examination of the language contained in Section 15(3)(m) extends not only to decisions to discharge or discipline particular employees, but also substantive or procedural decisions related to discharge or discipline of individual employees and decisions regarding the procedures set forth in an employer's policy regarding discipline or discharge.* Therefore, we cannot say that the result in this matter would differ significantly if the Legislature had changed the language of Section 15(3)(m) in a manner comparable to the change made in Section 15(3)(j) and prohibited bargaining over "any decision made by the public school employer regarding the [discipline or discharge] of teachers, or the impact of that decision on an individual employee of the bargaining unit. We find nothing in the language of Section 15(3)(m) to indicate that its applicability is limited to decisions on whether an individual employee should be disciplined or discharged.
>
> . . . We agree that Section 15(3)(m) only applies to the decisions specifically listed therein. However, the decisions listed in Section 15(3)(m) are broad enough to include the Employer's decision regarding the procedures it chose to use or to forego in its discipline of Creech. [Emphasis added.]

The Commission also held that contract provisions incorporating statutory or constitutional rights are prohibited subjects of bargaining, and unenforceable under Section 15(3)(m), to the extent that they concern decisions by public school employers related to teacher discipline or discharge. It conceded that a provision in a collective bargaining agreement that promises not to deny or restrict any rights an employee may have under Michigan law might, under certain circumstances, be interpreted as a promise not to violate the employee's *Weingarten* or constitutional due process rights. However, it concluded that Section 15(3)(m) would make this provision unenforceable as applied to teacher discipline or discharge. This does not mean, as the Commission emphasized, that teachers do not have PERA or constitutional due process rights, or rights under policies adopted by the employer's school board. However, these rights cannot be contractual and cannot be enforced through the grievance arbitration process but must be enforced in forums other than the grievance procedure. In accord with its holding in *Pontiac*, the Commission concluded that the union in *Shiawassee* violated Section 10(2)(d) of PERA by attempting to use arbitration to enforce provisions in the collective bargaining agreement made unenforceable by Section 15(3)(m).

The facts in this case are similar to those in *Shiawassee*, as are the arguments made by the Union. The Union argues here, as the union did in *Shiawassee*, that the parties' collective bargaining agreement contains provisions incorporating into the contract procedural due process rights under the Michigan and United States Constitutions and pre-disciplinary procedural rights established by Board policy. As the Commission held in *Shiawassee*, provisions in a collective bargaining agreement incorporating due process and other constitutional rights, statutory rights, and board policies are unenforceable to the extent that they concern an employer's decision to discipline or discharge a teacher. Moreover, as the Commission held in *Pontiac* and in *Shiawassee*, a union's demand to arbitrate a grievance over prohibited subjects violates its duty to bargain in good faith. I conclude that the Union's demand to arbitrate the October 6, 2015, grievance, violated Section 10(2)(d) of PERA because it constituted an unlawful attempt to enforce contract provisions on a prohibited topic, teacher discipline.

The Union points out that the Schafer grievance, as amended, includes an allegation that the Employer failed to comply with the grievance procedure in processing the grievance. The Union asserts that as the grievance procedure in the contract is not a prohibited subject of bargaining, and is valid and binding, the Union is not violating its obligation to bargain by demanding to arbitrate a grievance over the Employer's failure to comply with the grievance procedure. I note that the Union has not apparently withdrawn the other issues included in the amended grievance from consideration by the arbitrator. In any case, I disagree with the Union that the grievance procedure, as applied to a grievance filed over teacher discipline, is not a prohibited subject of bargaining. As the Court stated in *Michigan State AFL-CIO v MERC*, at 487, parties to a collective bargaining relationship can discuss a prohibited subject of bargaining without violating PERA. It does not follow, however, that an employer can be compelled, either by PERA or by a provision in a collective bargaining agreement, to do so. As stated in Section 15(4) of PERA, matters made prohibited subjects of bargaining by Section 15(3) are "within the sole authority of the public school employer to decide." I conclude that contractual provisions governing the processing of grievances are unenforceable as prohibited topics to the extent that they require a public school employer to discuss prohibited subjects of bargaining, such as teacher discipline, with the bargaining representative.

I also conclude that the Union in this case violated its duty to bargain in good faith by demanding that the Employer arbitrate a grievance asserting that the Employer did not comply with the contractual grievance procedure in processing the October 6, 2015 Schafer grievance. This demand, I find, constituted an attempt to compel the Employer to bargain over a subject, teacher discipline, made a prohibited subject of bargaining by Section 15(3)(m) of PERA.

In accord with the facts and the conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The Howell 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 employer's objection, grievances concerning prohibited subjects of bargaining under Section 15(3)(m) of PERA.

2. Advise the arbitrator and the Employer that the Union is withdrawing the grievance it filed on October 6, 2015, regarding discipline issued to Randy Schafer.

4. Post the attached notice to members of its bargaining unit at places on the premises of the Howell Public Schools 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: August 18, 2016