STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

IONIA PUBLIC SCHOOLS,
Respondent-Public Employer,

MERC Case No. C13 F-107
-and- Hearing Docket No. 13-004684

IONIA EDUCATION ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Kevin S. Harty and Timothy T. Gardner, Jr., for Respondent

Kalniz, Iorio & Feldstein, Co., L.P.A. by Fillipe S. Iorio, for Charging Party

DECISION AND ORDER

On February 22, 2016, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent, Ionia Public Schools (Employer), did not breach its duty to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). Charging Party Ionia Education Association, MEA/NEA (Union) alleged that Respondent unlawfully refused to bargain over certain proposals made by the Union for addition to the parties' successor collective bargaining agreement. The ALJ concluded that Respondent had no duty to bargain over those Union proposals, because the proposals would have limited Respondent's discretion in making decisions affecting teacher placement, layoff, recall, discipline, and discharge, which are prohibited subjects of bargaining under Section 15(3)(j), (k), and (m) of PERA. On that basis, the ALJ recommended that the charge be dismissed. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

After requesting and receiving an extension of time, Charging Party filed its exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on April 14, 2016. Respondent requested and received an extension of time to file its response to the exceptions. Respondent filed its brief in support of the ALJ's Decision and Recommended Order on May 9, 2016.

On October 31, 2016, the Commission received a letter from Respondent indicating that the dispute underlying the charge in this case and the charge filed by the

Employer against the Union in a related case[1] has been settled. Attached to the letter was a Stipulation of Withdrawal by the parties, in which they agreed that the unfair labor practice charges filed in each case and the exceptions filed by Charging Party in this case should be withdrawn. The parties' mutual request to withdraw the charge and the exceptions in this case is hereby approved. This Decision and Order and the ALJ's Decision and Recommended Order will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 27, 2016

[1] Ionia Education Association MEA/NEA and Ionia Public Schools Board of Education, Case No. CU13 D-016, was pending before the ALJ prior to the parties' Stipulation of Withdrawal.

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

IONIA PUBLIC SCHOOLS,
Respondent-Public Employer,

Case No. C13 F-107
-and- Docket No. 13-004684-MERC

IONIA EDUCATION ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Kevin S. Harty, for Respondent

Kalniz, Iorio & Feldstein, by Fil Iorio, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). Based on the pleadings, briefs and the transcript of the oral argument that was held on February 7, 2014, in Detroit, Michigan, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

This case arises from an unfair labor practice charge filed on June 13, 2013, by the Ionia Education Association. The charge alleges that Ionia Public Schools violated Section 10(1)(e) of PERA by refusing to bargain over the Union's February 26, 2013, contract proposal. On November 5, 2013, the school district filed a motion for summary disposition, asserting that the charge was barred by the doctrine of res judicata and because the Union's contract proposal contained or implicated topics which are prohibited subjects of bargaining under Section 15(3) of the Act. Charging Party filed a brief in opposition to the motion for summary disposition on December 19, 2013. Both parties subsequently filed supplemental briefs in response to various issues raised during oral argument.

Findings of Fact:

The following facts are derived from the pleadings and the assertions of the parties at oral argument, as well as the exhibits stipulated to by counsel, with all factual allegations set forth by Charging Party accepted as true for purposes of this decision. In addition, I have relied on the findings of facts set forth in *Ionia Public Schools*, 28 MPER 58 (2014), a prior case involving these same parties.

I. Background

Charging Party represents a bargaining unit comprised of teachers and other professionals employed by Ionia Public Schools. The most recent collective bargaining agreement between the parties expired on August 25, 2011.[2] Negotiations for a successor contract commenced on June 27, 2011. The school district's chief spokesperson at the bargaining table was Bruce Bigham. MEA UniServ Director Theresa Alderman was the lead bargainer for the Union during the negotiations.

On July 19, 2011, the Legislature enacted and gave immediate effect to 2011 PA 103, an amendment to PERA which made certain topics prohibited subjects of bargaining for public school employers and employees. The prohibited topics are set forth in Section 15(3)(j)-(o) of the Act, MCL 423.215(3)(j)-(o), and, as explained in more detail below, include any decision made by the public school employer regarding the placement of teachers; teacher layoffs and recall; teacher evaluation systems and classroom observations; merit pay for teachers; and discipline and discharge involving employees covered by the Teacher Tenure Act.

Following the enactment of 2011 PA 103, there were multiple unfair labor practice charges filed with MERC concerning the scope and interpretation of the new legislation. Several of those charges involved Ionia Public Schools and the Ionia Education Association, as described below.

