STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UTICA COMMUNITY SCHOOLS,
Public Employer-Respondent in MERC Case No. C15 J-131,
Public Employer-Charging Party in MERC Case No. CU15 L-045,

-and-

UTICA EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party in MERC Case No. C15 J-131,
Labor Organization-Respondent in Case No. CU15 L-045,

-and-

UTICA FEDERATION OF TEACHERS, AFT MICHIGAN,
An Interested Party.
_____/

APPEARANCES:

Lusk Albertson PLC, by William G. Albertson, for the Public Employer

McKnight, Canzano, Smith, Radtke & Brault, P.C., by David R. Radtke and John R. Canzano, for the Labor Organization

Law Offices of Mark H. Cousens, by Mark H. Cousens, for the Interested Party

DECISION AND ORDER

On April 12, 2018, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order[1] in the above matter finding that Respondent Utica Community Schools (the School District or the Employer) did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, when it created its Alternative Learning Center and staffed that program entirely with employees of a bargaining unit represented by members of the Utica Federation of Teachers (UFT). The ALJ also found that Respondent Utica Education Association (UEA or the Union) violated § 15(3)(j) of PERA by demanding that the Utica Community Schools arbitrate its grievance challenging the staffing of the Alternative Learning Center. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

[1] In MAHS Hearing Docket Nos. 15-056378, 15-064549, 15-056378, 15-064549

After all parties were granted an extension of time, the Employer filed its exceptions and brief in support of exceptions to the ALJ's Decision and Recommended Order on June 5, 2018. The Union filed its exceptions and brief in support of exceptions to the ALJ's Decision and Recommended Order on June 6, 2018. After requesting and receiving an extension of time, the Employer filed its brief in support of the ALJ's Decision and Recommended Order on June 15, 2018. The Union filed its brief in opposition to the Employer's exceptions on June 28, 2018.

In its exceptions, the Union contends that the instant case involves a question of unit placement and that the ALJ erred in concluding that this was a case in which the duties previously performed by UEA members were merely transferred to individuals in another bargaining unit. The Union further argues that, even assuming that the "exclusivity rule" applies, the ALJ erred in concluding that the rule was not violated. Finally, the Union contends that the ALJ erred in concluding that the Union violated § 15(3)(j) when it attempted to move the grievance involved in this dispute to arbitration.

The Employer, in its exceptions, contends that the ALJ erred in concluding that it was not necessary to address its contention that bargaining over the creation of the Alternative Learning Center was also prohibited under § 15(3)(h) of PERA and its contention that the UEA also violated § 15(3)(h) of PERA by attempting to process its grievance to arbitration.

We have reviewed the exceptions filed by both parties and find them to be without merit.

Factual Summary:

Prior to 2015, the Utica Community Schools operated two alternative education programs, one in the daytime and the other during the evening.

The day program was staffed by teachers who were members of a bargaining unit represented by the Utica Education Association (UEA), an affiliate of the Michigan Education Association (MEA). Prior to 2010, the day program was referred to by the parties as the Utica Center for Applied Learning. In 2010, the name of the day program was changed to the AdvancePath Academy, sometimes referred to as "APUCAL."

Teachers assigned to the evening program were part of a bargaining unit represented by the Utica Federation of Teachers (UFT). The evening program was called the Utica Learning Academy (ULA) until it was later consolidated with the day program and both were renamed the Alternative Learning Center.

Both the day and night alternative education programs served students who had difficulty succeeding at the School District's traditional schools because of social, emotional, academic and/or attendance-related issues. The curriculum was not as intense as in the traditional high schools and extracurricular activities were generally not offered to alternative education students. There were typically between 200 to 250 students enrolled in alternative education in the School District ranging in age from 14 to 19 years old. Students had the option of taking alternative education classes in the daytime or evening. Prior to 2015, students could transfer from the day program to the evening program and vice versa. Students, however, were not permitted to attend

classes in both programs simultaneously. Students in the day and evening programs followed the same school calendar and attended a combined graduation ceremony. The teaching of alternative education in both programs was a responsibility which was shared by UEA and UFT members.

In 2014, the School District became concerned with the achievement levels of the alternative education students. At the time, the graduation rate for students attending the AdvancePath Academy during the day was around 50 percent, while the graduation rate for night students in the Utica Learning Academy was 5.88 percent. Consequently, the school district decided to develop a new alternative education program which would emphasize the use of technology and eliminate all traditional classroom teaching, while still providing instruction from teachers as necessary.

In February of 2015, the School District began having discussions regarding its alternative education program with AdvancePath Academics (AdvancePath), a corporation which provides school districts throughout the country with professional development training, technology and infrastructure, including computers, software and furniture.[2]

On June 10, 2015, the School District announced plans to sign a contract with AdvancePath on the basis of which the company would be the source of not only curriculum, hardware and software, but also staffing for alternative education within the district. Under this plan, the alternative education teaching work previously performed during the day by members of the UEA bargaining unit and at night by UFT members would be outsourced to AdvancePath employees.

After becoming aware of the School District's plans, UEA president Liza Parkinson submitted to the school district a written demand to bargain over the outsourcing of instructional staff in the alternative education high school. The UFT also presented a demand to bargain over "the decision to subcontract the instructional work historically performed by the Utica Learning Academy certified teachers unit." Michael Strum, the district's assistant superintendent for human resources, responded to the UFT by letter dated June 16, 2015. In the letter, Strum wrote "[I] have received your demand to bargain relative to the above captioned matter. The District believes the essential components of the alternative education redesign fall under the Michigan Public Employment Relations Act 423.215 as prohibited subjects of bargaining…" Strum also sent a similar letter to the UEA that same day.

In the following weeks, representatives of the School District and both unions met and engaged in discussions concerning the alternative education program. Topics discussed during these meetings included accreting some UEA positions to the UFT bargaining unit and having both UEA and UFT members jointly staff the labs in the day program. Strum testified that issues of critical importance to the school district, such as the use of seat time waivers which would allow students to take classes off-site, were "non-starters" for the UEA. Parkinson admitted that matters such as seat time waivers and changes to class size would have been "difficult" to bring back to the membership, but she testified that the Union was willing to "listen to what the District ha[d] to say about them."

[2] The School District had previously contracted with AdvancePath in connection with changes made to the alternative education program in 2010.

By early August, Strum determined that there was no possibility of reaching any agreement satisfactory to the School District and submitted to the School Board a report prepared by the District's curriculum subcommittee entitled "Alternative Learning Options." The report set forth three options for the future of alternative education within the district. Proposed Option #1 called for the establishment of "contracted educational services" for alternative learning. Under Proposed Option #2, the district would implement an AdvancePath Academy model in the high schools with sessions in the day and night. The programs would use a blended learning model which incorporated online learning and seat time waivers and would be staffed by UEA teachers in the day session and UFT members at night. Under Proposed Option #3, the district would implement an AdvancePath Academy model with blended learning blocks of academic time provided entirely by UFT teachers in both the day and night sessions. Under this option, students would access core academic classes and electives through online "virtual" courses.

On August 9, 2015, the School Board passed a resolution formerly adopting Proposed Option #3, which included the plan to staff all alternative education classes within the School District with UFT teachers. Under the plan adopted by the Board, no UEA represented employees were to be assigned to the new program. The resolution adopted by the board described the new consolidated alternative education program as "a pilot that uses new technology and innovative educational approaches to provide, among other things, improved and more flexible and efficient modes of education and educational achievement to non-traditional high school learners, credit recovery students and evening students."

By letter dated August 17, 2015, the school district announced the new program to the families of returning day and night alternative education students. The letter stated that the new program would "help students achieve more credits by increasing their learning potential" and described some of the changes which were being made.

The following day, the UEA filed a grievance asserting that the removal of bargaining unit positions from the alternative education program violated the recognition clause of the collective bargaining agreement and Article III, Section A(1), the general working conditions provision. As a remedy, the UEA requested that the school district restore the bargaining unit positions to the alternative education program as they existed during the 2014-2015 school year, recall teachers who were laid off as a result of the contract violation, and make teachers whole for lost pay, benefits and seniority.

Following a grievance hearing, the School District denied the UEA grievance noting that the matter involved a prohibited subject of bargaining that was excluded from the grievance process. By email dated October 5, 2015, the UEA notified the School District of its intent to advance the grievance to arbitration.

On October 1, 2015, the UEA filed an unfair labor practice charge alleging that the School District violated its duty to bargain in good faith under PERA by unilaterally eliminating positions within its unit.

On December 28, 2015, the School District filed a counter charge against the UEA asserting that the labor organization had violated PERA by filing a grievance challenging the staffing of the new alternative education program and by advancing that grievance to arbitration.

On February 2, 2016, the UEA amended its charge to assert that the School District's decision to staff the alternative education program with only UFT bargaining unit members constituted an unlawful transfer of work that had exclusively been performed by members of the UEA.

The Employer and UEA charges were consolidated and an evidentiary hearing was held on March 29 and 30, 2016. Subsequent to this, the ALJ concluded that it was necessary to reopen the record and issued an interim order on May 11, 2017. In the interim order, the ALJ attempted to join the UFT as a party to the dispute but the UFT indicated that it did not consider itself a party to the dispute and did not offer argument regarding either charge. An additional hearing date was then held on September 28, 2017, at which time the UEA and the school district agreed to a stipulation of facts to supplement the record.

Discussion and Conclusions of Law:

I. The Employer did not violate its duty to bargain in good faith.

Under § 9 of PERA, public employees have the right to organize and engage in collective bargaining. Section 15 of PERA requires a public employer to bargain collectively with the recognized representative of its public employees. Certain issues including "wages, hours and other terms and conditions of employment" are considered to be mandatory subjects of collective bargaining. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55, 214 NW2d 803 (1974); *Local 1277, Metropolitan Council No. 23, AFSCME v Center Line*, 414 Mich 642, 652, 327 NW2d 822 (1982). Issues falling outside of this category are classified as either permissive or illegal subjects of bargaining. *Id*. at 652, 327 NW2d 822. The classification of a particular issue as a mandatory or permissive subject "plays a vital role in the bargaining dynamics of the public sector." *Id*. at 653, 327 NW2d 822. Unilateral action on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute an unfair labor practice under § 10(1)(e) of PERA.