II. Case No. C12 G-136

The prior collective bargaining agreement between Charging Party and Respondent included provisions that designated a procedure for the assignment of vacant teaching positions. The contract required the school district to hold a meeting, referred to by the parties as a "bid-bump" or "teacher assignment" meeting that was to take place near the end of the school year. The purpose of the meeting was to permit teachers to bid on open positions.

After the contract expired in August 2011, the parties continued to operate under its terms. However, the Employer did not schedule any "bid-bump" meetings despite the Union's repeated requests. On July 12, 2012, the Union filed an unfair labor practice charge alleging that the Employer violated Section 10(1)(e) of PERA by repudiating its

[2] The parties entered into a new collective bargaining agreement sometime after the instant charge was filed, the details of which were not made part of the record in this matter.

contractual obligation to hold "bid-bump" meetings and by failing or refusing to post vacancies for teaching positions in accordance with the expired contract.

As a defense to the charge, the Employer asserted that the recent enactment of Section 15(3)(j) of PERA removed any duty to bargain over teacher placement decisions and, therefore, it was no longer required to employ the "bid-bump" procedure.

Following oral argument, I issued a Decision and Recommended Order on March 1, 2013, dismissing the charge on summary disposition. I concluded that the language of Section 15(3)(j) unambiguously gives public employers broad discretion to make placement decisions without bargaining the decisions or the effects thereof and that any limitation on that discretion would be contrary to the plain reading of the statute. For that reason, I held that the school district had no duty to bargain any decision pertaining to teacher placement, including the "bid-bump" procedure. The Union filed exceptions to that recommended order and, in a Decision and Order issued on April 22, 2014, the Commission agreed with my interpretation of the statute and dismissed the charge. The Commission held that not only does the school district have no duty to bargain over the "bid-bump" process, but that "the parties are prohibited from doing so."

On July 28, 2015, the Court of Appeals issued a decision affirming MERC. *Ionia Public Schools v Ionia Education Ass'n*, ___ Mich App ___ (July 28, 2015). The Court concluded that the "bid-bump" meeting was part of the decision-making process with respect to teacher placement and that, based upon the plain language of Section 15(3)(j), the school district has unfettered discretion over "any decision" regarding or concerning teacher placement.

II. Case Nos. CU12 C-013 & C12 E-094

Around the time that 2011 PA 103 went into effect, the school district presented Charging Party with a document categorizing approximately 45 sections in the expired contract as pertaining to topics made prohibited subjects of bargaining by the new legislation. The provisions identified by the Employer included Article X (teaching assignments); Article XII (vacancies and transfers); Article XIII (layoff and recall); Article XIV (teacher evaluation); Article XXII (substance abuse); and Article V, Section 4 (just cause standard for discipline). In the document, the Employer indicated that "[t]he exclusion of these provisions is required as a matter of law and is not the subject of negotiations or ratification. Given the issues are prohibited topics, there would be no future grievance or arbitration access on issues directly or indirectly related to these issues." The school district reiterated its position regarding the above contract provisions on August 1, 2011.

During the contract talks which followed, Charging Party took the position that there could be no bargaining over the removal of language in the expired collective bargaining agreement pertaining to prohibited subjects since such action would constitute unlawful bargaining over those topics under 2011 PA 103. The Union asserted that either party's insistence on bargaining over the removal of such provisions would constitute an unfair labor practice.

On August 18, 2011, Bigham presented Charging Party with a package proposal in which the school district explicitly indicated that it would not "enter or execute any successor collective bargaining agreement which contains provisions embodying or pertaining to any prohibited subjects of bargaining as set forth in Section 15(3) of the Act."

Bigham reiterated Respondent's position in a letter to the Union dated December 28, 2011. Accompanying that letter was a comprehensive "package" proposal which reflected the school district's understanding that all prohibited topics must be removed from the collective bargaining agreement.

On March 20, 2012, the school district filed an unfair labor practice charge alleging that the Union violated its duty to bargain in good faith by continuing to propose and/or insist on the retention or inclusion in the parties' successor contract of provisions from the expired agreement which pertain to prohibited subjects of bargaining. The Union filed its own charge against the Employer on May 11, 2012, asserting that the school district violated PERA by conditioning its agreement on a new contract on the wholesale revision or removal of various provisions contained in the expired collective bargaining agreement. The charges were consolidated and assigned to ALJ Julia C. Stern (Case Nos. CU12 C-013 & C12 E-094).

On March 29, 2013, ALJ Stern issued a Decision and Recommended Order in which she concluded that the school district did not violate its duty to bargain by insisting that the parties' successor agreement not include any provisions from the expired contract that affected prohibited subjects of bargaining under 2011 PA 103. In so holding, the ALJ rejected the Union's contention that the Employer had unlawfully claimed the right to solely determine what was or was not a prohibited subject. ALJ Stern concluded that whether a topic is a prohibited subject is a question of statutory interpretation and that if the Union disagreed with the Employer's reading of the statute, it was free to challenge it by countering with its own interpretation or by filing an unfair labor practice charge. Because the Union did neither, the ALJ determined that no violation of the duty to bargain by the school district had been established. With respect to the charge filed by the Employer, the ALJ found that the Union had unlawfully impeded the resolution of the parties' contract dispute by continuing to insist that the new agreement include provisions affecting prohibited subjects of bargaining after the Employer had unequivocally refused to bargain over those matters.

In a Decision and Order issued on December 18, 2014, the Commission agreed with the ALJ that the Employer's refusal to bargain over provisions that it identified as prohibited subjects did not constitute a violation of the duty to bargain under Section 10(1)(e) of the Act. *Ionia Public Schools*, 28 MPER 58 (2014). The Commission concluded that the provisions of the parties' expired collective bargaining agreement which applied to teacher placement, procedures for filling vacant teaching positions, and procedures relating to the layoff and recall of teachers were "indisputably no longer mandatory subjects of bargaining." *Id.* at 381. For that reason, the Commission determined that the school district was no longer required to comply with those terms or bargain over them. In so holding, the Commission noted that the Union had not indicated any basis for disagreeing with the school district's identification of the provisions from

the expired contract as prohibited subjects of bargaining, nor had it offered any rationale for finding that those provisions could be lawfully bargained.

The Commission also rejected the Union's assertion that the provisions identified by the Employer as being prohibited subjects automatically carried over to the new contract. The Commission held that inclusion of the provisions in a successor agreement "could not be accomplished in the absence of collective bargaining" and that "it is simply not possible to reach a collective bargaining agreement which encompasses a prohibited subject without engaging in bargaining over the subject, an act that the law instructs public school employers not to perform." *Ionia Public Schools* at 382-383, quoting *Calhoun Intermediate Ed Ass'n, MEA/NEA*, 28 MPER 26 (2014), aff'd *Calhoun Intermediate Ed Ass'n v Calhoun ISD*, ___ Mich App ___ (July 28, 2015). With respect to the Employer's charge, the Commission agreed with ALJ Stern that the Union unlawfully obstructed the bargaining process by insisting on the inclusion of topics that had become prohibited subjects as a result of the passage of the new legislation.

III. The Instant Case: Charging Party's February 26, 2013, Contract Proposal

The parties continued contract negotiations while the unfair labor practice charges in Case Nos. CU12 C-013 & C12 E-094 were pending. On February 15, 2013, after ALJ Stern issued her recommended order, but before the Commission issued its decision, Charging Party met with representatives of the school district and, for the first time, the parties engaged in a discussion concerning the contract provisions which the Employer asserted were prohibited subjects of bargaining. On February 26, 2013, Charging Party presented the school district with a comprehensive proposal that included modifications to some of the provisions in the expired contract which the Employer had claimed were prohibited topics. The Union's proposal provided, in pertinent part:

> **Article V/Teacher Rights**:
>
> 4. No professional staff member shall be disciplined, reprimanded, reduced in compensation, or deprived of any professional advantage in an arbitrary and capricious manner. Any such discipline, reprimand, or reduction in compensation or advantage shall be subject to the Grievance Procedure contained elsewhere in this agreement. All information forming the basis for disciplinary action shall be made available to the professional staff member. This provision shall not apply to first and second year probationary professional staff members or to any teacher or professional staff member in a Schedule B position.
>
> No teacher shall be disciplined, reprimanded, reduced in compensation, or deprived of any professional advantage in an arbitrary and capricious manner. Any such discipline, reprimand, or reduction in compensation or advantage shall be subject to the Grievance Procedure contained elsewhere in this Agreement. All information forming the basis for disciplinary action shall be made available to the teacher. This provision shall not apply to first and second year probationary teachers who are

hired subsequent to January 1, 2003, or to any teacher in a Schedule B position.

* * *

6. If a reprimand or similar disciplinary action, which shall be made a matter of written record is to be given by the Board or any agent or representative, the professional staff member or teacher shall be notified that such action is contemplated and advised that he/she may have present at the time of reprimand or disciplinary action an Association Representative of her/his choosing. Similarly, the Board or any agent or representative administering such reprimand or disciplinary action shall be entitled to have present a witness of its choosing. When a request for Association representative is made, no action shall be taken with respect to the professional staff member or teacher until an Association Representative is present. Such representation must be made available within five (5) working days of the request.