A prerequisite to any determination concerning a duty to bargain about the transfer of work is a finding that the work is "bargaining unit work." The exclusivity rule developed by the Commission recognizes that before a bargaining unit may lay sole claim to a particular work assignment, the unit must establish that the work was performed exclusively by unit members. If the work has not been assigned exclusively to one unit, then there is no obligation to bargain on the part of the employer before shifting duties among the employees to which the work has been assigned. *City of Southfield*, 433 Mich 168 (1989), aff'g 1985 MERC Lab Op 1025. A showing of exclusivity is essential to establish that an employer has a duty to bargain over the transfer of work outside the unit, and the Union carries the burden of proof as to that issue. See *Kent County Sheriff,* 1996 MERC Lab Op 294; *Township of West Bloomfield* (no exceptions), 21 MPER 62 (2008).

In the present case, the evidence establishes that the teaching of alternative education was a responsibility which was shared by UEA and UFT members for more than twenty years until the School District made the decision to assign those duties to only UFT members in August of 2015. All of the teachers in the day and evening programs taught alternative education students who were in the program because of difficulties that they experienced in succeeding at the School District's traditional high schools. The students in both programs were of high school age and did not exceed 19 years of age. The primary purpose of both the day and night programs was to ensure that students attained a high school diploma. Students had the option of attending either the day or night program, and they could transfer from one program to the other without restriction. The programs both followed the same school calendar, and all alternative education students attended a combined graduation ceremony. Classes were taught in the same building, and teachers in both programs were subject to the same certification requirements.

The ALJ, therefore, properly concluded that the school district did not violate § 10(1)(e) of PERA by unilaterally deciding to assign teaching duties to members of the UFT bargaining unit to the exclusion of UEA members.

In its exceptions, the UEA argues that the instant case involves a question of unit placement and not the transfer of unit work. The Commission has long recognized the distinction between removing duties from a bargaining unit and the transfer of individual positions from one unit to another and has held that the latter implicates matters of unit placement which fall within the exclusive jurisdiction of the Commission. *Detroit Fire Fighters v City of Detroit*, 96 Mich App 543 (1980). See also *City of Grand Rapids*, 19 MERC Lab Op 69 (2006). In the present case, however, the record supports the ALJ's conclusion that the UEA failed to prove that the School District transferred, or attempted to transfer, any UEA member or UEA represented position into the UFT bargaining unit. Rather, the evidence only establishes that duties and responsibilities previously performed by UEA bargaining unit members were transferred to individuals in another bargaining unit. Consequently, we do not believe that the instant case involves a question of unit placement.

The Employer, in its exceptions, argues that the ALJ should have found that bargaining over the creation of the Alternative Learning Center was also prohibited under § 15(3)(h) of PERA.[3] In our view, however, it was not necessary to determine whether bargaining over the creation of the Alternative Learning Center was also prohibited under §15(3)(h) in order to resolve the instant charge. Consequently, we do believe the ALJ erred we he did not consider this issue.[4] See *Grand Rapids Public Schools,* 1986 MERC Lab Op 560, 569; *Reese Public Schools*, 1989 MERC Lab Op 476.

[3] Section 15(3)(h) prohibits bargaining over "[d]ecisions 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."

[4] Although the Employer also argued, before the ALJ, that bargaining over the creation of the Alternative Learning Center was prohibited under § Section 15(3)(j) of PERA, the ALJ did not find it necessary to consider this argument, and the Employer has not taken exception to this.

II. The Union violated § 15(3)(j) of PERA.

If a union attempts to arbitrate a grievance which concerns, in whole or in part, a prohibited subject of bargaining it acts in a manner forbidden by PERA. As we explained in *Ionia County Intermediate Ed Ass'n*, 30 MPER 18 (2016), advancing a grievance to binding arbitration "goes beyond the discussion stage, it is more like insistence upon bargaining [over] a prohibited subject when the other party has refused to do so." Consequently, a union's demand to arbitrate a grievance over a prohibited subject of bargaining constitutes an unlawful attempt to compel a public employer to abide by a contractual provision or provisions which are unenforceable as a matter of law. See also *Pontiac Sch Dist*, 28 MPER 34 (2014); *Grand Rapids Educational Supp Personnel Ass'n*, 23 MPER 5 (2009).

Although the UEA contends that the ALJ erred in concluding that the UEA violated § 15(3)(j) when it attempted to arbitrate the present grievance, the Commission and the Michigan Court of Appeals have previously considered the meaning and scope of § 15(3)(j). In *Ionia Pub Sch*, 27 MPER 55 (2014), we held that the public school employer did not violate § 10(1)(a) or (e) of PERA when it refused to hold teacher assignment or "bid-bump" meetings with the union as required by the collective bargaining agreement or when it refused to post vacant teaching positions. We concluded that those matters pertained to teacher placement and, therefore, constituted prohibited subjects of bargaining. In affirming our decision, the Court of Appeals held that the broad language of § 15(3)(j) affords public school employers with considerable discretion:

> [W]e conclude 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 decision 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]ny decision" regarding teacher placement and providing no limitation or explanation thereafter, the Legislature demonstrated its intent to afford public school employers broad discretion over any type of teacher placement decision or the impact of that decision on individual teachers or the bargaining unit as a whole. *Ionia Ed Ass'n v Ionia Public Schools*, 311 Mich App 479 (2015).

In the present case, the grievance filed by the UEA on August 18, 2015, alleges that the removal of bargaining unit positions from the alternative education program violated the collective bargaining agreement and seeks, as a remedy, the recall of all teachers who were laid off as a result of this violation. Section 15(3)(j) of PERA, however, prohibits collective bargaining over "[a]ny decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit." By requesting the remedy set forth in its grievance, the UEA was effectively seeking to have an

arbitrator make decisions with respect to teacher placement which the Legislature has determined are within the sole discretion of the public school employer. Consequently, the ALJ properly found that the UEA violated § 15(3)(j) of PERA when it attempted to process the grievance involved in this dispute to arbitration. Given this conclusion, it was not necessary to address the School District's contention that arbitration of the grievance was also prohibited by § 15(3)(h) of the Act and the ALJ did not err when he refused to do so.[5] See *Grand Rapids Public Schools,* 1986 MERC Lab Op 560, 569, *aff'd* Mich App No. 94109 (1988); *Reese Public Schools*, 1989 MERC Lab Op 476.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. We, therefore, affirm the ALJ's decision and adopt the Order recommended by the ALJ.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 18, 2019

[5] As noted in Footnote 3, Section 15(3)(h) prohibits bargaining over "[d]ecisions 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."

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UTICA COMMUNITY SCHOOLS,
Respondent-Public Employer in Case No. C15 J-131; Docket No. 15-056378-MERC,
Charging Party-Public Employer in Case No. CU15 L-045; Docket No. 15-064549-MERC,

-and-

UTICA EDUCATION ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization in Case No. C15 J-131; Docket No. 15-056378-MERC,
Respondent-Labor Organization in Case No. CU15 L-045; Docket No. 15-064549-MERC,

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UTICA FEDERATION OF TEACHERS, AFT MICHIGAN,
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APPEARANCES:

Lusk Albertson PLC, by William G. Albertson, for the Public Employer

McKnight, Canzano, Smith, Radtke & Brault, P.C., by David R. Radtke and John R. Canzano, for the Labor Organization

Law Offices of Mark H. Cousens, by Mark H. Cousens, for the Interested Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

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 heard on March 29, 2016, and March 30, 2016, before Administrative Law Judge (ALJ) David M. Peltz of the Michigan Administrative Hearing System (MAHS) acting on behalf of the Michigan Employment Relations Commission (MERC or the Commission). Based upon the entire record, including the transcripts of hearing, the post-hearing briefs filed by the parties on July 20, 2016, the stipulation of facts agreed to by the parties on the record on September 28, 2017, and the supplemental post-hearing brief filed by the Utica Education Association on November 10, 2017, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charges and Procedural Background:

For many years, Utica Community Schools (the school district or the Employer) operated two alternative education programs, one in the daytime and the other during the evening. The day program was staffed by teachers who were members of a bargaining unit represented by the Utica Education Association (UEA), an affiliate of the Michigan Education Association (MEA). Teachers assigned to the evening program were part of a unit represented for purposes of collective bargaining by the Utica Federation of Teachers (UFT), an affiliate of AFT Michigan (AFT). In 2015, the school district consolidated the two alternative education programs into one day/night program and assigned all of the teaching duties to UFT members. The new program was called the Alternative Learning Center. In response, the UEA filed an unfair labor practice charge alleging that the school district violated its duty to bargain in good faith under PERA by unilaterally eliminating positions within its unit. The charge, Case No. C15 J-131; Docket No. 15-056378-MERC, was assigned to ALJ Julia Stern and an evidentiary hearing was scheduled for December 3, 2015.

On October 22, 2015, Judge Stern directed the school district, as a necessary prelude to the holding of a productive hearing, to file a position statement responding to the allegations in the charge. The district filed its position statement on November 20, 2015. Around the same time, the hearing was adjourned at the request of the UEA and rescheduled for January 19, 2016. On or about November 30, 2015, ALJ Stern served a copy of the unfair labor practice charge on AFT representative Agatha Butts-Dier.

On December 28, 2015, the school district filed a counter charge against the UEA asserting that the labor organization had violated PERA by filing a grievance challenging the staffing of the new alternative education program and by advancing that grievance to arbitration. In the charge, which was assigned Case No. CU15 L-045; Docket No. 15-064549-MERC, the Employer asserted that the creation of the new program constituted an experimental and/or pilot program within the meaning of Section 15(3)(h) of the Act and, as such, any decisions regarding the use and staffing of the program, and the impact of such a decision on individual bargaining unit members, constituted prohibited subjects of bargaining. In addition, the school district argued that its implementation of the new program was a decision concerning the use of technology to deliver educational programs and services and, therefore, bargaining over that decision and the impact thereof was prohibited by Section 15(3)(h) of PERA.

By order dated December 30, 2015, the UEA's charge, Case No. C15 J-131; Docket No. 15-056378-MERC, was transferred from Judge Stern to the undersigned for administrative reasons.[6] That case was then consolidated with Case No. CU15 L-045; Docket No. 15-064549-MERC, the charge which was filed two days earlier by the school district. The evidentiary hearing, which had been scheduled for January 19, 2016, was converted to a prehearing conference for the purpose of clarifying the allegations and to discuss procedural issues relating

[6] At the time, Judge Stern had been assigned to preside over a highly complex case which was expected to involve multiple days of hearing and require an expedited decision. For that reason, several of the existing cases on her docket, including the instant case, were transferred to other ALJs.

to the hearing on the consolidated charges. Butts-Dier was copied on the Notice of Prehearing Conference.

By letter dated January 12, 2016, attorney Mark H, Cousens, counsel for the UFT, indicated that his client would not be taking part in the prehearing conference or otherwise participating in this proceeding absent an order by the undersigned directing that labor organization to appear. In the letter, Cousens wrote, "The local affiliate of the AFT is not a party to this action and is not seeking to act as an intervenor."