7. No adversely critical material originating after original employment of the professional staff member or teacher will be placed in her/his personnel file, unless the professional staff member or teacher has had opportunity to review the material. The professional staff member or teacher may submit written comments within sixty (60) days regarding any material, and the same shall be attached to the file copy of the material in question. If the professional staff member or teacher believes the material to be placed in his/her file is inappropriate or in error, he/she may utilize the Grievance Procedure contained elsewhere in this Agreement to modify or remove such adversely critical material.

Article X/Teaching Assignments:

5. Teachers will be advised as soon as practicable of their assignments for the coming school year. It is expected that these assignments will be announced by July 1. If changes in assignments are necessitated beyond July 1, the administration will make a reasonable effort to notify the teacher.

6. Teachers shall not be assigned outside the scope of their teaching certificate or their major or minor field of study, except temporarily and for good cause.

Article XI/Teaching Conditions:

g. No professional staff member or teacher will be threatened, disciplined, reprimanded, punished, discharged, or denied any professional advantage, directly or indirectly, by the Board or any agent or representative thereof, due in any way to the professional staff member or teacher having:

1.) filed a complaint under Part 8 of the Michigan Special Education Rules or with the Office of Civil Rights (OCR), U.S. Department of Education; or

2.) asserted his/her rights of those of a handicapped/non-handicapped student as provided for in this Article or by law.

Article XII/Professional Staff Member Position Vacancies and Transfers:

1. A professional staff member or teacher position vacancy shall be deemed to exist when a professional staff member or teaching position, whether full-time or part-time, shall be open due to the creation of a new position or to resignation, retirement, reassignment, termination or death.

* * *

3. Internal Posting

Teachers will be notified of new professional staff member or teacher vacancies by:

a. E-mail to their school e-mail address.
b. Posting of the vacancy on the district web page.

Teachers will have until 3:00 p.m. on the fifth business day after the e-mail notice and posting on the web page to respond in writing or by e-mail to the Union President and Associate Superintendent of their interest in the vacancy.

* * *

6. Transfers to counseling positions requested by teachers are to be minimized and avoided whenever possible.

Article XIII/Layoff and Recall:

1. The Board agrees to file written notice to the Association prior to affecting reductions in personnel. Individual professional staff member[s] or teachers shall be notified in writing at least thirty (30) days prior to the effective date of layoff, except when a millage election will be held within that period, in which case fourteen (14) calendar days shall be the minimum.

Article XIX/Grievance Procedure:

2. c. The following matters will be subject to the grievance procedure, but only up to the Superintendent's Level:

1.) any matter involving the discipline or non-renewal of a probationary professional staff member or teacher in her/his first two (2) full years of employment at Ionia Public Schools.

3. a. The discharge of a tenured teacher shall not be the basis of a grievance under this Agreement.

b. For any other matter for which the Michigan Teacher Tenure Act provides relief, the teacher may within thirty (30) days, elect a remedy as provided either under the Act or the grievance procedure. It is expressly understood that the teacher may not elect both remedies.

* * *

14. If any professional staff member or teacher for whom a grievance is sustained shall be found to have been discharged in an arbitrary and capricious manner, he/she shall be reinstated with full reimbursement of all professional compensation lost. If he/she shall have been found to have been improperly deprived of any professional compensation or advantage, the same or its equivalent in money shall be paid to her/him.

The contract proposed by Charging Party defines "professional staff member" as "all employees represented by the association in the bargaining or negotiating unit . . . who are not subject to the Teacher Tenure Act."

After reviewing the February 26, 2013, comprehensive bargaining proposal, Bigham notified the Union that various provisions contained therein implicated prohibited subjects of bargaining within the scope of Section 15(3) of PERA and, for that reason, the school district would not bargain over those topics as they applied to teachers within Charging Party's bargaining unit.

On April 23, 2013, the school district filed an unfair labor practice charge in Case No. CU13 D-016; Docket No. 13-001592-MERC, alleging that the Union had unlawfully insisted on the inclusion of prohibited subjects of bargaining in the successor contract. The Union filed the instant charge on June 13, 2013, asserting that the Employer violated Section 10(1)(e) of PERA by refusing to bargain over its February 26, 2013, contract proposal. The charges were assigned to me and consolidated.

On November 5, 2013, the school district filed a motion for summary disposition of the Union's charge in Case No. C13 F-107; Docket No. 13-004684-MERC. The Employer asserts that dismissal of the charge is warranted because there is no dispute that the content of the Union's February 26, 2013, proposal implicated prohibited subjects of

bargaining and, therefore, the school district had no duty to negotiate over such matters. In addition, Respondent contends that the instant charge is barred by the doctrine of res judicata as a result of the prior litigation between the parties. Charging Party filed a response to the Employer's motion on December 19, 2013.

On February 7, 2014, I held oral argument on Respondent's motion for summary disposition. Thereafter, the parties, at my direction, filed supplemental briefs addressing several issues, including the question of whether the charges were timely filed under Section 16(a) of PERA. The Employer's supplemental brief was filed on January 8, 2015, while the Union filed its supplemental brief on January 20, 2015. A prehearing conference was held on March 23, 2015, during which the parties agreed to bifurcate these matters and to have the instant charge proceed to decision based upon the briefs and stipulated exhibits. It was agreed by both parties that the Employer's charge would remain in adjourned without date status until the issuance of a decision in the instant case.

Discussion and Conclusions of Law:

Under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours, and other conditions of employment. In 1994 PA 112 (Act 112), the Legislature amended Section 15 of PERA to give public school employers, as defined by Section 1(h) of the Act, extraordinary discretion in managing and directing its operations. PA 112 significantly narrowed the scope of bargainable issues by making certain decisions prohibited subjects of bargaining, including the school year starting day, the policyholder of employee group insurance benefits, the use of volunteers and pilot programs, and the decision whether or not to contract with a third party for one or more noninstructional support services. Although the amendment did not define the term "prohibited subject", the Court of Appeals concluded that the Legislature's intent was to foreclose the possibility that a school district could be found to have committed an unfair labor practice by refusing to bargain over a prohibited topic or that a prohibited topic could become part of a collective bargaining agreement. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995), aff' d 453 Mich 262 (1996). Thus, Act 112 essentially created an exception to the general rule requiring a public employer to bargain over terms and conditions of employment.

The Legislature added to the list of prohibited subjects of bargaining in 2009 and then again in 2011 with the passage of PA 103. Effective July 19, 2011, PA 103 prohibits public school employers and the unions representing their teachers from bargaining over the following subjects:

1. Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit. [Section 15(3)(j)]

2. Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the

elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit. [Section 15(3)(k)]

3. Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit. [Section 15(3)(l)]

4. 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. [Section 15(3)(m)]

5. Decisions about the format, timing, or number of classroom observations conducted for the purposes of section 3a of article II of 1937 (Ex Sess) PA 4, MCL 38.83a, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. [Section 15(3)(n)]

In the instant case, the Employer asserts that it properly rejected Charging Party's February 26, 2013, bargaining proposal because several of the provisions set forth therein are prohibited subjects of bargaining under Section 15(3) of PERA. Specifically, the school district contends that it had no duty to bargain over the Union's proposal concerning Article X (Teaching Assignments), Article XIII (Layoff and Recall) and Article XII (Position Vacancies and Transfers). In addition, Respondent asserts that it cannot lawfully be compelled to bargain over the terms set forth in Article V (Teacher Rights), Article XI (Teaching Conditions) and Article XIX (Grievance Procedure) of the

Union's contract proposal because those provisions would restrict the school district's ability to make decisions concerning the discharge or discipline of employees. Charging Party contends that none of the provisions within its February 26, 2013, contract proposal implicate prohibited subjects of bargaining and, therefore, the school district violated its duty to bargain by refusing to negotiate regarding such provisions.

Since the enactment of PA 103, the Commission and the Court of Appeals have repeatedly been tasked with determining whether the actions of a public school employer, or the content of specific bargaining proposals, implicate the topics which were made prohibited subjects of bargaining in 2011. Several of these cases have involved the assignment of teachers to new or different positions. For example, in *Pontiac School District*, 27 MPER 52 (2014), affirmed by *Pontiac School District v Pontiac Education Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015 (Docket No. 321221), the Commission dismissed a charge filed by the union alleging that the school district violated PERA by failing to bargain over its unilateral decision to reassign a teacher for disciplinary reasons. The Commission concluded that the involuntary transfer of the teacher was a decision made by the public school employer about teacher placement and, therefore, was a prohibited subject of bargaining under Section 15(3)(j).