Following the prehearing conference, the UEA filed an amended charge. That pleading, which was filed on February 2, 2016, asserted that the school district's decision to staff the alternative education program with only UFT bargaining unit members constituted an unlawful transfer of work that had exclusively been performed by members of the UEA. On February 18, 2016, the UEA filed a position statement setting forth in detail the basis for its claim that the Employer's actions in creating the new alternative education program constituted a violation of Section 10(1)(e) of PERA.

An evidentiary hearing was held on March 29, 2016, and March 30, 2016, in Detroit, Michigan, during which six witnesses were called to testify and 29 exhibits were admitted into the record. No representative of the UFT attended the hearing. At the conclusion of the proceedings, the evidentiary record was closed and a deadline for the submission of briefs was agreed upon. After the parties filed their post-hearing briefs on July 20, 2016, the matter was placed on my decisional docket.

At the onset of my preparing a written decision in this matter, several issues became apparent which caused me to conclude that it was necessary to reopen the record pursuant to Rule 172(2)(g), R 423.172, of the General Rules and Regulations of the Employment Relations Commission and order the joinder of the UFT as a necessary party under Rule 157, R 423.157 of MERC's rules. In an interim order issued on May 11, 2017, I explained to the parties the reasoning underlying this conclusion:

> Although I have not made any final determination with respect to the merits of the charges, there is a substantial factual and legal basis upon which to conclude that the school district's decision to unilaterally move adult education teachers and counselors from the UEA bargaining unit to the unit represented by the UFT constituted a violation of PERA.
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> * * *
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> As a remedy in this matter, the UEA requests that the [Utica Community Schools] be ordered to restore the status quo by returning the daytime adult education teachers to its bargaining unit. However, such a remedy would result in the Commission sanctioning what would be an objectively inappropriate unit configuration. To the extent that there was ever any meaningful distinction between the duties and working conditions of the daytime adult education teachers and those of the adult education teachers who teach at night, those

differences no longer exist following the creation of the Alternative Learning Center in 2015. The record establishes that the day and night sessions have effectively been merged into a single program. Having two separate units of employees performing the same work under these circumstances would unduly fragment the workforce and discourage effective collective bargaining. Such a result is clearly contrary to the well-established mandate that the Commission constitute the largest unit which is most compatible with the effectuation of the purposes of the Act and which includes within a single unit all employees sharing a community of interest. *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952). The Commission cannot turn a blind eye when faced with a per se inappropriate bargaining unit configuration such as this.

At present, the UEA and the UFT both have arguably valid claims to represent the adult education teachers and counselors.

* * *

As noted, the Commission must tread with extraordinary care when making any policy choice which impinges on the right of employees to select their exclusive bargaining representative. Given the unique bargaining history and unit configuration which is presented in this matter, it appears that the proper course of action is for an election to be conducted so that the all of the adult education teachers and counselors working in the school district's Alternative Learning Center can vote on whether they wish to be represented by the UEA or the UFT. The Commission can direct such an election upon the filing of a proper petition by one or more of the parties. Alternatively, because this case presents a representation law issue, it is governed by unit determination principles and, for that reason, the Commission may direct an election even absent the filing of a petition. See e.g. *Southeast Michigan Transp Auth* [1985 MERC Lab Op 278].

Before any election is ordered, however, the parties, including the UFT, should have the opportunity to file supplemental briefs and, if warranted, present additional evidence regarding the question of the proper unit configuration. Accordingly, I am directing the parties and their representatives to participate in an in-person pretrial conference for the purpose of discussing the unit configuration issue, as well as the question of whether UEA members are entitled to back pay in connection with this dispute. In addition, the parties should be prepared to decide on a schedule for the filing of supplemental briefs and/or additional hearing dates.

A prehearing conference was held in Detroit on May 12, 2017, with all parties, including the UFT, in attendance. During the conference, the parties agreed to discuss possible settlement of this dispute. A follow-up conference was initially set for June 12, 2017, but was rescheduled to July 13, 2017, at the request of the UEA.

In a letter dated July 5, 2017, David Radtke, counsel for the UEA, indicated that he did not believe any further discussions regarding settlement of this dispute would be productive. Rather than hold another prehearing conference, Radtke suggested that I facilitate agreement amongst the parties on a schedule for the filing of supplemental briefs and/or schedule additional hearing dates. On July 11, 2017, the UFT, by way of its attorney Cousens, similarly requested cancelation of the upcoming prehearing conference. Cousens wrote that this matter "should be decided without further evidence or argument from the [UFT]."

Rather than cancel the prehearing conference outright, I convened a telephone conference on July 13, 2017, during which the parties agreed that they would attempt to enter into a stipulation of facts to supplement the record and address the issues which I raised in my May 11, 2017, interim order. In addition, it was agreed that the parties would file supplemental briefs by the close of business on August 17, 2017. Prior to the briefing deadline, William Albertson, counsel for the school district, submitted a letter to the undersigned asserting that he had drafted a proposed stipulation of facts and circulated it to the attorneys for the UEA and the UFT, but that he had received no response to that communication from the unions. Albertson requested that rather than require the immediate filing of additional briefs, I instead schedule a hearing for the purpose of supplementing the factual record.

By letter dated August 16, 2017, Cousens once again indicated that the UFT did not consider itself a party to this dispute and that his client would not be submitting any written argument in this matter. I responded to Cousens in writing that same day:

> The position of your client is noted. However, I must indicate for the record that I have formally joined the Utica Federation of Teachers as a party in this matter and I have specifically advised you of the potential outcomes, including the possibility of the Commission ordering an election for employees who are currently part of the Utica Federation of Teachers. Therefore, your refusal to file a brief and/or participate in a hearing shall be considered, at least from my perspective, to constitute a waiver of any objection you may have to that potential result.

An additional hearing date was scheduled for September 28, 2017. On that date, the UEA and the school district agreed to a stipulation of facts to supplement the record in this matter with respect to the proper remedy if I were to conclude that the district violated PERA by unilaterally transferring UEA work out of the unit. The stipulation was read into the record and a limited oral argument was held. Neither Cousens nor any other representative of the UFT was in attendance. At the conclusion of the hearing, the parties agreed to file supplemental briefs by no later than thirty days following receipt of the transcript. The UEA filed its supplemental brief on November 10, 2017. The school district did not file a brief or any other supplemental pleading.

Findings of Fact:

The following facts are derived from the transcript of hearing, exhibits submitted by the parties, the stipulation of facts entered into on September 28, 2017, and the statements made by counsel during oral argument which were not in dispute.

I. Background: Utica Education Association

On October 4, 1966, the UEA was certified by the Michigan Labor Mediation Board, the precursor to the Commission, as the collective bargaining representative of certificated instructional personnel employed by Utica Community Schools, including art, physical education, music and reading consultants, diagnosticians, visiting teachers, counselors, department heads, co-op program coordinator and elementary librarians. *Utica Community Schools*, 1966 MERC Lab Op 326. In 1972, the Commission ordered the accretion of school nurses to the UEA bargaining unit on the ground that the job duties and functions of the nurses were sufficiently integrated with, and allied to, the instructional process that the nurses could be appropriately included in the existing unit of teachers. *Utica Community Schools*, 1972 MERC Lab Op 804. In so holding, the Commission concluded that it would "better effectuate the purposes of PERA and would be more in accord with the policy of maximizing bargaining units . . . to have one rather than two units of nonsupervisory professional employees of an employer." *Id.* at 308.

At the time of the hearing in this matter, the UEA represented approximately 1,500 teachers, counselors and other instructional personnel within Utica Community Schools. The most recent contract between the UEA and the school district covered the period July 1, 2012, through June 30, 2017. Article 1 of that agreement provides, in pertinent part:

> The Board hereby recognizes the Utica Education Association as the exclusive bargaining representative, as defined in Section II of Act 379, Public Acts of 1965, for all professional personnel on Tenure or probation, as defined by the Michigan Tenure Act, school psychologists, social workers, speech therapists, counselors, physical and occupational therapists under contract/statement of employment with Utica Community Schools but excluding individuals providing services under contract service agreements, substitutes, individuals employed for Appendix IV positions who are not otherwise members of the bargaining unit, supervisory and executive personnel, certain mentor teachers, members of the Utica Federation of Teachers, Montessori pre-school teachers, and non-certified personnel. The term "teacher" when used hereinafter in the Agreement shall refer to all Employees represented by the Association in the bargaining unit as defined above.

Article III of the UEA collective bargaining agreement governs working conditions for bargaining unit members. Section A, Paragraph 1 of that provision states, "The responsibilities of any position in the bargaining unit will not be substantially altered or increased without prior negotiations with the Association in district-wide agreement implementation meetings." Article IV of the UEA contract contains a grievance procedure culminating in final and binding arbitration.

Article XI of the contract between the school district and the UEA provides for the continuance of the Curriculum Leadership Council (CLC). The CLC is a group consisting of ten teachers and nine administrators which acts in an advisory capacity to the school board's subcommittee on education. According to Article XI, Section B of the contract, the purpose of

the CLC is to review all new programs, major revisions to programs, and new textbooks that are brought to the school board for approval. In addition, the CLC "will be involved in research evaluation for implementation and facilitate the uses of best practice [sic] in the area of curriculum and instruction and classroom practice." The CLC meets up to eight times during the school year and may be required to hold meetings during the summer months. Article XI, Section D of the contract provides that "All major revisions of curriculum and new programs whether initiated by teachers or administrators shall be presented in writing as actionable items to the CLC." In the past, pilot programs under consideration by the school district were put before the CLC for review.

II. Background: Utica Federation of Teachers

In 1995, the Commission, following an election, certified the Michigan Federation of Teachers and School Related Personnel, the predecessor to UFT/AFT Michigan, as the bargaining representative of a unit described as "All full and/or part time professionals teaching in the Utica Community Schools Adult Education Program, including the TACT program, the Chrysler program and the Ford program, including vocationally certified teachers. Excluding supervisors and administrators." Certification of Representative, Case No. R94 L-214, issued on March 17, 1995.

The UFT currently represents a bargaining unit consisting of approximately 18 teachers employed by the school district, eight of whom are currently assigned to the new alternative education program which is the subject of this dispute. The most recent contract between the UFT and the school district covered the period July 1, 2015, through June 30, 2016. Pursuant to Article 1 of that agreement, the UFT is recognized as the exclusive bargaining representative of "the Utica Community Schools Community Education Department, which includes Teachers and Academic Advisors assigned to the following programs: Adult Education, ESL (English as a Second Language), and Auto Plant Learning Center Programs and Utica Learning Academy." The contract specifically provides that the UFT "shall not represent any other classification of employees of the Utica Community Schools except those specifically listed" in the recognition clause. It is undisputed that members of the UEA bargaining unit have significantly higher wages and better benefits than UFT members.