Similarly, in *Pontiac School District*, 28 MPER 34 (2014), the Commission held that the public school employer had no duty to bargain over its decision to transfer a high school speech pathologist to a position at an elementary school and that the union breached its duty to bargain in good faith by seeking to arbitrate a grievance it had filed challenging the transfer. In so holding, the Commission rejected the union's argument that the Legislature's use of the term "placement" suggests an initial action rather than a reassignment or transfer.

In *Pontiac School District*, 27 MPER 60 (2014), the union filed an unfair labor practice charge alleging that the public school employer unlawfully withdrew from a settlement agreement limiting its use of long-term substitutes to fill vacant teaching positions instead of hiring teachers. As part of the settlement agreement, the employer had acknowledged the recall rights of teachers, made the recall of one specific teacher effective immediately, and promised to recall four other teachers as soon as possible. The Commission concluded that the agreement to recall teachers and place them in vacant positions was "an agreement regarding teacher placement" which could not lawfully be bargained under Section 15(3)(j) of the Act. For that reason, the Commission dismissed the union's charge. The Court of Appeals affirmed the Commission's decision, finding that the settlement agreement "clearly contravenes § 15(3)(j)'s prohibition of collective bargaining of '[a]ny decision made by the public school employer regarding the placement of teachers, or the impact of that decision on an individual employee . . . .'" *Pontiac School District v Pontiac Education Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2015 (Docket No. 322184).

As indicated above, the Court of Appeals found, in a case involving these same parties, that a "bid-bump" procedure for the assignment of vacant teaching positions was part of the decision-making process with respect to teacher placement and that, based upon the plain language of Section 15(3)(j), the Employer had no duty to bargain with the

Union over discontinuing that procedure. *Ionia Public Schools v Ionia Education Ass'n*, ___ Mich App ___ 2015 WL 4545946 (July 28, 2015). In describing the discretion afforded to a public employer by the statute, the Court in *Ionia Public Schools* held:

> Given the broad language employed in § 15(3)(j), we find that the Legislature intended to prohibit an employer from bargaining over any decision, including policies or procedures such as the bid-bump procedure, with regard to teacher placement. *The plain language of the statute gives broad discretion to public school employers to make "[a]ny decision, i.e. every or all decisions, "unmeasured or unlimited in amount, number or extent," regarding or concerning teacher placement. The statute contains no limitations on the employer*. Also, the statute refers to decisions, which include the act or process of deciding. By stating that there was no duty to bargain over "[a]any decision" regarding teacher placement and providing no limitation or explanation thereafter, the Legislature demonstrated its intent to afford public school employers broad discretion of that decision on individual teacher or the bargaining unit as a whole. [Emphasis supplied.]

Charging Party asserts that its February 26, 2013, contract proposal does not run afoul of Section 15(3)(j) because it places no limitations on the school district's authority to make teacher assignments. I disagree. Article X, by its very terms, prohibits the school district from permanently assigning teachers outside the scope of their teaching certificate or their field of study, while Article XII, ¶ 6 mandates that requests by teachers to transfer to counseling positions "are to be minimized and avoided whenever possible." Such provisions clearly and unequivocally interfere with the broad discretion afforded to school districts to make decisions concerning teacher placement. In addition, the proposal places notification requirements on the employer with respect to teacher assignments and position vacancies and mandates that the school district make a "reasonable effort" to notify teachers of certain assignment changes. Such requirements are, for all practicable purposes, no different than the "bid-bump" procedure in that they act as a limitation not on the placement decision itself, but on the Employer's authority to determine the policies and procedures used to make such a decision.

It is for the same reason that I conclude that Respondent had no duty to bargain over the layoff and recall language set forth in Article XIII of the Union's February 26, 2013, contract proposal, which requires the school district to provide written notice to the Union and to individual employees prior to affecting reductions in personnel. Section 15(3)(k) of PERA unequivocally prohibits bargaining over the procedures relating to the layoff and recall of teachers. *Pontiac School District*, 28 MPER 1 (2014). See also *Baumgartner v Perry Pub Sch*, ___ Mich App ___ (2015) (layoff-related claims no longer implicate public sector labor laws).

Lastly, Charging Party argues that the school district breached its duty to bargain under Section 10(1)(e) of PERA by refusing to bargain over provisions relating to the discipline or discharge of teachers. Article V, ¶ 4 would impose an "arbitrary and capricious" standard for teacher discipline and require that the school district provide teachers with all information forming the basis for a disciplinary action. Article V, ¶ 6

would require Respondent to notify teachers of the issuance of a disciplinary action and mandate that the district allow a Union representative at any meeting at which disciplinary action is imposed. Under Article V, ¶ 7 of Charging Party's proposal, Respondent would be required to give teachers the opportunity to review any "adversely critical material" before such documents are placed in the teacher's personnel file and allows a teacher to utilize the grievance procedure to modify or remove the material. Article XI prohibits the school district from disciplining a teacher for having filed complaints under state and federal law. Finally, Article XIX of the Union's February 26, 2013, contract proposal would allow probationary teachers to utilize the grievance procedure to challenge discipline and give tenured teachers the option to grieve all disciplinary matters other than discharge. That provision would also mandate the reinstatement of any teacher whose grievance is sustained after having been discharged in an arbitrary and capricious manner.

Although the Commission has not yet had occasion to consider the scope of Section 15(3)(m) of PERA, that issue was recently the subject of a Decision and Recommended Order issued by ALJ Stern in *Shiawassee ISD*, Case No. CU15 F-019, issued January 12, 2016. That dispute arose after the school district issued a two-day disciplinary suspension to a member of the bargaining unit. The Union filed a grievance alleging that the suspension violated the employee's right to due process and freedom from retaliation. The employer denied the grievance on the basis that it involved a prohibited subject of bargaining. The union, however, advanced the matter through the grievance process and filed a demand to arbitrate.

In response, the employer filed an unfair labor practice charge with MERC asserting that the union breached its duty to bargain in good faith and Section 10(2)(d) of PERA by grieving its decision to discipline the teacher and by demanding that an arbitrator review or set aside the disciplinary decision. The employer argued to ALJ Stern that Section 15(3)(m) is so broadly written that it renders teacher discipline and anything related to it a prohibited subject of bargaining. While conceding that teacher discipline is a prohibited subject of bargaining under Section 15(3)(m) of the Act, the Union asserted that the grievance was proper because it did not challenge the employer's right to discipline the employee. Rather, according to the union, the subject matter of the grievance was the employer's failure to follow non-discipline related provisions of the collective bargaining agreement.

Both parties in *Shiawassee ISD* filed motions for summary disposition. Following oral argument, Judge Stern issued a Decision and Recommend Order in which she concluded that the union violated its duty to bargain in good faith by insisting, over the employer's objection, on pursuing a grievance over prohibited subjects of bargaining and by demanding to arbitrate that grievance. The ALJ began her analysis by examining the language of the statute itself. She noted that the Legislature, in listing the subjects covered by Section 15(3)(m), prohibited bargaining over the "content, standards, procedures . . . of a policy regarding discharge or discipline of an employee." The ALJ found it significant that even though the term "content" arguably subsumes both standards and procedures, the Legislature saw fit to explicitly list both of those terms and then proceeded to list both "decisions over the discipline or discharge of an individual employee" and the impact of such decisions on individual employees and on the union as

prohibited subjects. Based upon the statutory language, the ALJ concluded that "the Legislature's intent in Section 15(3)(m) was to ensure that teacher discipline and any topic related to it be removed from the realm of collective bargaining."

Because Section 15(3)(m) explicitly includes disciplinary "procedures" as well as disciplinary "standards" in its list of prohibited subjects, Judge Stern held in *Shiawassee ISD* that an attempt by a labor organization to enforce any contract language which could be interpreted as requiring a public school employer to follow certain procedures in disciplining teachers covered by the agreement would be an attempt to enforce a contract provision made unenforceable by Section 15(3)(m). Therefore, the ALJ determined that the union had acted unlawfully by demanding to arbitrate a grievance which advanced an interpretation of the collective bargaining agreement that would require the school district to afford employees due process rights and which would mandate that teachers be allowed to have a union representative present during disciplinary meetings. In so holding, Judge Stern noted that although Section 15(3)(m) "removes disciplinary procedure from the sphere of collective bargaining" it does not eliminate a school district's duty to afford its employees due process or prevent a union from assisting its members in supporting their constitutional or statutory rights in venues outside the contractual grievance procedure.

Finally, the ALJ in *Shiawassee ISD* held that the Union's demand to arbitrate a grievance challenging the suspension of a teacher constituted a violation of Section 10(2)(d) of PERA. Judge Stern concluded that by demanding to arbitrate a grievance which asserted that the employer violated the contract and board policy by disciplining the teacher in retaliation for her complaints about building conditions, the union was seeking to have an arbitrator determine why the employer disciplined an individual teacher, including whether the reasons the school district gave in support of the disciplinary action were pretextual. The ALJ held that when the Legislature made "decisions concerning the discharge or discipline of an individual employee" a prohibited subject of bargaining for teachers, it removed the authority of an arbitrator to review or set aside the employer's decision to discipline or discharge a teacher. Exceptions were filed challenging Judge Stern's recommended order and a Commission decision is pending.