III. Origins of Alternative Education in Utica Community Schools

None of the witnesses who testified at the hearing in this matter had specific recollection of the origins of alternative education in Utica Community Schools. However, there was universal agreement that the school district has, since at least 1996, operated an alternative education program with day and afternoon/evening components. For the day classes, instruction and guidance counseling was provided by UEA members. In the afternoon/evening, the program was staffed by members of the UFT bargaining unit. Prior to 2010, the day program was referred to by the parties as the Utica Center for Applied Learning. As explained more fully below, the name of the day program was changed in 2010 to Advance Path Academy, sometimes referred to as "AP-UCAL." The afternoon/evening program was called the Utica Learning Academy (ULA) until the 2015-2016 school year, when it was consolidated with the day program and renamed the

Alternative Learning Center. For purposes of this decision, the prior afternoon/evening program will hereafter be referred to as the Utica Learning Academy or "night" program.

Both the day and night alternative education programs served students who had difficulty succeeding at the district's traditional schools because of social, emotional, academic and/or attendance-related issues. The curriculum was not as intense as in the traditional high schools and extracurricular activities were generally not offered to alternative education students. There were typically between 200 to 250 students enrolled in alternative education in Utica Community Schools ranging in age from 14 to 19 years old. Students had the option of taking alternative education classes in the daytime or evening. Factors which might affect whether a student attended classes in the day or evening included individual work schedules, sleeping habits and transportation requirements, as the district only provided busing to alternative education students attending school during the day. Although the ultimate goal of both programs was to ensure that students achieved a high school diploma, the night program catered somewhat more to older students. Prior to 2015, students were allowed to transfer from the day program to the evening program and vice versa; however, students were not permitted to attend classes in both programs simultaneously. Students in the day and evening programs followed the same school calendar and attended a combined graduation ceremony.

There were generally around 20 teachers assigned to alternative education in Utica Community Schools. All of the alternative education teachers were required to hold valid teaching certificates issued by the Michigan Department of Education and were covered by the Michigan Teachers' Tenure Act, MCL 38.71 et seq. They were also all subject to the same continuing education requirements. Teachers were generally assigned to either the day or night program; however, some teachers taught in both programs at the same time. Historically, the day and night programs were housed within the same school, but in different parts of the building. The programs did not share any common spaces and there was generally no intermingling of day and night students.

IV. Night Program Prior to 2015

As noted, the night program for alternative education was known as the Utica Learning Academy until the 2015-2016 school year when it was consolidated with the day program and renamed the Alternative Learning Center. The Utica Learning Academy was part of the school district's Community Education Department, which provides auxiliary services to the community, including English as a Second Language (ESL), adult education, community enrichment, and school-aged childcare.[7] All of the instructional employees assigned to the Community Education Department, including alternative education teachers, were members of the bargaining unit represented by the UFT.

The Utica Learning Academy offered alternative education classes four days per week from 3:05 p.m. through 9:35 p.m. Within those hours of operation, there were four blocks of

[7] In its post-hearing brief, the school district used the terms "adult education program" and "alternative education program" interchangeably which introduced some confusion into the record. Based upon clarification from the parties during the supplemental hearing held in this matter, it is presumed for purposes of this decision that these references were unintentional and erroneous.

classes: the first block was a 60-minute lab; the second and third blocks were comprised of traditional instruction led by teachers; the fourth block was a 90-minute combination of labs and classes taught by teachers. For the labs, the students would be assigned a book and a packet of written materials including worksheets, tests and quizzes. A grade of 60% or higher was required to pass each test. Any student who failed to achieve a passing grade after three attempts was required to go back and show the teacher or aide his or her work, repeat the study guide and then retake the exam. The curriculum, including books, exams and assignments, was identical to that used in the school district's traditional high schools. There was no online learning component to the night program as it existed prior to 2015; rather, all instruction was provided in classrooms and labs.

There were typically around 12 teachers assigned to the night program, though only 7 taught there during the 2014-2015 school year. Each teacher was assigned a different subject for which he or she was certified to teach. Teachers in the night program were paid hourly and were classified by the school district as part-time employees. The night teachers were supervised by a principal and a head teacher. As noted, teachers and aides in the night program were part of the UFT bargaining unit.

V. Day Program Prior to 2015

The daytime alternative education program was originally called the Utica Center for Applied Learning (UCAL). Instruction in UCAL was exclusively by way of traditional classroom-based education in which teachers worked face-to-face with students. All teachers assigned to the day program were members of the UEA bargaining unit. In 2010, Utica Community Schools entered into a five-year contract with AdvancePath Academics, a corporation which provides school districts throughout the country with professional development training, technology and infrastructure, including computers, software and furniture. The contract provided for the creation of "an innovative 'school within a school'" approach which would "serve out-of-school and at-risk youth with a specialized programmatic approach utilizing customized learning plans to meet the varies needs of students who have dropped out of high school." In conjunction with the agreement, the day program moved to a new building, the Training and Development Center (TDC), within which AdvancePath constructed three large computer labs. At the same time, the school district changed the name of the daytime alternative education program from UCAL to AdvancePath Academy.

Initially, the school district planned to eliminate all direct instruction and standalone classes and instead utilize computers and software provided by AdvancePath to educate day students using only a technology-based curriculum. However, the UEA took the position that this change would violate the terms of the parties' collective bargaining agreement and the district ultimately agreed to restructure the program into a "blended learning" model which involved a combination of online education and traditional classroom methods. The AdvancePath students began the day at 7:40 a.m. with four hours of lab time before breaking for lunch. In the afternoon, some students would attend standalone classes while other students would return to the labs for the remainder of the day. The standalone sessions consisted of traditional lecture-based classroom instruction in which a teacher sat at a desk in the front of the room and interacted with students using a whiteboard, projector, computer and books. In the classroom

setting, teachers followed the same curriculum and used the same books and study materials as in the district's high schools.

The AdvancePath program utilized three labs which were outfitted with computers for students and teacher workstations. The "A" lab was generally set aside for 9th-10th graders. The "B" lab was for 11th-12th graders who were short on credits or otherwise in danger of not attaining a degree; this group made up the largest portion of the program's student body. The "C" lab was typically reserved for 12th graders who were on track to graduate. In these labs, students utilized a technology-based curriculum provided by AdvancePath which was called APEX. In addition, the AdvancePath program incorporated "No Red Ink," a personalized writing program. Students worked at their own pace in the labs using online study guides, worksheets and discussion questions. They generally remained at the same workstation throughout the day. Members of the UEA bargaining unit rotated between the labs, providing assistance to students on their coursework and making available or "unlocking" exams and quizzes as students became ready to take them. Teachers also conducted "pull out" sessions in which they would take a small group of between six to twelve students away from their workstations to an area on the side of the lab to review worksheets and answer questions. According to Edward Wessel, Jr., a teacher who worked in the AdvancePath program throughout its existence, these pullout sessions occurred approximately three to five times a week. However, Marc Kay, the principal of AdvancePath during the 2014-2015 school year, testified that he was in the labs every day and "saw very little to none" of the pull-outs.

The AdvancePath labs were outfitted with wireless networking (WiFi). Students and teachers used desktop computers supplied by AdvancePath, each of which had a Microsoft operating system installed. During the final year of the program, the computers assigned to teachers were changed to the Google Chrome operating system. There were two Microsoft Surface tablets available which teachers could use when walking around the lab. Online-based elective courses were made available to students enrolled in the AdvancePath program during the 2014-2015 school year and students were permitted to go back to their home high schools to take elective courses. The AdvancePath curriculum could be accessed off-site and some students were allowed to take classes from home under special circumstances such as in the event of disciplinary problems or for medical reasons. In such cases, a seat time waiver could be used which would permit the student to take all or most of his or her classes online while allowing the school district to receive the state foundational allowance for off-site learning.

The AdvancePath alternative education program was part of the school district's Teaching and Learning Department. On average, there were seven or eight teachers assigned to AdvancePath, all of whom were members of the UEA bargaining unit. For the 2014-2015 school year, there was one counselor assigned to the AdvancePath Program; that individual was also a member of the UEA unit. The daytime alternative education teachers were full-time salaried employees of Utica Community Schools.

VI. 2015 Changes to the Alternative Education Program

Robert Monroe has been assistant superintendent for teaching and learning for Utica Community Schools since 2012. In 2014, Monroe decided to undertake a review of the

alternative education program in advance of the expiration of the school district's contract with AdvancePath. Monroe was concerned with the achievement levels for some of the alternative education students. At the time, the graduation rate for students attending the AdvancePath Academy during the day was around 50 percent, while the graduation rate for night students in the Utica Learning Academy was 5.88 percent. The State average graduation rate for that period was between 75 and 78 percent. ACT scores were also below the state average. Moore concluded that the amount of pull-out instruction was not satisfactory. He decided to develop a new alternative education program which would emphasize the use of technology and eliminate all traditional classroom teaching, while still providing instruction from teachers as necessary. In February of 2015, Monroe began having discussions with AdvancePath on how best to achieve these objectives.

On June 10, 2015, the school board held a study session at which it announced plans to sign a new contract with AdvancePath pursuant to which the company would provide not only curriculum, hardware and software, but also staffing for alternative education within the district. Under this plan, the alternative education teaching work previously performed during the day by members of the UEA bargaining unit and at night by UFT members was to be outsourced to AdvancePath employees. Following the study session, UEA president Liza Parkinson submitted to the school district a written demand to bargain over the outsourcing of instructional staff in the alternative education high school. That same day, the UFT presented management with a demand to bargain over "the decision to subcontract the instructional work historically performed by the Utica Learning Academy certified teachers unit." Michael Strum, the district's assistant superintendent for human resources, responded to the UFT by letter dated June 16, 2015. In the letter, Strum wrote "[I] have received your demand to bargain relative to the above captioned matter. The District believes the essential components of the alternative education redesign fall under the Michigan Public Employment Relations Act 423.215 as prohibited subjects of bargaining including but not limited to subsections 3h, 3j, 3k and 4." Strum testified that he sent a similar letter to the UEA that same day, and a copy of a letter addressed to Parkinson was introduced into evidence as Exhibit 27 at hearing. Although Parkinson asserted at the hearing that the school district did not advise her of its position that the proposed alternative education program constituted a prohibited subject of bargaining until later that summer, she was later shown a copy of the June 16, 2015, letter and did not deny having received it. Parkinson testified, "I'm not saying I didn't receive it; I just don't recall receiving it." I credit Strum's testimony that he notified both unions of the district's position regarding staffing of the alternative learning program on or about June 16, 2015.