ALJ recommended orders are not binding precedent; however, I agree with Judge Stern's conclusion that Section 15(3)(m) of PERA effectively renders anything related to teacher discipline a prohibited subject and, therefore, I conclude that the school district had no duty to bargain with Charging Party over its proposals which concern discipline and discharge. Although Charging Party sets forth a multitude of arguments in support of its interpretation of Section 15(3)(m), including arguments based upon legislative history and policy, none of these considerations override the plain language of the statute. As noted, Section 15(3)(m) explicitly includes disciplinary "procedures" as well as disciplinary "standards" and "policies" in its list of prohibited subjects. Several of the Union's proposals would require the Employer, as a matter of contract, to follow specific procedures in disciplining teachers covered by the agreement. For example, Article V, ¶ 5 would require that the school district provide teachers with information utilized by the Employer in making the disciplinary decision, while Article V, ¶ 6 would require Respondent to notify teachers of the issuance of a disciplinary action and mandate that

the district allow a Union representative to be present at any meeting at which disciplinary action is imposed. Such provisions clearly implicate the topics which the Legislature included in the list of prohibited subjects.

Charging Party argues that even if Section 15(3)(m) of PERA prohibits bargaining over the policies leading up to the imposition of discipline and the disciplinary decision itself, the statute does not prohibit a labor organization from challenging discipline once it actually has been imposed by the school district. For that reason, the Union contends that Respondent was obligated to bargain over its proposals concerning the grievance procedure, including its proposal to adopt the arbitrary and capricious standard for employee discipline and discharge as set forth in Article V, ¶ 4 and Article XI ¶ 14 of the February 26, 2013, contract proposal. In support of this contention, Charging Party references the last sentence of Section 15(3)(m), which prohibits a public school employer from adopting, implementing or maintaining a policy for discharge or discipline that is different than the arbitrary and capricious standard provided under the Teacher Tenure Act (hereafter "TTA"), MCL 38.71 et seq. Based on that language, the Union asserts that rather than prohibiting bargaining over the arbitrary and capricious standard, Section 15(3)(m) actually mandates its adoption for all public employees whose employment is regulated by the TTA, and that such language constitutes verification that the Legislature did not contemplate making grievance arbitration a prohibited subject of bargaining. Once again, I disagree with the Union's interpretation of the statute.

First and most importantly, Charging Party's argument ignores the fact that Section 15(3)(m) explicitly prohibits bargaining over disciplinary "standards" and there is no question that "arbitrary and capricious" is, in fact, a disciplinary "standard" by any reasonable definition of the term. Moreover, the argument set forth by the Union would effectively allow the Union to override the school district's decision to impose discipline on individual teachers.

If the parties were to adopt Article V, ¶ 4 and Article XI ¶ 14 of the Union's February 26, 2013, contract proposal, disciplinary decisions made by the school district, including the public school employer's decision to discharge an individual teacher, could be grieved by the labor organization and subject to review and possible reversal by an arbitrator. Grievance arbitration is a method for interpreting contract language and, for that reason, is an extension of the collective bargaining process. Therefore, the statutory interpretation proposed by Charging Party would clearly and unequivocally be contrary to the plain language of the statute, which explicitly prohibits the parties from bargaining over "decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee." This result does not, as suggested by Charging Party, nullify the standard to be applied in evaluating the discipline of employees subject to the TTA. Even though the arbitrary and capricious standard cannot be made part of a collective bargaining agreement, it will still apply to disciplinary decisions reviewed by the Teacher Tenure Commission under that statute.

Reading Section 15(3)(m) in its entirety leads to the inescapable conclusion that in amending PERA in 2011, the Legislature intended to insulate all aspects of a public school employer's disciplinary actions from the realm of collective bargaining. For that reason, I conclude that Respondent did not breach its duty to bargain in good faith by

refusing to negotiate over contract proposals relating to discipline and discharge, including provisions that would allow the Union to challenge Respondent's disciplinary decisions in grievance arbitration.

I have carefully considered all other arguments set forth by the parties in this matter, including the Employer's assertion that the charge is barred by the doctrine of res judicata as a result of the prior litigation between the parties, and have concluded that they do not warrant a change in the result. Based on the findings of fact and conclusions of law set forth above, I issue the following recommended order:

RECOMMENDED ORDER

The unfair labor practice charge filed by the Ionia Education Association against Ionia Public Schools in Case No. C13 F-107; Docket No. 13-004684-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 22, 2016