The next regular school board meeting was held on June 22, 2015, at which time the plan to outsource staffing of the alternative education program to AdvancePath was tabled. In the weeks and months which followed, representatives of the school district and both unions met and engaged in discussions concerning the future of the alternative education program. Strum testified that these were not contract negotiations because the district considered the subject matter of these discussions to be prohibited topics. Rather, he characterized the interactions as "mutual collaborative discussions" and framed the items discussed during these meetings as "concepts" or "supposals." In contrast, Parkinson described the discussions as negotiation sessions and testified that the UEA and UFT made several proposals to the school district. Whether characterized as proposals or concepts, it is undisputed that the discussions which

occurred pertained only to financial and staffing matters. Topics discussed during these meetings included accreting some UEA positions to the UFT bargaining unit and having both UEA and UFT members jointly staff the labs in the day program. Strum testified that issues of critical importance to the school district such as the use of seat time waivers which would allow students to take classes off-site were non-starters for the UEA. Parkinson admitted that matters such as seat time waivers and changes to class size would have been "difficult" to bring back to the membership, but she testified that the Union was willing to "listen to what the District has to say about them."

By early August, Strum had determined that there was no possibility of reaching any agreement satisfactory to the school district. Around that time, Strum submitted to the school board a report prepared by the district's curriculum subcommittee entitled "Alternative Learning Options." The report set forth three options for the future of alternative education within the district. Proposed Option #1 called for the establishment of "contracted educational services" for alternative learning through a "new technology instructional pilot at the TDC in the amount of $1,350,000 in 2015-2016 as compared to $2,234,000 that was paid in 2014-2015." Under Proposed Option #2, the district would implement an AdvancedPath Academy model in the high schools with sessions in the day and night. The programs would use a blended learning model which incorporated online learning and seat time waivers and would be staffed by UEA teachers in the day session and UFT members at night. This option would result in a savings of $830,496 from the previous alternative education budget. Under Proposed Option #3, the district would implement an AdvancePath Academy model at the TDC with blended learning blocks of academic time provided entirely by UFT teachers in both the day and night sessions. Under this option, students would access core academic classes and electives through online "virtual" courses. The cost of this program was estimated at $1,299,228 for the 2015-2016 school year.

On or about August 5, 2015, Strum informed Parkinson that the AdvancePath contract discussed a few months earlier at the school board study session would be placed back on the agenda at the next school board meeting. At or around the same time, he provided to the UEA a proposed agreement which essentially incorporated Proposed Option #3 from the curriculum subcommittee report. Specifically, the proposed agreement stated, in pertinent part:

> The District believes the implementation of the AdvancePath Agreement including staffing, is a prohibited subject of bargaining within the meaning of PERA. The Association believes the implementation of the AdvancePath Agreement is not a prohibited subject of bargaining within the meaning of PERA. Regardless, the District and the Association have negotiated and entered into this Agreement. THEREFORE, IT IS AGREED:
>
> 1. The Association acknowledges the District will implement the AdvancePath Agreement at the beginning of the 2015-2016 school year. The Association also acknowledges that none of its members will be assigned to this District's alternative education program and as a result, a reduction in membership will occur.

2. The Association agrees to release the District of and from any and all grievances, claims, demands, action or causes of action whatsoever arising from or relating to the District's implementation of the AdvancePath Agreement. This includes all grievances, administrative complaints (including an unfair labor practice charge), or civil actions alleging a violation of . . . the statutes and regulations of the United States and the State of Michigan (including PERA); any collective bargaining agreement between the District and the Association . . .

* * *

4. The District, in return for the Association's agreements [sic] agrees that instructional personnel for the AdvancePath Academy Program shall include the Utica Federation of Teachers (UFT); provided, however, the District retains its discretion to implement the AdvancePath Agreement consistent with its rights as a public school employer, including those rights established by Section 15(3)(h) of PERA, MCL 423.215(3)(h). In addition, and at its discretion, the District shall increase the anticipated staffing levels by adding approximately four full-time equivalent (FTE) positions for the Association's members during the 2015-2016 school year. These FTE's will not be applied to the AdvancePath Program.

5. The District and the Association agree this Agreement is not an amendment of the District's collective bargaining agreements with the Association or the UFT and may not be enforced or [be] the subject of a grievance under those collective bargaining agreements.

The UEA did not accept the proposed agreement.

At its meeting on August 9, 2015, the school board passed a resolution formerly adopting Proposed Option #3, which included the plan to staff all alternative education classes within the school district with UFT teachers.[8] Under the plan adopted by the board, no UEA represented employees were to be assigned to the new program. The resolution adopted by the board described the new consolidated alternative education program as "a pilot that uses new technology and innovative educational approaches to provide, among other things, improved and more flexible and efficient modes of education and educational achievement to non-traditional high school learners, credit recovery students and evening students." Strum testified that he did not believe the school district and the UEA were at impasse when the board made the decision because the discussions between the parties had concerned prohibited subjects and, therefore, no collective bargaining had actually occurred. It is undisputed that the district did not consult with the Curriculum Leadership Council before or after the board resolved to create the new alternative education program.

[8] There is no indication in the record whether the school district implemented Paragraph 4 of its proposed agreement, which called for the addition of four FTE positions in the UEA bargaining unit.

On or about August 11, 2015, the school district entered into a three-year agreement with AdvancePath to create "a new pilot learning community of high expectations, including 21st Century learning platforms, technology models, combining non-traditional high school learners (and especially struggling 9th grade students), credit recovery students, and students 17-19 enrolled in the current ULA program." The agreement, which is entitled "AdvancePath Educational Pilot and Technology Agreement" is scheduled to expire on June 30, 2018, unless extended by mutual agreement. Monroe testified that the school district would be monitoring and evaluating the program before making a determination whether to extend the contract or "move in a different direction." The contract sets forth various attributes which were to be incorporated into the new program, including: seat time waivers allowing students to attend school for a reduced session time; new technology elements including Google for Education, devices and wireless connectivity; a new rotational blended learning model in which a certified teacher in each discipline, supported by instructional aides, rotates among four blended learning classrooms each session; a separate classroom for pull-out instruction; two to three 4-4.5 hour sessions each day; and instructional staff hired by Utica Community Schools and trained and supported by AdvancePath. At hearing in this matter, Strum conceded that one of the reasons the district decided to staff the new program with UFT members was to cut costs.

In a letter dated August 17, 2015, principal Kay announced the new program to the families of returning day and night alternative education students. The letter stated that the new program would "help students achieve more credits by increasing their learning potential" and described some of the changes which were being made. The following day, the UEA filed a grievance asserting that the removal of bargaining unit positions from the alternative education program violated the recognition clause of the collective bargaining agreement and Article III, Section A, Paragraph 1, the general working conditions provision cited above. In addition, the UEA alleged that the school district breached the contract by failing to bring the changes to the alternative education program to the Curriculum Leadership Council for review. As a remedy, the UEA requested that the school district restore the bargaining unit positions to the alternative education program as they existed during the 2014-2015 school year, recall teachers that were laid off as a result of the contract violation, and make teachers whole for lost pay, benefits and seniority.

Following a hearing, the school district issued a written memorandum denying the UEA grievance. The memorandum, which is dated September 4, 2015, provides, in pertinent part:

> **FINDINGS**
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> A Level III grievance hearing was held Monday, August 31, 2015 at which time the Union reiterated its position as indicated in the statement of the grievance.
>
> Administration reviewed its position that the 2015-2106 Alternative Education Program is subject to PERA (423.215 3h) in that collective bargaining between a public school employer and a bargaining representative of its employees shall not include decisions concerning the use and staffing of experimental or pilot programs and decisions concerning the use of technology to deliver education programs and services and staffing to provide that technology, or the impact of

those decisions on individual employees or the bargaining unit. Administration also articulated its position that, regardless whether its decisions were prohibited subjects of bargaining, it had not violated the referenced provisions of the CBA.

DISPOSITION

The matter of focus is considered a prohibited subject of bargaining and thus excluded from the grievance process. The layoff of Association members from the Alternative Education Program is also a prohibited subject of bargaining. Separately, the District did not violate the CBA. The grievance is therefore denied.

By email dated October 5, 2015, the UEA notified the school district of its intent to advance the grievance to arbitration. The arbitration is currently on hold pending resolution of the instant charge.

VII. The Alternative Learning Center

The new alternative education program is called the Alternative Learning Center. It began operation at the start of the 2015-2016 school year. There are two components to the new program: a day session which runs from 7:40 a.m. through 2:30 p.m. and a night session which starts at 3 p.m. and concludes at 7:10 p.m. The day session is divided into three blocks, each of which is two hours long. The night program consists of two blocks lasting two hours each and a third block of time to be completed by students off campus. The day and night programs share labs and classroom facilities within the TDC.

All of the certified teachers who formerly taught alternative education during the daytime in the AdvancePath Academy were replaced with new teachers who are represented for purposes of collective bargaining by the UFT. As of March of 2016, the UFT represents three teachers assigned to the night component of the new alternative education program and five teachers who work in the program during the day. At the hearing, the evidence established that no UEA-represented teachers or counselors have been assigned to work in the new Alternative Learning Center.[9] As a result of the change to the Alternative Learning Center, eight members of the UEA bargaining unit were laid off at the start of the 2015-2016 school year. By the time of the hearing, two of those individuals had been returned to work in unspecified positions with the school district as "mid-year late returns." No evidence was presented regarding the impact of the change on any specific teachers or counselors, nor does the record establish which individuals were teaching in the day and night programs prior to, or after, the 2015 changes.

[9] In the supplemental stipulation entered into by the parties after the conclusion of the hearing, the school district and the UEA agreed that "[a] Utica Education Association-represented teacher . . . work[s] with students in the Utica Community Schools Alternative Education Program if needed. The Learning Center teacher is presently assigned full-time to the Alternative Education Program." No additional information was provided regarding this teaching position.

The Alternative Learning Center does not include any traditional lecture-based classroom instruction. Rather, the program is comprised entirely of lab-based learning. Each lab is dedicated to a particular academic subject area and teachers assigned to a particular lab have the appropriate certification and are highly qualified to teach in that discipline. Whereas teachers moved from lab to lab in the AdvancePath Academy, students enrolled in the Alternative Learning Center are expected to rotate between labs throughout the sessions. In practice, however, there are occasions when a student may stay in the same lab and work on a different subject than the one which has been specifically assigned to that lab. For example, a student may complete his or her studies in the assigned subject matter early and begin working on another subject for the remainder of the session.

There are fewer students assigned to each lab than in the former AdvancePath Academy and the instructional aides are responsible for more of the daily monitoring of student progress within the labs, including performing the task of unlocking exams. This shift in responsibilities was for the purpose of freeing up the teachers to focus on pull-out sessions. Approximately six times per week, students are pulled out of the labs in small groups and taken by their primary teacher to a separate classroom for a 30-minute session. No longer are the pull-out sessions simply for the purpose of reviewing worksheets and answering student questions as they were in prior years. Rather, teachers now develop lessons geared specifically toward the deficiencies students have demonstrated during their online learning and engage in focused instruction related to the online curriculum content. Because each lab is dedicated to a specific subject matter, students receive direct instruction from a teacher certified in that subject during any pull-out session. Another key component of the new program is a greatly expanded use of student seat time waivers which allow the school district to receive foundational money from the State for time spent by students learning off-site. As noted, seat time waivers were previously limited to students who had to work from home in the event of disciplinary problems or for medical reasons.

As with the prior day program, the Alternative Learning Center uses the APEX platform to deliver its curriculum. However, APEX is now based on common core and is more rigorous than the previous online curriculum. The school district continues to use the No Red Ink writing program, but has also incorporated several new web-based learning platforms. These include E-Dynamics which supplements APEX by offering additional online elective courses, and Scholarcentric, which provides instructional staff with the ability to obtain a social/emotional profile and assessment of students to enable determinations of their strengths and weaknesses. In conjunction with the change to the new alternative education program, AdvancePath updated all 162 computers within the labs and classrooms from the Microsoft Windows platform to the Google Chrome operating system and replaced the existing WiFi network with a system dedicated to the alternative education program. The program also began utilizing Google Apps for Education which allows students to work collaboratively on projects and has expanded the ability of students to work off-site. In addition to the new software, AdvancePath purchased tablets and Chromebook laptop computers for use by both students and teachers while on campus. At the start of the 2016-2017 school year, AdvancePath provided 5-6 days of training to teachers and instructional aides on technology, curriculum resources and instructional strategies.

As principal of the Alternative Learning Center, Kay monitors the progress of the program by reviewing test results and class completion data on a weekly or bi-weekly basis. He also evaluates student progress toward graduation and credit recovery. Kay testified that he performed the same type of evaluation process as principal of the AdvancePath Academy, but that his review of the former alternative education program was conducted "[o]n a more minimal basis." When asked whether any benchmarks exist to determine whether the new program is successful, Kay responded by stating, "As a pilot program, the benchmarks are kind of being – I'd really need to look at it at the need of this year to see where we would need to go forward in the next two years of the pilot program." Monroe, the district's assistant superintendent for teaching and learning, testified that at the conclusion of the three-year contract with AdvancePath, the school district will evaluate the success of the program and decide what steps to take next. According to Monroe, one option might be to make the Alternative Learning Center permanent.

Positions of the Parties:

I. Summary of UEA's Position

The UEA argues that the school district violated its duty to bargain under Section 10(1)(e) of PERA by removing teachers and counselors from its bargaining unit and making them part of the bargaining unit represented by the UFT. The UEA contends that staffing of the daytime alternative education program was work which was exclusive to its bargaining unit and that the school district made no changes to the duties of the affected positions sufficient to have destroyed the community of interest between those positions and other teachers and counselor positions within its bargaining unit. The teachers working in the Alternative Learning Center are still certified teachers subject to the Michigan Teachers' Tenure Act who are primarily engaged in teaching underachieving students using online tools, just like the teachers in the UEA bargaining unit who worked in the former daytime program. The UEA asserts that teachers in the "new" program do student pull-outs, just as the UEA teachers did in the AdvancePath Academy. The new teachers continue to use APEX as the core curriculum and they continue to teach in a classroom or lab where students are sometimes working on subjects other than those for which the teacher is certified. Although the school district has deployed some new technology, the UEA contends that these changes are no more consequential than buying new calculators. According to the UEA, the district's actions constitute an unlawful attempt to "gerrymander" the established bargaining unit. The UEA asserts that the school district's decision to remove its members from the day program cannot constitute a prohibited subject of bargaining under Section 423.215(3), as those provisions of the Act do not override the Commission's exclusive authority to determine bargaining unit placement.

II. Summary of the School District's Position

The school district asserts that the UEA's charge should be dismissed because teaching the school district's alternative education students was not a task exclusively performed by members of the UEA bargaining unit. According to the district, the record establishes that for more than 25 years, members of both the UEA and UFT bargaining units have shared, and fairly equally so, the duties of teaching alternative education students enrolled at Utica Community Schools. Although UEA members were assigned to the day session and UFT members taught at night, the district contends that the teaching responsibilities were very similar, if not identical. According to the district, the UEA's attempt to define the work as being exclusive to its unit based solely on the hours it was performed is logically tortured. Utica Community Schools asserts that it was actually the UEA whose actions in connection with this matter constituted a violation of PERA. The school district argues that the UEA acted unlawfully by advancing to arbitration a grievance over staffing of the new alternative education program. According to the district, the decision to use UFT members to teach students in the Alternative Learning Center constituted a decision regarding "teacher placement, or the impact of that decision on individual employees or the bargaining unit" pursuant to Section 423.215(3)(j) of the Act and a decision regarding the use of technology to deliver instruction under Section 423.215(h). Finally, Utica Community Schools asserts that notwithstanding the fact that its decision to staff the new program with UFT members was a prohibited subject of bargaining, the district fulfilled its statutory duty to bargain by engaging in negotiations with UEA representatives prior to announcing that it was entering into a contract with AdvancePath. Given the UEA's stated refusal to even consider issues such as seat time waivers, the district contends that the parties had exhausted their ability to reach any mutual agreement prior to the start of the 2015-2016 school year and that any additional negotiations at that time would have been futile.

Discussion and Conclusions of Law:

I. Case No. C15 J-131; Docket No. 15-056378-MERC

The UEA asserts that the school district violated PERA by removing work from its bargaining unit in 2015 when the district created the Alternative Learning Center and staffed that program entirely with members of the UFT unit. The school district contends that the charge should be dismissed because teaching alternative education in Utica Community Schools was never work performed exclusively by UEA members. Rather, the district contends that this responsibility has been shared by members of the UEA and UFT bargaining units since at least 1996 and, therefore, it was lawful for Utica Community Schools to have assigned all of the work to UEA members.

I issued an interim order in this matter on May 11, 2017, after the record had closed and the parties had been afforded a full opportunity to argue the merits of the substantive allegations set forth in the charges. In that order, I suggested that based on my initial review of the record, I was prepared to find that the actions of Utica Community Schools did not implicate the exclusivity rule, but I stressed that I had not made any final determination regarding the merits of the charges.

Rather, the primary purpose of the interim order was to afford the parties, as well as the UFT, an opportunity to set forth arguments and, if necessary, present additional evidence regarding the appropriate remedy if I were to find a violation of PERA by the school district. My opinion, at

that time, that the exclusivity rule was inapplicable to this dispute was based, in large part, on the theory of the case advanced by the UEA. The UEA asserted that the school district had not merely transferred work out of the unit, but that it instead had altered the bargaining unit placement of individual instructors who taught alternative education during the day without any corresponding alteration of their duties and responsibilities. For example, in his opening statement, counsel for the UEA asserted that "the District abruptly announced in early August 2015 that it was simply going to remove the UEA's representation of classroom teachers and counselors in the daytime alternative education program and instead make them UFT members and put them in the UFT bargaining agreement – bargaining unit." The UEA has continued to advance this claim throughout these proceedings, most recently in its supplemental post-hearing brief. In that brief, the UEA asserts that as a result of the school district's implementation of the Alternative Learning Center, "[e]very single UEA-represented daytime Alternative Education teacher and counselor who was forced by the Employer to be covered by the UFT-UCS collective bargaining agreement chose to transfer out of those positions." A close examination of the record, however, reveals that the UEA failed to prove that the school district transferred, or attempted to transfer, any UEA member into the UFT bargaining unit. Rather, the evidence indicates that this was simply a case in which duties and responsibility previously performed by UEA members were transferred to individuals in another bargaining unit.

In support of its contention that the school district unlawfully altered the bargaining unit placement of its members, the UEA relies upon Exhibit 10, which is a copy of the grievance filed by the Union on August 18, 2015. Notwithstanding the fact that the allegations contained within a grievance cannot, standing alone, be accepted as fact in an unfair labor practice proceeding, there is no language within that document which would establish that the school district made changes to the established bargaining unit configuration with respect to any UEA teacher. The Union also cites Exhibit 11 in support of its claim that the school district attempted to force UEA teachers to become members of the UFT bargaining unit. Exhibit 11 is a document entitled, "Recall of Professional Staff – August 2015." It consists of a spreadsheet containing a list of the names of various UEA staff members, along with information which includes their date of hire, the subject matter that they were assigned to teach during the 2014-2015 school year, and the building to which they were assigned. The document also lists a "Lottery Number" for each teacher and indicates if they were on layoff and whether their recall had been accepted or rejected by the district. Although Exhibit 11 was admitted into the record as a Union exhibit without objection by the school district, no witnesses were questioned regarding the document and the information contained therein is in no way explanatory on its face. Whether this exhibit is somehow relevant to the UEA's allegation that the district unlawfully altered the bargaining unit placement of its members is simply impossible to determine on this record. Similarly, the testimony cited by the UEA in its brief fails to establish that any member of the UEA bargaining unit was forced to become part of the UFT. In fact, the only testimony in the record which provides any insight into the effect of the change on individual teachers is that of Marc Kay, principal of the Alternative Learning Center. Kay stated that at the start of the 2015-2016 school year, the day program was staffed entirely by new teachers.[10]

[10] The offer presented to the UEA by the school district also seems to call into question the Union's claim that its members were forced by the Employer to be covered by the UFT contract. That offer, which the district made on the same day that Strum informed the UEA that the AdvancePath contract would be placed back on the school board's agenda, suggests that it was the Employer's plan from the start to lay off all UEA-represented alternative education

The distinction between removing duties and responsibilities from a bargaining unit versus the transfer of individual employees or positions from one unit to another without a corresponding change in duties is significant. The latter implicates matters of unit placement which fall within the exclusive jurisdiction of the Commission. "[B]argaining unit placement is neither a mandatory subject of bargaining nor a matter of managerial prerogative but a matter reserved to the Commission by Section 13 of PERA. That is, an employer may not alter bargaining unit placement unilaterally or after bargaining to impasse, but must either obtain the union's agreement to changes in bargaining unit composition or obtain an order from this Commission . . . ." *Detroit Fire Fighters v City of Detroit*, 96 Mich App 543 (1980). See also *City of Grand Rapids*, 19 MERC Lab Op 69 (2006); *Northern Mich Univ*, 1989 MERC Lab Op 139. In contrast, an employer's decision to unilaterally transfer duties and responsibilities from one unit to another may constitute a violation of the duty to bargain, but only if it can be established that the work was exclusive to the members of the bargaining unit bringing the unfair labor practice charge. *City of Southfield*, 433 Mich 168, 185 (1989), aff'g 1985 MERC Lab Op 1025; *Mid-Michigan Comm College*, 29 MERC Lab Op 61 (2016) (no exceptions); *Kent County Sheriff*, 1996 MERC Lab Op 294. An employer has no duty to negotiate where job functions have historically been assigned interchangeably to both unit and non-unit employees because such work is not the "bargaining unit work" of the unit from which the work has been removed. This is true even where the transfer of work is for the purpose of reducing costs. The distinction between the transfer of positions versus the removal of work was recently the subject of discussion in *Mid-Michigan Comm College*, in which the Commission held that the exclusivity rule did not apply where the employer removed two counselor positions from the charging party's unit and, without changing their duties, transferred them to newly-titled positions in another unit.

The exclusivity rule has its origins in *Fenton Area Pub Sch*, 1976 MERC Lab Op 632 (no exceptions) and *Detroit Police Dep't v Detroit Police Lieutenants & Sergeants Ass'n*, 1980 MERC Lab Op 110. In *Fenton*, the employer unilaterally replaced instructional aides who were members of the charging party's bargaining unit with work-study or neighborhood youth corps students who were unrepresented for purposes of collective bargaining. The evidence established that the work, which included assisting teachers in certain specialized classes and supervising students during recess and at the lunch hour, had been performed by both aides and the unrepresented students. The ALJ recommended dismissal of the charge based, in part, on his conclusion that the work in question was not exclusive to the bargaining unit and that decision became the final order of the Commission when no exceptions were filed. Although the Commission seemingly abandoned the exclusivity rule in *Detroit Police Dep't v Detroit Police Lieutenants & Sergeants Ass'n*, the Court of Appeals remanded the case with instructions that MERC consider the exclusivity rule. The Commission's subsequent adoption of the exclusivity rule as a required element to establish a violation of the bargaining duty where an employer has transferred work from one bargaining unit to another group of employees was later affirmed by the Supreme Court in *Southfield Police Officers Ass'n v Southfield*, *supra*.

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teachers, or reduce the total number of UEA-represented positions, rather than move UEA teachers to the UFT bargaining unit. The proposed agreement specifies that "none of [the UEA's] members will be assigned to this District's alternative education program and as a result, a reduction in membership will occur."

The Commission has since applied the exclusivity rule in multiple cases involving the unilateral transfer of duties and responsibilities to non-unit employees. For example, in *City of Lansing (Police Dep't)*, 1989 MERC Lab Op 1055, the union which represented nonsupervisory sworn police officers filed a charge asserting that the employer violated PERA by unilaterally transferring work from its members to civilian employees. The record indicated that prior to the change, the officers in the charging party's bargaining unit had been responsible for various duties within the detention center, including booking and fingerprinting prisoners and searching male prisoners. The six nonsworn female matrons had been tasked with searching female prisoners and, on occasion, photographed and fingerprinted female prisoners. The employer replaced both the male officers and the matrons with a group of civilian detention employees of both genders. The union representing the sworn officers asserted that the exclusivity rule did not apply because the work performed by the officers and the matrons was distinguishable based upon the sex of the prisoners with whom they interacted. The Commission dismissed that argument, concluding that the work was the same for purposes of the exclusivity rule and, therefore, the employer had no duty to bargain over the transfer of those responsibilities to the civilian employees.

An employer's decision to transfer work was similarly found lawful based on the exclusivity rule in *West Bloomfield Twp*, 21 MERC Lab Op 62 (2008). In that case, the union represented a bargaining unit of nonsupervisory office employees of the Township, including the position of parking enforcement officer (PEO), a civilian position in the police department. The PEOs were responsible for patrolling the Township and issuing citations for vehicles which were in violation of the parking ordinance. Upon returning to the office, the PEOs filed the citations with the police department and the treasurer. The PEOs were also involved with collecting unpaid fines, including the issuance of civil infractions. After the Township decided to eliminate the PEOs and transfer their work outside the unit, the union filed a charge asserting that the employer's decision constituted a violation of Section 10(1)(e) of PERA. I recommended dismissal of the charge on the ground that the union had failed to establish that its members exclusively performed parking enforcement work:

> Police officers performed duties relating to the enforcement of the Township's parking violations ordinance for many years preceding the filing of the instant charge. While the police officers spent less time on parking enforcement than did the PEOs, the work itself was essentially the same. Upon encountering a vehicle parked in violation of the ordinance, both the PEOs and the police officers would fill out a citation, leave a copy on the vehicle and perform the appropriate follow-up work. Although different forms were used depending on whether the citation was initially written by a police officer or a PEO, the underlying parking violations were identical. If a parking violation notice remained unpaid after a specified period of time, the PEO would fill out and issue a "civil infraction" using the same form utilized by police officers at the scene of the violation. The fact that the Township's share of the money collected from the tickets differed depending on which form was used is, in the opinion of the undersigned, of no significance to the question of whether the work itself was the same. A showing of exclusivity is essential to establish that an employer has a duty to bargain over the transfer of work outside the unit, and the Union carries the burden of proof as

> to that issue. I find that it has not met that burden in the instant case. Accordingly, I conclude that the Township did not violate PERA by assigning to police officers the task of issuing parking violations notices. [Citation omitted.]

The Commission adopted my decision when no exceptions were filed. See also *City of Lansing (Police Dep't)*, 29 MERC Lab Op 58 (2016) (no exceptions) (removal of public information officer position from command unit and transfer of duties to an outside employee was not unlawful where the work had been performed by members of both the command and non-supervisory units); *Kent County Sheriff*, *supra* (charge alleging unilateral transfer of work was dismissed where evidence established that at least some of the disputed work was performed by individuals outside the unit); *Saginaw Twp Comm Schools*, 1993 MERC Lab Op 738 (district had no duty to bargain over the assignment of telephone answering responsibilities to co-op students where such work had historically been performed by students, administrators and secretarial personnel).

It is the Charging Party which carries the burden of proof as to exclusivity. *Kent County Sheriff*, *supra* at 302. In the instant case, the evidence overwhelmingly establishes that the teaching of alternative education was a responsibility which was shared by UEA and UFT members for more than twenty years until the school district made the decision to assign those duties to only UFT members in August of 2015. All of the positions taught alternative education students who were in the program because of difficulties succeeding at the school district's traditional high schools. Although the demographics of the night program skewed a bit older, students in both programs were of high school age and did not exceed 19 years old. The primary purpose of both the day and night programs was to ensure that students attained a high school diploma. Students had the option of attending either the day or night program and they were allowed to transfer from one program to the other without restriction. The programs both followed the same school calendar and all alternative education students attended a combined graduation ceremony. Classes were taught in the same building and teachers in both programs were subject to the same certification requirements. In fact, the UEA concedes in its supplemental post-hearing brief that between about 1995, when the UFT was certified to represent its bargaining unit, and the 2010-2011 school year, daytime alternative education teachers "performed the same exact work." Although the day program ultimately became more focused on on-line learning, that change did not occur until 2010 and, despite the introduction of computer labs, UEA members continued to engage in traditional direct lecture activities through the 2014-2015 school year, with students using the same curriculum, books and study materials within the standalone classrooms.

The only truly distinguishing characteristic of the teaching duties previously assigned to UEA members was that the work was performed during the morning and early afternoon hours, whereas UFT teachers worked later in the day and into the early evening. The Commission has held that the determination of whether work is exclusive centers on the tasks or services being performed on an employer-wide basis, with consideration given to the particular qualifications required or the nature of the job itself. *Muskegon County Sheriff's Dep't*, 2000 MERC Lab Op 88. See also *City of Iron Mountain*, 19 MERC Lab Op 29 (2006) (no exceptions). As explained above, the primary responsibilities of the work performed by UEA and UFT members prior to the 2015-2016 school year and the basic requirements to perform those duties were virtually

identical. A thorough review of the record establishes that there is simply no basis upon which to conclude that the teaching of alternative education by UEA members was fundamentally different than the work assigned to UFT teachers simply because of when that work was performed. The time of day that the work is performed is no more distinguishable for purposes of application of the exclusivity rule than the gender of prisoners with whom both sworn police officers and matrons interacted in *City of Lansing (Police Dep't)*, *supra*. Based on a careful review of the record in this matter, I find that the UEA has failed to meet its burden of establishing that the teaching of alternative education constituted work performed exclusively by members its unit. Accordingly, I conclude that the school district did not violate Section 10(1)(e) of PERA by unilaterally deciding to assign teaching duties to members of the UFT bargaining unit to the exclusion of UEA members.

I also find no evidence in the record supporting the UEA's contention that the school district violated PERA by transferring counselors from its bargaining unit to the UFT unit. Although the UEA referenced the transfer of guidance counseling positions in the charge, the impact of the new program on UEA counselors appears to have been little more than an afterthought to both the Union and the school district during the course of these proceedings. In fact, the UEA did not reference the counselors a single time in its post-hearing brief, nor was the counselor position referenced in the stipulation of facts entered into by the parties after the evidentiary hearing concluded. The transcript and exhibits are similarly devoid of evidence regarding the impact of the change on the counselor position. There is no dispute that UEA counselors have historically worked within the day alternative education program. In fact, Kay testified that there was one UEA counselor assigned to the day program during the 2014-2015 school year, though only for the first semester. However, the record seems to suggest that alternative education counseling duties were, like the teaching responsibilities described above, not exclusive to members of the UEA bargaining unit. The Alternative Learning Options report admitted into evidence at hearing indicates that there was an "unaffiliated" advisor/counselor assigned to the Utica Learning Academy in 2014-2015 and that under Proposed Option 3, which the school district ultimately adopted, the advisor/counselor work would continue to be performed by unrepresented employees. Similarly, the UEA proposals entered into evidence in this matter reference the existence of a "non-affiliated" advisor/counselor position in the night program prior to 2015. The only testimony in the record with respect to the performance of counseling duties after the change is Kay's statement that there were two counselors assigned to the Alternative Learning Center. Kay did not specify whether those counselors were members of the UEA, the UFT or unrepresented for purposes of collective bargaining, nor did any other witness testify regarding the bargaining unit status of those individuals. For these reasons, I find that the UEA has not established that the school district violated PERA by unilaterally transferring work from its bargaining unit with respect to alternative education counselors.

II. Case No. CU15 L-045; Docket No. 15-064549-MERC

Public employers and labor organizations have an obligation under Section 15 of PERA to negotiate in good faith over mandatory subjects of bargaining, that is wages, hours and other terms and conditions of employment. MCL 423.215(1); *Detroit Police Officers Ass'n, supra*. Permissive subjects of bargaining are matters that the parties may bargain over which are not considered wages, hours or other conditions of employment. *Id.* at 54-55 n 6. Illegal or

prohibited subjects of bargaining are matters that are unlawful or prohibited under applicable statutes. *Id*.; *Calhoun Intermediate Sch Dist*, 314 Mich 41, 48 n 5 (2016), aff'd 314 Mich App 41 (2016). While a public employer and a labor organization may discuss an illegal or prohibited subject of bargaining, a party may not insist on such a subject as a condition of employment and any contract provision pertaining to an illegal or prohibited subject of bargaining is not enforceable. *Michigan State AFL-CIO v MERC*, 212 Mich App 472 (1995). See also *Pontiac Sch Dist*, 27 MERC Lab Op 2014), aff'd unpub'd opinion per curiam of the Court of Appeals, issued September 15, 2015 (Docket No. 322184). A public school employer may put an end to discussions about a prohibited subject at any time by either taking unilateral action on the matter or by demanding the immediate cessation of those discussions. See *Kalamazoo County*, 22 MPER 94 (2009). If a union insists on negotiating over a prohibited subject when the employer has repeatedly refused to do so, the union's actions will constitute a breach of the duty to bargain in good faith. *Ionia County Intermediate Ed Ass'n*, 30 MERC Lab Op 18 (2016), aff'd unpub'd opinion per curiam of the Court of Appeals, issued February 22, 2018 (Docket No. 334573); *Calhoun Intermediate Ed Assn, MEA/NEA*.

The mere processing of a grievance which concerns, in whole or in part, a prohibited subject of bargaining is akin to a discussion of the public school employer's decision on such a subject and, therefore, does not ordinarily constitute a violation of Section 10(1)(e) of PERA. *Ionia County Intermediate Ed Ass'n*, *supra* at 110. See also *Saginaw Twp*, 18 MPER 30 (2005); *Wayne County Cmty Coll*, 16 MPER 19 (2003). If a union attempts to arbitrate that grievance, however, it runs afoul of the prohibition on demanding to bargain over a prohibited subject. As the Commission recently explained in *Ionia County Intermediate Ed Ass'n*, advancing a grievance to binding arbitration "goes beyond the discussion stage, it is more like insistence upon bargaining a prohibited subject when the other party has refused to do so." Thus, a union's demand to arbitrate a grievance over a prohibited subject of bargaining constitutes an unlawful attempt to compel a public employer to abide by contract provisions which are unenforceable as a matter of law. *Id*. See also *Pontiac Sch Dist*, 28 MERC Lab Op 34 (2014) (because the transfer of a speech pathologist was a prohibited subject of bargaining under Section 15(3)(j), the union violated its duty to bargain by attempting to arbitrate a grievance disputing that decision); *Grand Rapids Educational Supp Personnel Ass'n*, 23 MPER 5 (2009) (union acted unlawfully by demanding the arbitration of a grievance concerning subcontracting of transportation services, a matter made a prohibited subject of bargaining by Sections 15(3)(f) and (4)).

As noted, the grievance filed by the UEA on August 18, 2015, asserts a number of contract violations by the school district and seeks, as a remedy for those violations, the recall of all teachers who were laid off as a result thereof. Section 15(3)(j) of PERA prohibits collective bargaining over "[a]ny decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit." In the interim order which I issued on May 11, 2017, I opined that Section 15(j)(3) did not appear to be applicable to the school district's decision to create the new alternative education program because that section was not intended to allow a public employer to unilaterally move classifications from one bargaining unit to another. That preliminary conclusion was based primarily on the UEA's contention that the school district forced the teachers and counselors within its bargaining unit to become UFT members. I posited that such an interpretation of Section 15(3)(j) would infringe on the Commission's exclusive jurisdiction to determine unit

placement and would conflict with the statutory right of employees to freely select or reject their bargaining representative. As noted above, however, the record does not actually support a finding that the school district transferred, or attempted to transfer, any UEA member or classification into the UFT bargaining unit. Accordingly, the applicability of Section 15(3)(j) is an issue which must be reexamined.[11]

The Commission and the Courts have had several occasions to consider the meaning and scope of Section 15(3)(j) of the Act. In *Ionia Pub Sch*, 27 MPER 55 (2014), the Commission held that the public school employer did not violate Sections 10(1)(a) or (e) of PERA when it refused to hold teacher assignment or "bid-bump" meetings with the union as required by the collective bargaining agreement or by refusing to post vacant teaching positions. The Commission concluded that those matters pertained to teacher placement and, therefore, constituted prohibited subjects of bargaining. In affirming the Commission's decision, the Court of Appeals held that the broad language of Section 15(3)(j) affords public school employers with considerable discretion:

> [W]e conclude 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 decision 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]ny decision" regarding teacher placement and providing no limitation or explanation thereafter, the Legislature demonstrated its intent to afford public school employers broad discretion over any type of teacher placement decision or the impact of that decision on individual teachers or the bargaining unit as a whole. Cf. *People v. Cunningham*, 496 Mich 145, 155; 852 NW2d 118 (2014) (reasoning that where the Legislature provided courts with the authority to impose "any cost" in MCL 769.1k(1)(b)(ii) and thereafter specified with particularity the costs that could be imposed, such language "suggests strongly that the Legislature did not intend MCL 769.1k(1)(b)(ii) to provide courts with the independent authority to impose 'any cost' "). In other words, the

[11] The school district did not rely upon Section 15(3)(j) in its charge. Rather, the district asserted that the creation of the new program constituted an experimental and/or pilot program within the meaning of Section 15(3)(h). However, in its June 16, 2015, letters to the UEA and UFT, the district cited several sections of PERA, including Section 15(3)(j) in support of its claim that the matter was a prohibited subject of bargaining. For that reason, and more importantly because staffing of the alternative education program appeared to implicate matters of "teacher placement", I instructed the parties to brief whether Section 15(3)(j) was applicable. I specifically indicated that if, after reviewing the issue, either party determined that the submission of additional evidence was necessary, I would, upon request, reopen the record. Both the UEA and the school district did in fact address the applicability of Section 15(3)(j) in their post-hearing briefs; notably, neither party moved to present additional evidence on the issue. Because the applicability of Section 15(3)(j) is reasonably related to, and in fact intertwined with, the allegations in the charge, and given that the issue was fully litigated, I find that it is appropriate to decide the alleged violation of that section of the Act. *Dolores Sharp, d/b/a Oleson House*, 1973 MERC Lab Op 846 (no exceptions); *Gibraltar Sch Dist*, 1993 MERC Lab Op 510. See also *Desert Aggregates*, 340 NLRB 289, 292-293 (2003); *Teresa Coal Co*, 259 NLRB No. 47 (1981); *Vic Tanny Int'l*, 232 NLRB No. 57 (1977).

> Legislature intended to remove from the ambit of bargaining *any decision* concerning the assignment or placement of teachers, and that any decision-making about teacher placement or assignments is to be within the sole discretion of the employer. The broad language used in the statute necessarily includes any decision-making process as well; consequently, policies and procedures used to make teacher-placement decisions such as those at issue in the instant case undoubtedly fall within the broad reach of "any decision" regarding teacher placement. Therefore, the plain language of § 15(3)(j) precludes bargaining over the bid-bump procedure, or any other procedure used in teacher placement.

Ionia Ed Ass'n v Ionia Public Schools, 311 Mich App 479, 486-487 (emphasis in original).

The grievance filed by the UEA in the instant case asserted that the removal of bargaining unit positions from the alternative education program violated the recognition clause of the collective bargaining agreement, the general working conditions provision of the agreement and contractual language requiring the school district to bring major revisions of curriculum and new programs to the CLC for review. While some or all of these alleged contractual violations may have been proper matters for consideration by an arbitrator, I find that the UEA clearly ran afoul of Section 15(3)(j) of the Act by demanding, as a remedy, that the school district "[r]ecall teachers that were laid off as a result of the contract violation." By making such a demand, the UEA is effectively seeking to have the arbitrator make decisions with respect to teacher placement which the Legislature has determined are within the sole discretion of the public school employer. For this reason, I conclude that the UEA violated PERA by attempting to process its grievance to arbitration. Given this conclusion, it is not necessary that I also address the school district's contention that bargaining over the creation of the Alternative Learning Center was prohibited under Section 15(3)(h) of the Act.

I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. In summary, I find that the UEA failed to establish that the school district violated PERA by unilaterally transferring exclusive work from its unit with respect to alternative education teachers and counselors. I further conclude that the UEA violated Section 15(3)(j) of PERA by demanding that the school district arbitrate its grievance challenging the staffing of the Alternative Learning Center exclusively by members of the UFT bargaining unit. Accordingly, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by the Utica Education Association against the Utica Community Schools in Case No. C15 J-131; Docket No. 15-056378-MERC is hereby dismissed in its entirety.

With respect to Case No. CU15 L-045; Docket No. 15-064549-MERC, the Utica Education Association is hereby ordered to:

1. Cease and desist from demanding to arbitrate or insisting on pursuing over the objection of the Utica Community Schools, grievances concerning prohibited subjects of bargaining under Section 15(3)(j) of PERA.

2. Advise the arbitrator that the Utica Education Association is withdrawing the grievance it filed on August 18, 2015, regarding the Alternative Learning Center.

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

4. Post the attached notice to members of its bargaining unit at places on the premises of the Utica Community Schools where notices to unit members are normally posted for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 12, 2018

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY THE UTICA COMMUNITY SCHOOLS, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **UTICA EDUCATION ASSOCIATION** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY THE MEMBERS OF OUR BARGAINING UNIT THAT:

WE WILL NOT demand to arbitrate or insist on pursuing over the objection of the Utica Community Schools, grievances concerning prohibited subjects of bargaining under Section 15(3)(j) of PERA.

WE WILL advise the arbitrator that the Utica Education Association is withdrawing the grievance it filed on August 18, 2015, regarding the Alternative Learning Center.

WE WILL refrain from taking action to enforce any arbitration award which may have been issued pursuant to that grievance.

UTICA EDUCATION ASSOCIATION

By: _____

Title: _____

Date: _____

This notice must remain posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.